



Rudolph Holton

On June 23, 1986, Katrina Graddy, a 17-year-old prostitute, was raped and strangled in an abandoned crack house in the Central Park Village housing project in Tampa, Florida. The house was then set on fire.

A neighbor told police he saw 33-year-old Rudolph Holton, a local drug addict with a \$1,000-a-day habit and with more than two dozen arrests for theft and burglary, enter the house the night before.

After police found a pack of cigarettes with Holton's fingerprints on it inside the house, Holton was arrested and charged with first-degree murder, sexual assault and arson.

Holton went on trial in the summer of 1987. The prosecution presented witness Johnny Newsome, who said he saw Holton in or around the house the night of the crime.

Flemmie Birkins, a Hillsborough jail inmate who had known Holton from the streets, testified that Holton admitted to the murder. Further, the prosecution presented testimony that a pubic hair found in Grady's mouth could have been Holton's.

On June 30, 1987, a jury convicted Holton of murder and he was sentenced to death.

In the years after his conviction, much of the evidence used to convict Holton unraveled. Not only did Birkins and Newsome recant their testimony, DNA testing showed that the hair in Grady's mouth was not Holton's.

In addition, police records were found that show that at the exact hour that Birkins claimed Holton was confessing at the jail, he was at the Tampa Police Department, being interviewed by detectives.

At trial, prosecutors told the jury that Birkins got no deal in exchange for his testimony on pending charges for burglary and grand theft. But after Holton was sentenced to death, the prosecutor asked a judge for leniency for Birkins, who could have gotten life as a habitual offender. Instead, he got probation. Holton's defense lawyers were never told of the deal.

Prosecutors also withheld evidence that Graddy had reported being raped days before she was murdered.

After numerous appeals, a Florida judge granted Holton a new trial in 2001, based on the evidence that had surfaced since his conviction. Prosecutors dismissed the charges and Holton was released on January 4, 2003, after he had spent 16 years on death row.

Birkins and Newsome were charged with perjury and both pleaded guilty. In November 2003, Birkins was sentenced to 13 years in prison and Newsome received a 14-year prison term.

In August 2003, Holton married a woman he met after his released. In June

State:	Florida
County:	Hillsborough
Most Serious Crime:	Murder
Additional Convictions:	Sexual Assault, Robbery
Reported Crime Date:	1986
Convicted:	1987
Exonerated:	2003
Sentence:	Death
Race:	Black
Sex:	Male
Age:	33
Contributing Factors:	Mistaken Witness ID, Perjury or False Accusation, Official Misconduct
Did DNA evidence contribute to the exoneration?	Yes*
:	

2004, Holton pleaded guilty to aggravated battery for striking the woman with a golf club and to misdemeanor assault for a confrontation with a cousin. He was sentenced to two years in prison.

In 2006, Holton was convicted of attempted murder and domestic battery for choking his wife. He was sentenced to 20 years in prison.

- Karen Oprea

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105. Rudolph Holton *Florida Conviction: 1986, Charges Dismissed: 2003*

Florida death row inmate Rudolph Holton was released on January 24, 2003, after prosecutors dropped all charges against him. (Miami Herald, January 25, 2003). Holton's conviction for a 1986 rape and murder was overturned in 2001 when a Florida Circuit Court held that the state withheld exculpatory evidence from the defense that pointed to another perpetrator. The court also found that new DNA tests contradicted the trial testimony of a state's witness. At trial, a prosecution witness testified that hairs found in the victim's mouth linked Holton to the crime. However, recent DNA tests conclusively exclude Holton as the contributor of the hair, and found that the hairs most likely belonged to the victim. (Florida v. Holton, No. 86-08931 (Fla. Cir. Ct. Sept. 2001) (order granting, in part, motion to vacate judgment)). In December 2002, the Florida Supreme Court upheld the lower court's decision to reverse Holton's conviction and sentence. (Florida v. Holton, No. SC01-2671, 2002 Fla. LEXIS 2687 slip op. at 1 (Fla. December 18, 2002)). Prosecutors announced in January 2003 that the state was dropping all charges against Holton, who had spent 16 years on death row.

(Miami Herald, January 25, 2003)

Read "Part I: The Innocence Defense" by David Karp in *The St. Petersburg Times* (January 24, 2003)

Read "Part II: The Innocence Defense" by David Karp in *The St. Petersburg Times* (January 24, 2003)

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<http://www.oranous.com/innocence/RudolphHolton/HoltonhearingApril192001.htm>

Attorney Wants Review Of Case Against Holton

By JOSHUA B. GOOD jgood@tampatrib.com

Published: Feb 12, 2003

TAMPA - Sixteen years ago, Tampa police Detective Kevin Durkin's investigation put a man on death row for the murder of a teenage girl.

But last month, Rudolph Holton was freed, in part, because his appeals attorney, Linda McDermott, pursued leads, which Durkin didn't follow, that point to another man as the possible killer. The case made national headlines over glaring discrepancies by key witnesses, investigators and prosecutors.

Despite the questions surrounding the case, Tampa police have yet to re-open the case. And even if they do, and charge another suspect, officials say, it would be hard to overcome a defense attorney's claim that Holton was the real killer.

"We looked under every stone we could have looked under," Durkin said.

McDermott found a report indicating that murder victim Katrina Graddy had been raped 10 days before her death. It took nine years for the rape report to be turned over by Tampa police to Holton's appeals team.

McDermott's work convinced the Florida Supreme Court that Holton, 49, deserved a new trial for the 1986 slaying of Graddy, a 17-year-old prostitute found strangled to death in a downtown crack house.

After State Attorney Mark Ober concluded last month there was not enough evidence to retry Holton, he declined to open an investigation into why it took years for Holton's team to get the rape report. He said Graddy used a fake last name, so police didn't know the murder victim and the rape victim were the same person. Withholding the rape report was not intentional, he and Hillsborough Circuit Judge Daniel Perry concluded. Perry also reviewed the Holton case.

McDermott says the victim's family deserves to have the investigation re-opened. She also says authorities should look into how the case was handled.

"Why aren't they concerned about the fact things were withheld from the defense at the trial? Why aren't they investigating that?" McDermott said.

Standing By His Case

Durkin said he still believes Holton is guilty and he welcomes a review of how he handled the case. With the support of Judge Perry and Ober, it seems unlikely that Durkin, president of the Tampa Police Benevolent Association, will be investigated by his department, the state attorney's office or the Florida Department of Law Enforcement.

Ober said he has no intention of investigating how police handled the Graddy homicide.

"It's very apparent to me that the Tampa Police Department did the best they could with the information they had in 1986," Ober said. "I don't fault the Tampa Police Department whatsoever for the final outcome of this case."

Gov. Jeb Bush ordered the FDLE to investigate. But Bush's order on Jan. 28 directed FDLE to focus only on why two prosecution witnesses - Flemmie Birkins and Johnny Lee Newsome - changed their stories about Holton. Bush did not ask the FDLE to investigate how Durkin handled the investigation or why it took nine years for police to turn over the Graddy rape report.

"We do what the governor tells us," FDLE spokeswoman Jenny Khoen said.

Bush is also trying to eliminate the Capital Collateral Regional Counsel, the state agency that represents death row inmates. McDermott works for the agency.

Saving Holton

McDermott was right out of law school when she started working on Holton's death-row appeal in 1997. It didn't take long for her to find holes in the case, which was supervised in the homicide squad by Robert H. Price, who has since been promoted to captain.

Durkin didn't scrutinize another man who Graddy had accused of raping her before her slaying, McDermott said, though Holton's original defense attorney told Hillsborough Circuit Judge Harry Lee Coe and prosecutor Joe Episcopo that there was information Graddy had been anally raped by a man nicknamed "Pine." Graddy was also anally raped by her killer.

McDermott also said Durkin didn't interrogate a man who went to the scene of the crime and said he heard how Graddy had been strangled, even though that information had not yet been made public.

Years later, that man, Donald Lemar Smith, would tell McDermott's investigators that the man who told him how Graddy died also confessed to killing the teenager. Smith said that man was David "Pine" Pearson, the same man Graddy had accused of raping her, according to court records.

And Durkin didn't scrutinize a flaw in Birkins' story. Birkins was facing life in prison on an unrelated charge and claimed Holton told him he killed Graddy, McDermott said. Birkins said Holton made the admission in jail at a time when homicide detectives later reported they were interrogating Holton at police headquarters, McDermott said.

Though prosecutors said they never offered Birkins a plea deal, he was later sentenced to five years probation on a felony charge that could have cost him a life sentence.

Just after the murder, Newsome told police he saw Holton and Graddy together the night of the murder. In 2001, he testified that he lied, then two years later, said his original account was true.

Durkin said there was plenty of proof to convict Holton.

Witness Cary Carson Nelson testified in Holton's trial in 1986 that she saw Holton climb out a window of the crack house hours before Graddy's body was discovered.

Carson has since died, but before her death, she told a friend that she had lied about seeing Holton, McDermott said.

Police also found Holton's fingerprint on a pack of Kool cigarettes in the crack house.

And perhaps most damning was Birkins' statement that Holton confessed. Birkins passed a lie detector test administered by Jack Evans Mehl, a state attorney investigator, records show.

In 2001, McDermott's investigators found Birkins, who told them he lied at Holton's trial because he was facing life in prison. In exchange for his testimony, Episcopo asked a judge to give Birkins probation.

Recently, Birkins told Ober he lied to McDermott and had told the truth at Holton's trial. Birkins is now at the center of the FDLE's investigation. But finding out why he changed his story may be difficult.

Reached last week, Birkins said he wasn't talking to reporters or investigators about the case.

Stephen Crawford, a former state and federal prosecutor, said Birkins could be charged with second-degree perjury if he lied at a death-penalty trial.

Case Might Get Another Look

Sgt. Jim Simonson, head of the Tampa Police Department's homicide squad, said he spoke to Durkin about the case. Durkin told him Holton was the killer and there were no other suspects. Simonson concluded there would be no reason to re-investigate the case.

But after a reporter told Simonson this week about evidence Holton's defense team had uncovered about Pearson - the man accused of raping Graddy before her death - Simonson said he would look at the case file and make a decision about re-opening the investigation.

But finding enough evidence to arrest Pearson or anyone else for the crime will be difficult, Ober and Durkin said.

The crack house that Graddy was killed in was destroyed shortly after the slaying in 1986. Pearson told police and prosecutors he did not kill Graddy. He volunteered for a DNA test, Ober said. But there was no physical evidence from the murder scene for a DNA comparison.

In 1986, investigators found hairs in Graddy's mouth. DNA tests were not available then, but Episcopo suggested to the jury that the hairs were Holton's. They weren't. They were Graddy's, a recent DNA test revealed.

But the most difficult hurdle to prosecute another suspect for Graddy's death is Holton's conviction. Any new suspect could point to Holton's conviction and say Holton was the real killer, Ober said. That would be enough for reasonable doubt and an acquittal, he said.

Barry Cohen, a Tampa defense attorney who recently won a \$2.9 million settlement resulting from the botched prosecution of the parents of a missing infant, said Ober should investigate how the case was handled.

"I would want to know how this happened because it undermines people's trust in the system," Cohen said.

But E.J. Salcines, a Florida 2nd District Court of Appeal judge and former Hillsborough state attorney, believes Ober made the right decision.

To open an investigation, "I would think [Ober] would want something more than the case fell apart because the police didn't follow a lead," Salcines said. "I've got to assume the police acted in good faith."

A LOOK BACK

JUNE 23, 1986: The body of Katrina Graddy, 17, is discovered in a crack house at 1236 E. Scott Street in downtown Tampa. A nylon cloth is tied around her neck. Her hands were bound and she was anally raped with a beer bottle. Her body was set on fire.

JUNE 23, 1986: Police interview two people who place Rudolph Holton at the scene of the murder. Holton denies he was at the scene. Police arrest him.

JULY 1, 1986: Detectives interview Flemmie Birkins, a jail trusty who said Holton confessed to killing Graddy.

JULY 8, 1986: Birkins passes a polygraph about his contention Holton admitted killing Graddy.

DEC. 5, 1986: A jury convicts Holton of 1st first-degree murder. Jurors recommend he be executed.

FEB. 12, 1987: Hillsborough Circuit Judge Harry Lee Coe III sentences Holton to death. 1996: Holton, in a letter, asks Gov. Lawton Chiles to execute him.

JANUARY 1997: Attorney Linda McDermott takes on Holton's death penalty appeal.

SOMETIME IN EARLY 2001: McDermott's investigators find Birkins homeless. He tells them he lied at the trial to avoid going to prison for life on his own charges.

NOV. 2, 2001: Hillsborough Circuit Judge Daniel Perry orders a new trial for Holton, based on evidence Graddy had been raped by another man and Birkins changing in his story.

DEC. 18, 2002: The Florida Supreme Court also orders a new trial for Holton.

JAN. 24, 2003: Hillsborough State Attorney Mark Ober decides there is not enough evidence to try Holton again. Prison officials set Holton free.

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<http://www.deathpenaltyinfo.org/node/54>

Part I: The Innocence Defense

Posted: December 05, 2006

A Two-Part Series [Times photos: John Pendency] Jan. 24, 2003 Coming out. With attorney Linda McDermott, Holton leaves prison. "I just want to take one day at a time. I forgive everybody." Story By DAVID KARP

Photos by John Pendency,
of the Times staff

© St. Petersburg Times

published February 9, 2003

A little over two weeks ago, Rudolph Holton walked away from death row. This is why he spent 16 years there: Tampa police never pursued a suspect accused of raping the murder victim. A jailhouse snitch said Holton confessed, though later he said he made it up to get a break in his own case. The prosecutor told the jury a hair found on the victim was Holton's, but he couldn't prove it. The judge refused to wait for a key defense witness. To set Holton free, it would take a lawyer who was too young and too reckless to know what she was up against.

June 24, 1986 Going in. Holton was in jail on a burglary charge when detectives questioned him about the murder of Katrina Graddy. TAMPA -- That afternoon she appeared in court, lawyer Linda McDermott was 27, two years out of law school, with no job and no prospects. She was living in a sparsely furnished apartment in Tampa Palms and borrowing money to pay the rent.

She wanted one thing from the judge: to represent Rudolph Holton, who had been sentenced to death for killing a 17-year-old Tampa woman. McDermott believed he was innocent.

She had quit the state agency that represents death row inmates, convinced it put politics ahead of clients.

Though on her own, she told the judge she was the best attorney for Holton. If he didn't believe her, she dared him to ask the agency lawyers even the most basic facts of Holton's case. They wouldn't know.

Her former boss told the judge she was not qualified to handle a capital case on her own. She meant well, but she had no job, no office.

McDermott promised she would find a way, if she had to "bang on every door in Hillsborough County."

The judge was amused; he was used to seeing lawyers try to get out of death appeals.

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State of Florida vs. Rudolph Holton

The crime scene: The state's version and Holton's version [2/09/03]

Previous coverage

Delays in death row case irk governor

Bush may order a review of the case because of a long-delayed police report and recantations by two witnesses that led to a release. [1/28/03]

Freed after years on death row

A man convicted of a 1986 murder is released; the state says it lacks enough evidence to

retry him. [1/25/03]

"We don't have people fighting over these cases too often," Circuit Judge Daniel Perry said.

Two weeks later, Feb. 26, 1999, Perry ruled, the case was hers.

McDermott hauled 25 boxes of files to her apartment and stacked them in the dining room, four boxes high.

June 23, 1986

The smell of a house fire wafted through the Central Park Village housing project for 21/2 hours before anyone bothered to call it in. Firefighters recognized the white house with red trim. They had been there twice before to put out fires started by crack addicts. Using axes, they tore down the plywood nailed over the doors of the condemned house. The rooms were littered with newspapers, butane lighters, Vaseline jars, a syringe on the window sill, Schlitz Malt Liquor empties.

On the floor lay a young woman, a nylon cloth wrapped four times around her neck as if someone had tied his shoelaces and squeezed. A fire had charred her body and burned a path into the carpet around her.

It was early on a Monday morning, June 23, 1986.

Homicide detective Sandy Noblitt canvassed the neighborhood and quickly encountered "Big Carrie," who lived along the alley behind the house.

Carrie Nelson said she was on her porch about 11 the night before and saw Rudolph Holton and a man she didn't know enter the condemned house at 1236 E Scott St. She recognized Holton: He had broken into her home four times.

Noblitt looked up Holton's criminal record. At 33, he had been arrested 25 times on 39 charges, mostly burglaries and thefts associated with his cocaine habit.

Finding him was easy; he was in jail. He had broken into a business in Ybor City that afternoon and stolen a microwave, a gold watch and stamps. They caught him walking down the sidewalk with the microwave.

Detective Kevin Durkin brought Holton from jail to the police station for an interview. Noblitt gave him some of his Winston Ultralight 100s to smoke.

Where was he Sunday night?

[Times photo: John Pendygraft]

Linda McDermott, on Holton: "He has influenced my life in ways he doesn't realize."

[Times photo: John Pendygraft]

Rudolph Holton, on McDermott: "She was like a buddy, a pal, one of the guys, a little sister."

He said he stopped in the Little Savoy, a bar on Nebraska Avenue, talked to a girl outside named "Red" and bought \$20 of cocaine at the "hole" in the projects. He rented a room at the boarding house behind the Red Top bar between 11 and midnight, and slept until noon Monday.

Did anyone see him at the bar?

Holton couldn't remember names, just "Red."

What was he wearing?

A black T-shirt and blue shorts. He'd thrown them away, which he did when his clothes got ratty. He bought new ones at the thrift shop next to the Tropicana restaurant.

Had he been inside the crack house?

About a week ago, but not since. Definitely not Sunday night.

Did he score drugs in the front room of the house?

He never went into the front room.

The detectives stood to leave.

"Next time you come see me," Holton said, "how 'bout bringing me a pack of Kools?"

* * *

Two days later, fingerprints confirmed the strangled woman's identity. Her name was Katrina Graddy.

She was 17. She lived with her mother and her 2-year-old, Benjamin, on Joed Court in Central Park Village. For money and drugs, she picked up men from behind the Star gas station, several blocks up Nebraska Avenue.

The day Graddy was identified, the detectives returned to the burned house, hoping to find something, anything, they had overlooked.

In the mess on the floor were empty cigarette packs, Marlboros, Newports and a container of Kool Lights. They sent the Kools, and only the Kools, to be checked for fingerprints.

About an hour later, the detectives ran into Johnny Lee Newsome, "Georgia Boy," who had helped them with information on other cases. Noblitt asked if he had seen Holton on Sunday night.

"Well, yes." Holton and Graddy were walking down Scott Street together.

The detectives fetched Holton from jail for a second interview. It was 5:10 p.m.

Thursday.

Again now: Was he sure he hadn't been inside the house on Sunday?

He was sure.

They told him about Georgia Boy, how he'd seen Holton and Graddy together Sunday night.

Yeah, he'd seen Georgia Boy, but earlier, around 2 p.m. And he wasn't with Graddy. He was alone.

He said he never left anything in the house. They told him about the Kools and the fingerprints they had matched to his.

"It ain't mine. I don't even smoke them kind of Kools."

Okay, he said, maybe he had been there, drinking beer in the front room. But it was a week ago. He left two hypodermic needles, nothing else. He did not kill the girl.

The detectives left Holton and filled out the arrest paperwork. Holton doodled an abstract drawing; part of it had a pack of Kools melting into a black face. It said, "Hi boy."

Making the arrest, police alerted the press, and the next morning, the Tampa Tribune had a picture of the detectives escorting Holton back to jail.

A county jail inmate named Flemmie Birkins asked for a phone. As a trusty, Birkins circulated through the jail with a cart of sundries he sold to the inmates. He said he had picked up some information.

Noblitt visited him early the next week. Birkins said he had known Holton all his life.

They had run into each other at the jail clinic Thursday, between 5 and 5:30 p.m. Birkins asked what he was in for.

"He told me that he had killed a girl, that he had strangled her. . . . That he went to the Star service station on Nebraska and got a can of gas and came back to the house and set it on fire."

On July 9, 1986, the grand jury for Hillsborough County indicted Holton. The charges

were arson, sexual battery and first-degree murder.

* * *

The prosecution of a drug addict for strangling a prostitute in a crack house never made its way to the front page.

The case was assigned to Circuit Judge Harry Lee Coe III, who proudly wore his "Hanging Harry" reputation. Coe ruled that Holton qualified for a public lawyer; from a list of attorneys accepting court appointments, he picked Mina Morgan.

Again and again, Morgan asked Coe for more time. She was juggling four other trials, one with 14 co-defendants. She was trying to track down a man known as "Pine," who she had heard might have raped Graddy.

Coe denied the requests and made clear what he thought of Holton's story that he was sleeping off his cocaine at Red's, his "so-called" alibi. He started the trial five months after Holton's arrest.

The prosecutor was Joe Episcopo, known for his flush face and theatrical hand gestures. He had lost an election for the circuit bench three months earlier. A major in the U.S. Air Force Reserve, he also prosecuted court-martials.

Episcopo showed the jury the awful photos of Graddy, tied up, with third-degree burns over 85 percent of her body. He entered in evidence the pack of Kools and Holton's fingerprint match. Carrie Nelson and Georgia Boy put him at the burned house. Birkins repeated the confession.

Episcopo told the all-white jury that Birkins was a small-time crook, facing just three years in prison, and had testified without getting a deal: "Ladies and gentleman . . . this is a horrible crime that even a fellow black inmate will not tolerate."

Another of Episcopo's witnesses was Carl Schenck, the man police found sleeping in a Toyota outside the burning house. The night before, he said, he drove a hitchhiker from the Pinellas side of the Gandy Bridge to Central Park Village. Holton looked like the hitchhiker, but he wasn't sure. Unlike Holton, the hitchhiker had a gold tooth.

"It's not a positive ID," Episcopo told the jury, "but beyond a reasonable doubt, it looks like him."

An FBI hair analyst testified about a hair found in Graddy's mouth. The hair was not long enough to link to a particular suspect. The FBI expert could say only that it came from the pubic area of an African-American. "I cannot exclude Mr. Holton," he testified. Episcopo told jurors to use their common sense. The hair could not have come from Graddy, it must have come from Holton.

"How are hairs down there going to get in her mouth?" he said. "I would just defy anybody to tell me how those are her hairs, how she got them."

He entered in evidence the surreal images Holton drew while detectives questioned him.

"Kools. Kools," Episcopo told the jury. "And you can take a look at the rest of the twisted mind that drew this."

Holton did not testify. If he had, the jury would have learned his long criminal history, mostly property crimes, but felonies nonetheless.

In his brief defense, his lawyer called Red Clemmons Jr., who lived behind the Red Top bar. Red said Holton paid \$5 for a room about 10 the night of the murder. The room was next to his, and he didn't hear Holton go out. Red's dog, a pit bull mix, with her litter of four pups, didn't bark all night.

Holton's lawyer wanted Pamela Woods to testify. She and Graddy, teenagers and best

friends, worked together from the Star gas station the night of the murder. It was Woods who told the defense that "Pine" raped Graddy about a week before she was murdered. But the jury never heard from Woods. Private investigators could not find her, and Coe wouldn't give Morgan more time.

"What am I supposed to do, declare a mistrial because we can't find her?" Coe said. "And we go two weeks and have another mistrial, another mistrial, another mistrial, another mistrial, another mistrial, and another mistrial, and another mistrial, and another mistrial, and another mistrial, and another mistrial."

The jury started deliberating the next morning. Then Woods showed up, too late. After lunch, the jury pronounced Holton guilty as charged. The judge wanted to move directly to the next phase, when the jury would recommend life or death. Morgan asked for a break, to collect herself and calm a witness, who was crying.

"Well, I will deny it," Coe said. "Let's just go on."

That afternoon, the evidence was presented, the arguments made, the instructions given, the verdict reached: The jury said Holton should be put to death for the murder of Katrina Graddy.

Judge Coe sentenced him on the spot.

* * *

Birkins' turn came two weeks later. He was before Circuit Judge Donald Evans to be sentenced for burglary and grand theft. Episcopo came to court to stand up for him. Episcopo told the judge that someone in his office had miscalculated Birkins' sentencing scoresheet. Because of the mistake, Episcopo had told Holton's jury that Birkins was small time and faced only three years.

Actually, he had been convicted of attempted murder, sexual assault and armed robbery. He had been acquitted of first-degree murder.

Birkins really was facing life -- which the judge said sounded right.

"The defendant's background totally justifies him being sentenced to life imprisonment without the right to parole," Evans said. "You have committed some of the most atrocious crimes."

"I would just like to have a chance," Birkins said.

"Well, you have had many chances."

Episcopo told the judge Birkins helped solve a "horrible homicide."

His testimony led to a conviction in a "very circumstantial" murder case, Episcopo said.

Birkins' testimony was especially helpful because the prosecutor could characterize it for the jury as given without motive to lie.

"We were able to present his testimony without any deal, and we never have made a deal," Episcopo said. "We have never made any promises to him from the time of his deposition to just before trial."

He suggested five years probation. The defense agreed.

Evans made it clear he didn't like it, but he gave Birkins his probation.

A true believer

The year Rudolph Holton was sentenced to death, Linda McDermott turned 17, a junior at Reavis High School outside Chicago. By the time she graduated law school, Holton already had spent 10 years on death row.

At age 26, McDermott sent out her first job applications, including one to the Capital Collateral Representative, the Florida agency that defends the condemned.

"I strongly oppose the death penalty," her application said, "and am confident that my commitment would make me an excellent post conviction attorney."

After she interviewed in Tallahassee, she followed up with a letter:

"Illinois executed a man earlier this morning. This individual has freely admitted that he killed several people so there is no doubt about his guilt. Despite the brutality of the crimes and the guilt of the man, I felt repulsed by the barbarity of our justice system. I have always desired to gain employment where I could help those that faced such injustice."

CCR was created in 1985, after two executions were stopped because the men did not have lawyers. Agency lawyers represented society's worst and made little more than schoolteachers. The office space, a converted A&P grocery next to a Gun & Pawn shop in south Tallahassee, symbolized the total lack of prestige.

CCR offered \$30,915 a year; McDermott started Dec. 2, 1996.

She had just passed the Florida Bar, and here the state was going to let her handle death cases. She was honored.

Her parents, British immigrants who settled in the Midwest, a pipe fitter and a secretary at UPS, couldn't understand why their youngest wanted this work. She owed more than \$110,000 on student loans at the University of Chicago and Northwestern. This job wouldn't help her financially, and her dad said the men on death row deserved to be there. McDermott came to work Sunday mornings and quickly made a reputation for getting excited about the latest theory in another of her hopeless cases.

An overachiever who missed three classes in all of law school, her first full assignment was Holton's case. The night before she drove to death row to introduce herself, she hardly slept.

For him, she was just the next attorney, they came and went. A new one would get up to speed and leave for a better job. Now came McDermott.

They met in a visitors room and sat at a table bolted to the floor. He was hostile, yelling at times.

"Look. I'm a burglar. I'm not a murderer."

McDermott tried to assure him, but she didn't know what to say. All she could manage was:

"Everything is going to be fine."

* * *

Holton spent his days drawing. He had a set of colored pencils and chalk and kept a Salvador Dali art book in his cell. He favored pastels and collages of images blended together.

He was up every day at 5 for breakfast and did pushups for an hour. He read law books and watched TV. He wrote to a woman from Germany who corresponded with death row inmates. She had visited him, and he called her his girlfriend.

He corresponded with two elderly ladies in Tallahassee who opposed the death penalty and hoped regular contact would help even the most isolated person feel human.

His pen pals shared pictures and news of their children. He sent them cards for anniversaries and Mother's Day. He told them about his upbringing, how he was raised by his grandmother, dropped out of high school, worked as a longshoreman and a dishwasher, and got into drugs.

Months passed with no visitors. His son and daughter, whom he had with his girlfriend

from Middleton High School, never drove up from Tampa. He grew so hopeless that he wrote Gov. Lawton Chiles in 1996 and asked him to sign his death warrant.

* * *

In 1997, hoping to speed up appeals, the Legislature divided CCR into three regional offices, the Capital Collateral Regional Counsel.

To run the Tampa office, Chiles picked John Moser, a lifelong prosecutor who had never handled a death penalty appeal. The year before, he had lost a run for Hillsborough state attorney.

Moser promised to end frivolous claims and provide an adequate defense without "wasting tax dollars."

McDermott and others who kept their own hours in Tallahassee found things different when they were transferred to Tampa. Moser wanted them there 9 to 5. Interviews were to be done by phone; investigators needed written approval to conduct an interview outside the office.

Agency critics said the new rules prevented overtime abuse. "Let's just say you would have investigators who would sit during the week with their feet up all day long, and say, 'I have to do investigating at night,' " said Michael Reiter, Moser's chief deputy.

Investigators felt hamstrung; their witnesses sometimes were homeless drug addicts who didn't keep office hours.

The old CCR would subpoena all public records, which critics considered a delaying tactic. Moser directed his assistants to curtail this practice; he said he did not want to anger law enforcement and have his funding cut.

McDermott thought Moser's approach did not serve the clients. The subpoenas spurred police to discover new documents and forced them to swear they had turned over everything.

The Tampa CCRC office divided into two camps: the old guard, mostly from Tallahassee, and Moser's new hires.

The new group considered McDermott too emotionally invested in cases. They resented being cast as villains; they litigated what they considered worthy issues rather than filing every possible claim, for delay.

McDermott clashed with her supervisor, Amy Settlemyre, to the point that McDermott refused to prepare a brief. Settlemyre thought she was out of control and had McDermott taken off all her cases.

McDermott wrote a letter to one of those clients, George Porter, warning that with her gone, his representation would suffer. She didn't care that her letter reflected poorly on her employer, the client came first.

"In my opinion, your case is at a critical point and removing the attorney most familiar with the facts and arguments regarding the appeal (me) does not serve your best interest. Unfortunately, I cannot control administrative decisions."

* * *

The first motion for a new trial McDermott ever filed was Holton's. She was terrified she would screw up.

She read and re-read the trial transcript and police reports, and she visited Holton every month. He had a good grasp of the evidence, and she learned more each time.

He liked that at long last, someone was listening, and mailed her his sketches. She hung

them in her office.

* * *

In November 1998, McDermott returned to Northwestern for the National Conference on Wrongful Convictions and the Death Penalty. DNA expert Barry Scheck spoke about new technology that had helped exonerate dozens of people.

Could it help Holton?

Episcopo had told the jury, "I would just defy anybody to tell me" how the hair found in Graddy's mouth came from her.

With the new technology, they could find out for sure.

But testing carried a huge risk. If the hair was Holton's, the case was over, none of the other issues would matter. On her next visit, McDermott explained the situation.

"It's not going to come back to me," he said. "It's not my hair. I don't know that woman."

* * *

McDermott's letter to George Porter -- warning that with her gone his defense would suffer -- circulated on death row. Moser didn't hear about it for more than a year, until an inmate arguing that Moser's office wasn't defending him effectively read the letter in court.

Moser confronted McDermott: What is this letter? Did her supervisor sign off before she sent it? Why wasn't a copy in Porter's file?

McDermott said she circulated it like any memo, received no feedback and put a copy in Porter's file. She couldn't say why it wasn't there.

Moser wanted to fire her, but he needed her. The Legislature had told the agency to move cases, and he had a hard time attracting qualified lawyers.

McDermott put out her resume and accepted an offer from the New York Legal Aid Society. On Jan. 13, 1999, she gave notice without speaking to a supervisor. She just left a resignation letter for Moser.

"I certainly believe that, under your tenure, this agency could become a place where I would be proud to work," she wrote. "However, that place appears to be a long way off. I fear that in the meantime many clients will suffer from grave mistakes that will be made." Leaving the office meant leaving Holton; another agency lawyer would get the case. What if they weren't dedicated enough?

McDermott already felt she had let Holton down for failing to get a dying witness' testimony on videotape. Now she had to tell him he would be getting a new lawyer.

Again.

Facing him, she couldn't do it.

She told Holton she was moving to New York but would find some way to keep his case. She would go to court, she would get the judge to let her continue as his attorney though she had not a clue how she would cover expenses that could run \$200,000.

A week after quitting, she realized her mistake. Moving to New York made no sense; she would earn less and couldn't afford to keep her promise. She asked Moser for her job back. He wouldn't take her.

She interviewed at corporate law firms back home in Chicago, telling prospective employers that whoever hired her had to let her finish her defense of a capital case in Florida. A friend told her she was nuts. She was in no position to make demands.

* * *

Moser's office had the heaviest caseload of the three CCRC branches, but he wasn't about

to let this case go. Not to Linda McDermott. When Judge Perry heard her motion to take Holton's case away from Moser's office, he sent his top assistants to court.

Perry, who had spent 11 years as a public defender, had to decide: Give the case to the idealistic, young lawyer with no money? Or leave it with experienced hands at a multimillion-dollar state agency? The judge asked Holton. What did he want?

"Ms. McDermott, she's a very good attorney. I trust her with my life, and I have a lot of respect for her."

Holton did not trust Moser's office.

"Any time you get people who do a good job on a death row case, you don't want them here, just like you don't want Ms. McDermott. You just pick people up and throw them on a case. And they are just as green as the leaves on the trees out there.

"Put yourself in my place. Would you want CCR representing you? Yes or no?"

* * *

After Perry gave the case to McDermott, friends at the agency encouraged her to apply at the Tallahassee branch.

Greg Smith ran the office. Before Gov. Chiles appointed him to the CCRC, he argued for the executions of a dozen men, including Ted Bundy. At the agency, he had a reputation for giving his assistants room to operate and for backing them.

The Tallahassee branch had become a refuge for McDermott's old group. But she was too proud to go crawling back. It took her about two months to accept that she had to.

Smith not only hired her, his North branch paid the expenses of defending Holton.

"She is a superb lawyer," said Smith, whom Gov. Jeb Bush later chose not to reappoint.

"I thought the whole office and a lot of clients would benefit."

McDermott told Smith she had never put on evidence and couldn't litigate Holton's case alone. Smith later agreed to hire outside investigators and Martin McClain, a nationally known death penalty lawyer.

Their first task was to test the hair. At a hearing before Judge Perry in August 1999, prosecutor Wayne Chalu argued that it was a delaying tactic, a wild goose chase for which there was no legal authority. Why relitigate the case? Holton had been on death row 13 years.

"It's going to set a kind of precedent that's going to open floodgates for this type of motion," Chalu said.

The judge ordered the test. A month later, the results were back: The hair was not Holton's, after all. It was Graddy's.

-- Times researcher John Martin contributed to this report.

Continue to Part II: The Innocence Defense

<http://www.floridasupport.us/forum/viewtopic.php?f=11&t=34>

Rudolph Holton exonerated
by sisselnor on Sun Oct 26, 2003 1:12 pm
Rudolph Holton domain:
www.rudolphholton.us

[http://www.oranous.com/innocence/Rudolph ... mmary.html](http://www.oranous.com/innocence/Rudolph...mmary.html)

SUMMARY OF RUDOLPH HOLTON'S CASE

On the evening of June 22, 1986, Katrina Graddy and her friend Pamela Woods went to Nebraska Avenue in order to buy drugs and turn tricks. At around midnight, Katrina entered the car of a black male. Pam did not see Katrina again that night. In the early morning hours of June 23, 1986, Katrina Graddy's body was found in an abandoned house on Scott Street. Katrina had been sexually assaulted and her attacker had set the house on fire.

In June, 1986, Rudolph Holton was a drug addict who stole in order to support his habit. His record included several convictions for burglary and drug possession and his only conviction for violence occurred when he fought with another individual over some change in a dice game. Within twenty-four hours of the time the police found Katrina's body, Rudolph Holton was arrested and charged with first-degree murder and related charges.

The police took statements from Carrie Nelson and Johnny Newsome. Both of these individuals told the police that they had seen Mr. Holton near the crime scene on the night of the murder. Mr. Newsome also said that he saw Mr. Holton with Ms. Graddy. Also, on the morning that Katrina's body was found, Carl Schenck, a white man who travelled to Tampa with a black hitchhiker he picked up the night before in St. Petersburg, was asleep in his car across the street from the vacant house. Mr. Schenck told the police that Mr. Holton resembled the individual he dropped off in the area; he did not identify Mr. Holton. He would only state that Mr. Holton because he had "shaving bumps" and "frizzy hair". Mr. Schenck further indicated that he had ingested large amounts of alcohol and t know how I made=I donAother drugs and he stated in reference to his driving =it, how I was even able to drive.

At trial, Mr. Holton was represented by Mina Morgan and presented an alibi defense. Solodon Clemmons testified that on the night of June 22, 1986, Mr. Holton arrived at his rooming house around 10:00 p.m. and went to bed. Mr. Clemmons told the jury that Mr. Holton did not leave during the night and was in bed at 6:00 a.m. the next morning.

The jury never heard from an individual, Dan Simmons, who was with Ms. Nelson on the night of the murder. This witness told the police that Ms. Nelson was lying because she

was angry with Mr. Holton. According to this uncalled witness, Mr. Holton did not enter the vacant house on the night of the murder. Furthermore, Johnny Newsome could not have seen Mr. Holton on the night of the murder because he was with a female friend, several blocks away, using drugs.

The prosecutor, Joe Episcopo, presented physical evidence purportedly linking Mr. Holton to the crime scene. A FBI agent, John Quill, testified that three hairs which were found in the victim's mouth were not microscopically inconsistent with characteristics of Mr. Holton's hair and therefore Agent Quill testified from being the source of the hairs. cannot exclude Mr. Holton

The hair evidence which was argued as linking Mr. Holton to the crime was analyzed in November of 2000 using mitochondrial DNA. The hair was determined to be s. Katrina

The State also presented evidence that on June 26th, Detective Durkin found at the unsecured crime scene of a Kools cigarette pack with Mr. Holton's fingerprint. Of course, Mr. Holton admitted that he, like many other individuals, entered the vacant house in order to use drugs. Further, the jury never heard Soldon Clemmons sworn testimony that when Detective Durkin a crumbled up cigarette pack, green and As room on June 25th, search Holton disappeared. white looking pack

Also, a jailhouse informant, Flemmie Birkins, testified that Mr. Holton had confessed to him. His testimony did not match any of the evidence presented in the case. Additionally, the jailhouse informant testified that he received a deal for the testimony he provided: He faced a three-and-one-half to four-and-one-half year sentence for the crimes for which he was charged, but he was going to be sentenced to three years. Thus, the jury heard that the jailhouse informant was receiving a six month benefit for his testimony.

The jury never heard that the jailhouse informant, Flemmie Birkins, in fact faced nine to twelve years in prison on his charges and that the State "erred" when calculating the snitch's sentence. In fact, the s trial said at the judge who sentenced Mr. Birkins two weeks after Mr. Holton s background totally justifies him being sentenced to The defendant sentencing: life imprisonment without the right to parole. *** The fairness [sic] of the defendant was he understood he was pleading to three years when he entered the In plea and I feel to some extent that my hands are tied in that regard. exchange for a three year sentence (ultimately, the State requested that the sentencing judge depart from the recommended guidelines because of the jailhouse informant's cooperation in the Holton case and the snitch was sentenced to five years of probation, the first two years to be served on community control, the first year to be served with specified residence in the Hillsborough County Jail), the jailhouse informant provided untruthful testimony against Mr. Holton.

I have to say that his sentencing, Mr. Episcopo stated At Mr. Birkins testimony, which was the first thing we presented in the trial and then, of course, corroborated by the other evidence, led to the conviction of [Holton].

Also, Mr. Holton's trial attorney wanted to present the testimony of the victim's friend, Pamela Woods. Even though Pam was properly subpoenaed to testify, she failed to appear at the trial. Mr. Holton's trial attorney requested a continuance so that she could secure Pam's presence, but the trial judge denied the request. The judge allowed the jury to hear part of Pam's deposition -- but only the part about Katrina's departing with a man, who was not Mr. Holton, and never returning. Pam also had knowledge and testified in her deposition about a rape that occurred in the vacant house about a week before the murder that she and Katrina witnessed. Katrina identified "Pine", a drug dealer from the neighborhood, as the rapist.

Additionally, over the past few years, Mr. Holton has learned an individual named Pine raped Katrina a week or so before the murder. Pine threatened Katrina and told her not to go to the police. Pine also confessed his involvement in Katrina's murder to his friends.

Mr. Holton's compelling case of innocence continues to develop.
sisselnor

Posts: 460
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Location: Norway
Website
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After exonerations, hunt for killer rare
by sisselnor on Tue Oct 28, 2003 9:11 am

After exonerations, hunt for killer rare

Police, prosecutors cling to original theories, seldom pursue new leads, suspects

By Steve Mills and Maurice Possley
Tribune staff reporters

October 27, 2003

After 16 1/2 years on Florida's Death Row, Rudolph Holton went free in January, the evidence against him so discredited, the case against him so undermined, that prosecutors had little choice but to drop their charges.

Stepping into the late afternoon sunshine outside prison, Holton tearfully said he was "on top of the world." Finally, he declared, he had proved his innocence.

Prosecutors refused to make any such concession.

"I am not saying loud and clear Rudolph Holton is innocent," Hillsborough County State

Atty. Mark Ober said at a news conference. "I am saying we cannot prove his guilt beyond a reasonable doubt."

Although dropping charges against Holton meant no one stood convicted of the murder of 17-year-old Katrina Graddy, police said they did not reopen the case. Nor did they investigate a man Graddy had accused of raping her 10 days before she died, and who had reportedly told another man he had committed the murder.

"Holton is a free man, but everybody is acting--everybody: the governor's office, prosecutors, police--like Holton got off on some fluke," said Martin McClain, a longtime death penalty lawyer and one of the attorneys who helped Holton win his freedom. "Those folks just won't let go of the idea that he's guilty."

Faced with unresolved murder cases, police and prosecutors rarely revisit the original crime or pursue avenues of investigation and suspects that have emerged during the often-long lifetimes of the cases, according to a Tribune investigation.

As a result, rarely is anyone brought to justice for crimes once considered worthy of society's most severe punishment, a failure that takes on greater significance when there is a possibility the real killer has been allowed to commit other crimes.

Since the death penalty's reinstatement in the mid-1970s, more than 100 people have been sentenced to be executed, only to be set free when they were legally absolved. The Tribune reviewed 88 cases in which 97 Death Row prisoners were set free, eliminating those cases with self-defense claims or pleas to lesser charges, to focus on those where a crime was left unsolved.

Each of those Death Row releases suggested the justice system had corrected itself. Instead, the legacy of those cases is a new set of troubling legal and ethical dilemmas that is largely lost amid the burst of public attention that accompanies a condemned inmate's unexpected freedom.

Court records indicate that an alternate suspect was identified in dozens of cases, but police charged a new suspect in just 10 cases, a reflection of the difficulty of pursuing an old case and the reluctance of authorities to admit error and seek new suspects. In three of those cases, the crucial work to solve the murder was done not by law enforcement, but by defense attorneys, private investigators or college students.

Without a doubt, the cases in which Death Row inmates were set free are complex. Few involve DNA, so it is difficult to determine with absolute certainty who is guilty and who is innocent.

"It's possible for prosecutors to say, 'We think we got the right guy,'" said University of Houston law professor David Dow, who defends Death Row inmates. "And it's hard to argue with them."

In these cases, 33 Death Row prisoners went free after they received a new trial and were found not guilty, while prosecutors dismissed the charges against 47 inmates--decisions that authorities cautioned are not findings of innocence but simply show they were unable to prove guilt beyond a reasonable doubt.

Moreover, prosecutors frequently have had legitimate reasons to abandon cases. Many cases have become almost unsolvable with age, as witnesses have died or their memories have faded and evidence has been lost or mishandled.

"The evidence is old, and the trail is cold--those are very real obstacles," said Jeffrey Renz, a University of Montana law professor and head of the school's legal assistance clinic. "At the same time, some police and prosecutors are unwilling to look at cases fresh."

Indeed, in many cases, authorities respond to a Death Row release by relying on their own certainty, insisting that a prisoner was guilty no matter how much evidence has emerged to support claims of innocence, or developing revised theories of the murder to accommodate new evidence.

The failure to reinvestigate also is found in cases in which DNA has freed inmates convicted of other crimes such as rape. In those cases, the Tribune investigation found, police sometimes did not take even the simplest investigative step--entering a genetic profile into a database to identify the real attacker.

Yet, unlike in rape cases, no statute of limitations exists for murder; consequently, the legal window for bringing a newly found suspect to justice never closes.

In Illinois earlier this year, four inmates could declare their innocence on a single day, when then-Gov. George Ryan pardoned them after reviewing their cases and determining they did not commit the crimes.

But Chicago police and Cook County prosecutors said they would not reinvestigate the killings for which the four men, and a co-defendant who remains in prison, were sent to Death Row--murders that, all together, took the lives of 14 people.

Officials said they are confident the men are guilty.

A crucial witness

When Perry Cobb and Darby Tillis were found not guilty in 1987 at their fifth trial--after nine years in prison, four of them on Illinois' Death Row--Cook County Circuit Court Judge Thomas Hett made clear who he believed was the most credible witness during the final trial.

It was Michael Falconer, a factory worker-turned-lawyer who had interned with the U.S. attorney's office and, at the time, was a 45-year-old prosecutor in neighboring Lake

County.

Falconer was a witness for the Cobb and Tillis defense, and his testimony, which Hett called "devastating" to the prosecution case, pointed at two of the state's own witnesses as the real killers.

But when Cobb and Tillis were acquitted and released, Chicago police and Cook County prosecutors never turned their investigative attention to the two people as potential suspects--even though one of them admitted she had driven the getaway car.

Falconer was not surprised. "As a prosecutor, I knew they'd invested too much in [their] theory to start over," he said. "There's a mind-set. The theory fits as well as anything; we're going to stick with it no matter what happens."

Prosecutors and police can become so wedded to initial theories of how a crime occurred that it can be difficult, they acknowledge, to start anew when an inmate is set free.

"For prosecutors and police, these cases are more to them than just having made a mistake or a mistake was made," said Richard Moran, a professor of sociology and criminology at Mt. Holyoke College.

"They have gone to court and argued these people are guilty. They need a full emotional commitment to that position, otherwise how can they prosecute them and send them to prison? That is difficult to change."

Cobb and Tillis were sentenced to death for the November 1977 murders of Melvin Kanter and Charles Guccion, who were shot at Kanter's North Side hot dog stand.

It was, as former prosecutor Nicholas Trutenko recalled recently, a "heater" case, one that had gotten attention in the media and that top officials had placed a high priority in solving.

No physical evidence tied Cobb and Tillis to the murders. Prosecutors at trial relied primarily on two central witnesses and one key piece of evidence. All were eventually called into question.

Chicago police found Cobb with Guccion's watch, though Cobb said he bought it from Johnny Brown, an acquaintance.

Arthur Shields, who worked at a nearby liquor store, initially testified that he got only a glimpse of the killers and could not identify them. But at later trials, Shields' identification became more detailed and more certain.

And Brown's girlfriend, Phyllis Santini, testified she was driving Cobb, Tillis and Brown around that night but dropped off Brown before the murders and was unaware Cobb and Tillis were going to commit murder.

After hung juries at the first two trials, Cobb and Tillis, who are black, were convicted by an all-white jury at a third trial and sentenced to death. The Illinois Supreme Court, however, reversed the convictions because of errors by the judge.

Falconer came forward before the fourth trial--the same trial at which Trutenko and his partner were assigned the case for the first time. That trial ended in a hung jury.

Before he became an attorney, Falconer worked at a factory with Santini. He said she told him she felt she had to stick with the account she had given prosecutors.

"She told me the real story, that she and her boyfriend went to rob this hot dog stand and something went wrong," Falconer recalled. "She said they had to shoot those guys. She said everything went wrong."

Later, after Falconer became a prosecutor and read about the case, he called defense attorneys.

Trutenko, who spent 10 years as a Cook County assistant state's attorney and later was a defense attorney, remains sure Cobb and Tillis were the killers.

"So many times the defense is that someone else did it, and it's usually a guy in the prosecution's case," said Trutenko, now a corporate attorney.

"There are only so many defenses," he added. "But never for one minute did we think we had the wrong people up there. We just thought we had a problem case."

Those problems included the testimony from Shields, who died before the fourth trial. Consequently, jurors could not see him testify and gauge his credibility. Instead, a court official read his testimony to them.

Santini also was a problem. Although Trutenko said she was persuasive preparing for trial, she was less convincing on the witness stand.

Then there was Falconer. Trutenko said Falconer came to trial with "built-in credibility." He was a prosecutor, after all, somebody any prosecutor would have loved to have as a witness.

But Trutenko said he was suspicious that Falconer had taken his information about Santini to defense lawyers rather than fellow prosecutors. He questioned why Falconer had waited to come forward.

Once Hett acquitted Cobb and Tillis, Trutenko said it would have been wrong to start fresh and bring a case against two new defendants.

"I couldn't lose the prosecution, then turn around and try to tag someone else with it," he

said. "I wouldn't have prosecuted them if I didn't think they were the right guys. I didn't have any issues with that case. They were the ones."

Hett ruled that although there was evidence that implicated Cobb and Tillis, it did not withstand scrutiny from the defense and the evidence that pointed to other suspects.

The judge said that Shields' testimony was marked by inconsistencies, and he questioned why it changed so much over the course of the trials. He said Cobb having Guccion's watch was not enough to convict.

Hett suggested it was a mistake for prosecutors to call Johnny Brown as a witness, saying that in his testimony at trial, Brown "exuded sharpness, double-dealing and dishonesty."

Hett reserved much scorn for the state's star witness, Santini. "Obviously manipulative and evasive, angry and conniving" is how Hett described her, and he said she and Brown had much to lose if authorities ever turned their focus on them.

At the end, Hett praised Falconer. The judge said that by testifying for the defense, Falconer was "exhibiting, at least in my mind, in the very best fashion, the true job of a prosecutor, to do justice as he sees it without fear or favor."

Skeptical courts

Among the cases the Tribune examined are those in which the courts felt compelled by law to order a Death Row inmate's release or to grant a new trial, although the courts were not necessarily convinced of an inmate's innocence.

Consequently, there was little impetus to reopen an investigation.

Jay Smith, a suburban Philadelphia high school principal, was set free in 1992, after spending close to six years on Pennsylvania's Death Row.

Smith had been convicted of the 1979 murders of teacher Susan Reinert and her two children, aged 11 and 10, in a plot with Reinert's lover.

The lover, a fellow high school teacher named William Bradfield, was the beneficiary of Reinert's roughly \$700,000 life insurance policy, and authorities believed that was Smith and Bradfield's motive.

Bradfield was convicted, too, but was sentenced to life in prison.

In a series of rulings, the Pennsylvania Supreme Court found that prosecutors had used hearsay and had relied on speculation in its case, so the court vacated Smith's convictions.

The court also found that prosecutors had engaged in intentional and egregious

misconduct by withholding evidence that might have helped Smith prove his innocence, and that prosecutors had denied making a deal with a key witness, when in fact they had.

The court barred prosecutors from trying Smith again.

Smith sued police and prosecutors for wrongful imprisonment, an effort that went all the way to the U.S. Supreme Court, but it failed.

One appeals court turned Smith aside in blunt terms, saying its "confidence in Smith's convictions for the murder of Susan Reinert and her two children is not in the least bit diminished."

"To portray these cases as a mistake--to suggest the system was going to execute the wrong person--well, that's a mistake," said Ward A. Campbell, a California deputy attorney general who has handled capital cases for two decades and who has written on the Death Row releases.

In Campbell's view, fewer than three dozen freed inmates can legitimately claim they were innocent of the crime that sent them to Death Row. He points to some cases in which a jury found the defendant took part in a portion of the crime--say, a robbery committed as part of a murder--and those in which significant evidence implicated the defendant.

It is a point of view shared by many prosecutors and, not surprisingly, disputed by a number of defense attorneys.

"Fact is," Campbell added, "we know we have a certain number of cases where the guilty guy has got off. That's the untold story here."

When the Florida Supreme Court vacated the murder conviction of Death Row inmate Andrew Lee Golden, citing insufficient evidence in the death of his wife, the court nonetheless said a "reasonable juror could conclude that he more likely than not caused his wife's death."

"The finger of suspicion points heavily at Golden," it added.

Prosecutors said there is no reason to reinvestigate Smith's or Golden's cases.

Although police and prosecutors have brought cases and have won convictions against new suspects after a Death Row inmate was exonerated and set free, they have had DNA evidence or a confession to make the cases. Otherwise, the hurdles are considerable, legal experts said.

Police searching a new suspect's home five, 10 or 15 years after the crime, for instance, would have little hope of uncovering any evidence.

In addition, defense attorneys for a new suspect could use the fact that prosecutors took to trial another suspect as a defense, and they can even use a prosecutor's original witnesses to suggest prosecutors were correct the first time.

Renz, from the University of Montana, said it also is easy for a defense attorney to "point a finger" at another suspect. He said the evidence that prosecutors have, or that defense lawyers find, "may not be enough to charge somebody."

Finally, there is the complicated calculus of how prosecutors and police should use their limited resources to grapple with these unresolved crimes.

"If you've got that guy locked up for something else, well, where is he going to go?" Renz said. "That's not necessarily such an unreasonable call."

"You can only get so much blood from the turnip."

'No justice'

Some cases stall even when DNA is involved, as prosecutors cling to their original theories, leaving murder victims' relatives with questions.

In Virginia, Earl Washington Jr. walked off Death Row, then out of prison, after DNA tests cleared him of the 1982 rape and murder of Rebecca Lynn Williams, a young mother who lived in Culpeper.

Washington, a mildly retarded farmhand, had been convicted largely over a confession, and he once came within nine days of execution during his nine years on Virginia's Death Row. Altogether Washington spent about 17 years in prison.

DNA tests on semen from Williams' body and from a blue blanket found at the scene supported Washington's claim that his confession was false. He won a pardon from the governor in 2000.

Not only did the tests exclude Washington, they linked the semen from the blue blanket to a convicted rapist. The DNA evidence from Williams' body remains unidentified.

Even after Washington was set free, officials in Culpeper, including the county's chief prosecutor, Gary Close, said they continued to believe Washington played some role in the murder. Three years after DNA results were obtained, the murder remains unsolved.

Close declined to comment because Washington has sued him, alleging slander over his statements. The lawsuit is still pending.

Williams' widower, Clifford Williams, said in a recent interview that Close's statements have provided little comfort.

"There's no justice been done here whatsoever," he said. "All I want to know is who did this? Seems like I'm owed that much."

When DNA evidence leads to a Death Row prisoner's release, and when it also identifies a potential suspect, expectations are high that authorities will spring into action and bring the suspect to justice.

But sometimes that does not happen. That is one of the issues at the heart of the controversy that has trailed the 1983 rape and murder of Jeanine Nicarico.

Two men--Rolando Cruz and Alejandro Hernandez--were sent to Death Row for raping and killing the 10-year-old girl in DuPage County.

Cruz spent 10 years under a death sentence, while Hernandez lived with a death sentence for six years, before the case against them foundered after a sheriff's lieutenant admitted during Cruz's third trial that his testimony about a crucial piece of evidence had been incorrect.

But the evidence against the two men had always been circumstantial, primarily consisting of what officials said was a "vision statement" from Cruz and testimony from jailhouse informants or others who claimed the two had implicated themselves in the crime.

Moreover, DNA testing had linked convicted murderer Brian Dugan to the crime as early as 1995, and he even offered to plead guilty to the murder in return for a life sentence.

Last November, DuPage County State's Atty. Joe Birkett said more sophisticated DNA tests had established with "scientific certainty" that Dugan was involved in the girl's slaying, evidence that in most cases would be sufficient for prosecutors to bring a defendant to trial.

But during a clemency hearing for Cruz last year, attorneys for the state argued that Cruz's involvement remained an open question.

Jeanine Nicarico's parents also argued against a pardon for Cruz, saying they believed he played some role in their daughter's slaying. Cruz was later pardoned.

Birkett, in an interview recently, said the investigation was a priority, but it was taking time because it was so complex. Prosecutors, he said, wanted to be prepared for whatever strategy Dugan's lawyers might take.

"Because you have a result on a piece of evidence doesn't mean you can resolve all the investigative questions you might face," Birkett said. "The evidence will be presented to a grand jury when I'm convinced we've dotted all the i's and crossed all the t's."

The toughest choice

In the aftermath of most cases, both sides often remain at loggerheads. Inmates, now free, maintain their innocence. Prosecutors and police insist the prisoners were guilty. No additional investigation is conducted.

In 1999, on the day his fourth trial for the murder of Linda Jo Edwards was to begin, Kerry Max Cook faced the toughest choice of his life: Plead no contest in exchange for freedom, or go to trial yet again.

Repeatedly maintaining his innocence, Cook had rejected earlier offers that required him to plead guilty. But finally prosecutor David Dobbs offered Cook the chance to make a plea that allowed him to say he had nothing to do with the murder.

Already, Cook had spent 20 years on Texas' Death Row. Over those two decades, he had once come within 11 days of being executed. He had been beaten and raped by other inmates.

Talking with his lawyers, Cook weighed his options. The case against him had unraveled in the years since he was first convicted and sentenced to death for killing the 21-year-old Edwards in 1977.

Witnesses who had implicated Cook had recanted, leaving only a fingerprint on Edwards' patio door to tie Cook, who lived in the same complex, to the scene. Even Texas' highest criminal appeals court had concluded the case was flawed, saying "prosecutorial and police misconduct have tainted this matter from the outset."

Cook decided to take the deal. Two months later, prosecutors announced that DNA tests on semen on the underwear Edwards was wearing the night she was killed matched someone else.

That person, authorities said, was James Mayfield, dean of the libraries at Texas Eastern University and Edwards' supervisor at the school. Mayfield had been questioned shortly after the murder and admitted having a relationship with Edwards, according to police reports and court records.

Mayfield had left his wife for Edwards in the weeks before she was murdered, those records showed, though he quickly returned home. On the day Edwards was killed, she informed him she was going to date other men. That night, Edwards' roommate told police that she believed she saw Mayfield inside Edwards' bedroom, according to court records.

When questioned, Mayfield said he and Edwards had not had sex in the three weeks before she was murdered. His wife and daughter said he was home when Edwards was slain. Police concluded Mayfield was not involved in Edwards' murder.

Attempts to reach Mayfield were unsuccessful. He has always denied a role in Edwards'

death.

Prosecutors called the DNA test results "irrelevant." Cook, they insisted, was the murderer. The case was closed.

Dobbs, who tried Cook twice and now is in private practice in Tyler, said the DNA "might have raised a question" about whether Mayfield had been telling the truth about his relationship with Edwards.

But Dobbs, as well as Edward Marty, a Tyler prosecutor who had worked on the Cook case, suggested that the semen stain on Edwards' underwear was from an earlier encounter with Mayfield and that Edwards might have been wearing underwear that had not been washed.

Moreover, they said court rulings and the death of a key witness, not any evidence brought by Cook's lawyers, had damaged the case.

"We just didn't have much left by the time the case came back," Marty said. "It was Texas procedural law that saved his ass, not innocence."

A half-dozen Death Row inmates have gone free with plea agreements that close cases. Those deals allow both sides to proclaim victory: Prosecutors salvage convictions and close investigations, while prisoners regain their freedom and maintain their innocence.

Left unanswered is the question of who committed the murders.

Pardon not enough

In some cases, authorities continue to try to tie an inmate to a crime after DNA has cleared him or he has been pardoned.

In 1997, eight years after Ronald Jones was sentenced to death for the rape and murder of a Chicago woman named Debra Smith, Jones got the news that eventually would set him free.

DNA tests done on semen recovered from Smith's body excluded Jones as the source. Two years later, prosecutors, who had won the original conviction against Jones with a disputed confession, dropped the charges, and he was freed.

A year after that, in June 2000, then-Gov. Ryan found the case against Jones so lacking he granted him a pardon based on innocence.

Nonetheless, Jones remained one focus of a continuing investigation into Smith's murder by Cook County prosecutors.

In dozens of interviews with potential witnesses after Jones was cleared and pardoned,

investigators questioned whether Jones and a second person--and possibly even a third--could have been involved in the crime, according to records.

It was a theory to account for the DNA test results.

"Instead of trying to find the real killer, they continued to pursue a mythical theory [that] Ronald Jones was somehow connected," said Flint Taylor, one of Jones' attorneys. "They would not give up the ghost on this case."

Illinois Deputy Atty. Gen. Ellen Mandeltort, who as a Cook County assistant state's attorney had a role in the reinvestigation, said detectives did not focus on Jones but went "back to square one."

"We investigated the case from top to bottom," she said.

After his release, Jones sued the City of Chicago and the Police Department, alleging police framed him by beating a confession out of him and by giving false testimony.

The city's defense against the lawsuit was that Jones committed the crime with an accomplice--a theory that county prosecutors tried, but failed, to establish and that contradicted prosecutors' previous claims that Jones committed the crime alone. The city also said the dropped charges and pardon did not resolve the criminal case against Jones "in his favor."

Recently, the city agreed to settle the lawsuit for \$2.2 million, according to court records and interviews. The settlement does not require the city to admit wrongdoing.

The \$2.2 million represents part of the cost of wrongful convictions in capital cases. At least \$31 million has been paid to former Death Row inmates nationwide in judgments, settlements and compensation.

Although \$21 million of that was paid out to two Death Row prisoners exonerated in the Ford Heights Four case, the figure still is substantial because of the obstacles that prisoners face in winning compensation.

Prosecutors generally have immunity from lawsuits. Only 16 states, including Illinois, and the District of Columbia provide compensation for the wrongly convicted.

The \$31 million total may well grow. So far, two of the four Death Row prisoners pardoned in January by Ryan--Aaron Patterson and Madison Hoble--have sued Chicago police.

Those cases, as well as the cases against the other two inmates Ryan pardoned, were marked by various problems. Patterson's case, in fact, has long been one of the most controversial in Cook County, in part because of his allegations that detectives tortured him.

Patterson was convicted of the 1986 murders of Vincent and Rafaela Sanchez in their South Chicago home.

His defense team has long contended that a man in prison for a stabbing in Aurora committed the crime.

The Cook County state's attorney's office and Chicago police, however, said they have no plans to reinvestigate Patterson's case or the cases of the other men Ryan pardoned.

"It's up to the police to investigate," said John Gorman, a spokesman for State's Atty. Dick Devine. "If they bring us information, we'd deal with it then and evaluate and decide how to go forward."

Chicago police spokesman Dave Bayless said the cases remain closed.

Coming Sunday

Released from Death Row, Aaron Patterson tries to make a difference.

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News about Rudolph Holton

by brittaigel on Sun Nov 16, 2003 1:34 pm

'I just got off death row'

Those words have become a mantra for a former death row inmate as he struggles to find a job and deal with life's day-to-day problems.

By DAVID KARP, Times Staff Writer

Published November 16, 2003

<http://www.oranous.com/innocence/RudolphHolton/off.htm>

TAMPA - As students in the job training class told their stories, Sandra Holton heard it coming. She knew what her husband was about to say.

Please don't say it, she prayed.

She knew he would. He always did.

Not again. Please.

"I just got off death row," Rudolph Holton said.

Heads turned. Sandra lowered her head.

The teacher had asked students to explain their criminal pasts. People brought up the usual drug charges and domestic disputes. No one, except Rudolph, mentioned a murder charge.

Sandra, 37, knew her husband couldn't keep his secret.

But how was he going to survive if he kept blurting out those words? How could he find a job and stay out of trouble? How would he deal with the rush of emotions - shame and anger, love and lust - that she felt?

When Rudolph, now 50, was sent to death row, he was 33. For the next 16 1/2 years, until January, he lived in an environment where condemned men marked their days.

He developed social habits by talking through bars to other inmates. He learned about survival by watching his back in the prison yard. He acquired job skills by figuring out how to make something from nothing, such as heating water in his cell using a razor blade, Popsicle sticks and dental floss.

All along, he maintained his innocence. But it took years for his attorney to convince others that someone other than Rudolph had killed a prostitute that night in 1986.

Finally, Rudolph was released into the world, with a JCPenney winter jacket, \$100 cash and no clue of what else life would bring.

He knew he could make it behind bars. But what about the outside?

* * *

One recent night, he was lounging in a sofa chair watching Monday Night Football while Sandra soaked in the tub. Her 16-year-old daughter, Tiffany, was asleep in their \$550-a-month home off Nebraska Avenue.

All of a sudden, Sandra started screaming.

"Rudy! Rudy!" She heard something outside.

By the time Rudolph walked to the back yard, the shed door was open.

The new lawn mower was gone - and, with it, Rudolph's livelihood.

He and his wife jumped in their car and drove around the block, looking for someone pushing a mower. But the streets were empty.

Rudolph trudged back inside, depressed. A friend had paid for the mower.

He dreamed of running his own lawn care business and already had talked a few people into letting him cut their grass.

Now what would he do?

* * *

The next morning, Sandra got up before 8 a.m. and smoked a cigarette. Rudolph dug through papers, looking for the lawn mower receipt.

Police needed the serial number to identify the mower at pawn shops.

Meanwhile, Rudolph needed a job.

He had not earned steady wages for more than 16 years. In his 20s, he laid pipes. He loaded ships at the Tampa banana docks.

While serving time on other charges, he worked as a custodian at the Florida State Prison. One of his tasks was cleaning the electric chair.

Now free, he would walk along Hillsborough Avenue and enter stores, asking for work. When employers asked about his experience, he blurted out the truth.

"I just got off death row," he would say.

He didn't get any offers.

Finally, someone told him about the Corporation to Develop Communities of Tampa Inc., a nonprofit run by community activist Chloe Coney. The center helps felons and other hard cases find work.

His appointment was at 9 a.m. Nov. 4.

It was the morning after the mower theft, and the Holttons barely spoke as they got ready to leave home. In the parking lot outside the center, they held hands.

Inside, there was a room full of people filling out forms. Everyone was quiet. Rudolph signed in and took a seat.

In the class, the instructor asked everyone to write the word "J-O-B," then create a word for each letter.

How many people had a resume? the instructor asked.

"I put in about 15 resumes," Rudolph said.

After class, the Holtons met with a job counselor in a cubicle. Rudolph crossed his arms and stared at her.

"What was your last employer?" she asked.

The couple looked at each other.

"Self-employed," Sandra said, meaning the lawn jobs.

The counselor wrote it down.

"Can you do carpentry? Painting? What did you do in prison?" she asked.

He had spent much of his time in prison trying to get released.

She teased him. Maybe he wanted to work as a lawyer.

"It's too stressful," he answered.

* * *

Outside, they piled into Sandra's Mazda and rolled down the windows. The air conditioning was broken, and Sandra had no money to fix it.

They headed to Home Depot, hoping the store had kept a record of their mower purchase. They still needed the serial number for police.

But the store hadn't kept a record. The two left in silence.

Back home, Rudolph went through the paperwork again.

"I put it with the rest of the bills," he said.

He called the woman whose lawn he was supposed to cut.

"Somebody has stolen my lawn mower," he explained.

Before he went to Florida's death row in 1986, Rudolph had been a petty burglar, breaking into houses and stealing TVs to get money for drugs.

He wasn't a careful thief; he was caught walking down Ybor City streets in daylight hauling stolen TVs.

This time, he was on the other side. This time, he knew how crime felt.

Rudolph went outside to check the mail.

"Mailman came," he said as he looked at the letters. "Bills."

* * *

Sandra first saw Rudolph on the news. He had just gotten off death row.

"The first time I saw him, I thought, "What a beautiful body,"" she said.

He started hanging around her. Soon, he moved in.

The arrangement served Rudolph well. Except for relatives, he had nowhere to live and no one to assist him.

Sandra went to work and paid the bills, while Rudolph looked after the house and Tiffany.

Other women had promised to stick with him. But when he was released, they disappeared. Sandra stayed.

When he thinks about her love, it steals his breath and puts a tear in his eye.

"We both really need each other," he said.

"I can sit down and talk to her about things I can't talk to anyone about. She really listens."

One night, talking in bed, she asked him: Will you marry me?

He asked her to get on her knees. She did.

"Yes, pumpkin," he said.

They planned to buy a house together in Spring Hill, but on closing day, the deal fell through. They needed better credit.

That night, Aug. 2, they found a notary and got married in a rainstorm. They celebrated at

Red Lobster.

* * *

The relationship divided Rudolph and his family. When the two hooked up, Sandra was divorcing his uncle, Lawrence Holton Sr.

Back in November 2002, while Rudolph was still on death row, Sandra told police that the uncle had pointed a gun at her and threatened to kill her. Lawrence Sr. denies that charge.

Then in May, the uncle's son, Lawrence Holton Jr., showed up at Sandra's house to claim some belongings. According to police reports, Lawrence Jr. raised a fist at Rudolph, who then raised a stick. Lawrence Jr. said Rudolph raised a machete, but police found none.

They did find Rudolph, who explained, "I just got off death row."

He said he had feared that Lawrence Jr., who was later arrested on unrelated rape charges, might break in and attack them or Sandra's daughter.

"The only thing I did was protect myself," Rudolph said.

Lawrence Sr. urged authorities to prosecute his ex-wife's new beau. He reminded them that Rudolph had just gotten out of prison. He also told a Times reporter he hoped for Rudolph's arrest, noting that Sandra had caused his arrest.

Police had left the house in May without taking anyone in. The couple thought the incident was over.

But in August prosecutors charged Rudolph with aggravated assault.

No one served him papers. He learned about the arrest warrant a month later from the Times.

The next day, he turned himself in at the Pinellas County Jail in Largo, rather than the Hillsborough County Jail. He had bad memories of the Orient Road jail, and he didn't trust the officers in Tampa.

* * *

When Rudolph bailed out of the Pinellas County Jail, the woman at Quick & Easy Bail Bonds gave him a business card. On it was the name of lawyer John Trevena.

Maybe this lawyer would help, he thought.

Rudolph wanted to sue the state for putting him on death row. He wanted money; he thought he deserved it.

In some ways, Rudolph knew that prison had saved him. If he had stayed on the streets, stealing to feed his drug habit, he probably would have been killed or would have overdosed.

But when he thought about the years he lost, when he contemplated his future, he couldn't help but cry.

"It's like I spent all that time for nothing," he said one afternoon at home.

Sandra rubbed his back, trying to comfort him.

"It seems like no one cares," he said.

Sometimes, in the middle of the night, he forgets that he is free.

"I wake up at 4 o'clock or 5. Sometimes I think they are getting ready to feed us," he said.

For days, Rudolph went through the Yellow Pages calling lawyers. But no one wanted his case.

All he needed was enough money to buy a house far off in the woods. He hoped to get a job without much stress.

Finally, he called Trevena, who was known for taking on prosecutors.

Trevena agreed to help.

* * *

On Nov. 6, the Holtons headed back to the job center. In the parking lot, he wore a headset, plugged into jazz.

"You don't need that in there," Sandra said, pulling off the headset.

"I'm not in there yet," Rudolph said.

He put it back on. He looked away.

"I'm the child," Rudolph said. "She's the mother."

Inside, the counselor had landed Rudolph a job interview on a construction site in New Tampa.

Rudolph and Sandra set out for the interview. As they drove up Bruce B. Downs Boulevard, Sandra admired the palm trees and nice homes. They passed the Men's Warehouse, and Rudolph pointed at it.

"When I get some money, I'm going there," he said.

"He doesn't need more clothes," Sandra said.

At the construction site in the sprawling subdivision, cement trucks and pickups lined the street. Cranes moved trusses. Construction workers stood on roofs.

Rudolph, accompanied by a reporter and photographer, asked the crew chief for a job.

"Got tools?" the chief asked.

Rudolph didn't answer. Instead, he said: "I just got off death row."

The crew chief needed bodies, badly.

"Then, you're ready for work," he said.

He gave Rudolph a list of required tools: a hammer, a measuring tape, a level and a tool belt.

Work starts at 7 a.m., the chief said.

"Tomorrow, I'll fill out an application," Rudolph offered.

No application was required. Only tools.

Sandra wrapped her arms around him and planted a kiss.

"I knew it, baby! What did I tell you!" she said.

In the car, she held his hand.

"This means a lot," she said. "He can feel like himself again."

Driving home, Rudolph noticed a souped-up pickup on Bruce B. Down Boulevard.

"One day, I would like something like that," he said.

* * *

He had no money for construction tools. He had no ride to work.

Sandra's job at a dialysis clinic started about 5:30 a.m., but she told Rudolph he could take her car while she was at work. The car would give him freedom.

But Rudolph said no. He's too afraid to drive, and besides, he doesn't have a license. He never had one.

"My feet get jumpy on the pedal," he said. "I am afraid of getting pulled over, of getting harassed."

Sandra offered him money for the tools. She could borrow from her sister, she decided.

That weekend, they drove to Kissimmee, where her sister lives. A tire blew out on Interstate 4.

Rudolph could feel the stress mounting.

He found himself opening beer bottles and cursing at Sandra, resenting the way she nagged, even talking about leaving.

"I have to get out sometimes," he said.

Everything made it worse - the tools, the job, the car problems, the pending criminal charges.

Monday would have been his first day on the job.

He dropped Sandra at work and headed to the construction site in New Tampa in her Mazda. Before he left, she gave him a copy of the car's vehicle registration, just in case he needed it.

On Bruce B. Downs Boulevard, Rudolph saw police lights in his rear view mirror. He pulled over, and a sheriff's deputy ordered him out.

Driver's license, please.

"I just got off death row," he said.

He told the officer he was driving his wife's car and trying to get to work.

You can go to jail for driving without a license, the deputy said.

But then the deputy cut him a break. He gave Rudolph a warning and told him to head straight home.

He never made it to work. Not that day or any last week.

* * *

On Friday, Rudolph had an 8:30 a.m. court date before Circuit Judge Anthony K. Black on his new aggravated assault charge.

He emerged from his house dressed neatly in pressed slacks, a sweater and black leather

shoes. He carried a briefcase.

Sandra came out in her pajamas, yelling at Rudolph and pointing her finger. They had been arguing about something.

"This is your choice," she said.

In the car, Rudolph stared out the window.

"This gets me stressed out," he said.

He kept checking his watch. He didn't want to be late.

In court, he looked at old newspaper articles that had been written about him. The pictures showed him in his prison uniform from death row.

A bailiff approached.

"You know when court starts, you can't read," the bailiff said.

"I know," Rudolph replied.

A lawyer held out his hand.

"Mr. Holton," he said.

Rudolph met his court-appointed attorney, Bob Fraser, for the first time. He gave Rudolph a business card.

Rudolph studied the card. Fraser's offices are in Lakeland and Brandon.

"Lord, have mercy," he said. "I can't get over there."

As he waited for his case to be called, Sandra slipped into the courtroom, dressed for work, and sat in the back. She came to be with her husband.

He motioned for her to join him. She didn't respond.

Outside after court, Sandra walked several feet in front of Rudolph. He called her name, but she still didn't answer.

She walked one way; he walked the other.

Then, she shouted to him: "Don't forget to go to the CDC."

That's what she calls the job center.

She looked at him. He looked at her. Then, he walked over.

They talked about the worst that could happen - five years in state prison.

Five more years.

Then they left together, a little distance between them, a husband and a wife headed for home.

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[http://www.sptimes.com/2003/11/16/Hills ... eath.shtml](http://www.sptimes.com/2003/11/16/Hills...eath.shtml)
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Picture of Rudolph November 2003
by sisselnor on Sun Nov 16, 2003 2:15 pm

sisselnor

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Rudolph and Sandra
by sisselnor on Sun Nov 16, 2003 2:16 pm

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Man on death row gets new trial
by sisselnor on Sun Nov 16, 2003 4:21 pm
[http://www.oranous.com/innocence/Rudolph ... wtrial.htm](http://www.oranous.com/innocence/Rudolph...wtrial.htm)

Man on death row gets new trial
The man was convicted 15 years ago of raping and killing a 17-year-old prostitute. Police withheld a crucial crime report.
By DAVID KARP

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TAMPA -- A drug-addicted drifter sent to death row 15 years ago won a new trial Friday in a murder case that attracted hardly any attention at the time.

The extraordinary turn of events in the case against Rudolph Holton happened in a courtroom Friday in near silence.

Circuit Judge Daniel Perry handed out his opinion overturning Holton's murder conviction without comment. In a busy courtroom, no one except the lawyers and a few relatives knew what had just happened.

As the judge moved to the next case, one of Holton's attorneys scanned the ruling, then gave a thumbs up.

Outside, Holton's daughter cried and said, "Bless God. Bless God."

With tears running down her cheeks, she hugged Linda McDermott, a 31-year-old lawyer who had made Holton's case her cause.

McDermott worked on the case for free at one point and searched the state for funding. When she couldn't raise money for a defense, McDermott abandoned plans to enter private practice and returned to work at the state agency that represents death row inmates so she could finish Holton's case.

"There was something about Rudolph and his case that was compelling," McDermott said. "Someone had to step up and say, 'This is going to be the case I go the extra mile on.' "

McDermott brought in a capital appeals specialist from New York and recruited

investigators who tracked down homeless men who were witnesses. "It was one of my first cases," McDermott said. "It had never been looked at closely."

When the murder happened in 1986, it was the sort of case lawyers refer to as a "misdemeanor murder" because the victim is little-known and unsympathetic. In this case, the deceased was a 17-year-old crack addict and prostitute named Katrina Graddy who was raped and set on fire in an abandoned drug house near College Hill.

Holton, then 33, had been convicted of more than a dozen crimes, mostly nonviolent burglaries, to feed a drug habit.

Six months after his arrest, Holton was convicted and sentenced to die. His court-appointed lawyer, Mina Morgan, had four months to prepare a defense while juggling five other trials. She begged then-Circuit Judge Harry Lee Coe to grant her more time, but Coe refused.

Coe wouldn't give her a five-minute break between Holton's trial and his death penalty hearing.

The evidence against Holton was circumstantial. The prosecutor on the case, Joe Episcopo, told jurors that a hair found in the victim's mouth came from an African-American. Holton is black.

A witness testified that she saw Holton enter the drug house the night Graddy was killed. A jail informant said Holton confessed.

Fifteen years later, even Episcopo said he doesn't find the case convincing. DNA tests show that the hair did not come from Holton. The jail informant admitted he lied, and other witnesses changed their stories too.

Most important, police never turned over a crucial crime report to Holton's attorney. Although police unintentionally withheld the report, Judge Perry cited it Friday as a main reason for a new trial.

Shortly before Graddy's murder, she reported that a man named David Pearson, now 43, raped her. When she was found dead, she had been raped in a similar way.

This summer, Pearson gave detectives samples of his DNA. In a sworn statement, he denied raping the woman but acknowledged having sex with her in exchange for drugs, then fighting about it 10 days before her murder.

Pearson, a convicted criminal who is currently in jail on unrelated charges, denied any role in the woman's death.

State Attorney Mark Ober has 30 days to decide if he will appeal Perry's decision. Prosecutors may have a difficult time retrying Holton, now 48. All of the state's witnesses

have either died, recanted their testimony or been discredited by new witnesses. No physical evidence links Holton to the murder, although prosecutors now want to test hair fibers that were never tested 15 years ago.

"If you look at the evidence," defense attorney Martin McClain said, "it's basically all gone."

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Death penalty under scrutiny
by sisselnor on Sun Nov 16, 2003 4:23 pm
[http://www.oranous.com/innocence/Rudolp ... oubled.htm](http://www.oranous.com/innocence/Rudolp...oubled.htm)

Posted on Tue, Jan. 28, 2003

Death penalty under scrutiny
Newly freed inmate recounts his ordeal
By Bill Cotterell
DEMOCRAT SENIOR WRITER

State officials should take a hard look at capital punishment but probably won't, a man who spent 16 years on Death Row said Monday.

Rudolph Holton and two attorneys who fought for his exoneration in the 1986 murder of a young woman held a news conference to discuss his ordeal. Holton, 49, is scheduled to attend a "service of thanksgiving" at the Great Seal of the State today on the Capitol's first floor - where death penalty opponents usually gather for prayer after an execution.

Holton was freed Friday when the state admitted that exculpatory evidence, including information about a different suspect, was withheld from his defense attorney.

"It was just one of them things," Holton said. "It's the system. It's the people who work in the system, how they do things."

Holton and attorneys Linda McDermott and Martin McClain said Gov. Jeb Bush and the Legislature should be troubled by the 25th case of a man getting off Florida's Death Row. But Bush has proposed abolishing the office of Capital Collateral Representative, which

represents condemned killers, and hiring private attorneys - on a budget lowered from \$10 million to \$6 million next year.

Earlier Monday, Bush said there might be an investigation of why some witnesses - including a jailhouse informant - changed stories in Holton's case. But he said he does not plan to review all death cases.

Holton, who spent the weekend at an undisclosed Tallahassee home while visiting his son and daughter, said he is not angry about his ordeal. McDermott said attorneys have been trying since 1992 to get public records from Tampa investigators who knew of another man accused of raping the victim before her murder.

"This case should bring a meaningful review of the entire process of capital cases," McDermott said.

She said defense lawyers were told original crime reports were either lost or never existed. Katrina Graddy told police another man had raped her 10 days before she was killed.

McDermott said that man was later charged with obstructing justice for using a fake name when he was questioned by police. But Holton's defense lawyer was never told that someone else had a motive for killing Graddy, to keep her from testifying if he was arrested for sexually assaulting her.

Graddy, 17, was sodomized and strangled, her body set on fire in an abandoned crack house. McClain said a third man asked investigators, "Who choked Katrina?" - indicating that he knew a dead woman was in the burned-out house and that she had been strangled - information that had not been disclosed at the time.

McDermott said she was able to locate police reports under some different names used by the other suspect in the case and Graddy's earlier report of her assault. Circuit Judge Daniel Perry ordered a new trial and the state appealed, but the Florida Supreme Court took just six days last month to uphold Perry's ruling.

"I'm just going to take it one day at a time and keep a positive attitude and a smile on my face," Holton said.

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Death Row review is not needed, Bush says
by sisselnor on Sun Nov 16, 2003 4:25 pm
[http://www.oranous.com/innocence/Rudolp ... needed.htm](http://www.oranous.com/innocence/Rudolp...needed.htm)

Posted on Tue, Jan. 28, 2003

Death Row review is not needed, Bush says
BY PETER WALLSTEN
pwallsten@herald.com

TALLAHASSEE - Gov. Jeb Bush said Monday he sees no reason to conduct the kind of exhaustive review that led the former Illinois governor to clear his state's Death Row, even though Florida leads the nation in the number of Death Row inmates whose sentences have been overturned because of questions about guilt and innocence.

Bush's comments came as former Florida inmate Rudolph Holton -- freed Friday after 16 years on the row when prosecutors said they could no longer prove his guilt -- appeared at a news conference to condemn "the system" for taking a third of his life.

"I don't think it's necessary for our state," said Bush, referring to the study of Illinois death sentences that led former Gov. George Ryan to commute 167 sentences in his final days in office. "We have a criminal justice system that protects the rights of these folks in an extraordinary way and continues to do so."

Death penalty opponents renewed calls Monday for a Florida moratorium after Holton became the 23rd inmate in the state to walk off Death Row or be exonerated since 1973, and the fourth since Bush took office.

Illinois, according to the Death Penalty Information Center, is second nationally behind Florida with 13 exonerations since 1973. Ryan, a Republican, cleared the state's Death Row after conducting a thorough review that led him to question the fundamental fairness of capital punishment, largely out of the fear of executing an innocent person.

Holton, 49, was released after a Tampa prosecutor said he did not have any evidence for a new trial to tie him to the rape and murder of 17-year-old Katrina Graddy.

The Florida Supreme Court ordered the trial after witnesses who had testified against Holton recanted their testimony and defense lawyers learned Tampa police had failed to reveal that the victim had reported that she had been raped by another man 10 days before her murder.

Defense lawyers heard about the report years after Holton's 1986 conviction and filed a public records request for it in 1992 with the Tampa police.

As Holton waited in a six-by-nine-foot cell that would get so hot in the summer "the walls would sweat," as he put it, it took the police nearly a decade to fill the request. In 2001, lawyers received the report that they believed pointed to a different suspect in the murder.

REVIEW PROCESS

Holton and his lawyers said Monday that given Holton's experience and that of other inmates before him, Bush should follow Ryan's lead.

Holton's lawyer, Linda McDermott -- who watched the Super Bowl Sunday with her client, the first time he had seen a color TV in 16 years -- said his case should be viewed by state leaders as "an important step to meaningfully review the process."

Holton and his lawyers also criticized Bush Monday for his proposal to phase out the state agency that represents Death Row inmates -- the Capital Collateral Regional Counsel -- and replace it with a registry of private lawyers.

Holton was represented by the counsel, as were the three other inmates who were exonerated or left Death Row in the past four years. Bush's critics worry that private lawyers who are not experts in death-sentence cases may not have the time or expertise to work aggressively for evidence that could clear a client, such as the Tampa police report.

"Anything that's good, it seems like the state's against it," Holton said. "[Bush] wants to cut the funding and hire a bunch of jerks, and jerks don't know anything."

SPEED UP APPEALS

But Bush, a staunch supporter of capital punishment, tried to turn Holton's case into an argument for speeding the death penalty appeals process, a change he has been pushing for years despite critics who say speeding it up could result in innocent people being executed.

"The fact that someone would have to wait 16 years is part of the problem," he said. "This could have been found earlier."

Bush said Monday he is considering asking the Florida Department of Law Enforcement to investigate how and why the witnesses who testified against Holton recanted their stories.

And he said he may pursue more ways to speed the appeals process.

But, he said, the system still guards against executing an innocent person.

"It concerns me if anyone's innocent in prison, not just Death Row," Bush said. ``But I can tell you of the people I have signed death warrants for, they've all been deserving of the toughest penalty."

Holton said he expects no apology from the state. But he sniffled and cried, hugging his lawyer and saying how he can't replace the years lost in prison.

"There would be not enough money that could get me back my loss," he said. ``Six grandkids, I didn't get a chance to play with them or hold them. Nothing. Missed all that."
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Attorney Wants Review Of Case Against Holton

by sisselnor on Sun Nov 16, 2003 4:29 pm

[http://www.oranous.com/innocence/Rudolp ... durkin.htm](http://www.oranous.com/innocence/Rudolp...durkin.htm)

Attorney Wants Review Of Case Against Holton

By JOSHUA B. GOOD jgood@tampatrib.com

Published: Feb 12, 2003

TAMPA - Sixteen years ago, Tampa police Detective Kevin Durkin's investigation put a man on death row for the murder of a teenage girl.

But last month, Rudolph Holton was freed, in part, because his appeals attorney, Linda McDermott, pursued leads, which Durkin didn't follow, that point to another man as the possible killer. The case made national headlines over glaring discrepancies by key witnesses, investigators and prosecutors.

Despite the questions surrounding the case, Tampa police have yet to re-open the case. And even if they do, and charge another suspect, officials say, it would be hard to overcome a defense attorney's claim that Holton was the real killer.

``We looked under every stone we could have looked under," Durkin said.

McDermott found a report indicating that murder victim Katrina Graddy had been raped 10 days before her death. It took nine years for the rape report to be turned over by

Tampa police to Holton's appeals team.

McDermott's work convinced the Florida Supreme Court that Holton, 49, deserved a new trial for the 1986 slaying of Graddy, a 17-year-old prostitute found strangled to death in a downtown crack house.

After State Attorney Mark Ober concluded last month there was not enough evidence to retry Holton, he declined to open an investigation into why it took years for Holton's team to get the rape report. He said Graddy used a fake last name, so police didn't know the murder victim and the rape victim were the same person. Withholding the rape report was not intentional, he and Hillsborough Circuit Judge Daniel Perry concluded. Perry also reviewed the Holton case.

McDermott says the victim's family deserves to have the investigation re-opened. She also says authorities should look into how the case was handled.

“Why aren't they concerned about the fact things were withheld from the defense at the trial? Why aren't they investigating that?” McDermott said.

Standing By His Case

Durkin said he still believes Holton is guilty and he welcomes a review of how he handled the case. With the support of Judge Perry and Ober, it seems unlikely that Durkin, president of the Tampa Police Benevolent Association, will be investigated by his department, the state attorney's office or the Florida Department of Law Enforcement.

Ober said he has no intention of investigating how police handled the Graddy homicide.

“It's very apparent to me that the Tampa Police Department did the best they could with the information they had in 1986,” Ober said. “I don't fault the Tampa Police Department whatsoever for the final outcome of this case.”

Gov. Jeb Bush ordered the FDLE to investigate. But Bush's order on Jan. 28 directed FDLE to focus only on why two prosecution witnesses - Flemmie Birkins and Johnny Lee Newsome - changed their stories about Holton. Bush did not ask the FDLE to investigate how Durkin handled the investigation or why it took nine years for police to turn over the Graddy rape report.

“We do what the governor tells us,” FDLE spokeswoman Jenny Khoen said.

Bush is also trying to eliminate the Capital Collateral Regional Counsel, the state agency that represents death row inmates. McDermott works for the agency.

Saving Holton

McDermott was right out of law school when she started working on Holton's death-row appeal in 1997. It didn't take long for her to find holes in the case, which was supervised in the homicide squad by Robert H. Price, who has since been promoted to captain.

Durkin didn't scrutinize another man who Graddy had accused of raping her before her slaying, McDermott said, though Holton's original defense attorney told Hillsborough Circuit Judge Harry Lee Coe and prosecutor Joe Episcopo that there was information Graddy had been anally raped by a man nicknamed "Pine." Graddy was also anally raped by her killer.

McDermott also said Durkin didn't interrogate a man who went to the scene of the crime and said he heard how Graddy had been strangled, even though that information had not yet been made public.

Years later, that man, Donald Lemar Smith, would tell McDermott's investigators that the man who told him how Graddy died also confessed to killing the teenager. Smith said that man was David "Pine" Pearson, the same man Graddy had accused of raping her, according to court records.

And Durkin didn't scrutinize a flaw in Birkins' story. Birkins was facing life in prison on an unrelated charge and claimed Holton told him he killed Graddy, McDermott said. Birkins said Holton made the admission in jail at a time when homicide detectives later reported they were interrogating Holton at police headquarters, McDermott said.

Though prosecutors said they never offered Birkins a plea deal, he was later sentenced to five years probation on a felony charge that could have cost him a life sentence.

Just after the murder, Newsome told police he saw Holton and Graddy together the night of the murder. In 2001, he testified that he lied, then two years later, said his original account was true.

Durkin said there was plenty of proof to convict Holton.

Witness Cary Carson Nelson testified in Holton's trial in 1986 that she saw Holton climb out a window of the crack house hours before Graddy's body was discovered.

Carson has since died, but before her death, she told a friend that she had lied about seeing Holton, McDermott said.

Police also found Holton's fingerprint on a pack of Kool cigarettes in the crack house.

And perhaps most damning was Birkins' statement that Holton confessed. Birkins passed a lie detector test administered by Jack Evans Mehl, a state attorney investigator, records show.

In 2001, McDermott's investigators found Birkins, who told them he lied at Holton's trial because he was facing life in prison. In exchange for his testimony, Episcopo asked a judge to give Birkins probation.

Recently, Birkins told Ober he lied to McDermott and had told the truth at Holton's trial. Birkins is now at the center of the FDLE's investigation. But finding out why he changed his story may be difficult.

Reached last week, Birkins said he wasn't talking to reporters or investigators about the case.

Stephen Crawford, a former state and federal prosecutor, said Birkins could be charged with second-degree perjury if he lied at a death-penalty trial.

Case Might Get Another Look

Sgt. Jim Simonson, head of the Tampa Police Department's homicide squad, said he spoke to Durkin about the case. Durkin told him Holton was the killer and there were no other suspects. Simonson concluded there would be no reason to re-investigate the case.

But after a reporter told Simonson this week about evidence Holton's defense team had uncovered about Pearson - the man accused of raping Graddy before her death - Simonson said he would look at the case file and make a decision about re-opening the investigation.

But finding enough evidence to arrest Pearson or anyone else for the crime will be difficult, Ober and Durkin said.

The crack house that Graddy was killed in was destroyed shortly after the slaying in 1986. Pearson told police and prosecutors he did not kill Graddy. He volunteered for a DNA test, Ober said. But there was no physical evidence from the murder scene for a DNA comparison.

In 1986, investigators found hairs in Graddy's mouth. DNA tests were not available then, but Episcopo suggested to the jury that the hairs were Holton's. They weren't. They were Graddy's, a recent DNA test revealed.

But the most difficult hurdle to prosecute another suspect for Graddy's death is Holton's conviction. Any new suspect could point to Holton's conviction and say Holton was the real killer, Ober said. That would be enough for reasonable doubt and an acquittal, he said.

Barry Cohen, a Tampa defense attorney who recently won a \$2.9 million settlement resulting from the botched prosecution of the parents of a missing infant, said Ober should investigate how the case was handled.

“I would want to know how this happened because it undermines people's trust in the system,” Cohen said.

But E.J. Salcines, a Florida 2nd District Court of Appeal judge and former Hillsborough state attorney, believes Ober made the right decision.

To open an investigation, “I would think [Ober] would want something more than the case fell apart because the police didn't follow a lead,” Salcines said. “I've got to assume the police acted in good faith.”

A LOOK BACK

JUNE 23, 1986: The body of Katrina Graddy, 17, is discovered in a crack house at 1236 E. Scott Street in downtown Tampa. A nylon cloth is tied around her neck. Her hands were bound and she was anally raped with a beer bottle. Her body was set on fire.

JUNE 23, 1986: Police interview two people who place Rudolph Holton at the scene of the murder. Holton denies he was at the scene. Police arrest him.

JULY 1, 1986: Detectives interview Flemmie Birkins, a jail trusty who said Holton confessed to killing Graddy.

JULY 8, 1986: Birkins passes a polygraph about his contention Holton admitted killing Graddy.

DEC. 5, 1986: A jury convicts Holton of 1st first-degree murder. Jurors recommend he be executed.

FEB. 12, 1987: Hillsborough Circuit Judge Harry Lee Coe III sentences Holton to death. 1996: Holton, in a letter, asks Gov. Lawton Chiles to execute him.

JANUARY 1997: Attorney Linda McDermott takes on Holton's death penalty appeal.

SOMETIME IN EARLY 2001: McDermott's investigators find Birkins homeless. He tells them he lied at the trial to avoid going to prison for life on his own charges.

NOV. 2, 2001: Hillsborough Circuit Judge Daniel Perry orders a new trial for Holton, based on evidence Graddy had been raped by another man and Birkins changing in his story.

DEC. 18, 2002: The Florida Supreme Court also orders a new trial for Holton.

JAN. 24, 2003: Hillsborough State Attorney Mark Ober decides there is not enough evidence to try Holton again. Prison officials set Holton free.

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Some mediacoverage
by sisselnor on Sun Nov 16, 2003 4:50 pm
[http://www.oranous.com/innocence/Rudolp ... erage.html](http://www.oranous.com/innocence/Rudolp...erage.html)

Man on death row gets new trial
The man was convicted 15 years ago of raping and killing a 17-year-old prostitute. Police withheld a crucial crime report.
By DAVID KARP

© St. Petersburg Times,
published November 3, 2001

<http://www.rudolphholton.us/legal/watch.htm>

Death Row Inmate Granted New Trial
By GARY SPROTT - gsprott@tampatrib.com
Published: Nov 3, 2001

<http://www.rudolphholton.us/legal/skipped.htm>

Judge considers plea for new murder trial
Attorneys for the convicted murderer say that evidence such as recanted testimony would have altered the verdict.
By DONG-PHUONG NGUYEN

© St. Petersburg Times,
published June 30, 2001

<http://www.rudolphholton.us/legal/newtrial.htm>

Jun 29, 2001
Man on death row awaits test result
LYDA LONGA
of The Tampa Tribune

<http://www.rudolphholton.us/legal/lie.d.htm>

June 28, 2001

State struggles to save '86 case
(source: Tampa Tribune)

<http://www.rudolphholton.us/legal/struggles.htm>

Jun 26, 2001
DNA casts light, doubt on '86 death row case
LYDA LONGA
of The Tampa Tribune

<http://www.rudolphholton.us/legal/besides.htm>

New tests discredit evidence in slaying
By DAVID KARP

© St. Petersburg Times,
published June 26, 2001

<http://www.rudolphholton.us/legal/convinced.htm>

New stories cast doubt on a murder verdict

Witnesses and new evidence run counter to those presented at a man's homicide trial in 1986.

By DAVID KARP © St. Petersburg Times, published April 24, 2001

<http://www.rudolphholton.us/legal/suggest.html>

<http://www.rudolphholton.us/legal/seeking.htm>

Coincidentally, McClain is challenging another of Coe's death penalty cases. Rudolph Holton is awaiting execution for the murder in Tampa of 17-year-old Katrina Graddy in 1986. McClain says some of the same issues exist in the Holton case, and he is seeking a new trial.

(source: Tampa Tribune)

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For a moratorium: Florida's death row holds innocence hostag

by sisselnor on Sun Nov 16, 2003 5:05 pm

[http://www.oranous.com/innocence/Rudolp ... ostage.htm](http://www.oranous.com/innocence/Rudolp...ostage.htm)

Editorial

Tuesday, January 08, 2002

For a moratorium: Florida's death row holds innocence hostage
News-Journal editorial

Five a.m.: Breakfast. Inmates are allowed plates and spoons.

For 17 years, this was Juan Melendez's life.

At 10:30 a.m., lunch. Food is prepared by Florida State Prison personnel and is

transported in insulated carts to the cells.

Every day, the same thing. Trapped in a 6x9 cell. No human contact.

At 4 p.m., supper. Inmates may shower every other day.

Every day was spent in the shadow of an oaken chair just a few hundred feet away. One day, the chair was replaced with a gurney and a needle. It probably didn't make much difference for Juan Melendez.

Inmates do not have cable television or air-conditioning and they are not allowed to be with each other in a common room. They can watch church services on closed circuit television.

For an innocent man on Death Row, what was there to pray for? And what compensation is due to a man who has had his life stolen, not by murder but by an official act of the state?

Polk County prosecutors offer no apologies to Melendez, who was convicted of a 1983 killing he didn't commit on the word of two eyewitnesses and no physical evidence. One of those witnesses is dead. Another has recanted.

In 1999, a transcript of another man's confession to the killings was finally provided to defense attorneys. That statement showed that another man, now dead, told at least four law-enforcement officials or attorneys of his guilt.

If Melendez were the only innocent man on death row, his case would still stain the fabric of justice in this country. He's not. He will be the 99th death row inmate in the United States to be found innocent and freed since executions resumed in 1973. Rudolph Holton, a Hillsborough County man whose 1986 conviction was overturned in November, remains on death row while prosecutors debate whether to retry him. If they don't, he might be the 100th.

Florida has executed 51 people since 1973. Twenty-four have been set free. At least two executed inmates -- Bennie Demps and Leo Jones -- have been virtually proven innocent after their deaths. Of the three men set to die over the next five weeks, two still maintain their innocence and one is mentally retarded.

Leaders in other states, with far less evidence that their court systems are denying justice, are questioning whether they should continue using the death penalty. Yet Gov. Jeb Bush and the Florida Legislature continue to ignore the mounting evidence that this state's system is deeply flawed.

Prior to execution, an inmate may request a last meal. To avoid extravagance, the food to prepare the last meal must cost no more than \$20 and must be purchased locally.

State leaders can let the system grind on, and hope the innocent -- who have already lost years of their lives to the grim routine of Death Row-- are rescued before they're killed. But when the state is forced to release one inmate for every two it executes, something is clearly wrong with its justice system. A far better course would be to stop executions, if not forever, then at least until every credible claim of innocence or injustice is explored.

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Rudolph on death row
by sisselnor on Sun Nov 16, 2003 5:35 pm

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Location: Norway
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From death row
by sisselnor on Sun Nov 16, 2003 5:39 pm
[http://www.oranous.com/innocence/Rudolp ... /Rudo.html](http://www.oranous.com/innocence/Rudolp.../Rudo.html)

BLACK DEATH ROW MALE back in court. Good looking, 46, 5'8", 170 lbs, sports, music, drawing, writing. Seeking friends. Race open. Intelligence, personality, and honesty a must. Age open. Love to communicate on any topic or subject. Send photo if possible to --MR. RUDOLPH HOLTON, 97066508, 1201 Orient Road Jail, Tampa, FL 33619.

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09/27/90 RUDOLPH HOLTON, v. STATE OF FLORIDA,
by sisselnor on Sun Nov 16, 2003 5:42 pm
[http://www.oranous.com/innocence/Rudolp ... olton.html](http://www.oranous.com/innocence/Rudolp...olton.html)

09/27/90 RUDOLPH HOLTON, v. STATE OF FLORIDA,

[1] SUPREME COURT OF FLORIDA

[2] RUDOLPH HOLTON, Appellant,

v.

[3] STATE OF FLORIDA, Appellee

[4] No. 69,861

[5] 573 So. 2d 284, 15 Fla. Law W. S 500

[6] September 27, 1990, As Corrected

[7] An Appeal from the Circuit Court in and for Hillsborough County, Harry Lee Coe, III, Judge - Case Nos. 86-8931 Div. A & 86-15176.

BLUE BOOK CITATION FORM: 1990.FL.2314 (<http://www.versuslaw.com>)

[8] Date Reported: Rehearing Granted In Part January 15, 1991 at 1991 Fla.

[9] APPELLATE PANEL:

[10] Shaw, C.J., and Overton, McDonald, Ehrlich, Barkett, Grimes and Kogan, JJ.,
concur.

[11] PER CURIAM DECISION

[12] Rudolph Holton appeals his conviction for first-degree murder and sentence of death. He also challenges his convictions and sentences for first-degree arson and sexual battery. We have jurisdiction. Art. V, 3(b)(1), Fla. Const. We affirm Holton's convictions and the imposition of the death penalty but remand to the trial court as to the sentences imposed for arson and sexual battery.

[13] On June 23, 1986, the unclothed, partially charred body of Katrina Graddy was found in a burning vacant house. Pieces of a nylon cloth were tied around her neck and

around one wrist. The neck of a glass bottle was partially inserted in her anus. Tests for sperm in the victim's bodily orifices were all negative. It was determined that the fire was started intentionally, but the cause of death was strangulation.

[14] Following the discovery of the victim's body, police questioned Carl Schenck, who had been asleep in his truck parked directly across from the burning house. Schenck told investigators he had parked there at about 10:00 or 11:00 p.m. the night before. He had been waiting for the return of a hitchhiker he had picked up earlier in the day while the hitchhiker went to purchase some marijuana. Schenck fell asleep and eventually was awakened by the fire engines. A black shaving bag left by the hitchhiker in Schenck's vehicle was taken as evidence. Schenck was unable to make a positive identification of Holton from photographs or at trial, but said Holton closely resembled the hitchhiker.

[15] Johnny Lee Newsome testified that on the night of the murder, he saw Holton and the victim at about 11:00 p.m. talking outside the vacant house where the victim's body was found. Newsome said Holton was holding a black shaving bag. Another witness, Flemmie Birkins, who had known Holton for a number of years and was serving time in the county jail when Holton was arrested, testified that Holton told him "he had killed a girl, that he had strangled her" and then set fire to the house. Birkins also stated that Holton claimed he did not mean to kill the girl. A third witness claimed that, around 11:00 p.m. on the night of the murder, she saw Holton enter the vacant house where the homicide occurred.

[16] When questioned by investigators, Holton claimed he was at home at the time of the murder.*fn1 He said he had not been to the vacant house for ten days. When told that his fingerprint had been found on the wrapper of an empty pack of cigarettes removed from a room in the house, Holton admitted he had been shooting drugs in the house several days before the homicide occurred but denied being near the house on the night of the murder. Photographs were taken of Holton depicting scratches on his chest and a cut on his finger.

[17] The jury returned verdicts of guilty for premeditated murder, sexual battery with great force, and first-degree arson. By a vote of seven to five, the jury recommended a sentence of death. The judge found four aggravating factors*fn2 and no statutory mitigating factors. As nonstatutory mitigating circumstances, the trial court considered that Holton has two children and is a drug addict. Holton was sentenced to death for the murder of Katrina Graddy and given consecutive sentences of life imprisonment for the sexual battery conviction and thirty years' imprisonment for the arson conviction.

[18] As his first issue, Holton argues that the state exercised three peremptory challenges to systematically exclude prospective black jurors from the jury panel. In *State v. Neil*, 457 So.2d 481 (Fla. 1984), we established a test for determining whether an opposing party's peremptory challenges have been exercised improperly to excuse prospective jurors. The complaining party must make a timely objection, demonstrate on the record that the challenged persons are members of a distinct racial group, and show that there is a strong likelihood these persons have been challenged because of impermissible bias. *Neil*, 457 So.2d at 486. In *State v. Slappy*, 522 So.2d 18 (Fla.), cert. denied, 487 U.S.

1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988), we extended the principles set forth in Neil and held that any doubt as to whether the complaining party has met the initial burden required under Neil should be resolved in that party's favor. Once this burden has been met, the burden shifts to the state to demonstrate that the proffered reasons are, first neutral and reasonable and, second, not a pretext. Slappy, 522 So.2d at 22.

[19] During jury selection, defense counsel timely objected on two separate occasions to the exclusion of prospective black jurors. The record shows that following the questioning of the first group of prospective jurors, the state exercised two peremptory challenges. After objecting, defense counsel explained that each peremptory had been used to exclude the only two blacks on the panel. Counsel then stated her belief that the state was systematically excluding blacks from the jury. The trial court overruled the objection without an inquiry because the two prospective jurors had expressed opposition to the death penalty, which the trial court deemed a sufficient reason for the challenges.

[20] The record clearly supports the trial court's ruling. When asked whether he could recommend the death penalty in an appropriate case, the first black individual expressed his reservations about the death penalty because of his belief that death sentences are imposed disproportionately on the basis of race. When asked the same question, the second prospective black juror stated that she was opposed to capital punishment under any circumstances. While defense counsel met the first two prongs of the Neil test, counsel was unable to demonstrate a strong likelihood that the two prospective jurors were challenged solely because of their race. Ambivalence toward recommending a sentence of death and opposition to the death penalty are race-neutral and acceptable grounds for excusing a prospective juror. We find the record supports the trial court's ruling.

[21] When defense counsel objected to the state's exercise of a peremptory challenge to exclude a third prospective black juror, the trial court asked the state for reasons to support the challenge. The state explained it was concerned that the prospective juror, based upon her answers during voir dire, would not be sympathetic toward the victim because she was a prostitute. The state believed the prospective juror might believe the victim was in some way responsible for what had occurred because the victim had been a prostitute. The trial court accepted the state's explanation and noted defense counsel's objection.

[22] The record reflects that defense counsel satisfied its initial burden by demonstrating that the prospective juror was a member of a distinct racial group and that there was a likelihood the challenge resulted from an impermissible bias. When questioned by the trial court, the reason proffered by the state to support the challenge was race-neutral, and one could reasonably conclude that the prospective juror could not be sympathetic toward a prostitute. Therefore, we find that the state did not exercise peremptory challenges to exclude blacks improperly from the jury.

[23] As his second issue, Holton contends that the state's cross-examination of Detective Childers, who participated in the investigation of the murder, was prejudicial because it

misled the jury. Detective Childers was questioned following the testimony of Fleminie Birkins, a witness for the state to whom Holton made a jail-house confession. Holton claims it was error for the state to ask Detective Childers whether Birkins was able to tell investigators facts concerning the murder that only the murderer would know. Holton argues that by asking this question the state led the jury to believe that Detective Childers had access to evidence not produced at trial that confirmed Birkins' testimony and proved Holton's guilt.

[24] The record reflects that when the state first posed this question, defense counsel lodged an objection which was sustained by the trial court. Detective Childers was asked this question a second time in response to defense counsel's redirect questioning of him concerning whether there had been television coverage of the murder after it occurred. Although defense counsel did not object, the trial court interjected and the question was never answered. Accordingly, we find no error and note defense counsel's redirect questioning of Detective Childers "opened the door" to the question posed by the state on cross-examination.

[25] Holton also objects to the state's questioning of Detective Durkin. Specifically, Holton contends that it was improper for the state to ask Detective Durkin whether any homicides had occurred since Holton's arrest involving a victim who had been raped, strangled and burned. Holton argues that this question was prejudicial because it suggested that other similar homicides had been committed prior to Holton's arrest but that none had occurred after his arrest.

[26] Our review of the record reveals that defense counsel opened the door to this line of questioning. During cross-examination of state's witness Johnny Lee Newsome, defense counsel questioned Newsome regarding another homicide in which he was a witness. Newsome was asked whether that particular murder involved a victim who was found in a burning vacant house. Defense counsel's questions also inferred that Newsome may have committed that murder and therefore could have committed the murder in this case. It was not error for the state to question Detective Durkin about similar homicides to rebut the inferences raised by the defense.

[27] As his fourth issue, Holton claims that he was denied a fair trial because of improper prejudicial comments during the state's closing argument. Holton cites several comments by the prosecutor that he believes require reversal of his conviction. However, most of the comments were not preserved for appeal by timely objection in the trial court. We agree that Holton has waived any right to appeal these remarks. See *Wilson v. State*, 294 So.2d 327 (Fla. 1974). Two other comments were the subject of timely defense objections, but Holton later failed to move for mistrial.

[28] The state notes that, in *Clark v. State*, 363 So.2d 331, 335 (Fla. 1978), receded from on other grounds, *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), this Court held that for an objection to a prosecutor's comment to be preserved for appeal, the objection must be followed by a motion for mistrial. However, we believe this rule to be purposeless where, as here, the objection is overruled. The objection itself calls the court's attention to the

error alleged to have prejudiced the party making the objection and to the possibility that a mistrial may be in order.*fn3 *Simpson v. State*, 418 So.2d 984, 986 (Fla. 1982), cert. denied, 459 U.S. 1156, 103 S. Ct. 801, 74 L. Ed. 2d 1004 (1983). We thus proceed to the merits of the issue.

[29] The first objection was to negative comments by the prosecutor on Holton's courtroom demeanor and remarks that a drawing penned by Holton during a police interview was the product of a "twisted mind." An objection was made to a second comment by the prosecutor regarding the testimony that no similar crime had been committed since Holton's arrest. We agree that the prosecutor's arguments slightly exceeded the bounds of fair comment. While a prosecutor certainly must argue the state's case zealously, the zeal must be curbed when it pushes the argument into speculation and innuendo. See *Stewart v. State*, 51 So.2d 494, 495 (Fla. 1951). However, we agree that the error committed here was minor compared to that in *Stewart*, where the prosecutor indulged in gross speculation about future crimes the defendant might commit against children. *Id.* at 494. Here, we believe the state's comments at most warranted a mild rebuke from the trial court. In light of the entire record, we find the error harmless beyond a reasonable doubt. DiGuilio.

[30] Next, we turn to Holton's argument that the trial court erred in not granting a continuance until a key defense witness could be located to testify. He claims that the witness' testimony was essential for a fair trial. Our review of the record discloses that defense counsel was aware that the witness had failed to appear on the first day of the trial. Yet it was not until the morning defense counsel was to present her case, three days after the trial had begun, that counsel informed the trial court that she had been unable to secure the presence of the witness. Moreover, on the suggestion of the trial court, the parties eventually agreed to summarize the witness' deposition for presentation to the jury.*fn4 Both the defendant and the state were involved extensively in the preparation of the statement. For these reasons, we find no error in the trial court's denial of the motion for continuance.

[31] We now address Holton's claim that the evidence at trial was insufficient to support a conviction for premeditated first-degree murder. Holton argues that because Fleminie Birkins testified that Holton said he did not mean to kill the victim, the murder was accidental and not premeditated.

[32] Premeditation can be shown by circumstantial evidence. *Sireci v. State*, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2257, 72 L. Ed. 2d 862 (1982), overruled on other grounds, *Pope v. State*, 441 So.2d 1073 (Fla. 1983). However, to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. *Cochran v. State*, 547 So.2d 928, 930 (Fla. 1989); *McArthur v. State*, 351 So.2d 972, 976 n.12 (Fla. 1977). Thus, when attempting to establish premeditation by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference that could be drawn. *Cochran*, 547 So.2d at 930; *Wilson v. State*, 493 So.2d 1019, 1022 (Fla. 1986). Whether the state's evidence fails to exclude all reasonable hypotheses of innocence is a question of fact for

the jury. Cochran, 547 So.2d at 930. If there is substantial competent evidence to support the jury verdict, the verdict will not be reversed. *Id.* As this Court stated in *Larry v. State*, 104 So.2d 352, 354 (Fla. 1958):

[33] Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned.

[34] Applying these principles to the circumstances of this case, we find there was sufficient evidence from which the jury could have inferred premeditation to the exclusion of all other possible inferences, including accidental death. The victim was found with a ligature secured tightly around her neck. Death was caused by strangulation. The victim had long fingernails, and photographs of Holton taken the day after the murder showed fresh scratch marks on Holton's chest, suggesting a struggle. Setting the vacant house on fire to dispose of the body was an attempt to cover up the incident. Holton also made exculpatory statements when questioned by police detectives. Because the circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, Cochran, 547 So.2d at 930, the jury properly could have concluded that Holton's version of the facts was untrue. We find there was substantial competent evidence to support the jury verdict that the murder was premeditated.

[35] As his next issue, Holton claims the evidence at trial was insufficient to support a conviction for first-degree arson. He correctly points out that an element of first-degree arson requires that the structure be occupied by a human being. However, even though the medical examiner testified that the victim's death occurred before the fire was set, the jury reasonably could have inferred from all of the evidence that Holton believed the victim was alive at the time the fire was set.

[36] Holton also challenges his conviction for sexual battery with great force. This challenge is based on two grounds. The first centers on Holton's belief that the use of the word "person" in section 794.011(3), Florida Statutes (1985),⁵ contemplates that the victim of sexual battery must be alive. Holton argues, therefore, that because the evidence could not conclusively establish the bottle was inserted in the victim's anus before death but could only prove that insertion occurred prior to the fire, the evidence was insufficient to support his conviction under section 794.011. Second, Holton charges that because the victim was a prostitute, it is reasonable to conclude that she consented to the penetration.

[37] Again, we are persuaded that the jury could have believed that Holton thought the victim was alive at the time he initiated the sexual battery. Under the facts of this case, we find there was substantial, competent evidence to support Holton's conviction for

sexual battery with great force. "Once competent, substantial evidence has been submitted on each element of the crime, it is for the jury to evaluate the evidence and the credibility of the witnesses." *Hufham v. State*, 400 So.2d 133, 135-36 (Fla. 5th DCA 1981) (citing *State v. Smith*, 249 So.2d 16 (Fla. 1971)). Factual conflicts are to be resolved by the jury. *State v. Smith*, 249 So.2d at 17. The concern on appeal is whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict, there is substantial competent evidence to support the verdict and judgment. *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981). The evidence was sufficient to support Holton's sexual battery conviction.

[38] We disagree with Holton's assertion that the trial court erroneously denied his request to instruct the jury on unnatural and lascivious act, section 800.02, Florida Statutes (1985), as a lesser included offense of sexual battery with great force, section 794.011(3), Florida Statutes (1985). There was no error because section 800.02 is not a necessarily lesser included offense of section 794.011(3).

[39] Next, Holton argues that his sentences for sexual battery and arson must be vacated because a guideline scoresheet was not prepared. Rule 3.701(d)(1), Florida Rules of Criminal Procedure, provides:

[40] One guideline scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing. The state attorney's office will prepare the scoresheets and present them to defense counsel for review as to accuracy in all cases unless the judge directs otherwise. The sentencing judge shall approve all scoresheets.

[41] Thus, rule 3.701(d)(1) mandates that a sentence be imposed based on a sentencing guideline scoresheet that has been reviewed by the trial judge. See e.g., *Brooks v. State*, 505 So.2d 639 (Fla. 1st DCA 1987); *Sanchez v. State*, 480 So.2d 704 (Fla. 3d DCA 1985); *Barr v. State*, 474 So.2d 417 (Fla. 2d DCA 1985). Therefore, we vacate Holton's sentences for sexual battery and arson and remand for resentencing after a guideline scoresheet has been prepared and considered by the trial judge.

[42] Holton also claims that the state rather than the trial judge was responsible for preparing the written findings of fact in support of the death penalty. The record, however, does not support this contention.

[43] Holton further argues that his death sentence should be overturned because the sentence was imposed on December 5, 1986, but the trial judge's written findings are dated February 12, 1987, some two months following sentencing and after certification of the record on February 6, 1987. In *Van Royal v. State*, 497 So.2d 625 (Fla. 1986), this Court emphasized the necessity of entering written sentencing orders on a timely basis. In doing so, we stated that entering the written sentencing order after oral pronouncement of sentence was acceptable provided the order was filed before the trial court loses jurisdiction. Later, in *Grossman v. State*, 525 So.2d 833, 841 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989), we found it necessary to establish a procedural rule requiring that prior to or contemporaneous with an oral

pronouncement imposing the death penalty, the trial court must prepare its written sentencing order to be filed concurrent with the pronouncement. The rule was established even though we recognized that many trial courts in other cases had not had the benefit of Van Royal and its progeny. *Id.* Therefore, under certain circumstances we allowed some leeway regarding the filing requirement in cases in which the sentencing proceeding occurred before our decision in *Grossman*. *Stewart v. State*, 549 So.2d 171, 176 (Fla. 1989) (remand for written findings when sentencing proceeding occurred before *Grossman* and trial court followed jury recommendation of death and dictated findings into the record).

[44] Since the sentencing proceeding in Holton's case took place prior to our decision in *Grossman*, the actions of the trial court should be viewed in light of the standards established in the Van Royal line of cases. In *Muehleman v. State*, 503 So.2d 310, 317 (Fla. 1987), we permitted Muehleman's death sentence to stand even though the written findings were filed two and one-half months after sentencing but prior to certification of the record to this Court. Holton claims, however, that in his case the written findings were filed six days after the clerk of the court certified the record on February 6, 1987. Our review of the record reveals two separate certifications of the record, one dated February 6, 1987 and one dated February 17, 1987. It appears the February 17 certification was done to include the trial judge's written findings. The record was then filed in this Court on February 23, 1987. Because the written findings followed the jury's recommendation of death and were certified by the clerk of the court and included as part of the record before the record was filed in this Court, we find there was no error.

[45] We now turn to Holton's argument that the trial court erroneously determined that four aggravating factors applied in this case. We agree that the trial court improperly considered his contemporaneous convictions for sexual battery of the murder victim and arson to support the aggravating factor of prior felony conviction involving the use or threat of violence to the person. § 921.141(5)(b), Fla. Stat. (1985) In *Wasko v. State*, 505 So.2d 1314, 1318 (Fla. 1987), we held that a trial court could not rely upon a contemporaneous conviction for an offense committed against the murder victim to find this aggravating factor. In this case, however, the trial court properly relied upon Holton's prior conviction for attempted robbery in addition to relying on the contemporaneous convictions. Because there was a valid ground to support this aggravating factor, the error on this point is harmless.

[46] Furthermore, we find no error in the trial court's determination that the murder was committed while Holton was engaged in the commission of a sexual battery. We have already determined that the evidence was sufficient to support a conviction for sexual battery. The record also supports the trial court's finding that the murder was especially heinous, atrocious, or cruel. The victim's death by strangulation accomplished by a ligature tied around her neck was sufficient to support the finding of this factor. This Court previously has stated that it can be inferred "that strangulation, when perpetrated on a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Tompkins v. State*, 502 So.2d 415, 421 (Fla. 1986) (citations omitted). See also *Hildwin*

v. State, 531 So.2d 124 (Fla. 1988).

[47] We disagree with the trial court's finding that the murder was committed in a cold, calculated, and premeditated manner. To support this factor, the trial court relied on the jury's determination that Holton was guilty of first-degree premeditated murder rather than felony murder. Simple premeditation of the type necessary to support a conviction for first-degree murder is not sufficient to sustain a finding that a killing was committed in a cold, calculated, and premeditated manner. *Hamblen v. State*, 527 So.2d 800, 805 (Fla. 1988). A heightened form of premeditation is required which can be demonstrated by the manner of the killing. *Id.* To achieve this heightened level of premeditation, the evidence must indicate that a defendant's actions were accomplished in a calculated manner, i.e., by a careful plan or a prearranged design to kill. *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). The evidence in this case does not establish that Holton's actions resulted from a prior calculation or prearranged plan. Indeed, the facts suggest conclusions other than the finding that the murder was committed in a cold, calculated, and premeditated manner. The strangulation murder occurred during the commission of another crime, sexual battery, and could have been a spontaneous act in response to the victim's refusal to participate in consensual sex. Additionally, inmate Flemmie Birkins testified that Holton stated that he did not mean to kill the victim. We do not believe this factor was established beyond a reasonable doubt. See *Harmon v. State*, 527 So.2d 182 (Fla. 1988).

[48] Next, Holton claims that the trial judge failed to consider the statutory mitigating circumstance of impaired capacity. § 921.141(6)(f), Fla. Stat. (1985). He argues that this circumstance should apply because of his longstanding drug addiction. However, in the sentencing order the trial judge stated:

[49] 2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; to wit: The defendant testified he was addicted to drugs but still maintained his innocence of these offenses. This factor would not apply in view of that sworn testimony.

[50] A defendant has the right to maintain his or her innocence and have a trial by jury. Art. I, § 22, Fla. Const. The protection provided by the fifth amendment to the United States Constitution guarantees an accused the right against self-incrimination. The fact that a defendant has pled not guilty cannot be used against him or her during any stage of the proceedings because due process guarantees an individual the right to maintain innocence even when faced with evidence of overwhelming guilt. A trial court violates due process by using a protestation of innocence against a defendant. This applies to the penalty phase as well as to the guilt phase under article I, section 9 of the Florida Constitution. Therefore, entering a plea of not guilty does not preclude consideration by the sentencer of matters relevant to mitigation.

[51] While the trial court did not make the finding that Holton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired because of his drug abuse, we are not persuaded that Holton's drug

abuse was not considered. Indeed, the record reflects that this matter was considered when the trial court reviewed the non-statutory evidence presented concerning Holton's character. Therefore, any error that may have occurred in light of this fact is harmless.

[52] Of the four aggravating circumstances found by the trial court, we have found three to be valid. The two mitigating circumstances found were that Holton is a drug addict and that he has two children.⁶ While there was error in the weighing of the aggravating and mitigating factors, we conclude that reversal of one invalid aggravating factor could not reasonably have resulted in a lesser sentence. See *Rogers*, 511 So.2d at 535. Under the circumstances of this case, we cannot say there is any reasonable likelihood the trial court would have concluded that the three valid aggravating circumstances were outweighed by the mitigating factors. *Id.*; *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986). We find the error was harmless beyond a reasonable doubt.

[53] The remaining claims raised by Holton are without merit.⁷ Therefore, for the reasons expressed we affirm the first-degree murder conviction and sentence of death. We also affirm the convictions for first-degree arson and sexual battery but remand to the trial court for resentencing as to these offenses.

[54] It is so ordered.

***** BEGIN FOOTNOTE(S) HERE *****

[55] *fn1 The elderly man with whom Holton lived testified that Holton came home at approximately 10:00 p.m.

[56] *fn2 The four aggravating circumstances found by the trial court are: (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the defendant was engaged in the commission of sexual battery and arson; (3) the capital felony was especially heinous, atrocious, or cruel; and (4) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral and legal justification. 921.141(5)(b), (d), (h), (i) Fla. Stat. (1985).

[57] *fn3 Of course, if the court sustains an objection, the other party still must bear the responsibility of moving for a mistrial, if appropriate. *Simpson v. State*, 418 So.2d 984, 986 (Fla. 1982), cert. denied, 459 U.S. 1156, 103 S. Ct. 801, 74 L. Ed. 2d 1004 (1983).

[58] *fn4 When the trial court first suggested summarizing the deposition, both the state and the defendant objected. The defendant urged the trial court to grant a continuance. The state's objection centered on the inability to cross-examine the witness.

[59] *fn5 Section 794.011(3), Florida Statutes (1985), states in pertinent part:

[60] (3) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof

[61] . . . uses actual physical force likely to cause serious personal injury is guilty of a life felony

[62] *fn6 We have previously recognized that the quality of being a caring parent may be considered in mitigation. *Jacobs v. State*, 396 So.2d 713, 718 (Fla. 1981).

[63] *fn7 These claims include: (1) Holton was denied the right to present a defense because a defense witness was not allowed to testify; (2) the trial court erred by allowing into evidence enlarged photographs of the victim's body; (3) the prosecutor improperly cross-examined defense witnesses during the penalty phase of the trial; and (4) the prosecutor's remarks during closing argument were improper.
sisselnor

Posts: 460

Joined: Fri Oct 24, 2003 4:48 pm

Location: Norway

Website

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06/03/91 HOLTON v. FLORIDA

by sisselnor on Sun Nov 16, 2003 5:44 pm

[http://www.oranous.com/innocence/Rudolp ... Holton.htm](http://www.oranous.com/innocence/Rudolp...Holton.htm)

06/03/91 HOLTON v. FLORIDA

[1] SUPREME COURT OF THE UNITED STATES

[2] No. 90-7757

[3] 1991.SCT.3149 <<http://www.versuslaw.com>>, 500 U.S. 960, 111 S. Ct. 2275, 114 L. Ed. 2d 726, 59 U.S.L.W. 3810

[4] June 3, 1991

[5] HOLTON, RUDOLPH, PETITIONER

v.

FLORIDA

[6] ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

[7] Rehnquist, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter.

[8] The petition for writ of certiorari is denied.

[9] Justice Marshall Dissenting:

[10] Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 231 (1976), I would grant certiorari and vacate the death sentence in this case.
sisselnor

Posts: 460

Joined: Fri Oct 24, 2003 4:48 pm

Location: Norway

Website

Top

From CCADP website about Holton

by sisselnor on Sun Nov 16, 2003 5:55 pm

[http://www.oranous.com/innocence/Rudolp ... nCCADP.htm](http://www.oranous.com/innocence/Rudolp...nCCADP.htm)

I am an innocent Black man that was railroaded in a Tampa, Florida court room, and now I am on Florida's Death Row for a crime that I did not commit.

At this time let me give you a little history about myself. My name is Rudolph Holton and I am 46 years old and I have been on Death Row for 13 years. My date of birth is April 20. I have made some bad decisions in my life, but I am not a killer. Some of my physical characteristics is I am 5 ft. 8 in. In height and I weigh 170 lbs., black hair and brown eyes. I grew up in a lovely culturally diversified neighborhood in Ybor City. I keep abreast of current topics and can communicate well with anyone on different subjects. Some interests of mine are art, basketball, and Van Halen. As far as art, I have always loved the work of Salvador Dali and would like to one day attend the museum. I have been into art since I was 10 years old and I love it. My parents have departed this life and I believe that they are with the Lord. Yes, I am a believer in God, Jesus Christ and the Holy Ghost and I do have them in my life. My family has been very supportive of me, but they can only do so much. I try to do some work on my case because the

attorneys that the state provides for Death Row inmates are not any good and they will not really "fight" for me; they will do so much and that's it. Currently I have been assigned a different attorney and investigator on my case that I feel really do believe that I am innocent and will do all they can to help. But, they really need more help, there is just so much the state will allow them to do. I truly believe that one day I will prove my innocence with some help. I know that every prisoner say that they are innocent, and they are not all innocent, but I am innocent. The reason I am writing this letter to you is because I really need help and I am fighting for my life and to be free; I will never give up on that. The circuit court judge assigned to my case hindered my trial attorney in every way that he could. The prosecutor in the case did everything and anything to ensure that he won the case; what I mean is there was a lot of lying going on by the state. The State Attorney's office got rid of him because there was a big investigation done about his practices and what he had been doing, but again it was too late for me.

I will tell you a little about Death Row and how things are really. People on Death Row experience indescribable emotional and mental suffering and they are psychologically abused and dehumanized in many ways. Many of them have little or no contact with people from the outside other than contact with a legal representative; which many of them rarely, if ever, receive a personal visit from a friend or family member. But myself I don't get any visits from anyone, but I am always praying to God to give me a strong mind and help me. Now the conditions on Death Row, the cells on Death Row are 6'x9' or 7'x9' an average sized man can stand in the middle of the cell with his arms stretched out and touch both walls. For two hours twice a week Death Row prisoners can go on the 'yard', a concrete-paved enclosure. Death Row prisoners are allowed a quick shower every other night. Otherwise, unless they are fortunate enough to have a visitor, or unless they are taken to the clinic or hospital, Death Row prisoners are in their cells. The cells are brutally hot in the summer and bitterly cold in the winter. Just imagine that you are existing under such conditions, for months, for years, years doing which you see those you have come to know led away to their execution as you await your death warrant; then try to imagine what it might mean to you to get a letter from someone just because they care. It means a lot to have a money order sent to your account so that you can purchase shoes, thermal underwear, a radio, arts and crafts supplies, soap, shampoo, writing paper, a newspaper or some little snack--basic things that people take for granted. It is especially nice when someone sends you a magazine subscription, a birthday card or to receive cards at other special occasions, such as Christmas, Easter, Fathers Day, etc.

I can telephone you if you will accept collect calls, okay. Well now that you know about me, please write back, I will be waiting anxiously to hear from you soon. So I am looking to hear from you soon, okay! Oh yes, I am back in court trying for a new trial", please keep me in your prayers and I will be praying for you.

Sincerely,
Rudolph Holton

Rudolph Holton 97066508
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Tampa Florida
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Awaiting ...
by sisselnor on Sun Nov 16, 2003 6:17 pm
[http://www.oranous.com/innocence/Rudolp ... aiting.htm](http://www.oranous.com/innocence/Rudolp...aiting.htm)

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At this time let me give you a little history about myself. My name is Rulford Holton and I am an intelligent 47 year old and have been on Death Row for 14 years now. My date of birth is April 20. I have made some bad decisions in my life, bit I am not a killer. I am 5st 8in in height and I weigh 170lbs, black hair and brown eyes. I grew up in a lovely culturally diversified neighborhood in Ybor City in Tampa, Florida. I keep abreast of current topics and can communicate well with anyone on different subjects. My interests are art, basketball, jazz, R&B also Van Halen. I have always loved the art of Salador Dali and would like one day to attend to museum. I have been into art since I was 10 years old and I love it.

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I truly believe that one day I will prove my innocence with some help. I know that every prisoner says that they are innocent, and that they are not all innocent. But I am innocent. I am writing this letter to let everyone know in the free world what's going on, and I am fighting like hell to be free. I will never give up on that. The circuit judge assigned to my case hindered my trial attorney in every way that he could. The prosecutor in the case did

everything and anything to ensure that he won the case. What I mean is that there was a lot of lying going on by the state. The state attorneys office got rid of him because there was a big investigation about his practices and what he had been doing. But again it was too late for me. The same judge in my case retired from the bench and became the Hillsborough State Attorney and was found dead of a self-inflicted gunshot wound to the head. I think he felt his time had come to be found out? All this had come about when "Gov. Jeb Bush" called for an investigation on the "State Attorney", so he took his own life.

Public figures are dishonest and not without sin, including the judge and prosecutor in my case.

Now Death Row and how things really are there. The cyclical rote of the weary lives of those condemned to die: as men await the ultimate punishment for the crimes alleged against them, days turn into months, months turn into years and years turn into decades. Most of America's condemned are securely locked away in some states maximum security prison. Depending on which state a prisoner is sentenced to death in, he being condemned by society, dreadfully faces unthinkable consequences for the unthinkable crimes he may be accused of. Indubitably some of Americas most atrocious criminals sit on Death Row across the land. This is not a debate of any particular individuals guilt or innocence. Rather, it is but a mere glimpse of a day in the life of the condemned.

Contrary to the onslaught of mainstream media hype, today's prison systems especially maximum security facilities, are far from being posh country clubs. In fact they remain as some of the most outdated, rankly dilapidated hell-holes that may well shock the good conscience of any decent, compassionate person. Still, in a few of the wealthier states Death Row facilities have been upgraded to supposedly more modern conventional housing units. The building is new, and the paint is fresh. Beyond this, life on Death Row is not a fantastic experience.

Time seems to loose all significance and the extended period of solitary confinement is a challenge to the most stable of souls. Very often this solitude combined with the general degradation takes it's toll on the frail human psyche. Each day is a semi-carbon copy of the last with no change expected in the future. People I have met on Death Row are optimistic. They have hopes, dreams and a strong will to aid themselves in contending with the unmanageable predicament of being sentenced to death. Sadly, many have suffered a re-death and are already resigned to surrender to the draconian principle of our republic that seeks justice by inflicting tortuous deaths upon some of its most helpless citizens. For the indigent, illiterate, and incompetent prisoner, the truth of the matter is there is virtually no reason to expect anything but certain death. On top of that realization, many suffer abandonment of family and friends who cannot, for one reason or another, bear the burdens associated with capital punishment. Still, yet undoubtedly by impetus of natural human desire, many of the condemned hope to be spared the unfathomable tragedy of being put to death at the hand of America's draconic injustice system.

Is capital punishment revenge or deterrence? "I don't know", an aspiring politician may sheepishly confess, "But one thing's for sure. If you want to hold an elected eat in this republic you better well be willing to kill, because that's our idea of Justice."

The penalty of death affects everyone differently, at least psychologically, so there is no short answer to what an individual may or may not feel upon the imposition of the death penalty. It is fair to say the infelicitous experience is one of the most unique, even when anticipated and can be the emotional roller-coaster of one's life, particularly if the defendant is only a juvenile or very young adult. That is not to say that being sentenced to death is, or should be considered any less trying on the average adult. At the Death Row facility where me and others are being housed, inmates are confined to one man cells 23 ½ hours a day. That is, all day long every day, unless the inmate is summoned by prison officials, the medical department, goes to a shower, recreation, or occasionally receives a visit from a family member or friend. Each cell is a 7' by 9' cubicle comprised of three solid concrete walls and the traditional steel grill serving as the front wall which provides an open view of the cell to all passers by. Accommodations in each cell, unless it is a security cell, include a steel bunk coupled with a thin institutional cotton mat, a locker box for storing personal possessions, a 12" black and white television, a combination sink/toilet, and a ceiling mounted fluorescent lamp. There are fourteen one-man cells on each cellblock, and there are twenty-four separate wings at this particular facility. This unit was designed with close security in mind. It's a technologically advanced structure with remote controlled locks, doors etc. and throughout each day one can hear the seemingly incessant buzzing of door-locks and the slamming of solid steel doors being opened and shut back. There is no carpet on the floors, or central heat and air-conditioning. During the winter the cellblocks can be unbearably cold, during the summer, HOT in a once man cell.

Meals are delivered to the inmate in his cell. Each inmate is fed three times a day. The regular, but very often bland and scanty institutional meal served on a plastic food tray. It is a meager diet hardly sufficient to satiate the average adult appetite. Prisoners that enjoy the financial support of family members or friends can counterbalance the poor diet with canteen items such a sandwiches, candy bars or chips. Not uncommonly, the indigent prisoners face long hungry nights, as it is approximately fourteen hours in between the time that the last evening meal is served and the time breakfast arrives the next morning. Day to day activities generally include; talking, playing chess, watching television, listening to the radio "if the prisoner can afford to purchase radio", writing letters to family, friends, and overworked lawyers, and if the prisoner has the funds to do so he can purchase hobby craft materials and draw, paint or crochet as a past time.

Death Row, not unlike any other part of the prison system is tattered with a diverse group of individuals and there is no single all-inclusive description that can be fairly applied to every man condemned to die. While it is true that there are some egregiously dangerous prisoners that have been condemned to death, this is the exception rather than the rule, as there are exceedingly more serial killers and prisoners convicted of multiple homicides serving life sentences or less time in the general population of state and federal prisons throughout the US or A. Some of the prisoners on Death Row proclaim their innocence

outright. Some are victims of circumstance, others are prisoners guilty of homicide, but not guilty of first-degree murder, still not being fortunate enough to have knowledgeable qualified and experienced trial attorneys, they have been wrongly convicted of first-degree murder, and subsequently wrongly sentenced to death. From day to day one can lay back on his bunk and listen to one legal horror story after another, as disillusioned inmates desperately attempt to get the next to see the injustice he has suffered. But legal discourses are not the only topics of conversation. In fact, there are a lot of people condemned to die that have astounding insight into many of our countries societal and cultural juggernauts, very enlightening discussions occur quite frequently.

Being human, Death Row prisoners also can have a sense of humor and may spend an afternoon “kicking the game around”, that is jocularly teasing and jesting with one another. Over time one can come to know, like and enjoy a genuine friendship with a fellow inmate. Albeit at the back of one's mind he may never know whether his friend was once capable of murder. Still, at the present time two people in similar circumstances freely reciprocate good will – much needed good will.

There are also bad days on Death Row. Days fraught with stress, confusion, and indescribable heartache. The hearts of those condemned to die are not always inerrably callous or unfeeling. We have all heard the reports on capital defendants showing no remorse, but I have heard grown men cry into their pillows. Did anyone take the defendant seriously when he earnestly apologized and begged for forgiveness for an act the defendant is still hard pressed to comprehend? It is commonly argued that Death Row inmates are the worst of all criminal elements of our society. Such a suggestion is mere propaganda. Ideally, the Death Penalty was to be carefully and deliberately used. Appallingly, today's Death Row prisoner might be one who accidentally shot someone with a gun believed to have been unloaded, or a school kid who has foolishly and ignorantly thrown his life away by taking someone else's life in a fit of anger or in a dare. Undeniably innocent lives have been taken by the sometimes mean, sometimes inconsiderate, sometimes foolish, sometimes careless individual, and these innocent souls should be greatly esteemed and surrendered over to the Lord. He is capable of restoring and he will. As for what to do with those guilty of murder, it seems the majority of Americans demand an eye for an eye. But no matter how anyone spins that concept, it will never amount to more than blood sport and such practice is a black eye to any professed civilized society.

Let us remember that our LORD once rewarded the humble and wisest King on earth, because this humble King, amongst other things, did not ask for the lives of his enemies [see 1st Kings 3:5-15, and 2nd Chronicles 1:7-12]. God has given us a higher principle and perhaps if our country, and every country, were to practice this higher principle, the imagined right to kill would eventually dissolve.

By mercy and truth iniquity is purged, and by fear of the Lord humans depart from Evil [Proverbs 16:6].

PS. I don't know why males get stuck with this burden, but it's true throughout the animal

kingdom. If you watch the nature show on the Discovery Channel, you will note that whatever species they are talking about

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Florida
32183
USA
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Joined: Fri Oct 24, 2003 4:48 pm
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OBJECTION TO PROPOSED ORDER AND MOTION FOR HEARING
by sisselnor on Sun Nov 16, 2003 6:23 pm
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IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT, IN
AND FOR HILLSBOROUGH COUNTY, FLORIDA
CASE NOS. 86-8931A

86-15176A

STATE OF FLORIDA,

Plaintiff,

v.

RUDOLPH HOLTON,

Defendant.

OBJECTION TO PROPOSED ORDER AND MOTION FOR HEARING

COMES NOW THE DEFENDANT, RUDOLPH HOLTON, by and through undersigned counsel, and herein objects to the proposed order filed by the State, in open court on June 29, 2001, regarding the release of evidence held by the Clerk's Office. Mr. Holton through counsel, avers:

1. On June 29, 2001, this Court held a hearing on the State's Motion to Continue Mr. Holton's evidentiary hearing. During argument Assistant State Attorney Wayne Chalu, on behalf of the State, indicated that he wanted to conduct DNA testing on several pieces of evidence which had been admitted into evidence during Mr. Holton's capital trial in 1986. Mr. Holton, through counsel, did not object to further DNA testing, but did object to the release of the evidence prior to an order granting a new trial. This Court denied the State's motion to continue but ruled that further DNA testing could occur and requested an order.
2. The State has submitted a proposed order which fails to indicate the procedure that will be followed in order to fairly and properly submit the evidence for DNA testing. In fact, the State's order fails to even indicate that DNA testing will occur. The order calls for the Clerk of the Court to release several items of evidence to two named detectives from the Tampa Police Department.
3. In December, 1998, Mr. Holton filed a Motion to Inspect, Examine and Test Evidence. Mr. Holton specifically averred the items of evidence he wanted to test, the method of testing and the examiners's names. The State has failed to supply any of this information to the Court or Mr. Holton. At this point in time, Mr. Holton has no idea what method of DNA testing the State plans to employ on the items of evidence it has requested for release and who will conduct such testing.
4. At the August 10, 1999, hearing regarding Mr. Holton's motion for DNA testing the State objected to the testing and argued: "[I]t also puts the evidence in jeopardy. If it ever comes a (sic) point where Mr. Holton gains postconviction relief, either here or at the appellate level, and a new trial is ordered, it may put our evidence in jeopardy in the event we have to retry this man." Mr. Holton has similar concerns regarding the State's request for DNA testing. Mr. Holton's concerns are certainly exacerbated because the State has failed to provide any information regarding the testing it wants to conduct.
5. On December 6, 1999, this Court held a hearing and granted Mr. Holton's motion to conduct testing. At that hearing, this Court instructed counsel to prepare and submit an order regarding the testing.

6. On January 20, 2000, this Court held a status conference. Undersigned filed three (3), proposed orders to facilitate the testing. Moments before the hearing began, Assistant State Attorney Chalu informed undersigned that he would be making an ore tenus motion for the Florida Department of Law Enforcement (FDLE), to conduct the DNA testing in the case rather than defense counsel's expert. The Court entertained the State's ore tenus motion. The State again argued that it had an interest in the evidence if there were ever a retrial.

7. This Court ruled that the State be allowed to send the evidence to FDLE so that FDLE could view the evidence and determine what testing was possible.

8. On January 27, 2000, undersigned counsel filed a Motion for Rehearing. In that motion, undersigned stated:

11. Undersigned respectfully requests that this Court reconsider this ruling. The State has made no different arguments than he made at the August 10th and December 6th hearings after which this Court granted Mr. Holton's motion to test the evidence. Furthermore, undersigned objects to crucial evidence being moved when there is no apparent reason to do so.

* * *

16. Mr. Holton requests that this Court rescind its January 20th Order, reinstate its December 6th Order and allow Mr. Holton access to the evidence for testing by his experts. In the alternative counsel requests a hearing to determine why it is necessary to send the evidence to FDLE. At that hearing Mr. Holton will be prepared to call qualified experts to testify regarding the inherent risks of moving crucial, minute evidence when there appears to be no good reason to do so. In addition, at this hearing, should this Court determine that FDLE be allowed to view the evidence, undersigned will request that strict procedures be implemented so that Mr. Holton may have a representative and/or expert present with the evidence upon any transfers or any time the seal of the packaging is removed.

Mr. Holton's January 27, 2000, Motion for Reconsideration (emphasis added)(Footnotes omitted).

9. Following the January 20th hearing, a series of hearings occurred concerning the proper procedures to follow for the testing. During those hearings undersigned informed that Court that it was her understanding that FDLE could not conduct mitochondrial DNA testing and that only a few private labs and the Federal Bureau of Investigation (FBI), were qualified to conduct such DNA testing. Also, undersigned argued against moving the evidence gratuitously to FDLE when it was apparent that they would be unable to perform the necessary testing. The parties also discussed with the Court the amount of time the testing would take if it were sent to the FBI. Undersigned informed the Court that her understanding was that a backlog of cases existed at the FBI and that therefore the testing would be delayed for some time.

10. The State argued that it did not want the evidence sent off for examination without some assurance that the evidence could be tested. Undersigned offered to arrange for her mitochondrial DNA expert to travel to Florida, inspect the evidence and meet with Assistant State Attorney Chalu. The Court directed the parties to arrange a meeting to determine if a stipulation could be reached regarding the examiner.

11. Subsequently, on March 7, 2000, Dr. Terry Melton traveled to Tampa in order to examine the evidence and meet with Assistant State Attorney Chalu. After meeting with Dr. Melton, Assistant State Attorney Chalu stipulated to her conducting the testing.

12. In the following weeks, the Court signed orders directing the transfer of evidence. Those orders made clear that both parties were to be present when any of the directives were carried out, if the parties chose to be. Undersigned and ASA Chalu met on several occasions and invoked their right to be present when evidence was transferred from the Tampa Police Department and the Clerk's Office.

13. Undersigned immediately informed the State of the results of the tests as well as other pertinent information obtained from the examiners.

14. There is no reason why the evidence should be released to the Tampa Police Department. The Tampa Police Department does not have the qualifications to conduct any form of DNA testing. Moving the evidence places the evidence at risk for loss and further contamination, among other concerns. Moving the evidence to the Tampa Police Department serves no purpose and must be denied.

15. Additionally, before any of the evidence is transferred for testing, Mr. Holton must be provided with the opportunity to inspect and photograph the evidence.

16. Further, the testing procedures directed by this Court to date have always included both parties. The State's proposed order indicates no such opportunity for Mr. Holton's counsel to be present during crucial points in the testing procedure. Mr. Holton has the same concerns the State expressed over the last two years regarding testing of evidence and likewise must be provided with input into testing procedures and must be allowed to be present when those procedures are carried out.

17. Despite defense counsel objections, this Court has always allowed the State to be included in the testing procedures and therefore Mr. Holton must now be involved in the testing that the State has requested.

18. Additionally, at the August 10, 1999, hearing regarding testing the State objected to DNA testing and argued: "I don't know if the condition of the evidence has degraded or what the condition of the evidence is." Furthermore, at a hearing held on April 26, 2001, Assistant State Attorney Chalu informed the Court that there were contamination issues that needed to be addressed regarding further DNA testing. Contamination is an issue. In fact, after consulting with a criminalist, Stuart James, and a DNA expert, Dr. Terry

Melton, both experts agree that much of the evidence has been contaminated. The source of contamination appears to be multi-faceted, ranging from the initial collection and testing of evidence to the manner in which the evidence has been maintained for the past several years. In fact, Dr. Melton has indicated that she would refuse to conduct testing on items of evidence in this case due to contamination problems. Before any evidence is released undersigned requests a hearing to determine what potential contamination issues are present and what those issues mean to the results of DNA testing.

19. Finally, counsel objects to releasing the photographs currently in evidence. The Tampa Police Department possesses the negatives and copies of the photographs introduced at Mr. Holton's trial. There is absolutely no need to remove these from the Clerk's Office since copies are available to the State and Tampa Police Department.

WHEREFORE, Mr. Holton objects to the State's proposed order and requests that this Court hold a hearing on the aforementioned issues, or at the very least grant Mr. Holton ten (10) days from the date of any order entered transferring evidence so that Mr. Holton and an expert of his choice may view, photograph and inspect the evidence, prior to its release from the Clerk's Office, in order to determine what contamination issues may afflict the evidence and/or what contamination has occurred.

Respectfully submitted,

LINDA MCDERMOTT

Assistant CCC-NR

Florida Bar No. 0102857

I HEREBY CERTIFY that a true copy of the foregoing Proposed Order and Motion for Hearing has been furnished by facsimile transmission and United States Mail, first class postage prepaid, to all counsel of record on July 2, 2001.

MARTIN J. McCLAIN

Florida Bar No. 0754773

Special Assistant CCC-NR

LINDA MCDERMOTT

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL
CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY
CRIMINAL JUSTICE DIVISION

THE STATE OF FLORIDA

vs. CASE NO: 86-8931

DIVISION: "A"

RUDOLPH HOLTON,

Defendant.

This cause came on to be heard before the HONORABLE DANIEL L. PERRY, Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa, Florida, on

April 18, 2001, as follows:

APPEARANCES:

Wayne Chalu, Assistant State Attorney, 800 E. Kennedy Blvd., Tampa, Florida 33602, in behalf of the State;

Linda McDermott, Martin McClain and Scott Mario, Esquires, CCR - Northern Region, 1533-B Monroe Street, Tallahassee, Florida, 32301, in behalf of the defendant.

COLLEEN MERRITT, OFFICIAL COURT REPORTER

800 EAST KENNEDY BLVD., COURTHOUSE ANNEX

CA-1-124, TAMPA, FLORIDA 33602

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MS. MCDERMOTT: Your Honor, we're here on Rudolph Holton case number 86-8931 and 86-15176 and we're present for an evidentiary hearing regarding his 3.850 motion and before we start I just wanted to bring up a couple of housekeeping matters.

THE COURT: Okay.

MS. MCDERMOTT: The first is that I understand that one of our crucial witnesses is not going to be transported here for this hearing.

THE COURT: Yeah, we couldn't get him here in time.

MS. MCDERMOTT: Judge, I don't know if there is any way we can get him here by Friday but we are ready to go and we're ready to put on all our evidence and it would be helpful if we could put it all on in one shot.

THE COURT: I agree with you but when we talked to the jail the problem is that one fellow is in some institution up in the Panhandle and they go to like once a week and we're not going to be able to get him here so we need to address when we can get him here and we can probably get him here next week but the problem becomes next week I don't have any time but I do have some time the 15th of May.

MS. MCDERMOTT: The 15th of May is a whole month away. Is there anything before that?

THE COURT: See well, the next week is a trial week and I don't have anything.

MS. MCDERMOTT: The second week with the week of the 30th of April is that just a possibility?

THE COURT: The 30th of April, well if it's not going to be long we can maybe do it the first of May at 1:30.

MS. MCDERMOTT: That's fine.

THE COURT: May one at 1:30, okay, Mr. Chalu?

MR. CHALU: What day of the week is that?

THE COURT: It's a Tuesday.

MR. CHALU: Yes, sir.

THE COURT: All right, let's do that. Get me an order to have him transported here by the 27th and get an order done and we'll get him here by then, okay?

MS. MCDERMOTT: We'll get an order for you by next week, Your Honor.

THE COURT: By the end of the week at the latest, all right?

MS. MCDERMOTT: And one other matter, Your Honor, we would like to invoke the rule but some of Mr. Holton's family is here and his sister and his ex-wife who is waiting outside because I asked her to step outside until I cleared this with you.

They may testify only to an issue about the mark on Mr. Holton's chest and the age of those marks so I was wondering if we could make an exception for them to be in the room and remove them from the room when Dr. Willey is going to testify regarding those as an expert and again call them later and they won't have heard that testimony.

THE COURT: Mr. Chalu?

MR. CHALU: Judge, I don't have an objection but I do want to bring up an issue in connection with that request and that is I would like to have one of the case detectives in this case sitting with me at the table during this hearing.

I know this has been done in trials quite frankly even in capital trials where detectives sit with the state attorney to assist. I think we're in a similar situation to the rule of sequestration and we can --

THE COURT: Any problem?

MS. MCDERMOTT: I would to object that. That's what the State wanted to do at trial and Ms. Morgan objected and the judge sustained that objection because the detective from what I know they're talking about the key detective. He was running the investigation and Mr. Chalu represented to me that they would be calling him in rebuttal and so I don't think he should be allowed to sit through the whole --

THE COURT: Which detective?

MR. CHALU: Detective Durkin, Your Honor, and I may not but it really depends on what develops during the hearing I may or may not.

THE COURT: Well, I will over the defense's objection I will allow the detective to sit with you.

MR. CHALU: It's not for the entire time.

THE COURT: All right.

MS. MCDERMOTT: All right. Your Honor, we're ready to go. Our first witness is going to be Dr. Terry Melton.

THE COURT: Okay.

MR. CHALU: One other matter that the State would renew its previous objections written and oral objections to the granting of certain evidentiary hearing on certain grounds that the Court has granted it on and I don't have anything other than that.

THE COURT: All right, thank you, sir.

MS. MCDERMOTT: I apologize, one more thing. I'm sorry, I was short on my manners. I wanted to put on the record that Mr. Holton is here present today for the evidentiary hearing and co-counsel assisting me is Scott Mario and special assistance from CCR Martin McClain.

THE COURT: Okay. Raise your right hand, please, ma'am. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Terry Melton, M-E-L-T-O-N.

THE COURT: You may inquire.

MR. MARIO: Your Honor, my name is Scott Mario, M-A-R-I-O.

THE COURT: All right.

MR. MARIO: I have spoken to counsel previously and provided them with a copy of Dr.

Melton's C.V. and he has agreed to stipulate she's qualified to testify as an expert in forensic mitochondrial DNA typing.

THE COURT: Okay.

MR. MARIO: I have a copy of the C.V. for the Court.

THE COURT: All right.

THE COURT: Is there a stipulation, is that correct; Mr. Chalu?

MR. CHALU: That's correct, Your Honor.

THE COURT: Okay, I'll find her to be an expert. Let's move on.

MR. MARIO: We would admit Defense One.

THE COURT: All right, Defense One. You may inquire.

Whereupon,

TERRY MELTON,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARIO:

Q Ms. Melton, if you could begin by just telling us your name for record.

A Terry Melton.

Q And how are you employed, Dr. Melton?

A I am president and CEO and laboratory director of Mitochondrial Typing Technologies in Pennsylvania.

Q What type of operation is Mitochondrial Typing Techniques?

A We are exclusively devoted to the forensic mitochondrial testing.

Q And what sort of cases would you do?

A Well, we have a wide range of cases primarily our cases are criminal cases. We do type

missing persons kind of investigations. We also look at related questions, um, people who are forensically related. Occasionally we'll do historical exams for state government cases of investigations. We do a range of different cases.

Q How did you come to begin that company?

A Well, I did my PHD at Penn State and the year of my PHD research in mitochondria DNA population genetics as specialized to using mitochondrial DNA forensic marker so that the origin of my experience using mitochondrial DNA while I was at Penn State I did some forensic case work as well.

Q So how long have you been using mitochondrial type technology then?

A Two and a half years.

Q Does any work that you do for them involve referrals from the FBI?

A Yes, the FBI has exclusively a large back log of cases. They're one to two years backlogged so in a mitochondrial DNA it's done quickly so they'll refer people to my lab or laboratories as an overflow facility.

Q Now you just stated a few moments ago that you graduated from Penn State?

A Yes.

Q And did you specialize in any particular field at Penn State?

A Well, my PHD is in genetics and in the specific area of population genetics of mitochondrial DNA as a forensic marker.

Q You received your degree, since you received your degree have you authored or published any publications?

A During the time I was working on my PHD and since I've published in the neighborhood of eight to ten articles in purely review publications. Some that are out there for example forensic articles. I have four articles in the American Journal. I have two articles and I have a couple of things in press with the Association of Medical Journal and I have recently co-authored an article in identity and entry of mitochondrial DNA for the Institute of Forensic Sciences.

Q Do you sometimes give presentations as well?

A Yes.

Q What type and where?

A Well, I have given nearly every year for about the last four or five years a talk at the American Academy of Science meeting and recently presented at the Promega (phonetic) Seminars on human identification. I have been an invited speaker at several professional meetings. I've been invited to speak for the Department of Justice and done a number of talks in fact.

Q As your job, Doctor, were you often called into court to testify about the results of your DNA testing?

A Yes.

Q Can you estimate how many times?

A I would say between ten and fifteen times. I don't know exactly how many.

Q And of those what percentage of cases approximately were you to testify in behalf of the prosecution versus defense?

A It's about two thirds prosecution and about a third defense.

Q Has mitochondrial DNA typing as a science been accepted in courts?

A Yes, it has.

Q Do you know about how many cases?

A My understanding is that within the United States there are approximately again three states that have used it in courtrooms. Not all those states have been through admissibility hearings but a large number of them have.

Q To your knowledge has several of them accepted been here in Florida in the Thirteenth Judicial Circuit here?

A Yes, I believe it was accepted in a case the FBI and I did two or three years ago the Bolin case I believe.

Q That's Oscar Ray Bolin?

A Yes.

MR. MARIO: Well, I think at this point the State has stipulated Dr. Melton in your qualifications as an expert in the field so if the Court --

THE COURT: I found her to be.

BY MR. MARIO:

Q Um, let's move on then to mitochondrial DNA type in general. Have you brought some examples or illustrations with you today?

A Yes.

Q Would that aid you in your testimony to the Court?

A Yes, they will and I might ask for a pen or something to point with so it's a little easier.

MR. MARIO: I have also given a set of these illustrations to opposing counsel previous and I would like to mark them and admit them into the record.

THE COURT: All right.

MR. MARIO: As a composite exhibit.

MR. CHALU: No objection, Your Honor.

THE COURT: All right, it'll be so received.

MR. CHALU: Are those composite exhibits?

THE COURT: Composite Number Two.

MR. MARIO: Two (A), Four (A) through (E.)

THE COURT: All right.

BY MR. MARIO:

Q Doctor, begin by explaining to us what mitochondrial DNA is.

A Yes, I'm going to use this as an example for you and I'm sure you have a lot of DNA in your courtroom and the justice system and DNA is really considered to be rather complex but actually it's easy to understand.

You probably have heard it described in legal terms and in fact it looks like coiled snakes if you actually look they're uncoiled it would look like a ladder with rails and rungs of a chemical basis connecting them up to each other through certain ways in which these basically connect up to DNA pairs with GFA is always paired with "T." These are base pairing rules.

So what we know when you have a sequence of clarified basis on one side we can infer we have it on the other side. This is the same for any kind of DNA. I'm going to talk specifically about mitochondrial DNA but this applies to nuclear DNA as well.

Q Let me just stop you for a second and just could you please explain mitochondrial DNA as contrast to nuclear DNA?

A I'm going to spend a lot of time on that. So it's the actual order of these basis along this rail of the ladder information contact or what I want to say it's information contact so for example the order here is TGCA, GCTG.

Now with respect to nuclear DNA their DNA the DNA of every individual in the world is considered unique. That's with the exception of identical twins. It will be different when we come to talk about mitochondrial DNA but in fact because there's informational contents if we take in order and switch the order around informational contents of a different person for certain regions of nuclear DNA.

It's like a telephone number. If you take the numbers in your telephone number and switch them around you'll definitely have a phone number for some other person. So the kind of DNA you normally hear about in court is nuclear DNA the kind that is given to us by our mother and our father. It's the reason for our chromosomes.

We have 46 chromosomes or two sets of 23 chromosomes, 23 pairs. Nuclear DNA found in the nucleus the middle of the cell and it has the same structure as other kinds of DNA and the type I'm talking about if you separate that into different parts of the cell. The part or type of DNA I'm talking about is mitochondrial DNA. It's actually found outside the nucleus in the cytoplasm or the kind of fluid that is around the nucleus in the or nucleus called mitochondrial.

Mitochondrial 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 mitochondrial even in mitochondrial we have ten to hundred copies of mitochondrial DNA and the cell itself can have hundreds to thousands copies of mitochondrial DNA and so within the mitochondria is the mitochondrial DNA.

Now specifically and it's actually a closed circular molecule. It has 16,569 pairs of those ACTAG and those line up exactly the way they were in mitochondrial DNA circular molecule in between there's these billions of basis pairs of molecular DNA molecules and we have again 16,000 pairs of DNA. This is the part we're interested in is actually the end of the small molecule called the control region.

Now it turns out in 1981 scientists actually went in and sequence or determined the order of ACTAG and every position in one person. They wrote a paper on that sequence and it's called the Anderson Reference Sequence.

It's a bench mark to which all the sequences are now determined and compared with. And in the region down here it turns out to be extremely visible among people so if you choose any two people at random from a population the chance they will have the same

type is very, very low.

In fact a high amount concentrated in the two regions called high variable region or LFI region could have two and again when we do the analysis if we look at the order of these ACTAG in their region of the two parts of the control region so I will go on if you want me to explain how we do the test?

Q Okay, well, let me just stop you before you get into that part. What are the forensic uses of mitochondrial testing?

A Well, it tends to be very useful in cases where nuclear DNA isn't available because there are only two copies nuclear DNA where a cell has a thousand copies of mitochondrial DNA a fact when obtained mitochondrial DNA substantially shed hairs or deal with general hairs that has no roots. So that mitochondrial even without a root a you can get a mitochondrial DNA profile.

It's also very useful for skeletal remains which if they have been in a very difficult environment, physical situation say they have been buried in a very hot and humid environment or they have been in various elements if you will then you can get mitochondrial DNA so it's an alternative way to do DNA and information on samples that you would not have gotten through DNA testing.

Q Sounds like you're talking about skeletal remains, hairs, things of that element?

A That's right.

Q How about pieces of evidence if hair is exposed to fire would that effect the ability to determine a DNA profile?

A Not necessarily, it depends on of course the amount of fire and whether the hair is chard or you can't tell by looking at a hair whether or not it would have been effected by the heat.

Q Well, why don't you tell us the procedure for DNA typing?

A The procedure for DNA type, mitochondrial DNA is similar to that use for nuclear DNA testing. The only exception is that at the end of the analysis -- I'll come back to that point.

The very first step of any DNA test is to extract, you know, to take the DNA out of the sample the hair, the blood, the bone and purify it away from all other things that are the tissues, the cell wall, anything encompassed in there.

When you're finished with the extraction process you end with effectively just pure DNA by itself. The second step is called PCL application and this particular technique is being used now especially all over the world to generate a larger amount of DNA from very

small number of starting copies.

It's largely a photocopy procedure. You lay your DNA tube with some copies and you run it through a machine and when you raise or lower the temperature it allows the different enzymes to copy to take the DNA and to produce multiple copies.

The machine makes a number of copies of every generation so after 30 generations and multiple copies of something you may start out with only 100 copies are out. So extraction then PLC is the second stage.

Q Are those stages is any different from what is done in conventional DNA typing?

A PFPL and RFLP, STR, other DNA methods used P.R.C. in fact so you end up with multiple copies of your molecules from your starting extracted product and the final stage is slightly different.

With mitochondrial DNA ultimately you're going to be determining the exact order of those copied basis and those two regions TV1 and TV2 and you're going to learn what sequence is for that sample for those two regions and that's done in a sequence in the laboratory and it is also based on the principle of PCR where you label these copies, these many copies with your residue and that is done in sequence in the machine.

Q Dr. Melton, you used the term sequence basis. What did you do with that, what does that tell you?

A Well, we have at the conclusion of our test in our laboratory we have a sequence of 783 is the basis in those two regions together. We determine the order basis in question, sequence or question sample and then we want to compare something to it obviously so we have to go to a sample known of the individual and we do exactly the same thing all over again and develop a profile or a sequence on a known sample then we compare the two together.

Q Can you tell us what inclusion is, exclusion is what is the difference between those two concepts?

A Yes, inclusion which also is called failure to exclude means that you have to found identical every one of those positions that you compared between the two samples. So in other words you're saying that you cannot exclude the possibility that this sample came from that person and there's one point I forgot to bring out a very important point with respect to mitochondrial DNA.

Mitochondrial DNA is led from mother to offspring in fact so the children of the same mother will actually have the same type or similar type, similar type of the mother and so forth. Now, in following the DNA path down from both parents to the children is something called recombination occurs and that can alter the, alter the sequences in the different children so different children don't match either the sample pattern but in

mitochondrial DNA all children from the same family with the same type of mitochondrial DNA and that's not necessarily in nuclear DNA.

Q So if you have a particular sample of DNA, mitochondrial DNA matches another sample that doesn't necessarily mean that is from the same person it can be a relative is that what you're --

A That's correct, yes.

Q But what if two samples don't match and there's some components different among them, could you explain what that means?

A That would be called exclusion and what that means when you find two or more differences in those 783 base pairs between two samples you have to say that sample did come from that person and that's based on studies in a lot of laboratories where they have to look at 1,000, if thousands or more offspring comparisons or taking samples from individuals and comparing them with a known individual to show that.

It is always transmitted from mother to offspring and that most tissue in the body are the same so if you see two are different you say we exclude this person as the contributor of the sample.

Q Now is the procedure outline discussed was the mother to your --

A Well, effectively the final part of mitochondrial DNA test when you have a failure to exclude or a match or inclusion whatever you want to call it you have to understand how rare or unusual this type is.

Obviously if we know they are from the same type this would not be a useful marker for forensic testing. So we have to use what is known as a standard and how many times we have seen this type before and that gives us an idea of the relative region in the population. What we do is we take this find and we observe and we go look at a large data base on that we use that is actually maintained by the FBI and we search that data base for the type we observed in the match and that gives us an idea of how common or rare the type is.

Q That applies if you're trying to match or make a failure or exclusion?

A That's right, it gives you information about how much that failure is to exclude is obviously a case where there is no match comes into play at all and you know for sure this person did not leave the sample.

Q Is that procedure then is the standard procedure that is used for mitochondrial DNA typing?

A Yes, it is.

Q There are procedures that the laboratory follows?

A Yes.

Q Could you explain to us a little bit of what sort of quality control procedure is in place to get an accurate result and not have contamination or things of that nature?

A Well, contamination of course is always an issue in a DNA laboratory just like mitochondrial DNA laboratories but there is a lot of effort that goes into protecting the integrity of the sample during the time of the testing so that you are sure that the type gotten from the sample is implemented to that and still what came from some other source.

So we certainly at our laboratory are always thinking about that and preventing it and one of the first things we do which we think is very important is we always process our questioned samples first. These samples that usually take very minimal DNA in them and take care of those first.

What we in fact do those one at a time in laboratory sequence. Those are taken and carried in a separate room from the known samples which in most likelihood is what has a lot of DNA in them so we take the samples first and we run a number of controls with our samples to be sure that what the sample is in association to the sample and we of course have a sort of clean room environment.

We wear gloves and we put on a second pair of gloves when we actually are working with the tubes. We are cloaked with face masks. We work under bio-hazard hoods which are cleaned between samples, ultraviolet lights and we make sure those are clean and our surfaces and we have a lot of disposable equipment.

We have reagents or chemicals for tests that are designated for these different chemical samples so really there's a long list of the sort of precautionary procedures we use.

Q Is there some type of testing procedure or something you could verify that your consistent results are an accurate result?

A Well, in terms of for this particular case?

Q Well, just in general within the laboratory period a particular test of some sort?

A Well, we do utilize a bureau of testing through the College of American Pathologist and they send us a set of mock up case work samples and we test those. We actually test two kits and do the testing and duplicate it and send the results in and then they inform us if your results are correct so we do that kind of thing on twice a year basis.

Q What sort of track record do you have on that testing?

A Well, we have taken the test five times and so every six months two and a half years we have finished five tests, um, in the three tests we have scored and sent back we got 100% correct. The one that is presently we have done we have information that we have gotten the right answer. We haven't gotten a formal result and the fifth test we just took so we don't know yet.

Q What is the American Society of Crime Lab Directors?

A Well, that is a body of individuals that have taken it upon themselves to inspect and create a different kind of forensic laboratories. It's actually a rather rigorous procedure. They not only come to the laboratories in the area for DNA but they accredit in the area of tool market, questionable documents, fingerprints and so forth and the DNA is one of the very large portion and what they do is they come into your lab and you have to make sure you have been following the guidelines that have been set up by the adversary board and then their own set of guidelines that are designed to ensure quality control of your testing.

Q Have you all been accredited by them?

A Yes, we were accredited in February of this year.

Q And is this something that's easily, have many laboratories been accredited?

A Well, there is a trend in forensic laboratories wanting to be accredited and it's actually not mandatory at this point. It's voluntary and more and more laboratories are moving towards being accredited but it's a very rigorous procedure and it took us, well when we set up our laboratory with the idea we wanted to be accredited so we have been following those kind of guidelines since the very first day but the inspection is very rigorous and it takes two days to come in and look at everything, every nook and cranny of your lab. So it is something you don't undertake lightly. It's a rather formal process.

Q Do you know how many labs world wide have been accredited in mitochondrial DNA typing?

A There are five now including us.

Q Do you know offhand a few of the other ones might be?

A FBI Mitochondrial Unit is accredited at this time. The Arm Forces Laboratory which does investigation of the skeletal remains use of mitochondrial DNA is accredited. Lab Core in North Carolina, Rely Core in Louisiana and then us.

Q Doctor, were you asked to do mitochondrial DNA testing in this case?

A Yes, I was.

Q And how did that come about specifically?

A Well, Ms. McDermott contacted me and asked me if I would be able to test some hair evidence in this case.

MR. MARIO: Okay, at this time, Your Honor, opposing counsel has agreed to stipulate that to chain of custody and I have the stipulation which I've previously shown to Mr. Chalu and would like to read it for the record.

THE COURT: All right, go ahead.

MR. MARIO: The hair evidence recovered from the victim's mouth as well as some sample from the's hair both has been maintained by the Tampa Police Department since 1986 were sent to Terry Melton and received by her on September 13th, 2000. Sample of Mr. Holton's blood obtained by the Department of Corrections pursuant to this Court's order was sent to Dr. Melton and received by her on September 11th, 2000.

THE COURT: Okay.

BY MR. MARIO:

Q Now, Doctor, once you received those materials what did you do?

A Well, as I recall we received Mr. Holton's blood sample first and we stored that in our known laboratory evidence and locked it up because it was one sample that had a lot of DNA in it. We did not open that sample until after we had completed testing the three questioned hairs. I believe we did his sample last. We did the victim's known hair after the three questioned hairs.

So we tested the three hairs. Initially I believe we did sort of a six -- I'm not sure of the order of the other two. We did come to a result on all three of those hairs. Then we did known hair from I believe the victim's pubic hair and then we did Mr. Holton's blood sample.

MR. MARIO: I have a copy here of the lab report prepared in connection with this case and I've shown it to opposing counsel and I'd like to have this marked as Defense Exhibit Three and introduced.

THE COURT: Okay, Mr. Chalu, any objection?

MR. CHALU: No, Your Honor.

THE COURT: It will be so received Defense Exhibit Number Three.

BY MR. MARIO:

Q Dr. Melton, do you have a copy of your reports with you?

A Yes, I do.

Q Referring to and we have a copy but tell us what the results were of your testing examination of the hair and blood evidence you received?

A Yes, there was actually two results overall. The first one was that Mr. Holton's mitochondrial DNA type is exclusively different from the type obtained from these hairs. There were not a match. In that case we were able to clearly exclude him as a contributor to those three hairs.

Q Respectfully what exactly do you mean?

A Well, we are required two different DNA sequence to make an exclusion. There are seventeen differences so there is no question there is an exclusion in this situation.

Q How many differences would you generally observe between two unrelated individuals?

A Well, depending on the population that you're looking at. You can select two Caucasian individuals and look at their profiles and on average you can see about eight differences. If you look at an African American person's you can see about 14 differences on average between them.

Q So seventeen differences in this case then is there any question that the hair that was found in the victim's mouth you testified to did not belong to Rudolph Holton?

A No question.

Q And is that an opinion within a reasonable degree of scientific certainty?

A Yes.

Q Did you also compare the questioned hair with each other?

A Yes, we did.

Q And what were the results of that finding and in fact let me refer you to page two of your report which is now Defense Exhibit Number Three in evidence. And there's a chart that appears at the bottom if you could explain to the Court that may help illustrate what you're talking about.

A Well, the chart is a shortened way of showing what the differences are in the samples from that Anderson Reference sequence that is the standard published reference

sequence.

Q First line up is their standard is that what you're referring to?

A That's correct, the Anderson Reference Sequence at a particular position in the numbered boxes above so in other words we don't have to show all 783 basis. We only have to show those positions that in which the sample differed from the standard reference.

Q So across the top here there are many excerpts from the strands of DNA?

A That's correct.

Q So it's almost like you line up each of these standards of DNA down here to this, side by side and you can compare at the different positions what base appears?

A Yes, and what we found was that in each of the three questioned hairs were the same or had the same type so they effectively matched each other at every single position suggesting that there was one contributor of all three hairs. Obviously since mitochondrial DNA is a unique identifier the possibility of possibly multiple contributors but all three hairs are the same and do match each other. They do also match the type they obtained from the pubic hair of the victim. So their identical again in every position all 783 basis between the three questioned hairs and her known sample.

Q This type that you observed both questioned hairs and the known sample from the victim how common is that type of hair in the general population? How often do you see that type?

A Well, certainly the data base for that I have given before observed that type in data base.

Q How large is that data base?

A It is 4,142 sequence at this point.

Q Was there anything else about the DNA profile that you observed in those hairs that you thought significant?

A Yes, in fact there is some rather interesting about all four of the samples. There's a con let has that is defined as a situation where a person has more than one type of mitochondria DNA in their bodies and it's a rather rare phenomenon but in this case both of those, all three hairs and the victim held has three at position 152 and so what that means is effectively all those three samples plus the pubic hair from the population molecules one class has T1 population, has a "T" position 152. The other population has a "C" position 152 and all three of those hairs and known to cite lastly because one is at one position so that is effectively a rare occurrence and that now occurred in four

separate samples so it actually is a strange match by some unique factor and can't put a number of it but it's rather an unusual thing to see that.

Q So in reality then the three hairs and the victim's hair are from the victim although we can't say certainly because of the fact of the mitochondrial DNA is materially erroneous under that sense?

A That's correct.

Q You could say those originated either from the victim or even a relative of the victim?

A Yes.

Q And there is no question that these hairs did not originate from Rudolph Holton?

A No question.

Q And are those opinions based on a reasonable degree of scientific certainty?

A Yes.

MR. MARIO: I have no other questions at this time, Your Honor.

THE COURT: Mr. Chalu, any questions?

MR. CHALU: No, Your Honor, I don't have any questions of Dr. Melton.

THE COURT: We need her any further? Can she be excused?

MS. MCDERMOTT: She can be excused and she stay in the courtroom from this point on?

THE COURT: Do you have a problem with her staying in the courtroom, Mr. Chalu, if she's not going to testify any more?

MR. CHALU: No problem with that.

THE COURT: Thank you, you're free to stay and watch if you would like.

MS. MCDERMOTT: At this point in time I don't see him out there. I just anticipated this would take a little longer.

THE COURT: You got anybody else out there?

MS. MCDERMOTT: I'll see if somebody else is here, Your Honor.

THE COURT: It's going to take longer than three days if you don't have any witnesses to call.

MS. MCDERMOTT: Your Honor, I would like to introduce this exhibit and we're asking the Court to take judicial notice of a response filed in the Wayne Tompkins case regarding and filing the response in opposition of the motion for DNA testing of evidence and I would like to introduce that actually as Defense Exhibit Number Four if there is no objection.

THE COURT: For what purpose?

MR. CHALU: Judge, I'm not sure what the relevancy of that is. The objection is filed by the State of Florida and it's a different case and it has nothing to do with this case.

THE COURT: What is the purpose?

MS. MCDERMOTT: It's the same authority that prosecuted Mr. Holton and in their response they indicate that in Mr. Holton's case there's representations made as to the hair evidence and that is why the state attorney needed to do the testing and that's important that it's the same authority that has asserted this misrepresentation in Mr. Holton's case and I think it's very important.

THE COURT: What kind of misrepresentation?

MS. MCDERMOTT: Well, Judge, if I can explain a little bit further in closing arguments Mr. Episcopo told the jury that there was no way these hairs could be from the victim because they were classified as transitional body hairs so they couldn't have been her own hairs so he indicated that the only possible source of those hairs was Mr. Holton or, you know, you know, thought could include other individuals but he made it very clear those would not be the victim's hair and clearly told that and that was a misrepresentation to the jury and that is the authority on the Wayne Tompkins' case.

MR. CHALU: Judge, I don't see the relevance. The record in this case will speak for itself and if this is in fact what Mr. Episcopo said that's already in the record. I don't understand why the attorney general's argument in an unrelated case has anything to do with --

THE COURT: I don't think it does either but you can put them into evidence but I don't think it has any relevance, any relevance but I'll admit it.

MS. MCDERMOTT: Thank you, Your Honor.

THE COURT: Okay.

MS. MCDERMOTT: Defense Exhibit Number Four.

THE COURT: We ready? We have Mr. Episcopo now?

MR. MCCLAIN: Yes.

THE COURT: Mr. Episcopo, if you'd step up here and have a seat in the witness chair, please, sir.

THE WITNESS: Yes, Your Honor.

THE COURT: Go ahead and have a seat. If you'd raise your right hand, please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE COURT: State your name for the record and spell your last name, please.

THE WITNESS: Joe Episcopo, E-P-I-S-C-O-P-O.

THE COURT: You may inquire.

Whereupon,

JOE EPISCOPO,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

MR. MCCLAIN: Thank you, Your Honor. Um, can I stand up?

THE COURT: Sure.

BY MR. MCCLAIN:

Q Mr. Episcopo, are you familiar with Rudolph Holton?

A Yes, I am.

Q Can you explain how you are familiar with him?

A I was the assistant state attorney assigned to prosecute his case in December of 1986.

Q And so you would have been the prosecutor at his capital trial that resulted in this sentence of death?

A Yes.

Q For the record I'm going to hand you exhibit number five and let me show Mr. Chalu and ask you if you first of all recognize the handwriting?

A Yes, I do, that's my handwriting.

Q And just perhaps to help everyone understand there are no transcript of the opening statements in this case but does this appear to be your handwritten notes to help you in making that opening statement?

A Yes, this is my handwritten notes of my opening statement.

Q So presumably that's what you would have argued and obviously it's shorthand it's not everything you would argue in the statement the argument but it sort of covers the points you would be making?

A Yes, I do recall it.

Q Okay. Um, now in Mr. Holton's case do you recall a witness by the name of Flemmie Burkins?

A Yes, I do.

Q And do you recall who he was?

A He was a jail house informant who stated to have taken a confession from the defendant Mr. Holton.

Q Do you recall calling him as a witness to testify regarding that in Mr. Holton's trial?

A Yes, I do.

Q I'm going to hand you what has been marked as Exhibit Number Six and let me show Mr. Chalu. I'm -- it's actually state exhibit which is from actually Mr. Burkins' court file and it appears to be a handwritten request for probation by Mr. Burkins and essentially I want to ask you if you can recall or if you are familiar with that or had that or disclosed that to defense counsel?

A I don't recall seeing this. I really don't.

Q And just also for the record do you recall who was defense counsel in Mr. Holton's case?

A Mina Morgan, court appointed.

Q Right. Um, while I hand you Exhibit Number Seven, Exhibit Number seven appears to be an FDLE rap sheet regarding Flemmie Burkins and I think if you check on the last page it indicates cc to the state attorney's office?

A Yes, I see that.

Q I think on the first page it also indicates the date of the print out?

A November 29th, '86.

Q And if the report shows the trial of Mr. Holton the trial started December first of 1986 that would have been before the start of the trial, correct?

A Yes.

Q Do you recall having that rap sheet at this point in time or --

A I really don't because his case was in a different division than mine.

Q Right, but of course do you recall whether you would have disclosed that to Ms. Morgan Mr. Burkins' criminal history in connection with his testimony in the Holton case?

A Well, yeah, if we had disclosed, I mean, it would be if they probably asked for it I guess.

Q Showing you exhibit number ten next which was the exhibit number ten I believe is the transcript of the sentencing proceedings in Mr. Burkins' case. First of all looking at that do you recall being present for that sentencing proceeding?

A I don't but looking at it I was and my name is on here having appeared.

Q Okay, so you would know, you recall well, let me back up. You were at that sentencing proceeding of Mr. Burkins; is that correct?

A No, I remember Julie Hineman (phonetic) assistant state attorney and apparently that was her case.

Q Okay. Well, do you know the date of that sentencing proceeding?

A Yes, this is the date December 19th, 1986 after the trial.

Q So it would have been after Mr. Burkins' trial?

A Correct.

Q Do you recall --

MR. CHALU: Excuse me, sir, do you mean you said Mr. Burkins' trial.

BY MR. MCCLAIN:

Q The Holton trial, I'm sorry.

A I meant after Mr. Holton's trial I'm sorry.

Q And going through that if it helps your memory as to the proceedings do you recall that at Mr. Burkins' sentencing it came out that in fact under the score sheet he was looking at nine to twelve years?

A Yes.

Q Um, and was that at the time news to you?

A Yes.

Q Do you recall Mr. Holton's trial any discussions with reference to what you thought the score sheet had been in Mr. Burkins' case?

A Yeah, I was using Mr. Burkins' calculations of three and a half to four and a half years. He took three, to three years that was what was in my mind at the time of the trial of Mr. Holton.

Q Okay but in Mr. Burkins' point of view that would indicate he received greater consideration, did you realize at that time Mr. Burkins' point of view that was great consideration?

A Had great consideration about what?

Q The sentence that he would be receiving a three year sentence and the sentence guidelines were nine to twelve?

A Yes, obviously that was to his benefit.

Q And I'm going to hand you exhibit number nine which actually I believe is the score sheet for Mr. Burkins and I don't know if at this point in time looking at that refreshes your recollection?

A Well, it's not my handwriting I can tell you that.

Q That does reflect nine to twelve; is that correct?

A Yes, this exhibit number nine reflects a guidelines sentence of nine to twelve years on case number 86-8003 Flemmie Burkins.

Q So under the sentencing guidelines he was looking nine to twelve years but received three years?

A I thought he already had three years before, before that.

Q Right, but it's clear this sentencing actually indicated that it happened on December 19th, 1986, correct, that's the transcript that you have?

A The transcript does, yes.

Q Do you know how much time, well, actually the transcript speaks for itself as to who appeared --

A Yes.

Q In December?

A I'm just reading what was said to refresh my memory.

Q And also complete on the back it makes reference to Flemmie Burkins case number and I believe is the PSI which would have been part of the proceedings. I don't know if you have any independent recollection of any of this or simply relying on what the record from those proceedings show but it's pretty clear that he received substantially less than nine to twelve?

A Yeah, I notice in here that the transcript that I mentioned that transcript which is exhibit ten that I had provided in the PSI exhibit eight to Ms. Morgan and it was available at the trial when he testified and the record was made known to the jury in that case.

Q Okay, did Ms. Morgan ever figure out on the sentencing guidelines that Flemmie Burkins was nine to twelve years under the score sheet?

A Pardon me?

Q Do you know whether Ms. Morgan ever figured out looking at his criminal history that really he was facing nine to twelve years?

A No, you would have to ask her that.

Q Okay, and obviously the record will speak for itself as to what the jury was told when Mr. Burkins testified?

A Yeah.

Q If I can have those back and give them to the clerk. Just one last exhibit eleven. This is actually the judgment and sentence in Mr. Burkins' case which reflects that in fact he received three years and is that consistent with your recollection?

A Well, again I would say I have no independent recollection. I would have to look at the document and --

Q Apparently you were at the sentencing?

A Yes, the transcript indicates that I was and it's dated December 19th of 1986 and it says that he was placed on a period of three years following community control, well, whatever it says speaks for itself.

Q Okay. Now Mr. Holton's trial did Ms. Morgan seem to be prepared satisfactorily in behalf of Mr. Holton?

A Yes, I don't know whether I can comment on that.

MR. CHALU: Objection that as far as to when counsel rendering an opinion as to the performance of counsel.

THE COURT: I'll sustain the objection.

BY MR. MCCLAIN:

Q Well, for the record, Your Honor, I would like to proffer that when I spoke to Mr. Episcopo earlier he indicated to me he thought she seemed somewhat lack luster was the phrase.

A She lacked passion.

Q Lacked passion.

A Then again some people are passionate and some aren't.

MR. MCCLAIN: Okay.

THE COURT: They can never say that about you, Mr. Episcopo. Go ahead.

BY MR. MCCLAIN:

Q Now, exhibit number twelve this was in the state attorney's file number two notice of taking depositions and I hand you them to you, two and three and on the second page there are some handwritten notes. Is that where you are like writing?

A Yes, that looks like my writing.

Q So those would be notes you'd be taking during the deposition; are you able to tell?

A I don't know because, you know, it says here three years Evans, see he had been sentenced on October 3rd of '86 to three years.

Q Well, I know and he was re-sentenced on the 9th of December, see that?

A Yes, I see but what I'm saying I actually, the record shows from that proceeding this would have been a plea agreement on October 3rd.

Q The third and the sentence actually didn't happen until December 19th after the trial?

A That would be the truth.

Q Okay, but specifically actually what I was going to ask you the handwritten notation with the name Wiley Simmons there. Do you have any memory of why that name is there or what it means?

A No, I don't.

Q You indicate 47 years old.

A Yeah, 47 years of age.

Q So it's just obviously that information came to you and you wrote it down and at this point in time you don't remember why?

A No, I don't.

Q Okay.

A Did plead, pled in August see that?

Q Yes, and but there's well, there's, Wiley Simmons and Burkins and it's not clear what necessarily or who this is referring to is that right or can you tell from reading your notes?

A Are you referring to what's in there?

Q Yeah?

A I would think it was.

Q Burkins?

A Burkins.

Q Okay.

A That's all about him on here.

Q Except for the name Wiley Simmons is actually above his name?

A I don't know, no, I don't know why that's in there.

Q Fair enough. Now in the course of Mr. Holton's case do you recall the defense having making a contention that Katrina Grant --

A I think the victim was Katrina Graddy.

Q Graddy, I'm sorry, do you recall the defense presenting any information or had information which would have been in addition a report of the fact that Katrina Graddy had been raped by someone else prior to the murder?

A I don't recall. If it's in the transcript I can refresh my memory.

Q Just give me a moment here. Um, seeing two motions that Ms. Morgan filed that appears in the record one at 817 and one at 823 and calling your attention --

MR. CHALU: Judge, excuse me, is counsel using those documents to refresh the witness' recollection?

MR. MCCLAIN: That's, yeah.

MR. CHALU: They're not marked as evidence right now.

MR. MCCLAIN: That's correct since they're already in the record and they're also part of record on appeal.

A Where do you see 817?

Q It's the page number of the record.

A Okay.

Q And 824.

A Let me read it.

Q There's a motion in the file by Ms. Morgan in the Holton case. Reviewing that does that refresh your recollection?

A Motion for continuous.

Q Right, there's a motion for additional costs of investigation for in a paragraph here and this paragraph over here this is reference to, um, victim Katrina Graddy having been raped by Pine?

A Investigator Sonny Fernandez was the investigator I guess for some more money.

Q Right because she wanted to investigate this matter but I'm just presenting it to you to refresh your recollection as to -- does it reflect your recollection to the extent that the defense had been arguing that there had been a rape of the victim?

A Yes, she was seeking a continuous for that and other reasons.

Q So you were alerted to the fact that the defense was investigating the possibility that a person who may have raped Katrina Graddy may have been involved in her death?

A Yes, I was, there was one motion I was present for this motion.

Q Well, I'm assuming you were present because you were the lead prosecutor on the case.

A Well, really the way it worked back then we had a homicide division and Mr. Benito was in charge of it.

Q Correct.

A And what they would do is they would look at how many homicide cases and then say well, we're going to send one back to Division "A" and the case would sometimes come to me after they had another attorney doing the prep work and I would take them to trial and that's how I recall doing a lot of the cases I did. I didn't take them to the grand jury.

Q Okay.

A Or anything like that. I didn't get them at intake. That was done in the homicide division.

Q Okay, see my question actually goes towards if you had any information of this police report regarding such a rape given the information that is these motions obviously you would think as a prosecutor you would disclose that to the defense?

A Well, sure if they asked for discovery we would give it.

Q Okay. I'm going to provide you with exhibit number thirteen, exhibit number fourteen

and these I believe are clearly police reports and if you need just a moment just to sort of familiarize yourself and on, I recognize that these copies are a little bit, not the best but that's the best we have and as long you don't mind perhaps if I may help if I can point some things out. For example the identify of the victim of sexual battery and then there is a birth date over here at the name of the sexual battery Katrina Grant as Katrina Graddy and then if you go to the next line there it indicates that there was a suspect she claims that had sexually assaulted her?

A In June of '86.

Q June of '86, June 13th is that a 13?

A That's what it looks like.

Q '86 which would have been ten days before the homicide in this case; if you recall?

A I don't recall the exact date but --

Q And in here in this report the suspect's name as David Pearson?

A Correct.

Q And I think if you read further it indicates that when he talked to them he gave them the name of Donald Smith?

A I believe.

Q Let me ask you this. If you knew this information, is this something that if you had you would have disclosed to the defense given the position of the defense that she had been sexually assaulted sometime prior to the homicide?

A There was, could be a connection. I mean it's a different name and --

Q Same first name, last name with a "G", one Grant and one Graddy?

A And the --

Q Birth date are a match?

A The facts of this case are not the facts of the Holton case.

Q Correct, but defense contends that Katrina had been raped by a man ten days before her death and that the man may have been the perpetrator of the homicide and in this police report the fact she reported it to the police and the fact in the police report she made allegations which certainly puts a connection to know that she claims she had been raped by him certainly would be evidence that perhaps could have helped, I mean it

corroborates the defense but what I want to point out is did you know about that? Did you have that police report?

A I don't remember. I have no idea.

Q If you had, had this police report is that the kind of thing you would have disclosed?

A Well, obviously she would have asked for it, right?

Q In this situation, correct?

A Well, sure.

Q Okay.

A Why not?

Q But at this point in time you have no recollection of having that police report?

A Or her asking for it.

Q Okay, and the other report just so you have a chance to look?

A That was thirteen.

Q Thirteen the other one is fourteen obstruction by disguise or false identity. I believe if you look at this you will see this says David Pearson and it's because he gave a false name when he was being investigated for a sexual battery?

A Yes, it appears that there's an obstruction by disguise or identity.

Q Again at this point you have no memory of this document?

A No, I don't remember any of this stuff.

Q Okay. Mr. Episcopo, do you recall in Mr. Holton's case a black bag or --

A Shaving bag, yes.

Q That was sort of a significant item?

A It was, yeah, it was in a car of somebody that had given him a ride to the crime scene area.

Q Okay, and in fact it was taken into evidence?

A Yes, it was.

Q I'm going to hand you exhibit fifteen and sixteen. I'll hand you fifteen first. I'm, I'm going to call your attention to sixteen.

A If I can look at the context here.

Q And calling your attention to page six which shows reference black pouch leather pouch. Again this is one of the things I'm not sure since you weren't the prosecutor but do you remember whether there was mentioned --

A It was --

Q No knowledge of the fact in David Pearson --

A Allen Nelson.

Q -- right, he's the prosecutor for David Pearson the individual that was identified in the other police report in obstructing the police officer but in deposition the description of David Pearson having been in possession of a black pouch or leather pouch. If this was any information that had ever been made it may -- if you recall knowing about that person?

A No, no way, it's just a bit vague.

Q Okay. And showing you exhibit number sixteen a police report regarding the same matter which is dated January 14th of 1986, was reference to his observing a black brown leather pouch?

A Just for clarification let me tell you when these cases would come to us the discovery generally before was provided by the homicide division.

Q Okay.

A Okay, and we didn't have to deal with a lot of the, depositions maybe but actually sending out discovery most of that had been done before.

Q Already been done?

A You know, they would hand us this big file and we would say, okay another case they don't want to try that kind of thing and you just dig in and get ready.

Q Right.

A Usually a couple months before the trial so all of this discovery Mr. Benito would give out everything. He never held anything back.

Q Right.

A I sometimes thought he gave out too much.

Q Okay.

A And/or Mr. Ober would have been the other assistant in the division other than Mr. Benito.

Q This case was in front of Judge Coe; was it not?

A Mr. Holton's case was. This case here on this David Pearson yeah, Division "A" I guess in there too but it's Allen Nelson's case and he was I guess one of the assistants in there and I was the division chief over --

Q Um, but you don't recall it ever coming to your attention or to your knowledge when prosecuting Mr. Holton that David Pearson was also known to carry that sort of black pouch kind of thing?

A No, no, they don't, they called it a shaving kit in here.

Q Right.

A I remember a kit, shaving kit.

Q You had that in evidence in Mr. Holton's case, correct?

A Yeah, I believe it was. I think there was a picture of it.

Q Right.

A If they were talking about a leather pouch I will tell you even if I saw it, I couldn't connect it.

MR. MCCLAIN: Okay, Your Honor, I have no further questions.

THE COURT: Any questions, Mr. Chalu?

MR. CHALU: Yes, Your Honor, I have a few.

THE COURT: Go ahead.

MR. CHALU: Counsel, are you using the items in evidence?

MR. MCCLAIN: Yes, I'm sorry.

THE COURT: Any objection, Mr. Chalu?

MR. CHALU: No, Your Honor.

THE COURT: They'll be so received.

MR. CHALU: Where are they located?

THE COURT: The clerk has them.

DIRECT EXAMINATION

BY MR. CHALU:

Q Mr. Episcopo, let me show you what has been identified as Defense Exhibit Number Six and I'll ask that you examine that for a second and I'll have a few questions for you.

A Yes, okay, I've looked it over.

Q All right, sir. Where in that exhibit six for the defense does that say that he's asking the judge for a break because he's going to be a witness in a murder trial?

A No, that's dated August of '96 too so --

Q And --

A It may have been bought to my attention at that time.

Q All right, the trial was in December of '86; was it not?

A Yes.

Q Another one is there anywhere in there where he's asking for a break from Judge Evans because he's going to be a state witness in a murder trial?

A No.

Q Okay. Let me show you what's been received into evidence as State's Exhibit Number Seven. Do you recognize that, sir? You previously identified that as a rap sheet of Flemmie Burkins?

A Yes, apparently it is.

Q Back in '96 were rap sheets generally discoverable and sent in specific motions in order --

A You mean '86?

Q Yes, sir.

A I don't recall.

Q Okay, in any event do you recall if you supplied this to Ms. Morgan?

A I don't know.

Q Okay.

A If it was asked for I would have given it to her. Again I would think that.

Q If she asked?

A The homicide division probably would have done that.

Q Is the giver?

A Well, yes of course especially a witness that was testifying for the defense.

Q Were you responsible for the prosecution of Flemmie Burkins at the state attorney at that time?

A No, I was not. He was in another division.

Q All right, sir. Let me show you what has been marked and received into evidence as State's Exhibit Number Nine. Bear with me for a minute and let me find it for you.

THE COURT: State's Exhibit Number Nine, you mean Defense?

BY MR. CHALU:

Q Defense number nine, thank you, Your Honor and you previously identified that as a score sheet apparently done in the Flemmie Burkins case, correct?

A Yeah, it says that Julie Hineman was the one that filled this in.

Q All right, is this a prepared score sheet done by you?

A No, that's not my handwriting.

Q All right. That was prepared by Hineman apparently the assistant state attorney assigned to his case?

A Yes.

Q All right. Sir, let me ask you this. Are you aware of a prior score sheet that may have been prepared on Mr. Burkins' case on an earlier date?

A No, I don't.

Q Would it refresh your memory or recollection if I were to show you the state attorney's file in Mr. Burkins' case?

A I don't know, it might, it might not.

Q Mr. Episcopo, do you recall ever making Mr. Burkins a specific plea offer in exchange for testimony against Rudolph Holton?

A No, there wasn't. One thing I recall he didn't ask for anything. We didn't, he wasn't offered anything.

Q If there would have been a three year offer in Mr. Burkins' case that was not made by you, correct?

A No, there was no deal for his testimony and he wasn't asking for one.

Q All right. Would it refresh your memory to look at Mr. Burkins' file concerning the date that he pled which would have been August 11th of 1986?

A I'll take a look.

Q All right. Does that indicate to you -- what happened on August 11th, 1986?

A He pled open.

Q All right, what does an open plea mean?

A That means you either didn't get or you rejected the state attorney's offer and you're going to take your chances on a judge with an open plea.

Q And that would indicate that Mr. Burkins did not have a plea offer at that time when he entered his plea to the charges in case number 86-8003?

A Well, it obviously he didn't take it because he pled open.

Q All right. Now let me also show you what has been marked, marked and received in evidence as Defense Exhibit Number Ten. Would you mind reviewing that transcript and I'll have some questions for you.

Mr. Episcopo, let me back up a second. Referring to page eight of that transcript as you continue to read it.

A Yes.

Q What if anything does the Court indicate concerning to, concerning the nature of the plea which resulted in this sentencing hearing which is the Defense Exhibit Number Ten?

A Well, um, the Court is questioning me, the presentencing investigation was an open plea and if I understand what you said just now Mr. Episcopo is pled to two and a half to three and a half.

Q So the Court indicates that it was an open plea, correct?

A Yeah, but I was under the impression that he had pled to three years.

Q All right.

A And that's what was presented to the jury and the fact that was in fact a below guidelines.

Q All right, go ahead and finish reading it.

A Okay.

Q Now you are indicating, sir, you did not offer Mr. Burkins anything in exchange for his cooperation against Mr. Holton, correct?

A No, I did not.

Q And you also indicated that you didn't offer Mr. Burkins anything specifically tied to his own case in 86-8003?

A No, he never asked for anything.

Q You were a prosecutor for how many years, sir, total?

A Um, to that point in time?

Q Yes?

A Um. Let's see it was about six with the Air Force and three with, four years with Pinellas County that's ten and a year, about eleven years.

Q 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.

Q All right. As the Court indicated a PSI indicates which has been introduced into evidence as Defense Exhibit Number Eight that this was an open plea, correct, sir?

A Yes.

Q So now if this was an open plea then the defendant would h
sisselnor

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL

CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR

HILLSBOROUGH COUNTY

CRIMINAL JUSTICE DIVISION

THE STATE OF FLORIDA

vs. CASE NO: 86-8931

DIVISION: "A"

RUDOLPH HOLTON,

Defendant.

This cause came on to be heard before the HONORABLE DANIEL L. PERRY, Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa, Florida, on

April 18, 2001, as follows:

APPEARANCES:

Wayne Chalu, Assistant State Attorney, 800 E. Kennedy Blvd., Tampa, Florida 33602, in behalf of the State;

Linda McDermott, Martin McClain and Scott Mario, Esquires, CCR - Northern Region, 1533-B Monroe Street, Tallahassee, Florida, 32301, in behalf of the defendant.

COLLEEN MERRITT, OFFICIAL COURT REPORTER

800 EAST KENNEDY BLVD., COURTHOUSE ANNEX

CA-1-124, TAMPA, FLORIDA 33602

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MS. MCDERMOTT: Your Honor, we're here on Rudolph Holton case number 86-8931 and 86-15176 and we're present for an evidentiary hearing regarding his 3.850 motion and before we start I just wanted to bring up a couple of housekeeping matters.

THE COURT: Okay.

MS. MCDERMOTT: The first is that I understand that one of our crucial witnesses is not going to be transported here for this hearing.

THE COURT: Yeah, we couldn't get him here in time.

MS. MCDERMOTT: Judge, I don't know if there is any way we can get him here by Friday but we are ready to go and we're ready to put on all our evidence and it would be helpful if we could put it all on in one shot.

THE COURT: I agree with you but when we talked to the jail the problem is that one fellow is in some institution up in the Panhandle and they go to like once a week and we're not going to be able to get him here so we need to address when we can get him here and we can probably get him here next week but the problem becomes next week I don't have any time but I do have some time the 15th of May.

MS. MCDERMOTT: The 15th of May is a whole month away. Is there anything before that?

THE COURT: See well, the next week is a trial week and I don't have anything.

MS. MCDERMOTT: The second week with the week of the 30th of April is that just a possibility?

THE COURT: The 30th of April, well if it's not going to be long we can maybe do it the first of May at 1:30.

MS. MCDERMOTT: That's fine.

THE COURT: May one at 1:30, okay, Mr. Chalu?

MR. CHALU: What day of the week is that?

THE COURT: It's a Tuesday.

MR. CHALU: Yes, sir.

THE COURT: All right, let's do that. Get me an order to have him transported here by the 27th and get an order done and we'll get him here by then, okay?

MS. MCDERMOTT: We'll get an order for you by next week, Your Honor.

THE COURT: By the end of the week at the latest, all right?

MS. MCDERMOTT: And one other matter, Your Honor, we would like to invoke the rule but some of Mr. Holton's family is here and his sister and his ex-wife who is waiting outside because I asked her to step outside until I cleared this with you.

They may testify only to an issue about the mark on Mr. Holton's chest and the age of those marks so I was wondering if we could make an exception for them to be in the room and remove them from the room when Dr. Willey is going to testify regarding those as an expert and again call them later and they won't have heard that testimony.

THE COURT: Mr. Chalu?

MR. CHALU: Judge, I don't have an objection but I do want to bring up an issue in connection with that request and that is I would like to have one of the case detectives in this case sitting with me at the table during this hearing.

I know this has been done in trials quite frankly even in capital trials where detectives sit with the state attorney to assist. I think we're in a similar situation to the rule of sequestration and we can --

THE COURT: Any problem?

MS. MCDERMOTT: I would to object that. That's what the State wanted to do at trial and Ms. Morgan objected and the judge sustained that objection because the detective from what I know they're talking about the key detective. He was running the investigation and Mr. Chalu represented to me that they would be calling him in rebuttal

and so I don't think he should be allowed to sit through the whole --

THE COURT: Which detective?

MR. CHALU: Detective Durkin, Your Honor, and I may not but it really depends on what develops during the hearing I may or may not.

THE COURT: Well, I will over the defense's objection I will allow the detective to sit with you.

MR. CHALU: It's not for the entire time.

THE COURT: All right.

MS. MCDERMOTT: All right. Your Honor, we're ready to go. Our first witness is going to be Dr. Terry Melton.

THE COURT: Okay.

MR. CHALU: One other matter that the State would renew its previous objections written and oral objections to the granting of certain evidentiary hearing on certain grounds that the Court has granted it on and I don't have anything other than that.

THE COURT: All right, thank you, sir.

MS. MCDERMOTT: I apologize, one more thing. I'm sorry, I was short on my manners. I wanted to put on the record that Mr. Holton is here present today for the evidentiary hearing and co-counsel assisting me is Scott Mario and special assistance from CCR Martin McClain.

THE COURT: Okay. Raise your right hand, please, ma'am. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Terry Melton, M-E-L-T-O-N.

THE COURT: You may inquire.

MR. MARIO: Your Honor, my name is Scott Mario, M-A-R-I-O.

THE COURT: All right.

MR. MARIO: I have spoken to counsel previously and provided them with a copy of Dr. Melton's C.V. and he has agreed to stipulate she's qualified to testify as an expert in forensic mitochondrial DNA typing.

THE COURT: Okay.

MR. MARIO: I have a copy of the C.V. for the Court.

THE COURT: All right.

THE COURT: Is there a stipulation, is that correct; Mr. Chalu?

MR. CHALU: That's correct, Your Honor.

THE COURT: Okay, I'll find her to be an expert. Let's move on.

MR. MARIO: We would admit Defense One.

THE COURT: All right, Defense One. You may inquire.

Whereupon,

TERRY MELTON,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARIO:

Q Ms. Melton, if you could begin by just telling us your name for record.

A Terry Melton.

Q And how are you employed, Dr. Melton?

A I am president and CEO and laboratory director of Mitochondrial Typing Technologies in Pennsylvania.

Q What type of operation is Mitochondrial Typing Techniques?

A We are exclusively devoted to the forensic mitochondrial testing.

Q And what sort of cases would you do?

A Well, we have a wide range of cases primarily our cases are criminal cases. We do type missing persons kind of investigations. We also look at related questions, um, people who are forensically related. Occasionally we'll do historical exams for state government cases of investigations. We do a range of different cases.

Q How did you come to begin that company?

A Well, I did my PHD at Penn State and the year of my PHD research in mitochondria DNA population genetics as specialized to using mitochondrial DNA forensic marker so that the origin of my experience using mitochondrial DNA while I was at Penn State I did some forensic case work as well.

Q So how long have you been using mitochondrial type technology then?

A Two and a half years.

Q Does any work that you do for them involve referrals from the FBI?

A Yes, the FBI has exclusively a large back log of cases. They're one to two years backlogged so in a mitochondrial DNA it's done quickly so they'll refer people to my lab or laboratories as an overflow facility.

Q Now you just stated a few moments ago that you graduated from Penn State?

A Yes.

Q And did you specialize in any particular field at Penn State?

A Well, my PHD is in genetics and in the specific area of population genetics of mitochondrial DNA as a forensic marker.

Q You received your degree, since you received your degree have you authored or published any publications?

A During the time I was working on my PHD and since I've published in the neighborhood of eight to ten articles in purely review publications. Some that are out there for example forensic articles. I have four articles in the American Journal. I have two articles and I have a couple of things in press with the Association of Medical Journal and I have recently co-authored an article in identity and entry of mitochondrial DNA for the Institute of Forensic Sciences.

Q Do you sometimes give presentations as well?

A Yes.

Q What type and where?

A Well, I have given nearly every year for about the last four or five years a talk at the American Academy of Science meeting and recently presented at the Promega (phonetic) Seminars on human identification. I have been an invited speaker at several professional meetings. I've been invited to speak for the Department of Justice and done a number of talks in fact.

Q As your job, Doctor, were you often called into court to testify about the results of your DNA testing?

A Yes.

Q Can you estimate how many times?

A I would say between ten and fifteen times. I don't know exactly how many.

Q And of those what percentage of cases approximately were you to testify in behalf of the prosecution versus defense?

A It's about two thirds prosecution and about a third defense.

Q Has mitochondrial DNA typing as a science been accepted in courts?

A Yes, it has.

Q Do you know about how many cases?

A My understanding is that within the United States there are approximately again three states that have used it in courtrooms. Not all those states have been through admissibility hearings but a large number of them have.

Q To your knowledge has several of them accepted been here in Florida in the Thirteenth Judicial Circuit here?

A Yes, I believe it was accepted in a case the FBI and I did two or three years ago the Bolin case I believe.

Q That's Oscar Ray Bolin?

A Yes.

MR. MARIO: Well, I think at this point the State has stipulated Dr. Melton in your qualifications as an expert in the field so if the Court --

THE COURT: I found her to be.

BY MR. MARIO:

Q Um, let's move on then to mitochondrial DNA type in general. Have you brought some examples or illustrations with you today?

A Yes.

Q Would that aid you in your testimony to the Court?

A Yes, they will and I might ask for a pen or something to point with so it's a little easier.

MR. MARIO: I have also given a set of these illustrations to opposing counsel previous and I would like to mark them and admit them into the record.

THE COURT: All right.

MR. MARIO: As a composite exhibit.

MR. CHALU: No objection, Your Honor.

THE COURT: All right, it'll be so received.

MR. CHALU: Are those composite exhibits?

THE COURT: Composite Number Two.

MR. MARIO: Two (A), Four (A) through (E.)

THE COURT: All right.

BY MR. MARIO:

Q Doctor, begin by explaining to us what mitochondrial DNA is.

A Yes, I'm going to use this as an example for you and I'm sure you have a lot of DNA in your courtroom and the justice system and DNA is really considered to be rather complex but actually it's easy to understand.

You probably have heard it described in legal terms and in fact it looks like coiled snakes if you actually look they're uncoiled it would look like a ladder with rails and rungs of a chemical basis connecting them up to each other through certain ways in which these basically connect up to DNA pairs with GFA is always paired with "T." These are base pairing rules.

So what we know when you have a sequence of clarified basis on one side we can infer we have it on the other side. This is the same for any kind of DNA. I'm going to talk

specifically about mitochondrial DNA but this applies to nuclear DNA as well.

Q Let me just stop you for a second and just could you please explain mitochondrial DNA as contrast to nuclear DNA?

A I'm going to spend a lot of time on that. So it's the actual order of these basis along this rail of the ladder information contact or what I want to say it's information contact so for example the order here is TGCA, GCTG.

Now with respect to nuclear DNA their DNA the DNA of every individual in the world is considered unique. That's with the exception of identical twins. It will be different when we come to talk about mitochondrial DNA but in fact because there's informational contents if we take in order and switch the order around informational contents of a different person for certain regions of nuclear DNA.

It's like a telephone number. If you take the numbers in your telephone number and switch them around you'll definitely have a phone number for some other person. So the kind of DNA you normally hear about in court is nuclear DNA the kind that is given to us by our mother and our father. It's the reason for our chromosomes.

We have 46 chromosomes or two sets of 23 chromosomes, 23 pairs. Nuclear DNA found in the nucleus the middle of the cell and it has the same structure as other kinds of DNA and the type I'm talking about if you separate that into different parts of the cell. The part or type of DNA I'm talking about is mitochondrial DNA. It's actually found outside the nucleus in the cytoplasm or the kind of fluid that is around the nucleus in the or nucleus called mitochondrial.

Mitochondrial 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 mitochondrial even in mitochondrial we have ten to hundred copies of mitochondrial DNA and the cell itself can have hundreds to thousands copies of mitochondrial DNA and so within the mitochondria is the mitochondrial DNA.

Now specifically and it's actually a closed circular molecule. It has 16,569 pairs of those ACTAG and those line up exactly the way they were in mitochondrial DNA circular molecule in between there's these billions of basis pairs of molecular DNA molecules and we have again 16,000 pairs of DNA. This is the part we're interested in is actually the end of the small molecule called the control region.

Now it turns out in 1981 scientists actually went in and sequence or determined the order of ACTAG and every position in one person. They wrote a paper on that sequence and it's called the Anderson Reference Sequence.

It's a bench mark to which all the sequences are now determined and compared with. And in the region down here it turns out to be extremely visible among people so if you

choose any two people at random from a population the chance they will have the same type is very, very low.

In fact a high amount concentrated in the two regions called high variable region or LFI region could have two and again when we do the analysis if we look at the order of these ACTAG in their region of the two parts of the control region so I will go on if you want me to explain how we do the test?

Q Okay, well, let me just stop you before you get into that part. What are the forensic uses of mitochondrial testing?

A Well, it tends to be very useful in cases where nuclear DNA isn't available because there are only two copies nuclear DNA where a cell has a thousand copies of mitochondrial DNA a fact when obtained mitochondrial DNA substantially shed hairs or deal with general hairs that has no roots. So that mitochondrial even without a root a you can get a mitochondrial DNA profile.

It's also very useful for skeletal remains which if they have been in a very difficult environment, physical situation say they have been buried in a very hot and humid environment or they have been in various elements if you will then you can get mitochondrial DNA so it's an alternative way to do DNA and information on samples that you would not have gotten through DNA testing.

Q Sounds like you're talking about skeletal remains, hairs, things of that element?

A That's right.

Q How about pieces of evidence if hair is exposed to fire would that effect the ability to determine a DNA profile?

A Not necessarily, it depends on of course the amount of fire and whether the hair is chard or you can't tell by looking at a hair whether or not it would have been effected by the heat.

Q Well, why don't you tell us the procedure for DNA typing?

A The procedure for DNA type, mitochondrial DNA is similar to that use for nuclear DNA testing. The only exception is that at the end of the analysis -- I'll come back to that point.

The very first step of any DNA test is to extract, you know, to take the DNA out of the sample the hair, the blood, the bone and purify it away from all other things that are the tissues, the cell wall, anything encompassed in there.

When you're finished with the extraction process you end with effectively just pure DNA by itself. The second step is called PCL application and this particular technique is being

used now especially all over the world to generate a larger amount of DNA from very small number of starting copies.

It's largely a photocopy procedure. You lay your DNA tube with some copies and you run it through a machine and when you raise or lower the temperature it allows the different enzymes to copy to take the DNA and to produce multiple copies.

The machine makes a number of copies of every generation so after 30 generations and multiple copies of something you may start out with only 100 copies are out. So extraction then PLC is the second stage.

Q Are those stages is any different from what is done in conventional DNA typing?

A PFPL and RFLP, STR, other DNA methods used P.R.C. in fact so you end up with multiple copies of your molecules from your starting extracted product and the final stage is slightly different.

With mitochondrial DNA ultimately you're going to be determining the exact order of those copied basis and those two regions TV1 and TV2 and you're going to learn what sequence is for that sample for those two regions and that's done in a sequence in the laboratory and it is also based on the principle of PCR where you label these copies, these many copies with your residue and that is done in sequence in the machine.

Q Dr. Melton, you used the term sequence basis. What did you do with that, what does that tell you?

A Well, we have at the conclusion of our test in our laboratory we have a sequence of 783 is the basis in those two regions together. We determine the order basis in question, sequence or question sample and then we want to compare something to it obviously so we have to go to a sample known of the individual and we do exactly the same thing all over again and develop a profile or a sequence on a known sample then we compare the two together.

Q Can you tell us what inclusion is, exclusion is what is the difference between those two concepts?

A Yes, inclusion which also is called failure to exclude means that you have to found identical every one of those positions that you compared between the two samples. So in other words you're saying that you cannot exclude the possibility that this sample came from that person and there's one point I forgot to bring out a very important point with respect to mitochondrial DNA.

Mitochondrial DNA is led from mother to offspring in fact so the children of the same mother will actually have the same type or similar type, similar type of the mother and so forth. Now, in following the DNA path down from both parents to the children is something called recombination occurs and that can alter the, alter the sequences in the

different children so different children don't match either the sample pattern but in mitochondrial DNA all children from the same family with the same type of mitochondrial DNA and that's not necessarily in nuclear DNA.

Q So if you have a particular sample of DNA, mitochondrial DNA matches another sample that doesn't necessarily mean that is from the same person it can be a relative is that what you're --

A That's correct, yes.

Q But what if two samples don't match and there's some components different among them, could you explain what that means?

A That would be called exclusion and what that means when you find two or more differences in those 783 base pairs between two samples you have to say that sample did come from that person and that's based on studies in a lot of laboratories where they have to look at 1,000, if thousands or more offspring comparisons or taking samples from individuals and comparing them with a known individual to show that.

It is always transmitted from mother to offspring and that most tissue in the body are the same so if you see two are different you say we exclude this person as the contributor of the sample.

Q Now is the procedure outline discussed was the mother to your --

A Well, effectively the final part of mitochondrial DNA test when you have a failure to exclude or a match or inclusion whatever you want to call it you have to understand how rare or unusual this type is.

Obviously if we know they are from the same type this would not be a useful marker for forensic testing. So we have to use what is known as a standard and how many times we have seen this type before and that gives us an idea of the relative region in the population. What we do is we take this find and we observe and we go look at a large data base on that we use that is actually maintained by the FBI and we search that data base for the type we observed in the match and that gives us an idea of how common or rare the type is.

Q That applies if you're trying to match or make a failure or exclusion?

A That's right, it gives you information about how much that failure is to exclude is obviously a case where there is no match comes into play at all and you know for sure this person did not leave the sample.

Q Is that procedure then is the standard procedure that is used for mitochondrial DNA typing?

A Yes, it is.

Q There are procedures that the laboratory follows?

A Yes.

Q Could you explain to us a little bit of what sort of quality control procedure is in place to get an accurate result and not have contamination or things of that nature?

A Well, contamination of course is always an issue in a DNA laboratory just like mitochondrial DNA laboratories but there is a lot of effort that goes into protecting the integrity of the sample during the time of the testing so that you are sure that the type gotten from the sample is implemented to that and still what came from some other source.

So we certainly at our laboratory are always thinking about that and preventing it and one of the first things we do which we think is very important is we always process our questioned samples first. These samples that usually take very minimal DNA in them and take care of those first.

What we in fact do those one at a time in laboratory sequence. Those are taken and carried in a separate room from the known samples which in most likelihood is what has a lot of DNA in them so we take the samples first and we run a number of controls with our samples to be sure that what the sample is in association to the sample and we of course have a sort of clean room environment.

We wear gloves and we put on a second pair of gloves when we actually are working with the tubes. We are cloaked with face masks. We work under bio-hazard hoods which are cleaned between samples, ultraviolet lights and we make sure those are clean and our surfaces and we have a lot of disposable equipment.

We have reagents or chemicals for tests that are designated for these different chemical samples so really there's a long list of the sort of precautionary procedures we use.

Q Is there some type of testing procedure or something you could verify that your consistent results are an accurate result?

A Well, in terms of for this particular case?

Q Well, just in general within the laboratory period a particular test of some sort?

A Well, we do utilize a bureau of testing through the College of American Pathologist and they send us a set of mock up case work samples and we test those. We actually test two kits and do the testing and duplicate it and send the results in and then they inform us if your results are correct so we do that kind of thing on twice a year basis.

Q What sort of track record do you have on that testing?

A Well, we have taken the test five times and so every six months two and a half years we have finished five tests, um, in the three tests we have scored and sent back we got 100% correct. The one that is presently we have done we have information that we have gotten the right answer. We haven't gotten a formal result and the fifth test we just took so we don't know yet.

Q What is the American Society of Crime Lab Directors?

A Well, that is a body of individuals that have taken it upon themselves to inspect and create a different kind of forensic laboratories. It's actually a rather rigorous procedure. They not only come to the laboratories in the area for DNA but they accredit in the area of tool market, questionable documents, fingerprints and so forth and the DNA is one of the very large portion and what they do is they come into your lab and you have to make sure you have been following the guidelines that have been set up by the adversary board and then their own set of guidelines that are designed to ensure quality control of your testing.

Q Have you all been accredited by them?

A Yes, we were accredited in February of this year.

Q And is this something that's easily, have many laboratories been accredited?

A Well, there is a trend in forensic laboratories wanting to be accredited and it's actually not mandatory at this point. It's voluntary and more and more laboratories are moving towards being accredited but it's a very rigorous procedure and it took us, well when we set up our laboratory with the idea we wanted to be accredited so we have been following those kind of guidelines since the very first day but the inspection is very rigorous and it takes two days to come in and look at everything, every nook and cranny of your lab. So it is something you don't undertake lightly. It's a rather formal process.

Q Do you know how many labs world wide have been accredited in mitochondrial DNA typing?

A There are five now including us.

Q Do you know offhand a few of the other ones might be?

A FBI Mitochondrial Unit is accredited at this time. The Arm Forces Laboratory which does investigation of the skeletal remains use of mitochondrial DNA is accredited. Lab Core in North Carolina, Rely Core in Louisiana and then us.

Q Doctor, were you asked to do mitochondrial DNA testing in this case?

A Yes, I was.

Q And how did that come about specifically?

A Well, Ms. McDermott contacted me and asked me if I would be able to test some hair evidence in this case.

MR. MARIO: Okay, at this time, Your Honor, opposing counsel has agreed to stipulate that to chain of custody and I have the stipulation which I've previously shown to Mr. Chalu and would like to read it for the record.

THE COURT: All right, go ahead.

MR. MARIO: The hair evidence recovered from the victim's mouth as well as some sample from the's hair both has been maintained by the Tampa Police Department since 1986 were sent to Terry Melton and received by her on September 13th, 2000. Sample of Mr. Holton's blood obtained by the Department of Corrections pursuant to this Court's order was sent to Dr. Melton and received by her on September 11th, 2000.

THE COURT: Okay.

BY MR. MARIO:

Q Now, Doctor, once you received those materials what did you do?

A Well, as I recall we received Mr. Holton's blood sample first and we stored that in our known laboratory evidence and locked it up because it was one sample that had a lot of DNA in it. We did not open that sample until after we had completed testing the three questioned hairs. I believe we did his sample last. We did the victim's known hair after the three questioned hairs.

So we tested the three hairs. Initially I believe we did sort of a six -- I'm not sure of the order of the other two. We did come to a result on all three of those hairs. Then we did known hair from I believe the victim's pubic hair and then we did Mr. Holton's blood sample.

MR. MARIO: I have a copy here of the lab report prepared in connection with this case and I've shown it to opposing counsel and I'd like to have this marked as Defense Exhibit Three and introduced.

THE COURT: Okay, Mr. Chalu, any objection?

MR. CHALU: No, Your Honor.

THE COURT: It will be so received Defense Exhibit Number Three.

BY MR. MARIO:

Q Dr. Melton, do you have a copy of your reports with you?

A Yes, I do.

Q Referring to and we have a copy but tell us what the results were of your testing examination of the hair and blood evidence you received?

A Yes, there was actually two results overall. The first one was that Mr. Holton's mitochondrial DNA type is exclusively different from the type obtained from these hairs. There were not a match. In that case we were able to clearly exclude him as a contributor to those three hairs.

Q Respectfully what exactly do you mean?

A Well, we are required two different DNA sequence to make an exclusion. There are seventeen differences so there is no question there is an exclusion in this situation.

Q How many differences would you generally observe between two unrelated individuals?

A Well, depending on the population that you're looking at. You can select two Caucasian individuals and look at their profiles and on average you can see about eight differences. If you look at an African American person's you can see about 14 differences on average between them.

Q So seventeen differences in this case then is there any question that the hair that was found in the victim's mouth you testified to did not belong to Rudolph Holton?

A No question.

Q And is that an opinion within a reasonable degree of scientific certainty?

A Yes.

Q Did you also compare the questioned hair with each other?

A Yes, we did.

Q And what were the results of that finding and in fact let me refer you to page two of your report which is now Defense Exhibit Number Three in evidence. And there's a chart that appears at the bottom if you could explain to the Court that may help illustrate what you're talking about.

A Well, the chart is a shortened way of showing what the differences are in the samples

from that Anderson Reference sequence that is the standard published reference sequence.

Q First line up is their standard is that what you're referring to?

A That's correct, the Anderson Reference Sequence at a particular position in the numbered boxes above so in other words we don't have to show all 783 basis. We only have to show those positions that in which the sample differed from the standard reference.

Q So across the top here there are many excerpts from the strands of DNA?

A That's correct.

Q So it's almost like you line up each of these standards of DNA down here to this, side by side and you can compare at the different positions what base appears?

A Yes, and what we found was that in each of the three questioned hairs were the same or had the same type so they effectively matched each other at every single position suggesting that there was one contributor of all three hairs. Obviously since mitochondrial DNA is a unique identifier the possibility of possibly multiple contributors but all three hairs are the same and do match each other. They do also match the type they obtained from the pubic hair of the victim. So their identical again in every position all 783 basis between the three questioned hairs and her known sample.

Q This type that you observed both questioned hairs and the known sample from the victim how common is that type of hair in the general population? How often do you see that type?

A Well, certainly the data base for that I have given before observed that type in data base.

Q How large is that data base?

A It is 4,142 sequence at this point.

Q Was there anything else about the DNA profile that you observed in those hairs that you thought significant?

A Yes, in fact there is some rather interesting about all four of the samples. There's a con let has that is defined as a situation where a person has more than one type of mitochondria DNA in their bodies and it's a rather rare phenomenon but in this case both of those, all three hairs and the victim held has three at position 152 and so what that means is effectively all those three samples plus the pubic hair from the population molecules one class has T1 population, has a "T" position 152. The other population has a "C" position 152 and all three of those hairs and known to cite lastly because one is at

one position so that is effectively a rare occurrence and that now occurred in four separate samples so it actually is a strange match by some unique factor and can't put a number of it but it's rather an unusual thing to see that.

Q So in reality then the three hairs and the victim's hair are from the victim although we can't say certainly because of the fact of the mitochondrial DNA is materially erroneous under that sense?

A That's correct.

Q You could say those originated either from the victim or even a relative of the victim?

A Yes.

Q And there is no question that these hairs did not originate from Rudolph Holton?

A No question.

Q And are those opinions based on a reasonable degree of scientific certainty?

A Yes.

MR. MARIO: I have no other questions at this time, Your Honor.

THE COURT: Mr. Chalu, any questions?

MR. CHALU: No, Your Honor, I don't have any questions of Dr. Melton.

THE COURT: We need her any further? Can she be excused?

MS. MCDERMOTT: She can be excused and she stay in the courtroom from this point on?

THE COURT: Do you have a problem with her staying in the courtroom, Mr. Chalu, if she's not going to testify any more?

MR. CHALU: No problem with that.

THE COURT: Thank you, you're free to stay and watch if you would like.

MS. MCDERMOTT: At this point in time I don't see him out there. I just anticipated this would take a little longer.

THE COURT: You got anybody else out there?

MS. MCDERMOTT: I'll see if somebody else is here, Your Honor.

THE COURT: It's going to take longer than three days if you don't have any witnesses to call.

MS. MCDERMOTT: Your Honor, I would like to introduce this exhibit and we're asking the Court to take judicial notice of a response filed in the Wayne Tompkins case regarding and filing the response in opposition of the motion for DNA testing of evidence and I would like to introduce that actually as Defense Exhibit Number Four if there is no objection.

THE COURT: For what purpose?

MR. CHALU: Judge, I'm not sure what the relevancy of that is. The objection is filed by the State of Florida and it's a different case and it has nothing to do with this case.

THE COURT: What is the purpose?

MS. MCDERMOTT: It's the same authority that prosecuted Mr. Holton and in their response they indicate that in Mr. Holton's case there's representations made as to the hair evidence and that is why the state attorney needed to do the testing and that's important that it's the same authority that has asserted this misrepresentation in Mr. Holton's case and I think it's very important.

THE COURT: What kind of misrepresentation?

MS. MCDERMOTT: Well, Judge, if I can explain a little bit further in closing arguments Mr. Episcopo told the jury that there was no way these hairs could be from the victim because they were classified as transitional body hairs so they couldn't have been her own hairs so he indicated that the only possible source of those hairs was Mr. Holton or, you know, you know, thought could include other individuals but he made it very clear those would not be the victim's hair and clearly told that and that was a misrepresentation to the jury and that is the authority on the Wayne Tompkins' case.

MR. CHALU: Judge, I don't see the relevance. The record in this case will speak for itself and if this is in fact what Mr. Episcopo said that's already in the record. I don't understand why the attorney general's argument in an unrelated case has anything to do with --

THE COURT: I don't think it does either but you can put them into evidence but I don't think it has any relevance, any relevance but I'll admit it.

MS. MCDERMOTT: Thank you, Your Honor.

THE COURT: Okay.

MS. MCDERMOTT: Defense Exhibit Number Four.

THE COURT: We ready? We have Mr. Episcopo now?

MR. MCCLAIN: Yes.

THE COURT: Mr. Episcopo, if you'd step up here and have a seat in the witness chair, please, sir.

THE WITNESS: Yes, Your Honor.

THE COURT: Go ahead and have a seat. If you'd raise your right hand, please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE COURT: State your name for the record and spell your last name, please.

THE WITNESS: Joe Episcopo, E-P-I-S-C-O-P-O.

THE COURT: You may inquire.

Whereupon,

JOE EPISCOPO,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

MR. MCCLAIN: Thank you, Your Honor. Um, can I stand up?

THE COURT: Sure.

BY MR. MCCLAIN:

Q Mr. Episcopo, are you familiar with Rudolph Holton?

A Yes, I am.

Q Can you explain how you are familiar with him?

A I was the assistant state attorney assigned to prosecute his case in December of 1986.

Q And so you would have been the prosecutor at his capital trial that resulted in this

sentence of death?

A Yes.

Q For the record I'm going to hand you exhibit number five and let me show Mr. Chalu and ask you if you first of all recognize the handwriting?

A Yes, I do, that's my handwriting.

Q And just perhaps to help everyone understand there are no transcript of the opening statements in this case but does this appear to be your handwritten notes to help you in making that opening statement?

A Yes, this is my handwritten notes of my opening statement.

Q So presumably that's what you would have argued and obviously it's shorthand it's not everything you would argue in the statement the argument but it sort of covers the points you would be making?

A Yes, I do recall it.

Q Okay. Um, now in Mr. Holton's case do you recall a witness by the name of Flemmie Burkins?

A Yes, I do.

Q And do you recall who he was?

A He was a jail house informant who stated to have taken a confession from the defendant Mr. Holton.

Q Do you recall calling him as a witness to testify regarding that in Mr. Holton's trial?

A Yes, I do.

Q I'm going to hand you what has been marked as Exhibit Number Six and let me show Mr. Chalu. I'm -- it's actually state exhibit which is from actually Mr. Burkins' court file and it appears to be a handwritten request for probation by Mr. Burkins and essentially I want to ask you if you can recall or if you are familiar with that or had that or disclosed that to defense counsel?

A I don't recall seeing this. I really don't.

Q And just also for the record do you recall who was defense counsel in Mr. Holton's case?

A Mina Morgan, court appointed.

Q Right. Um, while I hand you Exhibit Number Seven, Exhibit Number seven appears to be an FDLE rap sheet regarding Flemmie Burkins and I think if you check on the last page it indicates cc to the state attorney's office?

A Yes, I see that.

Q I think on the first page it also indicates the date of the print out?

A November 29th, '86.

Q And if the report shows the trial of Mr. Holton the trial started December first of 1986 that would have been before the start of the trial, correct?

A Yes.

Q Do you recall having that rap sheet at this point in time or --

A I really don't because his case was in a different division than mine.

Q Right, but of course do you recall whether you would have disclosed that to Ms. Morgan Mr. Burkins' criminal history in connection with his testimony in the Holton case?

A Well, yeah, if we had disclosed, I mean, it would be if they probably asked for it I guess.

Q Showing you exhibit number ten next which was the exhibit number ten I believe is the transcript of the sentencing proceedings in Mr. Burkins' case. First of all looking at that do you recall being present for that sentencing proceeding?

A I don't but looking at it I was and my name is on here having appeared.

Q Okay, so you would know, you recall well, let me back up. You were at that sentencing proceeding of Mr. Burkins; is that correct?

A No, I remember Julie Hineman (phonetic) assistant state attorney and apparently that was her case.

Q Okay. Well, do you know the date of that sentencing proceeding?

A Yes, this is the date December 19th, 1986 after the trial.

Q So it would have been after Mr. Burkins' trial?

A Correct.

Q Do you recall --

MR. CHALU: Excuse me, sir, do you mean you said Mr. Burkins' trial.

BY MR. MCCLAIN:

Q The Holton trial, I'm sorry.

A I meant after Mr. Holton's trial I'm sorry.

Q And going through that if it helps your memory as to the proceedings do you recall that at Mr. Burkins' sentencing it came out that in fact under the score sheet he was looking at nine to twelve years?

A Yes.

Q Um, and was that at the time news to you?

A Yes.

Q Do you recall Mr. Holton's trial any discussions with reference to what you thought the score sheet had been in Mr. Burkins' case?

A Yeah, I was using Mr. Burkins' calculations of three and a half to four and a half years. He took three, to three years that was what was in my mind at the time of the trial of Mr. Holton.

Q Okay but in Mr. Burkins' point of view that would indicate he received greater consideration, did you realize at that time Mr. Burkins' point of view that was great consideration?

A Had great consideration about what?

Q The sentence that he would be receiving a three year sentence and the sentence guidelines were nine to twelve?

A Yes, obviously that was to his benefit.

Q And I'm going to hand you exhibit number nine which actually I believe is the score sheet for Mr. Burkins and I don't know if at this point in time looking at that refreshes your recollection?

A Well, it's not my handwriting I can tell you that.

Q That does reflect nine to twelve; is that correct?

A Yes, this exhibit number nine reflects a guidelines sentence of nine to twelve years on case number 86-8003 Flemmie Burkins.

Q So under the sentencing guidelines he was looking nine to twelve years but received three years?

A I thought he already had three years before, before that.

Q Right, but it's clear this sentencing actually indicated that it happened on December 19th, 1986, correct, that's the transcript that you have?

A The transcript does, yes.

Q Do you know how much time, well, actually the transcript speaks for itself as to who appeared --

A Yes.

Q In December?

A I'm just reading what was said to refresh my memory.

Q And also complete on the back it makes reference to Flemmie Burkins case number and I believe is the PSI which would have been part of the proceedings. I don't know if you have any independent recollection of any of this or simply relying on what the record from those proceedings show but it's pretty clear that he received substantially less than nine to twelve?

A Yeah, I notice in here that the transcript that I mentioned that transcript which is exhibit ten that I had provided in the PSI exhibit eight to Ms. Morgan and it was available at the trial when he testified and the record was made known to the jury in that case.

Q Okay, did Ms. Morgan ever figure out on the sentencing guidelines that Flemmie Burkins was nine to twelve years under the score sheet?

A Pardon me?

Q Do you know whether Ms. Morgan ever figured out looking at his criminal history that really he was facing nine to twelve years?

A No, you would have to ask her that.

Q Okay, and obviously the record will speak for itself as to what the jury was told when Mr. Burkins testified?

A Yeah.

Q If I can have those back and give them to the clerk. Just one last exhibit eleven. This is actually the judgment and sentence in Mr. Burkins' case which reflects that in fact he received three years and is that consistent with your recollection?

A Well, again I would say I have no independent recollection. I would have to look at the document and --

Q Apparently you were at the sentencing?

A Yes, the transcript indicates that I was and it's dated December 19th of 1986 and it says that he was placed on a period of three years following community control, well, whatever it says speaks for itself.

Q Okay. Now Mr. Holton's trial did Ms. Morgan seem to be prepared satisfactorily in behalf of Mr. Holton?

A Yes, I don't know whether I can comment on that.

MR. CHALU: Objection that as far as to when counsel rendering an opinion as to the performance of counsel.

THE COURT: I'll sustain the objection.

BY MR. MCCLAIN:

Q Well, for the record, Your Honor, I would like to proffer that when I spoke to Mr. Episcopo earlier he indicated to me he thought she seemed somewhat lack luster was the phrase.

A She lacked passion.

Q Lacked passion.

A Then again some people are passionate and some aren't.

MR. MCCLAIN: Okay.

THE COURT: They can never say that about you, Mr. Episcopo. Go ahead.

BY MR. MCCLAIN:

Q Now, exhibit number twelve this was in the state attorney's file number two notice of taking depositions and I hand you them to you, two and three and on the second page

there are some handwritten notes. Is that where you are like writing?

A Yes, that looks like my writing.

Q So those would be notes you'd be taking during the deposition; are you able to tell?

A I don't know because, you know, it says here three years Evans, see he had been sentenced on October 3rd of '86 to three years.

Q Well, I know and he was re-sentenced on the 9th of December, see that?

A Yes, I see but what I'm saying I actually, the record shows from that proceeding this would have been a plea agreement on October 3rd.

Q The third and the sentence actually didn't happen until December 19th after the trial?

A That would be the truth.

Q Okay, but specifically actually what I was going to ask you the handwritten notation with the name Wiley Simmons there. Do you have any memory of why that name is there or what it means?

A No, I don't.

Q You indicate 47 years old.

A Yeah, 47 years of age.

Q So it's just obviously that information came to you and you wrote it down and at this point in time you don't remember why?

A No, I don't.

Q Okay.

A Did plead, pled in August see that?

Q Yes, and but there's well, there's, Wiley Simmons and Burkins and it's not clear what necessarily or who this is referring to is that right or can you tell from reading your notes?

A Are you referring to what's in there?

Q Yeah?

A I would think it was.

Q Burkins?

A Burkins.

Q Okay.

A That's all about him on here.

Q Except for the name Wiley Simmons is actually above his name?

A I don't know, no, I don't know why that's in there.

Q Fair enough. Now in the course of Mr. Holton's case do you recall the defense having making a contention that Katrina Grant --

A I think the victim was Katrina Graddy.

Q Graddy, I'm sorry, do you recall the defense presenting any information or had information which would have been in addition a report of the fact that Katrina Graddy had been raped by someone else prior to the murder?

A I don't recall. If it's in the transcript I can refresh my memory.

Q Just give me a moment here. Um, seeing two motions that Ms. Morgan filed that appears in the record one at 817 and one at 823 and calling your attention --

MR. CHALU: Judge, excuse me, is counsel using those documents to refresh the witness' recollection?

MR. MCCLAIN: That's, yeah.

MR. CHALU: They're not marked as evidence right now.

MR. MCCLAIN: That's correct since they're already in the record and they're also part of record on appeal.

A Where do you see 817?

Q It's the page number of the record.

A Okay.

Q And 824.

A Let me read it.

Q There's a motion in the file by Ms. Morgan in the Holton case. Reviewing that does that refresh your recollection?

A Motion for continuous.

Q Right, there's a motion for additional costs of investigation for in a paragraph here and this paragraph over here this is reference to, um, victim Katrina Graddy having been raped by Pine?

A Investigator Sonny Fernandez was the investigator I guess for some more money.

Q Right because she wanted to investigate this matter but I'm just presenting it to you to refresh your recollection as to -- does it reflect your recollection to the extent that the defense had been arguing that there had been a rape of the victim?

A Yes, she was seeking a continuous for that and other reasons.

Q So you were alerted to the fact that the defense was investigating the possibility that a person who may have raped Katrina Graddy may have been involved in her death?

A Yes, I was, there was one motion I was present for this motion.

Q Well, I'm assuming you were present because you were the lead prosecutor on the case.

A Well, really the way it worked back then we had a homicide division and Mr. Benito was in charge of it.

Q Correct.

A And what they would do is they would look at how many homicide cases and then say well, we're going to send one back to Division "A" and the case would sometimes come to me after they had another attorney doing the prep work and I would take them to trial and that's how I recall doing a lot of the cases I did. I didn't take them to the grand jury.

Q Okay.

A Or anything like that. I didn't get them at intake. That was done in the homicide division.

Q Okay, see my question actually goes towards if you had any information of this police report regarding such a rape given the information that is these motions obviously you would think as a prosecutor you would disclose that to the defense?

A Well, sure if they asked for discovery we would give it.

Q Okay. I'm going to provide you with exhibit number thirteen, exhibit number fourteen and these I believe are clearly police reports and if you need just a moment just to sort of familiarize yourself and on, I recognize that these copies are a little bit, not the best but that's the best we have and as long you don't mind perhaps if I may help if I can point some things out. For example the identify of the victim of sexual battery and then there is a birth date over here at the name of the sexual battery Katrina Grant as Katrina Graddy and then if you go to the next line there it indicates that there was a suspect she claims that had sexually assaulted her?

A In June of '86.

Q June of '86, June 13th is that a 13?

A That's what it looks like.

Q '86 which would have been ten days before the homicide in this case; if you recall?

A I don't recall the exact date but --

Q And in here in this report the suspect's name as David Pearson?

A Correct.

Q And I think if you read further it indicates that when he talked to them he gave them the name of Donald Smith?

A I believe.

Q Let me ask you this. If you knew this information, is this something that if you had you would have disclosed to the defense given the position of the defense that she had been sexually assaulted sometime prior to the homicide?

A There was, could be a connection. I mean it's a different name and --

Q Same first name, last name with a "G", one Grant and one Grandy?

A And the --

Q Birth date are a match?

A The facts of this case are not the facts of the Holton case.

Q Correct, but defense contends that Katrina had been raped by a man ten days before her death and that the man may have been the perpetrator of the homicide and in this police report the fact she reported it to the police and the fact in the police report she made allegations which certainly puts a connection to know that she claims she had been raped

by him certainly would be evidence that perhaps could have helped, I mean it corroborates the defense but what I want to point out is did you know about that? Did you have that police report?

A I don't remember. I have no idea.

Q If you had, had this police report is that the kind of thing you would have disclosed?

A Well, obviously she would have asked for it, right?

Q In this situation, correct?

A Well, sure.

Q Okay.

A Why not?

Q But at this point in time you have no recollection of having that police report?

A Or her asking for it.

Q Okay, and the other report just so you have a chance to look?

A That was thirteen.

Q Thirteen the other one is fourteen obstruction by disguise or false identity. I believe if you look at this you will see this says David Pearson and it's because he gave a false name when he was being investigated for a sexual battery?

A Yes, it appears that there's an obstruction by disguise or identity.

Q Again at this point you have no memory of this document?

A No, I don't remember any of this stuff.

Q Okay. Mr. Episcopo, do you recall in Mr. Holton's case a black bag or --

A Shaving bag, yes.

Q That was sort of a significant item?

A It was, yeah, it was in a car of somebody that had given him a ride to the crime scene area.

Q Okay, and in fact it was taken into evidence?

A Yes, it was.

Q I'm going to hand you exhibit fifteen and sixteen. I'll hand you fifteen first. I'm, I'm going to call your attention to sixteen.

A If I can look at the context here.

Q And calling your attention to page six which shows reference black pouch leather pouch. Again this is one of the things I'm not sure since you weren't the prosecutor but do you remember whether there was mentioned --

A It was --

Q No knowledge of the fact in David Pearson --

A Allen Nelson.

Q -- right, he's the prosecutor for David Pearson the individual that was identified in the other police report in obstructing the police officer but in deposition the description of David Pearson having been in possession of a black pouch or leather pouch. If this was any information that had ever been made it may -- if you recall knowing about that person?

A No, no way, it's just a bit vague.

Q Okay. And showing you exhibit number sixteen a police report regarding the same matter which is dated January 14th of 1986, was reference to his observing a black brown leather pouch?

A Just for clarification let me tell you when these cases would come to us the discovery generally before was provided by the homicide division.

Q Okay.

A Okay, and we didn't have to deal with a lot of the, depositions maybe but actually sending out discovery most of that had been done before.

Q Already been done?

A You know, they would hand us this big file and we would say, okay another case they don't want to try that kind of thing and you just dig in and get ready.

Q Right.

A Usually a couple months before the trial so all of this discovery Mr. Benito would give

out everything. He never held anything back.

Q Right.

A I sometimes thought he gave out too much.

Q Okay.

A And/or Mr. Ober would have been the other assistant in the division other than Mr. Benito.

Q This case was in front of Judge Coe; was it not?

A Mr. Holton's case was. This case here on this David Pearson yeah, Division "A" I guess in there too but it's Allen Nelson's case and he was I guess one of the assistants in there and I was the division chief over --

Q Um, but you don't recall it ever coming to your attention or to your knowledge when prosecuting Mr. Holton that David Pearson was also known to carry that sort of black pouch kind of thing?

A No, no, they don't, they called it a shaving kit in here.

Q Right.

A I remember a kit, shaving kit.

Q You had that in evidence in Mr. Holton's case, correct?

A Yeah, I believe it was. I think there was a picture of it.

Q Right.

A If they were talking about a leather pouch I will tell you even if I saw it, I couldn't connect it.

MR. MCCLAIN: Okay, Your Honor, I have no further questions.

THE COURT: Any questions, Mr. Chalu?

MR. CHALU: Yes, Your Honor, I have a few.

THE COURT: Go ahead.

MR. CHALU: Counsel, are you using the items in evidence?

MR. MCCLAIN: Yes, I'm sorry.

THE COURT: Any objection, Mr. Chalu?

MR. CHALU: No, Your Honor.

THE COURT: They'll be so received.

MR. CHALU: Where are they located?

THE COURT: The clerk has them.

DIRECT EXAMINATION

BY MR. CHALU:

Q Mr. Episcopo, let me show you what has been identified as Defense Exhibit Number Six and I'll ask that you examine that for a second and I'll have a few questions for you.

A Yes, okay, I've looked it over.

Q All right, sir. Where in that exhibit six for the defense does that say that he's asking the judge for a break because he's going to be a witness in a murder trial?

A No, that's dated August of '96 too so --

Q And --

A It may have been brought to my attention at that time.

Q All right, the trial was in December of '86; was it not?

A Yes.

Q Another one is there anywhere in there where he's asking for a break from Judge Evans because he's going to be a state witness in a murder trial?

A No.

Q Okay. Let me show you what's been received into evidence as State's Exhibit Number Seven. Do you recognize that, sir? You previously identified that as a rap sheet of Flemmie Burkins?

A Yes, apparently it is.

Q Back in '96 were rap sheets generally discoverable and sent in specific motions in order

--

A You mean '86?

Q Yes, sir.

A I don't recall.

Q Okay, in any event do you recall if you supplied this to Ms. Morgan?

A I don't know.

Q Okay.

A If it was asked for I would have given it to her. Again I would think that.

Q If she asked?

A The homicide division probably would have done that.

Q Is the giver?

A Well, yes of course especially a witness that was testifying for the defense.

Q Were you responsible for the prosecution of Flemmie Burkins at the state attorney at that time?

A No, I was not. He was in another division.

Q All right, sir. Let me show you what has been marked and received into evidence as State's Exhibit Number Nine. Bear with me for a minute and let me find it for you.

THE COURT: State's Exhibit Number Nine, you mean Defense?

BY MR. CHALU:

Q Defense number nine, thank you, Your Honor and you previously identified that as a score sheet apparently done in the Flemmie Burkins case, correct?

A Yeah, it says that Julie Hineman was the one that filled this in.

Q All right, is this a prepared score sheet done by you?

A No, that's not my handwriting.

Q All right. That was prepared by Hineman apparently the assistant state attorney

assigned to his case?

A Yes.

Q All right. Sir, let me ask you this. Are you aware of a prior score sheet that may have been prepared on Mr. Burkins' case on an earlier date?

A No, I don't.

Q Would it refresh your memory or recollection if I were to show you the state attorney's file in Mr. Burkins' case?

A I don't know, it might, it might not.

Q Mr. Episcopo, do you recall ever making Mr. Burkins a specific plea offer in exchange for testimony against Rudolph Holton?

A No, there wasn't. One thing I recall he didn't ask for anything. We didn't, he wasn't offered anything.

Q If there would have been a three year offer in Mr. Burkins' case that was not made by you, correct?

A No, there was no deal for his testimony and he wasn't asking for one.

Q All right. Would it refresh your memory to look at Mr. Burkins' file concerning the date that he pled which would have been August 11th of 1986?

A I'll take a look.

Q All right. Does that indicate to you -- what happened on August 11th, 1986?

A He pled open.

Q All right, what does an open plea mean?

A That means you either didn't get or you rejected the state attorney's offer and you're going to take your chances on a judge with an open plea.

Q And that would indicate that Mr. Burkins did not have a plea offer at that time when he entered his plea to the charges in case number 86-8003?

A Well, it obviously he didn't take it because he pled open.

Q All right. Now let me also show you what has been marked, marked and received in evidence as Defense Exhibit Number Ten. Would you mind reviewing that transcript and

I'll have some questions for you.

Mr. Episcopo, let me back up a second. Referring to page eight of that transcript as you continue to read it.

A Yes.

Q What if anything does the Court indicate concerning to, concerning the nature of the plea which resulted in this sentencing hearing which is the Defense Exhibit Number Ten?

A Well, um, the Court is questioning me, the presentencing investigation was an open plea and if I understand what you said just now Mr. Episcopo is pled to two and a half to three and a half.

Q So the Court indicates that it was an open plea, correct?

A Yeah, but I was under the impression that he had pled to three years.

Q All right.

A And that's what was presented to the jury and the fact that was in fact a below guidelines.

Q All right, go ahead and finish reading it.

A Okay.

Q Now you are indicating, sir, you did not offer Mr. Burkins anything in exchange for his cooperation against Mr. Holton, correct?

A No, I did not.

Q And you also indicated that you didn't offer Mr. Burkins anything specifically tied to his own case in 86-8003?

A No, he never asked for anything.

Q You were a prosecutor for how many years, sir, total?

A Um, to that point in time?

Q Yes?

A Um. Let's see it was about six with the Air Force and three with, four years with Pinellas County that's ten and a year, about eleven years.

Q 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.

Q All right. As the Court indicated a PSI indicates which has been introduced into evidence as Defense Exhibit Number Eight that this was an open plea, correct, sir?

A Yes.

Q So now if this was an open plea then the defendant would h
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TWO

[Times photo: John Pendencyraft]

Jan. 25, 2003: The morning after his release, Holton is still adjusting to light and open spaces. His daughter, Sontrivette Holton-Daniels, took him to the mall. He shopped for a Bucs jersey.

Unraveling Rudolph Holton's death sentence proved to be nowhere near as simple as convicting him. Five months after a young woman was found strangled in an abandoned crack house, he was tried, convicted and, the same afternoon, sentenced to die. His case sat for 10 years - until a lawyer just out of law school, who didn't know any better, got involved.

By DAVID KARP, Times Staff Writer

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TAMPA -- It had turned cold, the days had gotten shorter, and still they had not found Flemmie Birkins.

On and off for three months, the private investigators drove around Tampa looking for him. Fourteen years earlier, Birkins' testimony had put Rudolph Holton on death row. He said Holton admitted strangling a 17-year-old.

[Times photo: John Pendencyraft]

Attorney Linda McDermott says the first time she read Holton's case, she thought, "How did they convict this person?" Getting him out took six years -- and led her to discover the depths of her outrage.

Holton's attorney, Linda McDermott, had not heard Birkins testify, she had never met him. But from the first time she read his words in type she was convinced his story didn't make sense. She told her investigators:

"You have to find Flemmie. You have to get him to admit that he's a big, fat liar, and you have to get him to testify. There is no alternative, and there is no other thing that can happen."

Investigators Jeff Walsh and David Mack would start at sunrise; if Birkins was a drug addict, they wanted to talk to him early in the day, when he likely would be most coherent. They trolled street corners and hung out nights at the open-air Laundromat on Armenia Avenue. They knocked on doors up and down Walnut Street in West Tampa. They looked throughout the fall and into the winter of 2000. Around the turn of the year, they made their way into the circle around a bonfire at North Boulevard Homes, a public housing project. They said they were trying to save a man on death row.

"Be here at 9," someone said.

The next morning, they say, Birkins came riding down the sidewalk, carrying a plastic bag. Mack stepped in front of his bike. "Yo, Flemmie."

They needed to know about Holton.

Related link

Changing stories

After Rudolph Holton was convicted of strangling Katrina Graddy in 1986, some witnesses changed their stories

"I need to talk with my lawyer," Birkins said.

Walsh laughed to himself. "Who's your lawyer?" They said they would go with him.

No, Birkins said, he needed two hours to deliver his bag; meet him at the "blue store," the Sav-Mor Market on Rome Avenue. He pedaled off.

* * *

The investigators killed the next two hours at a fast food restaurant, reporting to McDermott that they had found Birkins, and worrying they had just lost him. They waited at the blue store.

Right on time, Birkins rode up and leaned his bike against a Dumpster. He said he had consulted his lawyer. His lawyer was God.

So what was the truth about Rudolph Holton?

"I set him up."

Birkins had been facing a long prison term. He said he made up Holton's confession to save himself.

He started to sob and leaned against the hood of the investigators' car. Walsh told him he needed to tell his story to a judge.

"I am never going to court saying that. You don't understand how Tampa police work."

If he admitted lying under oath, they would arrest him on the spot, Birkins was sure of it.

If it got out that he was a snitch, people would hurt him, he was sure of that, too.

He had a long, hard cry, collected himself and gave Walsh a phone number. He said he would testify.

* * *

McDermott had staked her career on Holton's case. Disgusted with how politics hurt her clients, she had resigned in 1999 from the Tampa office of the Capital Collateral Regional Counsel, the agency that represents death row inmates. Unable to handle Holton's case on her own, she had gone back to the agency's Tallahassee office.

She had two months to prepare for a key hearing. For the umpteenth time, she reviewed her file on David Pearson, the man known as Pine. In 1986, when Holton was convicted of strangling Katrina Graddy, the judge had not given his lawyer time to find Pine.

McDermott's file included a police report dated June 13, 1986, 10 days before Graddy's murder. The report said Pearson had been questioned about a sexual battery, case #86-54078.

A sexual battery?

McDermott searched her boxes but couldn't find anything about it. She asked Tampa police for the report.

Less than an hour later, her fax machine delivered a bombshell: evidence favorable to the defense, evidence the state had been obliged to disclose -- but had not.

Using an alias, Graddy had accused Pearson of raping her, anally, after they smoked crack at the Park Motel on Florida Avenue. Ten days later she was murdered, raped

anally.

Had the defense been given this police report, as the law required, Holton could have made the case that Pearson was the killer. Pearson had a motive: Graddy had smoked his crack cocaine and then accused him of rape.

Though the report was in their files, police did not make the connection between Graddy and Pearson. They never questioned him.

* * *

More than 14 years after Holton was sentenced to death, the day had come: He could put on evidence to prove he should get a new trial.

Walsh came early to meet Birkins and drive him to court. Birkins was waiting. He had showered and put on a clean white shirt.

"You didn't think I would be here," he said.

He paced like a nervous wreck. Out of prison eight years, he could not deal with going back.

"I'm not going to do it. I can't do it."

They drove to the Hillsborough County Courthouse Annex.

Waiting outside, a police officer came up and shook his hand: "Flemmie Birkins, we haven't seen you in some time."

"Well, you know," Birkins stammered.

The officer walked on.

"See," Birkins said. "Everyone knows me."

* * *

Inside, in Judge Daniel Perry's courtroom, Donald Lamar Smith testified in the blue prison garb of Wakulla Correctional Institution, where he was doing two years for possession of cocaine.

In 1986, Smith cut hair on the street in Central Park Village. Pearson was a regular, they were friends.

The morning Graddy's body was found, Smith came to the crime scene, where Detective Kevin Durkin was working. They spoke, but the lengthy report Durkin wrote later included no mention of this conversation.

Now McDermott asked Smith what he told the detective that morning.

He said Graddy had come looking for him, on his porch, about a week before. She wanted him to beat up Pearson because he had raped her.

"She had a lot of bruises around her neck. She told me he had choked her neck."

Smith and Graddy ran into Pearson that afternoon. Graddy screamed at him, and Pearson yelled back, "I'm going to kill your ass!"

Prosecutor Wayne Chalu was incredulous.

"So you knew that based on what you just testified to here that they had the wrong man in jail for this murder, right?"

"Well, I told the police who did it," Smith said. "If they would just find me. I was in the projects. So that was their job to do that."

"So if you're aware if somebody is innocent of a murder, and you know who the guilty party is, you're not going to volunteer it, right, sir?"

"Not in the projects. I'm just not like that."

* * *

The defense called Elease Moore, who lived next door to Graddy and her mother. She

was 64, had lived in Central Park all her life and knew just about everyone. She used to spend afternoons on the porch with "Big Carrie" Nelson, who died six years after the murder. It was Nelson who first put detectives onto Holton, saying she recognized him because he had broken into her home four times. Still, she had told the jury, "I don't hate him or nothing."

Years later, Moore said Nelson told her she really had not seen Holton that night.

"She was going to get even with him," Moore testified. "Her groceries were gone, and she believed Rudolph had stolen them."

Why hadn't Moore come forward sooner? "It wasn't important to me, sir," she said. She had more.

The night of Graddy's murder, Moore said she was drinking gin and Bull and having sex with a man known as Georgia Boy. They fell asleep about 9.

That contradicted what Georgia Boy testified to at Holton's trial. He said he had seen Holton and Graddy together about 11.

Now Georgia Boy -- Johnny Lee Newsome -- took the stand and recanted as well. He had not seen Holton that night. He had seen him, near the house, three days before the murder.

"So you lied at his trial?" McDermott said.

"Yes."

There was Carl Schenck, the man police found sleeping in his car outside the condemned house. Schenck had picked up a hitchhiker and taken him to Central Park for drugs. He was never certain the hitchhiker was Holton; at trial he said it could have been him.

Now, the defense showed Schenck a photograph of David Pearson.

That looks a lot like the man too, he said. Police officers told him Holton was the killer.

"They told me that he was a burglar and he had like a two or a three hundred a day habit of cocaine, and they were pretty sure that was their man."

* * *

Flemmie Birkins took the stand and swore to tell the truth.

"When you testified against Rudolph Holton did you tell the truth?" McDermott asked.

"No."

"Did Rudolph Holton ever discuss the case with you?"

"No. The man never said anything to me about his trial or case or anything."

He heard about Holton's arrest on the news, and "I used it to my benefit."

Birkins said he made up Holton's confession because he was facing years in prison, as much as life. The prosecutor at trial said Birkins was facing just three years, and testified without a deal.

Now prosecutor Wayne Chalu pressed Birkins about whether Detective Sandy Noblitt offered him anything for his testimony.

"He knew what I wanted at the time."

"Well what's your answer? Did he promise you anything or not, and if so, what did he promise you?"

"I wouldn't do no time."

"So he promised you that, or is that what you asked for?"

"That he would help me, he could."

"He didn't offer you anything, did he, sir?"

"Not, not in writing, not that way."

Chalu showed him copies of his statement to police, his deposition and his trial testimony. He walked him through each document to show that Birkins had consistently told the same story and to suggest his new version was a lie.

"Now you were under oath, sir, when you made this statement?" Chalu said.

"Yes."

"Remember the court reporter swearing you in, and you swearing to the tell the truth, correct?"

"Yes."

"So three times, sir, the statement to Detective Noblitt, the sworn deposition, and the trial, you stated the same thing, didn't you, sir?"

"Right."

Birkins said he never told anybody he lied at trial until 14 years later, when McDermott's investigators found him. Chalu found it hard to believe that he shared such an intimate secret with a stranger.

"So you were talking to him after five or ten minutes, (and) the conversation (was) that you had committed perjury under oath in a murder trial; is that what you're telling us?"

"Yeah."

* * *

All along there had been a reason to question Birkins' story. McDermott didn't spot it until about the eighth time she went through Noblitt's and Durkin's report, a month or so before the hearing.

The police report documented the second time detectives took Holton from jail to police headquarters. It said they talked to him on June 26, starting at 5:10 p.m.

In the trial transcript, Birkins said Holton confessed to him in the jail clinic on June 26, between 5 and 5:30 p.m.

How could Holton have confessed in the jail clinic when he was at the police station?

The inconsistency could be as insignificant as someone getting a time wrong, or it could be a little piece of a big lie.

* * *

Seven months later, the morning of Nov. 2, 2001, Holton was on death row as Judge Perry ran through the calendar in his courtroom in Tampa. Holton's hearing lasted only moments, a clerk distributed the judge's 21-page written order.

The state's mistakes were inadvertent, Perry ruled, but the failure to turn over information favorable to the defense meant Holton's conviction could not stand. He was entitled to a new trial -- one the state probably could not win.

They called the next case. Lawyers, defendants and families went about the business of court, few of them aware of what had just happened. Quietly, a mountain had moved.

* * *

For another 13 months, Holton stayed on death row, waiting for the Florida Supreme Court to hear the state's appeal.

The morning State of Florida vs. Rudolph Holton was on the calendar, McDermott had cases back to back. For the first, she took her usual place, at the appellant's table: Her clients were always the ones asking that their convictions be overturned.

When Holton's case was called, she gathered her belongings to change tables; prosecutors were appealing this time. Stephen Ake, representing the state, offered that she was fine where she was. No, McDermott said. She wanted to move.

Ake went first. Shortly after he began, Justice Barbara J. Pariente jumped in. "Can we get an overall review of this case, because it troubles me," she said. "It comes close to one of the closest cases to potential for actual innocence that I have seen. . . . Doesn't the state feel that under all the circumstances, that a new trial would serve the interests of justice?"

"No, your honor," Ake said.

The justices asked Ake and McDermott questions for 40 minutes. The court typically takes months to rule; this time it acted in six days.

The unanimous order, issued Dec. 18, 2002, said "competent, substantial evidence" merited a new trial.

* * *

The morning the news broke, a network of death penalty opponents connected across continents sprang to life. European abolitionists sent an e-mail blitz demanding Holton's release. Floridians for Alternatives to the Death Penalty had Holton's picture on its Web site with a link: Rudolph Holton, Innocent!

The group's 1,200 members started calling the State Attorney's Office at 8:36 a.m. By 10 a.m., secretaries were hanging up on them. The group also was organizing a vigil outside the Hillsborough County Courthouse.

McDermott called them off, worried that protests would only make prosecutors dig in. "In some ways, I don't want to be too pushy."

Many of the top staff of Hillsborough State Attorney Mark Ober were on vacation. Christmas passed. Then New Year's.

* * *

Ober vaguely remembered Graddy's murder, one of 123 in Hillsborough in 1986. Back then, he was part of a select group of prosecutors that handled only homicides.

He left to do criminal defense for 13 years and came back in 2000 as the elected state attorney. Now he had to decide: Take Holton to trial again or let him go.

He took the trial transcript home. It brought back memories; he had worked with prosecutor Joe Episcopo and tried murder cases in front of Judge Harry Lee Coe III.

Early in January, Ober convened the committee of his top staff that decides what to do in homicide cases. Detective Durkin, who had interviewed Holton, watched his demeanor and heard him change his story, told the committee he was certain Holton was the right man.

But in 16 years, the evidence had unraveled.

The hair that a prosecutor told the jury had to be Holton's wasn't his.

The informant who said Holton confessed now said he made it up.

An alternate suspect, whom police had not interviewed in 1986, had been found, along with a rape report linking him to Graddy.

Still, Ober did his homework.

Episcopo had told the jury that the cut on Holton's left hand could be evidence Graddy scratched him as she fought him off. Ober wanted to see if there was a medical basis for that argument. He sent the police photo of the cut to the medical examiner, who said it was old, it had nothing to do with the murder.

Ober's investigators found Birkins, working at the Salvation Army. He was missing his front teeth. He said somebody beat him up after he testified about being a snitch.

Birkins didn't want to talk again, but he came to the courthouse. Ober videotaped the

interview.

He won't show the video but says Birkins changed his story again and said his 1986 version was the truth. He was recanting what he had recanted.

The committee met again and watched the video. Some in the room found Birkins' account credible; how could investigators have gotten him to admit to perjury so easily? They did not trust Holton's lawyers and investigators, who worked at the agency some called the "anti-Christ." They were zealots, willing to do anything for the anti-death penalty cause.

The room was divided over which Flemmie Birkins to believe, but there was little division about his value as a witness. They had no case.

* * *

McDermott didn't know what prosecutors were thinking. They had stopped returning her calls because they had nothing to tell her. She took it as a breach of professional courtesy. She had reined in the death penalty activists, and how had prosecutors reciprocated? They let the holiday season slip by.

"I have worked weekends, holidays and New Year's -- and they should too," she said.

"I'm sorry that they can't deal with the fact that we litigated the case -- and we won."

Her voice rose. It was "incompetent" for Ober to wait so long to analyze things, he should have studied the facts a year ago. After 16 years, the state was prolonging the inevitable, how dare they hold Holton one day more. "It's outrageous."

From her home computer, she drafted a motion demanding a speedy trial. If prosecutors wanted to try Holton again, they had 60 days; they were up to day 34.

* * *

That week, Tampa was consumed by the Bucs' trip to the Super Bowl. The Friday morning before the game, Ober sat down with Graddy's older brother, Winford Moore, to inform him he could not prosecute Holton. The witnesses were not reliable.

Moore understood. He knew Georgia Boy. "I wouldn't trust him no further than I can see him," he said.

Ober called Holton's defense team with the news just before 11 a.m.

Forty-five minutes later, the intercom rang in McDermott's office. It was Holton, breathing hard.

McDermott acted like it was any old day. "Hey, Rudy. What's going on?"

Holton choked up. The guards said he was going home.

Still playing: "You're going home?" Then, turning serious: "Yeah, you are going home."

"Oh man. This caught me by surprise."

"This caught you by surprise?"

We've been working on this for six years, she said. You knew it was coming.

"Thank you, Linda." he said, heaving. "I owe you."

"Don't worry about it."

The phone would not stop. The Los Angeles Times was on the line; CNN wanted her Monday night.

A camera crew showed up and interviewed Martin McClain, the nationally known lawyer who had assisted McDermott. They asked him about Gov. Bush's death penalty policies. McClain, who doesn't work for the state, answered. McDermott's boss, appointed by the governor, told the TV crew not to put such questions to her.

If they ask, Michael Reiter told McDermott, "I don't want you answering."

Later, with Reiter gone, the TV reporter asked the question McDermott was supposed to duck. What did she think of Bush's proposal to eliminate the CCRC and pay private attorneys to do the work?

"I think it's important to understand that these cases take a lot of time," McDermott said. Attorneys requested records in Holton's case in 1992 but did not get them until March 2001. "It takes a lot of time and resources to do these cases. It takes a lot of institutional history."

She left a message for her mother in Chicago.

"Hey, Mom, just wanted you to know that Rudolph is getting off. Love you."

She did not call her father. He wouldn't understand why getting someone off death row was good news.

McDermott and her team arrived at Union Correctional Institution after 5 p.m.

Across the road, reporters were waiting. Holton had scrawled out a statement. "I just want to say I'm sitting on top of the world, enjoying the moment of the victory of the freedom that I've been fighting for for many years. ... I forgive everybody."

A pickup truck drove by and circled back twice. The passenger screamed: "They deserve to die! They deserve to die! Burn in hell!"

* * *

His first night of freedom, Holton visited the Westminster Oaks Retirement Village in Tallahassee.

He wanted to meet 72-year-old Mary Hardison, a death penalty opponent who had written Holton every month for 14 years. He called her "mom" and her late husband "dad." She telephoned her children as soon as she heard the news: "Your brother is out of prison!"

He sat in her house, with its recliner, soft carpet and tea cups, overlooking woods. She was overjoyed to have him there.

At the hotel later, he was reunited with his 31-year-old daughter, Sontrivette, and his 28-year-old son, Rudolph Jr. They never really knew him as their father, and had not seen him in years. Now they would have to work through how much to let him into their lives. Holton had a Big Mac and got a fitful night's sleep at the Homewood Suites. He woke Saturday and neatly made his bed.

"Daddy, you don't have to do that," Sontrivette said.

That afternoon Holton stopped by McDermott's office. After years working to get him out, it was weird to have him there. He passed the file cabinets with his name on them and lingered in the law library, where they worked his case.

"I was his attorney and now, I still feel like he needs me," McDermott said. But she couldn't be there for him much longer, not like before. He would need family and friends. Before she got involved, the case barely moved in 10 years. Lawyers were waiting for public records, and because no governor signed a death warrant, the case wasn't a priority. It took McDermott six more years of pushing to get him out.

She couldn't believe John Moser, her first boss at the agency, hadn't fired her. She deserved it. She saw now that she behaved unreasonably; it had been irresponsible to quit and argue she could handle Holton's case alone.

"I was an idiot. I was a foolish, young, idealistic lawyer who made bad choices. I wish it hadn't come to the point where we were in a courtroom and the client was saying he wanted me. I didn't really have anything to offer."

"I don't regret it," she said. "But I wouldn't do it again."

Holton came into her office. On the wall was his photo, the one he sent her six Easters years ago. She also had framed one of his paintings.

He was surprised to see them.

"Of course, I have your picture," she said. "You sent it to me. I put it up."

There was one more snapshot she wanted. Before he left town, she wanted him to sit at her desk, she wanted a photo of him in her chair.

-- Times researcher John Martin contributed to both days of this series.

Postscript

Joe Episcopo

Joe Episcopo, the prosecutor, was fired two months after Holton's trial for falsifying records to make his conviction rate look better than it was. He said the charges were untrue and the firing political. He ran for state attorney, lost and joined the defense bar. He has appeared on Larry King Live, Court TV and MSNBC to talk about Tampa cases, including the controversial "stop sign case." He said Holton should be free. "I am sorry it happened. At the time I believed what I was doing."

Mina Morgan Mina Morgan, paid \$8,264 to defend Holton at trial, handles appeals now for the Hillsborough public defender. After Holton was sentenced, she said she went on a three-day vodka diet. She stopped accepting death case appointments. "I have been haunted by this case for 16 years." During Holton's appeal, when Morgan had to testify about how she prepared his defense, she wept on the stand. His family sent her flowers. Holton told her not to blame herself; had he been on the streets, he said, he might be dead of a drug overdose.

Harry Lee Coe III Harry Lee Coe III, the judge, was elected state attorney in 1992. In that office, he opposed Holton's efforts to win a new trial and get DNA testing on hair evidence. Coe committed suicide in 2000 as investigators closed in with questions about gambling debts and destruction of public records.

John Moser John Moser left CCRC in 2001. An Army lieutenant colonel, he is in military intelligence at Special Operations Command, MacDill Air Force Base. He credits the agency's Tallahassee office for rescuing McDermott when she tried to defend Holton on her own. "Who is to say what would have happened if she retained it singly? I can't say on her own, she would not have prevailed. (But) I would like to say that I am right."

David Pearson, aka Pine David Pearson, aka Pine, is on probation for possession of cocaine and has been arrested more than 20 times since 1986. After McDermott's team suggested he killed Katrina Graddy, Pearson looked up her mother, Eva Lee, and told her he didn't do it.

Pearson met with prosecutors and volunteered a saliva sample, though there is nothing to compare it to in Graddy's case. State Attorney Mark Ober said the case is open, and he considers Pearson a suspect.

Linda McDermott Linda McDermott has won new trials for two others on Death Row. One is free and living in Puerto Rico; the other is expected to be tried again. She has worked at CCRC six years. Now 33, she was contemplating a change even before Bush said he wants to eliminate the agency where she works. Unhappy with living in rural North Florida, she may take the Georgia Bar and move to Atlanta.

[Times photo: John Pendygraft]

Eva Lee still lives in Central Park Village, where she works as a security guard. She doesn't know who killed her youngest daughter, only that she should not have been taken. "I don't feel like she had to die like that." Katrina Graddy's brother, Winford Moore, wonders why police cannot put the right person on trial. He has a lot of questions: Why didn't they bring his sister's friend, Pamela Woods, to court? Why didn't they listen to Donald Lamar Smith? Why didn't they talk to Pearson? "If it had been someone in Hollywood, they would," he said. "If it had been someone of importance, then it would be different."

Rudolph Holton was given \$100 when he was released. He has spent his first two weeks in Tallahassee, living with an elderly couple active in an anti-death penalty coalition and working part time on a construction site. He says he wants to enroll in a drug treatment program so he won't relapse. He may move to Lakeland with his daughter, but he's not sure. Her house already is crowded with four children.

<http://www.oranous.com/innocence/RudolphHolton/HoltonhearingApril202001.htm>

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL
CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY
CRIMINAL JUSTICE DIVISION

THE STATE OF FLORIDA

vs. CASE NO: 86-8931

DIVISION: "A"

RUDOLPH HOLTON,

Defendant.

This cause came on to be heard before the **HONORABLE DANIEL L. PERRY**,
Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa,
Florida, on

April 20, 2001, as follows:

APPEARANCES:

Wayne Chalu, Assistant State Attorney, 800 E. Kennedy Blvd., Tampa,
Florida 33602, in behalf of the State;

Linda McDermott, Martin McClain and Scott Mario, Esquire, Asst. CCC -
Northern Region, 1533 - B South Monroe Street, Tallahassee, Florida
32301, in behalf of the defendant.

COLLEEN MERRITT, OFFICIAL COURT REPORTER

800 EAST KENNEDY BLVD., COURTHOUSE ANNEX

CA-1-124, TAMPA, FLORIDA 33602

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THE COURT: Ready to proceed? Raise your right hand, please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: Put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Donald Lamar Smith, S-M-I-T-H.

THE COURT: All right.

MS. MCDERMOTT: I ask just to put something on the record regarding Mr. Smith's presence. Um, our office cooperated with the Hillsborough County Jail and we actually footed the bill in order to get Mr. Smith here because we thought he was very important his testimony including this portion of the hearing and so I didn't necessarily want to continue the hearing.

THE COURT: Okay, I appreciate that.

Whereupon,

DONALD LAMAR SMITH,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Mr. Smith, do you know an individual named Debra Smith?

A Yes, she's my wife. She had been my girlfriend.

Q Okay, and, um, how long have you two been together?

A Twenty-nine years.

Q Were you living together in 1996?

A Yes, ma'am.

Q Do you recall the address you were at in 1986?

A 1041 Harrison Street.

Q In the Central Park area?

A Yes, ma'am.

Q Do you know an individual named David Pearson?

A Yes, his nickname is Pine.

Q Nickname is Pine? How do you know Mr. Pearson?

A Well, we grew up so I believe we went to school and stuff.

Q And --

MR. CHALU: I couldn't hear.

THE COURT: They went to school.

BY MS. MCDERMOTT:

Q You need to speak up a little bit. How long have you known Mr. Pearson?

A Ever since '70, '71.

Q I'd like to show you, Mr. Smith, what has been moved into evidence as Exhibit Number 26 and I'm going photograph and I'd like for you to tell me do you recognize the individual in that photograph?

A Yes, that's Pine.

Q Now read what it says right there.

A Photo (b).

Q Thank you.

MR. CHALU: We since that is a composite exhibit which I don't know which part is significant.

MS. MCDERMOTT: I apologize, Wayne. That's photograph page four of the exhibit identified as photo (b).

THE COURT: Okay. He identified that as Pine if I'm not mistaken, correct?

MS. MCDERMOTT: Correct.

A Yes, sir.

BY MS. MCDERMOTT:

Q Now, Mr. Smith, did you also know an individual by the name of Katrina Graddy?

A Yes, ma'am.

Q And how did you know Ms. Graddy?

A I used to see her on the streets and associated with her many years ago when she was growing up.

Q And in June of 1986 in the morning did Katrina Graddy come to your house?

A Yes, me and my it was my girlfriend like she's my wife we have a porch and she walked up from town and 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.

Q She asked if your birth date was 9-25-57?

A Yes, ma'am.

Q Then what did she tell you?

A 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 --

THE COURT: All right, go ahead, I'm sorry.

BY MS. MCDERMOTT:

Q Mr. Smith, so when Ms. Graddy came to speak to you she didn't know your full name; is that correct?

A No she didn't know my full name.

Q She asked are you Donald Lamar Smith?

A Yes, ma'am.

Q And then she also told you that Pine had used your name the night before when?

A When he raped her.

Q Did it appear that she had bruises when she showed up; is that correct?

A Yes, ma'am, she had a lot of bruises around her neck.

Q Bruising on neck?

A She told me he had choked her neck.

Q She said --

A She said Pine did it. That Pine gave her some rocks to trick with her.

Q Okay, I'm sorry but when she showed you these marks on her neck did she say how those marks happened?

A Pine choking her.

Q Choking?

A Forcing her.

Q Then she proceeded to tell you why Pine raped her is that what you're just telling us?

A Yes.

Q Pine raped her?

A Because she gave him, Pine gave her some rocks and Pine I mean Pine gave her rocks and she wouldn't trick with him have sex with him so he took it.

Q So he raped her?

A Yes.

Q Okay. Okay, Mr. Smith, did Ms. Graddy ask you if you would beat up David Pearson for her?

A Yes, beat him up and I said, my wife told me no.

Q And after she gave you this information and told you to be careful because he used your name did she ask you to walk her down Scott Street?

A Yes, we were going to head down.

Q And what happened when you were walking down do Scott Street? Did you see anybody?

A Yes, we saw Pine.

MS. MCDERMOTT: Okay, stop right there. Your Honor, I would like if it's possible I think that at this time he is going to be using some curse words and I would like if that's possible I would like for him to possibly say those things he overheard if that's all right.

THE COURT: I'm sure it's nothing I haven't already heard in here, go ahead.

BY MS. MCDERMOTT:

Q Now, Mr. Smith, so you saw Pine coming in the other direction?

A Yes.

Q Did you say anything to Pine?

A Yes, I said, Pine, I said why in the fuck did you use my name and did this girl.

Q Okay, you told him that when he used your name when he raped that girl what you just said?

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 shit.

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 too loud.

Q Okay. Um, now okay. Now I want to move on to the next step. A week or so after she came to you with this information did something happen that seemed somewhat eventful to you?

A Talking about, um, when she got killed?

Q No, well, yes, yes okay so did you see the fire?

A Yes, I was in the park me and my wife and she said fire and the first thing I seen the smoke I see something burning.

Q Let me ask you this. When did you see in proximity to this when Ms. Graddy come to talk to you?

A I guess it was about a week or so later.

Q When you saw that smoke what did you do?

A Um, I ran down to the corner of the street.

Q When you ran over there did you see anybody?

A Yes, I seen Pine walking fast towards me.

Q Okay, and did Pine say anything to you?

A Yes, I said Pine, what happened down there and he said man, man, Katrina was found in there strangled. I said what? So I walked to the corner where the police were in the projects and some things going on and I said they found Katrina strangled and all of them turned around to me.

Q Donald, Mr. Smith, let me stop you for a moment. When the police turned around to you what did they ask you?

A They asked me for my I.D. after I say that they asked me who told you this.

Q Okay, when they asked you who told you this how did you respond?

A I said a guy told me.

Q So you didn't tell them that it was David Pearson?

A No, I didn't tell them that it was David Pearson. There was a lot of people out there. I thought they would call me a snitch or something.

Q Okay, but if the police had come to you later when there weren't people around would you have told them everything you knew?

A Yes, ma'am.

Q About the rape and Pine and using your name?

A Yes, ma'am.

Q Okay. Now, would you have told them Pine was the person you passed on the street?

A Yes, ma'am.

Q Who was in the house?

A Yes.

Q Now, a couple of weeks after Ms. Graddy's body was found were you hanging out with Pine?

A No, Pine came to my house.

Q Okay.

A I guess.

Q Pine came to the house, you cut hair on the street?

THE COURT: He cuts hair on the street.

BY MS. MCDERMOTT:

Q So someone came over for a hair cut?

A Correct.

Q And what were you doing on --

A I was cutting his hair.

Q While you were cutting his hair did you have a conversation?

A Yes, about killing Katrina and he said he said bitch did smoke my shit and called the police, fuck you and any way I just shut up and finished cutting his hair.

Q Okay. And did you tell anyone about that conversation that you had with Pine?

A I told a lot of people. I told her, told my old lady. I told Pine, not Pine but Knuckle.

Q Who is Knuckle?

A George Smith.

Q And, Mr. Smith, in 1986 did anyone who was helping Mr. Holton come to talk to you about what information that you had?

A A black man the name of Darryl.

Q Okay in 1986, anyone come to talk to you about?

A Talking about --

Q Back at the time this was all happening?

A No one came there.

Q And, um, if someone had come to speak to you would you have given the information that you provided today?

A Yes, I would.

Q Would you have testified at Rudolph Holton's trial?

A Yes, ma'am.

Q Okay. Now, Mr. Smith, where did you, you testified earlier that you resided at 1041 Harrison?

A Yes, ma'am.

Q And in 1998 did someone come and talk to you about Mr. Holton's case?

A Yes.

Q Okay.

A He called me up.

Q And did you -- where did you live at the time that someone came to speak to you in 1998?

A Next door to the second door.

Q Okay.

A 421023.

Q And did you ever, okay, and did you and your wife ever reside together at any other addresses throughout the past 15 years?

A No.

Q Between the two?

A Yes, ma'am.

Q Now Mr. Smith, if someone had come to you in 1986 and asked you who had raped Katrina Graddy would you have told?

A I would have told them --

THE COURT: Go ahead.

THE WITNESS: That Pine did it.

BY MS. MCDERMOTT:

Q Okay, and would you have told them about this information you told us today?

A Yes, ma'am.

Q And if they had come to you after Pine had confessed to you would you have told them that?

A Yes.

Q Okay. Now, Mr. Smith, why didn't you go to the police with the information you had about Mr. Pearson?

A Me and Pine well we was close friends.

Q Uh-huh.

A Like I said Pine and me and Knuckle.

Q Okay.

A From -- we grew up together all friends and we didn't do that back then.

Q Okay but no one came to speak to you?

A Yes.

Q Would you have talked to them?

A Yes.

Q Would you have told them the truth?

A Yes, ma'am.

MS. MCDERMOTT: Thank you, Mr. Smith. He may want to ask you some questions.

THE COURT: Mr. Chalu, you wish to ask any questions?

MR. CHALU: Yes, I do, Your Honor.

THE COURT: You may inquire.

CROSS-EXAMINATION

BY MR. CHALU:

Q Mr. Smith, you just testified that you didn't tell the police because Pine was a close friend?

A Yes.

Q All right, so what you're saying, sir, that you withheld material evidence in a murder case, right?

A Yes, sir.

Q Is that right?

A Yes, sir.

MS. MCDERMOTT: Nobody went to speak to him from the police department so he didn't withhold evidence.

THE COURT: Well --

MS. MCDERMOTT: I think I may have --

THE COURT: Rephrase your question.

BY MR. CHALU:

Q You knew about a murder and you did not tell the police about it, correct sir?

A Yes, sir.

Q And what you're saying today, sir, is that you knew that Mr. Holton had been arrested for this murder?

A Mm-mm.

Q Correct?

A I didn't know his name then but I didn't know his face either.

Q Did you know the person, you knew the person that was arrested for this murder was not David Pearson?

A Mm-mm.

Q Right, correct?

A Yes.

Q Say yes or no.

A Yes, sir.

Q Okay. So you knew that based on what you just testified to here that they had the wrong man in jail for this murder, right?

A Well, I told the police who did it. If they would just find me. I was in the projects so that was their job to do that.

Q So you told lots of people about what Pine told you, right?

A They could, the police could have come and questioned me too.

Q You could have told the police officer, sir, couldn't you?

A Yes, when you're in the projects the way I let or let them know that you couldn't call the police and tell the police you know what I'm saying?

Q Sir, you never told the police that Pine had confessed to this murder to you, did you?

A I told the police, yes, I did tell the police that.

Q You didn't tell them that did you, sir?

A Yeah, you're getting me confused. Can you repeat your question again?

Q You never told the police that Pine had confessed to you that he had done the murder?

A This man Darryl come to see me and he had a badge he was the police.

Q When did he come to see you, sir?

A Um, I don't know the year. It was I guess '98.

Q '98?

A Yes.

Q Okay.

A I told the other police that guy I told back who killed her and he got my address and he got my name.

Q You told the police?

A Yeah, about a year ago.

Q Listen to my question. You told the police the guy that had just walked away said that Katrine had been killed in the house, right?

A Mm-mm.

Q All right, you didn't tell the police that is the guy that killed her, right?

A No, I didn't.

Q Because at the time you didn't know that was the guy that killed her, right?

A What do you mean?

Q Because he only told you that, right?

A Pine?

Q Yes, he told you later that he killed her, right?

A Yes but he said it was a girl dead.

Q And --

A How can her know before anybody else do?

Q When Pine told you that he had killed her you never then went back to the police and told them that, did you?

A No, I didn't.

Q All right, that's what I'm getting at. Now you're saying Katrina came up to you about a week or so before the murder and told you that Pine had raped her?

A Yes.

Q So she asked for your date of birth?

A Yes, she said what day was I born and I told her.

Q Now --

A Yeah, now you're starting to confuse me, man.

Q Didn't you just say on direct examination by Ms. McDermott that she asked you what your name and date of birth?

A She said is your name Donald Lamar Smith and I said, yeah. She said, 9-25-57 and I said, yeah.

Q Where did she get your date of birth from, sir? What I'm getting at is where did Katrina get your date of birth?

A When Pine was telling the police officers my name. That's how she got the date of my birthday. She didn't know but then she came by in the morning that day she got raped.

Q All right, sir, for the next question, sir. Did anyone beside you hear Pine say that he had killed Katrina?

A No, me and Pine was friends and he let me know.

Q So he figured that you wouldn't turn him in?

A I guess he did let me know if --

Q You didn't go the police?

A Like I told you I told other people.

Q Now --

A He told her --

THE COURT: Wait for the questions, okay?

BY MR. CHALU:

Q You said these folks came to you see in 1998?

A In 1996 you said or --

Q 1998.

A '98.

Q Okay, they identified themselves as who, who were they?

A Darryl something, I don't know his name.

Q Darryl?

A He showed me a badge showed it to me.

Q Well, did he tell you why he was there?

A Yes, investigating the murder of Katrina Graddy.

Q What did he tell you about it?

MR. MCCLAIN: Objection, that's hearsay.

MR. CHALU: It goes to the witness' motive for testifying, Judge.

THE COURT: I'll overrule the objection.

BY MR. CHALU:

Q What did he tell you?

A I don't know I forgot.

Q I'm sorry, you forgot?

A Yeah.

Q Well --

A I was sitting as a matter of fact I was in the back drinking beers when he come up.

Q Okay, you were drinking beers where in your neighborhood?

A In the back of my house when he came up.

Q Okay.

A Partially drunk.

Q Then when he come up to you, who were you talking to when the man came to talk to you?

A Who?

Q The man named Darryl?

A Yes.

Q You were drunk?

A But not --

THE COURT: Partially drunk was his testimony, Mr. Chal.

BY MR. CHALU:

Q Okay, so you don't know what you told him?

A Well, I told him the same things that I told you all in court just then.

Q All right. Well what did he tell you?

A Yeah, would I come to court to testify and I said yes, I would.

Q Well did he say just come to court and testify? Did he say anything about the case?

A He didn't talk about the case.

Q He didn't ask you or tell you that he was an investigator?

A Investigating a murder.

Q Okay, did he tell you what murder?

A Yes, I just said Katrina Graddy and I said he didn't do it.

Q Did he tell you that they had the wrong man in prison?

A Did he tell me? I think he did. I'm not sure.

Q I'm sorry?

A I think he did but I'm not sure.

Q You think he did but you're not sure?

A Yes, sir.

Q Did he tell you that they needed your testimony to prove the man was innocent?

A Yes but he never come back to me.

Q Okay. How many times did that gentleman talk to you just once?

A No he talked to me several times.

Q Several times? When was the next time he talked to you?

A I wouldn't know dates or anything, sir.

Q Okay, well the next time they came to talk to you what happened?

A They asked me I don't know how you say it when you get a court date but they'll come get me.

Q All right, okay.

A But I think my girl was going through, she told me the same man came over looking for me but I was staying with somebody else at the time.

Q Right.

A I was seeing some other girl.

Q So they went and talked to your wife too?

A Um, I think he did. I'm not sure.

Q Did they talk to you separately or together?

A Separate.

Q When was the next time they came and talked to you? You said several times?

A That meeting there when this other man came to see me and I wasn't there.

Q Mm-mm.

A I was somewhere else.

Q Did they ever come to talk to you while you were in prison?

A Um, another dude did, a slender dude.

Q Okay. What from the same group of people did you ever cut Mr. Holton's hair?

A I think.

Q Okay what about this conversation what happened there?

A What I already told you.

Q Okay what did that gentleman tell you? Was that during that conversation in prison?

A Told me that I needed to come to court and tell what happened.

Q Okay. Did he tell you that they thought that Mr. Holton was innocent?

A No.

Q Okay. Had somebody said that to you before?

A No, they just said to come tell the truth and that's what I'm trying to do. The man is innocent.

Q Well, did tell you them you thought that he was innocent?

A No.

Q You didn't say that?

A The man needed help. I said I have been waiting for someone to come. I wasn't volunteering the help. I'm not going to volunteer because I'm in prison anyway at the time.

Q So if you're aware if somebody is innocent of a murder and you know who the guilty party is you're not going to volunteer it, right, sir?

A Not in the projects I'm not just like that.

Q You're in prison right now, sir.

A Yes, sir I'm in state custody. No one is going to get me there.

Q How many times have you been convicted of a felony, sir?

A Four times.

Q Four?

A Four or five, never been convicted of no murder.

Q I didn't say you had. How long have you been in prison now, sir?

A Now since January.

Q Okay. How many times have you been in prison?

A How many times?

Q Yes, sir?

A Five or four, five.

Q Four or five? Have you had since your sentence or contact with the defendant here Rudolph Holton?

A That man I can't get there.

Q Have you called him?

A No, sir.

Q Have you written him?

A No, sir.

Q Has he written you?

A No, sir.

Q When was your first felony conviction, sir, what year?

A I think '79, sir.

Q Okay. Did you know Rudolph Holton back in 1986?

A Yes, sir, I knew him before then but me and him we didn't talk that much.

Q You recognized him as somebody around the neighborhood?

A Sir?

Q You recognized him as somebody who was around the projects, the neighborhood, right?

A I see him around the neighborhood but we didn't really talk too much.

Q Okay. Just one moment, Your Honor. Did you ever see Rudolph Holton carrying a black shaving kit around?

A No, sir, not that I remember. It's been so many years ago, sir.

Q Were you aware back then in 1986 when Katrina was killed that Mr. Holton did drugs?

A Yes.

Q He did?

A Nodded affirmatively.

Q Do you know whether or not you had ever seen him in the house that was burned down where Katrina was killed?

A Well, a lot of people go in that house getting high, sir.

Q Sir, I'm talking before the murder did you see him go in the house?

A No.

MR. CHALU: I have no further questions.

THE COURT: Any further questions?

MS. MCDERMOTT: Can I have one moment, Your Honor?

THE COURT: Sure.

MS. MCDERMOTT: I have a couple of questions.

RE-DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Mr. Smith?

A Yes, ma'am.

Q David Pearson used your name after he raped Katrina. Was that the first time he used your name and date of the birth?

A No, ma'am.

Q That was not the first time?

A No, ma'am, he used my record to find out. He used my name plenty of times.

Q And, um, do you know when Pine's birthday is?

A I think August 27th, '58.

Q Okay, and when the people that were representing Mr. Holton came to talk to you did inform that Mr. Holton was innocent?

A Yes, I knew.

MS. MCDERMOTT: Thank you.

THE COURT: Anything further of this witness?

RE-CROSS EXAMINATION BY MR. CHALU

BY MR. CHALU:

Q Your date of birth is 9-25-57?

A Sir?

Q Your date of birth is September 25th, '57?

A Yes, sir.

MR. CHALU: Thank you.

THE COURT: All right, may this witness be excused?

MS. MCDERMOTT: Yes, Your Honor.

THE COURT: Do you need him any further?

MS. MCDERMOTT: No, Your Honor.

THE COURT: All right, he's free to go back where he came from.

MR. CHALU: If I may interrupt counsel for a second and I want to offer something to the Court because I don't know if I need to call a witness who is out of town in New Port Richey and it's not necessary for my case later but in rebuttal.

THE COURT: Okay.

MR. CHALU: There was already testimony in the form of the testimony that Mr. Birkins a colloquy where Mr. Episcopo represented to the court that Mr. Birkins had taken a polygraph concerning Mr. Holton confessing this crime to him and then in court yesterday we got into it a little bit more because when defense counsel questioned Mr. Birkins about how he could beat a polygraph he talked about like you can take a pill or tranquilizer or something of that sort.

In light of that testimony, Judge, my case before I would like to call in my case Jack Mehl who is available. He's back and he used to work for the state attorney's office and I would like to call him down here to refute that testimony concerning that you can fool a polygraph by taking a pill or tranquilizer or whatever like that because he's an expert polygrapher and I want to bring him in here if the Court is going to allow that testimony and I think it's relevant and germane and for rebuttal.

MR. MCCLAIN: In response, Your Honor, the results of a polygraph are inadmissible in any court because it's an area that is not recognized as having sufficient scientific value and the results of a polygraph examination I mean anything from a viewpoint of, a view so having a polygrapher testify regarding his opinion as to whether or not you can take a pill would be able to cause somebody to possibly pass a polygraph and give a false response is sort of minuscule anyway because under the law it's not a recognized scientific area or subject as expert testimony.

MR. CHALU: Well, normally it wouldn't be but they opened the door by introducing that exhibit which contains the representation that he had passed a polygraph and I think at that point it becomes fair game particularly in view of the fact that they then asked Mr. Birkins whether or not you can beat a polygraph and he said, yeah, you just take a pill so I mean certainly, Judge, they have opened the door and I'm entitled to address that issue so that testimony does not stand un rebutted.

MR. MCCLAIN: If I may, Your Honor, I believe it came up during cross-examination and nothing has been brought out to refute that but what the, the whole point is the polygraph results are not an aid because they're not considered to be reliable enough and whether this witness believes he had a method of appealing him or not the point is he passed it.

And that's not admissible as the fact he passed a polygraph is not scientifically reliable to be admissible in a court of law. Whether or not the polygrapher says you can't just take a pill or not to conceal it he passed it and that's really the issue. He passed it and he said he was lying when he passed it.

THE COURT: I'm sure -- well, I guess pursuant to their testimony I'll let you call him. I don't know how much weight I'm going to give that or the other as far as that so, yeah, you can call him.

MR. CHALU: Okay, thank you, Judge.

MR. MCCLAIN: With regard is it possible to do it over the phone today so we can finish today or --

THE COURT: He's going to be here today and we're going to finish today.

MR. CHALU: We'll get him here today.

MR. MCCLAIN: I was thinking --

THE COURT: No, we're going to finish this today. Who is your next witness?

MR. MCCLAIN: Our next witness is Elasis Moore.

THE COURT: Come up here and have a seat in the witness chair, please, ma'am. If you'd raise your right hand, please. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: You can put your hand down. If you'd state your name record and spell your last name.

THE WITNESS: Elasis Moore, E-L-A-S-I-S-E Moore, M-O-O-R-E.

THE COURT: You may inquire.

Whereupon,

ELASISE MOORE,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Ms. Moore, where do you live?

A I live at 1236 Burden Court.

Q Is that in Central Park?

A Yes, it is.

Q Did you live in Central Park in 1986?

A I have lived in Central Park all through ever since the fifties.

Q Okay. Do you know an individual by the name of Johnny Lee Newsome?

A We call him Georgia Boy.

Q That's what you call him?

A Yes, I do.

Q Did you know his real name is Johnny Lee Newsome?

A Yes, I did.

Q And did you know an individual named Katrina Graddy?

A Yes, I did.

Q How did you know Ms. Graddy?

A We were next door neighbors.

Q You lived next door to Ms. Graddy' mother?

A Yes, I did.

Q Were you friends with Ms. Graddy?

A Yes, I am.

Q And do you remember the morning when they found the body of a young girl in the vacant house on Scott Street?

A Yes, I do.

Q Okay and the night before they found the body where were you?

A Me and Johnny Newsome were in the vacant house off of Estelle Street.

Q You and Mr. Newsome were in a house together?

A Yes, we was.

Q Now did you two arrange to meet at the house?

A We went to the house together.

Q Okay. What time did you go to the house together?

A Well probably about nine o'clock.

Q Okay, and were you with Mr. Newsome around eleven o'clock that night?

A Yes, I was.

Q Now what were you doing in that house? What were you doing with Mr. Newsome?

A We was drinking, partying and um --

Q What do you mean partying? What do you mean?

A Having sex and drinking. He was smoking.

Q He was smoking drugs?

A Drugs.

Q Okay, and were you together all night?

A We was together all night.

Q When did you separate?

A We separated that morning. We came around the corner.

Q So you leave the house together?

A We left the house together and came around the corner and we saw a crowd of peoples so we wanted to know what was going on.

Q Okay, and did you learn what was going on over there?

A Yes, they found someone was in the house dead.

Q Did anybody know who the person was?

A No, they did not.

Q Okay now did you know an individual named Carrie Nelson?

A Yes, I did.

Q How do you know Ms. Nelson?

A We was neighbors.

Q She lived in Central Park?

A Off and on, yes she did she live in Central Park on Harrison.

Q Now did there come a time when you had a conversation with Ms. Nelson about Ms. Graddy's death?

A Yes, I did.

Q And do you recall how long after Ms. Graddy's death you had that conversation?

A Maybe about a year to six months something like that.

Q Now did Ms. Nelson tell you she had spoken to the police about the night of the murder?

A Yes she said the reason why she spoke to the police about that was because she thought Rudolph had stolen from her and she was going to get even with him.

Q So but what did she originally tell the police?

A I have no idea.

MR. CHALU: Objection to that because how would she know that unless --

THE COURT: She just said I have no idea.

MR. CHALU: This witness can't present what she talked to the police about. There's no predicate for that testimony.

THE COURT: Ask your question.

A She told the police I have no idea what she told them.

Q Okay, did she tell you she had seen them then?

A She said that Rudolph had went into the house.

Q Okay. Then she said, you said why she had said that to them?

A That's what she said.

Q It was?

A The reason was because her groceries was gone and she believed Rudolph had stolen them.

Q And did she also tell you that she lied to the police?

A Yes, she did.

Q And she told you that --

A She said I regret it and she knew she knew was wrong and she said she didn't want to die with that on her conscious. She wanted clear this up.

Q Okay. Do you know for sure whether she told anybody else about that?

A I have no idea.

Q Did you know if Ms. Nelson testified in Mr. Holton's trial?

A No, I did not.

Q Did you know if Johnny Lee Newsome testified against Mr. Holton?

A No, I did not.

Q Okay. Did someone come to speak to you in 1996 about Mr. Holton's case?

A Yes, they did.

Q Okay and did you find out through Ms. Nelson that Mr. Newsome had testified against Mr. Holton?

A Yes I did. I wondered how he could testify when I was with him, we was together and we came from around the corner together.

MS. MCDERMOTT: Okay. If I can have just a moment, Your Honor?

THE COURT: Sure.

MS. MCDERMOTT: Thank you.

THE COURT: Mr. Chalu, any questions?

MR. CHALU: Just a few, Judge.

THE COURT: You may inquire.

CROSS-EXAMINATION

BY MR. CHALU:

Q Thank you, Your Honor. How do you know Rudolph Holton the defendant in this case?

A I know Rudolph, I know him ever since he was stealing stuff and stealing out of school. I do not have no personal knowledge of him.

Q Okay, you have no personal knowledge of him?

A No, I don't know.

Q You're not friends with him or anything related to him?

A No, I'm not.

Q Okay. But you lived in the same general neighborhood as he did correct, ma'am?

A No, I did not.

Q Okay. Where was this place that you were allegedly with Mr. Newsome on the night of June 22nd, 1986?

A It was on Estelle Street.

Q How far is that from the burned house?

A It's not too far. It's only about a block away either way, you know, short cuts just a block away.

Q You said a block away?

A A block away.

Q Okay. And you said that night when you were with Mr. Newsome at this house a block away from the burnt house that you were drinking, partying, right?

A Yes, we were.

Q Okay. And would it be fair to say that you were, you were drinking to the point where you felt pretty good?

A No, I wasn't drunk.

Q You weren't drunk?

A No.

Q How many drinks do you have, do you remember?

A About two to three.

Q Two to three? Do you remember what you were drinking?

A We had shots of gin and Bull.

Q Okay. And what time did you get there, ma'am?

A We got there possibly nine o'clock at night.

Q Nine o'clock that night. And during that period of time did you fall asleep at some point?

A When we fell asleep we fell asleep, I fell asleep in his arms. He left them in that area no other kind of position.

Q Well do you remember, do you remember what time he fell sleep, ma'am?

A No possibly about twelve, one something like that.

Q How long did you sleep, ma'am?

A We slept until the sun rose.

Q Okay. So while you were asleep you know that Mr. Newsome was between there twelve and sun rise, right?

A Yes, I was in his arms.

Q You never even woke up that whole time?

A When I woke up I was his in arms was where I --

Q You don't know he could have left and come back during that period of time you were asleep and you wouldn't know about it?

A No, he didn't.

Q Okay. Now where did this conversation take place with Carrie Nelson?

A At her house.

Q And do you remember when that was, ma'am?

A It was all the way to a year to six months.

Q Okay. Now this was after the trial or before the trial?

A I have no idea about the trial.

Q Well, you knew that Mr. Holton or somebody had been arrested for the death of Katrina Graddy?

A Yes, I did.

Q Okay. Did you know it was Mr. Holton?

A Not personally I just, I never paid any attention.

Q Okay. Well when Ms. Nelson told you that she had not told the police the truth did you pick up the phone and call the police and tell them that?

A No, I did not.

Q Why not?

A I didn't want to interfere with it. I took it for granted that it wasn't my kind of business, sir.

Q Well, but ma'am somebody had informed you that the police had the wrong person who committed the crime and they're going down for murder wouldn't you want to tell the police that information was false?

A It wasn't important to me, sir.

Q So it was not your business that they arrested the wrong man for a murder is that what you're saying?

A I didn't understand what I was supposed to do because nobody come to me and asked me anything about it.

Q Well, couldn't you have picked up the phone and called the police and told them?

A I did not, sir.

Q You could have done that couldn't you?

A I didn't understand to do that.

Q Now when this person came to talk to you in 1996 where was that in your home?

A I was most like in the streets, you know walking the streets or something like that on the outside of my home or something like that. They didn't come to my address just for that.

Q What did they tell you?

A They -- I don't really remember what they asked me at this time.

Q Okay. Do you remember talking about whether they had the wrong man in jail for this murder?

A I didn't say anything about that either.

Q Um, did they say anything to you about that?

A No.

Q How did the conversation come about?

A They was talking about, I just told them what I knew about it.

Q Okay. Do you remember anything they said to you?

A Not right off it's been a long time.

Q Okay. So you don't remember anything they said to you back in 1996?

A I don't remember.

Q Okay but you do remember being with Johnny Newsome about ten years before that in 1986 at the exact time?

A I remember because we had been knocking around for sometime and I couldn't forget it I don't guess.

Q Do you remember Carrie Nelson telling you either in 1986 or 1987 about that conversation?

A I didn't know what day it was but I did remember, sir.

Q Okay but you don't remember the conversation you had with these people back in 1996 when they came to talk to you about the murder?

A Not right off not just like you asked I don't remember of it.

MR. CHALU: Thank you, ma'am.

THE COURT: Anything further?

MS. MCDERMOTT: No, thank you, Your Honor.

THE COURT: May this witness be excused?

MS. MCDERMOTT: Yes, Your Honor.

THE COURT: Ma'am, you're excused. Call your next witness.

MR. MCCLAIN: Mina Morgan would be our next witness, Your Honor.

THE COURT: Is she out there?

MS. MCCLAIN: She's out there.

THE COURT: Mina Morgan.

MR. MCCLAIN: Your Honor, she may be lengthy. I don't know how long you

--

THE COURT: Bring her in and we'll see how we're doing and we'll break for lunch when we can. Step up here to the witness chair, please, ma'am. Raise your right hand please, ma'am. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Mina Morgan, M-O-R-G-A-N.

THE COURT: You may inquire.

Whereupon,

MINA MORGAN,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MCCLAIN:

Q Ms. Morgan, my name is Mark McClain and we met last night and in order to try speed things up I showed you some documentation to help refresh your memory on this. Do you recall Mr. Holton's trial?

A Yes, I do.

Q Do you see him here in court today?

A Yes, I do.

Q Um, and were you able to refresh your recollection as to time frames do you remember when your appointment would have begun and when the trial was and that kind of thing?

A Yes, I took some notes on that. I don't think I would remember the dates without them.

Q Um and so if the record shows that you were appointed in July of 1986, is that consistent with your memory?

A Yes, it is.

Q And if the record were to show that the trial began December the first of 1986, would that be consistent with your memory?

A Yes, I believe it was right after Thanksgiving weekend.

Q And so you would have been representing Mr. Holton for approximately four months as the case went to trial; isn't that true?

A Yes.

Q Now just so the Court knows in terms of that time period those four months did you have other cases going on that you were handling?

A I looked at a couple motions to continue last night and I can see that it looks like there were about five trials set that period. I can't at this point in time remember which ones actually went other than Dr. Reese's case which went to trial for about a two week period immediately before this trial. That case involved 14 co-defendants, I think eleven of them testified in the case.

Q Okay, and for the record I'm going to show you a couple of motions for continuous that I think would help with your memory in that regard, and they are from the record it looks 852 and 817 of the record and first of all do you recognize your signature on those documents?

A Yes, I do.

Q Okay.

A Have you already marked these?

Q Pardon me?

A I don't see any exhibit number on it.

Q This is actually part of the court record.

A Okay, I'm looking at the motion for continuous with a certificate of service indicates September 30th.

Q Let me for record purposes that you know this is the page number 817 of the record on appeal and on this one, this document and it's hard to read 852.

A Okay, 817 which is a motion to continue which was delivered by hand on September 30th of 1986. That indicates that I had two trials set before Judge Menendez on October 27th, 1986.

A trial set before Judge Evans on November 3rd, 1986 and third trial set for trial set before Judge Graybill on November 10th, 1986. That, that trial was estimated to take about three weeks and with a normal judge it would have taken about three weeks. We worked two weeks and were there for night sessions. And I also said that I had a trial set before Judge Menendez on December first of 1986.

I think we can be sure that there the one before Judge Menendez on December first, 1986, didn't go. I don't know about the others other than the one before Judge Graybill.

Q Okay in looking at that in which you just recited was that your usual case load or was that a particularly busy time period for you?

A Was it particularly busy in the trial before Judge Graybill was Dr. J. Reese trial. It was an M.D. with 14 co-defendants. It was a drug trafficking case. We had a medical license that was at risk. We had a surprise witness that turned up in the second week of trial.

I was working I think probably not exaggerating about eighteen hours a day on that case during that trial. We were in court sometimes ten hours a day.

Q And were you concerned because of that trial regarding your ability to adequately represent Mr. Holton?

A I was. The concern arose even before we even, before we started Dr. Reese's trial, I knew that it would probably be a very grueling trial.

Q Okay, and that trial ended you said Thanksgiving?

A Yes, I think it was the day before Thanksgiving weekend began and then the next Monday, the following Monday was Mr. Holton's trial.

Q Okay. Now also I believe in those motions for continuous I was also given to point out do you see reference to Pine an individual by the name of Pine?

A Yes, on that first motion to continue which was the September one I stated I was unable to effect legal, legal service on four civilian witnesses in an attempt to serve them for deposition on October 22nd, '86 and that I believe that the testimony of, I'm sorry, it's the next paragraph the defendant discovered two of the witnesses that may be able to establish that the victim in this case was raped by a man named Pine approximately one week prior to her death and that the defendant in this case was charged with sexual battery, murder and arson and we were looking for Pine.

Q Did you receive information that an individual by the name of Pine was a significant witness and part of your reason for a continuous was in order to have more time in order to locate him?

A Yes.

Q In order to locate information regarding this incident?

A Yes.

Q Okay, and what was the date of that motion for continuous?

A The certificate of service is September 30, 1986.

Q At this point in time do you recall how that information came to you?

A I can't recall specifically that. I know that at one point in time we were having my investigator spoke with the victim's father and I recall generally, I know he said that the word on the street was that Pine had done this. I believe he may have said that he thought Pine had done this.

Q Okay.

A The name Pine kept coming up.

Q So you actually heard the name Pine from the victim's family?

A Yes, and I believe from Mr. Fernandez, but yes.

Q I am assuming you represented other capital defendants?

A Yes.

Q Is it unusual to have a victim's family providing information regarding other suspects?

A No, about the only time I've ever had that is when one member of the family was charged with the offense and also their family member.

Q I see. Now I'm going to hand to you from the record it's 823 and it's a motion to incur additional costs for the investigator and at this time I tried to help you out by having tabs there to point to you the paragraph. First of all do you recognize that motion as being a motion that you filed in this case?

A Yes.

Q And that was because of your need for additional investigation services to assist you?

A Yes, this case I know took a lot of investigative hours because it was very difficult to locate witnesses and when you did it was difficult to keep a handle on them.

Q When you say in this case it was difficult to locate witnesses can you sort of elaborate for the Court what problems were you having?

A A lot of the witnesses were street people, people that I don't know that anyone owned property, people rented, they moved frequently. We would get street names for witnesses and not real names and try to find out what their real name was.

Q And in this motion is there also reference to the person by the name of Pine?

A Yes, number 14 of the motion says the defense investigator spent numerous hours in trying to determine the true name of Pine. 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 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 a while we thought he was, might have been Johnny Newsome but nobody would ever say that Johnny Newsome went by that name.

Q Okay, and in the course of preparing your defense -- well first let me back up. Was your defense one of innocence?

A Yes, it was.

Q And why was that?

A Mr. Holton from the beginning maintained that he had not committed the offense, um, both my investigator and I believed that he had not committed the offense and that belief never changed.

Q Um, some people sometimes think that defense attorneys can be dilly eyed and think all their clients are innocent. Without revealing anybody else's case or information was it common for you to believe your clients were innocent?

A I had been a public defender for five years. I realized that most of the time my clients lied to me.

Q Okay. But in this instance you had concern that Mr. Holton was in fact innocent?

A Yes, I did.

Q And, um, then I assume you were looking for people who may have committed the murder in order to try establish his innocence in that fashion?

A Yes, we were.

Q And Pine was one of your primary suspects?

A He was.

Q Now that document that you have in front of you what's the date of certificate service on that?

A October 29th of 1986.

Q So that would be just a little over a month before the trial began?

A Yes, that was the month of the time that I could or was free to work just solely on Mr. Holton's case. I was, I was working primarily at that point in time also to get Dr. Reese's case ready.

Q Great. Now, in that motion and the motion for continuous would have been served on the state as well?

A Yes, the would have been.

Q Who was representing the State of Florida in this proceeding?

A Joe Episcopo.

Q So he would have been provided those documents making reference to Pine and your belief that Pine was significant to the case?

A Yes, definitely.

Q I'm going to provide you with what has been introduced into evidence as Exhibit 13 and 14. I'm going to ask you to take a look at those. I believe that I showed you copies of those last night so you would --

A Yes, you did.

Q -- save time so you would have a chance to peruse them before becoming a witness. Are those documents the documents that you had at the time of Mr. Holton's trial?

A Definitely not.

Q And in fact when is the first time that you saw those two documents?

A Last night.

Q Okay. Can you describe for the record what those documents are?

A They are police reports. They deal with a defendant named David Lorenzo Pearson.

Q First of all the copy quality obviously are not the best is that fair to say?

A Yes.

Q It takes a little bit of deciphering to be able to read that?

A One involves an alleged sexual battery and the alleged victim of that is Katrina Grant who is showing an address that is the same address that is on Katrina Graddy our victim in the Holton case death certificate.

Q Let me show you for the record Exhibit Number 22 which has been admitted into evidence so that you would have that as well. Is that the death certificate you were just referring to?

A Yes, and I compared the addresses and it's the same address as for Katrina Graddy. The birth date is the same except for a year and Katrina was 17 then and it wouldn't have been unusual at all for her to make herself a year older so when she can be considered as an adult.

Q And she in fact have also some legal problems as well?

A I believe one of my motions I may mention she had a warrant.

Q Okay. Okay, getting back to Exhibits 13 and 14. You were noting that you had identified the victim of the sexual battery as Katrina Grant?

A Yes.

Q But in comparing that to the death certificate does that seem the victim in this case the person you were looking for?

A It seems to be that it was really Katrina Graddy.

Q Okay, and is in looking at that report does it also provide information regarding other individuals that would have been significant to you?

A Yes, it does. David Pearson also David Pearson identified himself according to this it's David Lamar, Donald Lamar Smith and Donald Lamar Smith was an individual that turned up the morning after the killing asking questions of the police department about the killing.

Q And in fact I'm going to hand you an exhibit in that regard and for the record it's Exhibit Number 18 and it's already been admitted into evidence and I think that's what you were referring to there in your testimony just now; is that correct?

A Yes.

Q And go ahead and explain for the record the significance of how these documents related from your point of view?

A Well, it's significant to me on that I had the, had 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 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 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. Word again on the street was that Pine was angry at her that she had, had him arrested. Um --

Q Let me stop you one moment. 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.

Q Now let me just I think it's number 18 which is the one that you would have had.

A Eighteen is a police report.

Q You were aware of that police report?

A I believe that I was. It was in my file when I reviewed for this hearing so, yes.

Q So the name Donald Smith appears in that report?

A It does.

Q Is that something you recall that you wanted to investigate for this Donald Smith, or do you recall at this point?

A I really don't know at this point in time. If I had this report and it appears that I did have it then yes we would have been looking for Donald Smith and we would have wanted to interview him.

Q Do you know why you weren't able to find him?

A No other than the fact that I ran out of time.

Q Okay. If you had the other report would that have given you even more reason to find Mr. Donald Smith?

A It certainly would have.

THE COURT: Is this a good place for a break?

MR. MCCLAIN: Sure, this would be fine, Your Honor.

THE COURT: Let's break for lunch, ladies and gentlemen. How about 1:15?

THE BAILIFF: The court will stand in recess until 1:15.

(Whereupon, court was in recess)

(Whereupon, court was back in session)

THE COURT: Is Ms. Morgan, here?

THE WITNESS: Yes, sir, I am sorry.

THE COURT: Everybody ready to proceed?

MR. MCCLAIN: Yes, Your Honor.

THE COURT: Let's proceed.

MR. MCCLAIN:

Q I'm trying to remember where we left off. Ms. Morgan, you have the record so I don't want to separate the exhibits and let me check and make sure it's 18, record of discovery and it's four long pages and also page 822 which is from the record which is additional discovery in Mr. Holton's case and just ask you to look at that in terms of refreshing your recollection. First of all in this case you did ask for discovery?

A Yes, I did.

Q And these documents would be the formal pleadings filed by the state in response to your discovery demand?

A Yes, they would be.

Q Okay, and during the lunch recess I've been trying to I guess give you a chance to refresh your recollection with reference to and let me provide it to you Exhibit Number 18 which you testified to regarding previously and for the record Exhibit Number 18 is say what it is.

A It's a two page report and the initiating officer is T.A. Lawless and his I.D. number is 627. On the record 812 there's an Officer T.A L-A-W-L-E-S-W.

Q So apparently there was a typographical error in the spelling of his name?

A Well, there's also a typo on his I.D. number because it's number 16.

Q Okay.

A And Lawless on his report is number 627.

Q Okay, and the Lawless report and so the record is clear it indicates that Donald Smith was at the scene with information?

A Yes, but Donald Smith is not listed on either, either 822 or 810 through 815 which is the notice of discovery and the additional discovery.

Q Okay, and I'm also going to provide you with Exhibit Number 12 which has already been admitted into evidence and I'm calling your attention to the second page of it. This is in reference to Officer Lawless. That document indicates that he was excused without taking a deposition. Is that consistent with your recollection?

A Well, I've looked at it and we don't have a deposition from Lawless.

Q Okay?

A Ordinarily in a homicide even if I thought the witness knew very little about it and it was a police officer if I had a report from them I would make them come in just to say they don't have any knowledge outside the report. I would do that simply because I'm paranoid and I don't like surprises.

Q Right.

A If Lawless was excused then that probably means that I didn't have this two page report which is Exhibit Number 18.

Q In fact in the courtroom you have your trial file is present, correct?

A Yes.

Q Have you had a chance to look through it, I mean for every witness involved in the case did you keep a label file?

A I keep a label filed because I have a lot of trouble with names and ordinarily I'll get a police report and as I'm going through it the first time I'll create a file for each police officer who has any piece of any report even if it's a one page report and I didn't find a file folder for Lawless.

Q I'm going to hand you your file folder, well pulled out from your folder just to show this to you. There is a file folder on Officer Southwick; is it not?

A Yes, it is.

Q Now Officer Southwick is a name that does appear on exhibit, what is it number 18?

A Yes.

Q Because he was a supervisor?

A Yes, he's initiated it as, yeah, he's not the editor but it's down there.

Q And there's no question that you did have the name Southwick and you have a file on Southwick and in that file you do have a police report?

A Yes, it's a six page report and all the pages one through six are here and on this one it's interesting Southwick signed as first officer and Lawless signed as second next to it as second officer which at least I thought then but not now that he perhaps did it with him but actually everything that was writing it down was Southwick.

Q Okay. And but there's no question that in that file marked Southwick you do not have Exhibit Number 18?

A Eighteen and that I probably would not have put that report in this Southwick file but first signing officer was Lawless but if I had a report I would have filed it just like this with T.A. Lawless' name with that two page report.

Q Well --

A If I had it.

Q Just for the record and if the state doesn't object just to show what you are talking about I'm going to offer this as an exhibit so that you can you have on the record the manner in which you would keep a file and what is, what you would have in a file.

THE COURT: Any objection to it, Mr. Chalu?

MR. CHALU: Just give me one second, please.

THE COURT: I assume you're not offering the contents of the file.

MR. MCCLAIN: No, it's just demonstrative.

MR. CHALU: Judge, let me just ask one question of Ms. Morgan voir dire on.

THE COURT Go ahead.

VOIR DIRE BY MR. CHALU

BY MR. CHALU:

Q Ms. Morgan, you recognized this as a file which came from your files in this particular case of Mr. Holton's case?

A Yes, because he did not testify there is a sticky taped over it, yes, it's my handwriting on it and he did not testify.

Q Do you recognize this as your file?

A Yes, it's got the, it's got the same labeling system that I use and they're all the same color ones I was using for this trial.

MR. CHALU: No objection, Your Honor.

THE COURT: All right, it will be so received as Defense Exhibit Number --

MR. MCCLAIN: Thirty.

THE COURT: Thirty.

BY MR. MCCLAIN:

Q In fact I think by mistake when you delivered the file you also delivered another person's file and you color coordinated your files so that the Holton files have blue labels and this other person file had yellow labels?

A Yes, I believe it was the Brate file.

Q So in examining the notice of discovery that was provided by the state and the additional discovery which lists the reports and Exhibit Number 18 and also I guess Exhibit Number 12 which shows Lawless was excused, um, at this point in time can you tell whether you had in your position or provided Exhibit Number 18?

A I didn't have it and I'm willing to bet that I excused Lawless from this deposition because I saw Lawless as just a second signer on that six page report that it was really Southwick doing the interviews and I had Southwick coming to the deposition to answer questions about it.

Q Okay now in that number 18 that report Donald Smith's name appears and can you state for the record what information regarding Donald Smith is provided in terms of being able to locate him?

A In talking about Smith it says, it identifies him as Donald Lamar Smith. It gives a TDID number on his I.D. number of 220071 and says that he used to live I think it's 3804 Jackson Street but now he lives at 1041 Harrison Street and his Florida driver's license number is also here and identifies him as five foot eleven.

Q So with that information you would or should have been able if you had that information to locate him if he was at that address?

A I think we could have because especially even if the usual driver's license and address didn't work if you had the TDID number we could

find co-defendants on his other cases and maybe find him that way. There was a lot of, a lot of information in there.

Q And also in Exhibit Number 18 the information Donald Smith provided the police, looking at that now is that information that you as the defense attorney for Mr. Holton would want to investigate?

A Yes, particularly if on the second page it says note approximately 11:30 hours black male walked up to the crime scene area and asked me quote "Who choked Anita, what happened, who got choked?" unquote. She was strangled with a ligature. I would have wondered how this individual would know she was choked at all and the fact that this individual had that information even if a person just overheard it out there would have been enough that I would want to find him and I am probably positive would want to put him on.

Q Okay.

A He is someone in the area that has some knowledge about a death and what happened to this woman so I would really want to know because he would have been a suspect in my mind.

Q Okay. I'm going to just provide back to you the other exhibits which I left off. You had most of them on the stand, 13 and 14 and 22, the death certificate, and 13 and 14 are sexual battery and obstructing police reports. Again as the information regarding of Donald Smith piles up on the witness stand in front of you obviously, you would have as a defense attorney would have more reason to want to talk to him?

A Yes, I would have found out that Pine's real name was Pearson and that Pine ten days before had reportedly raped this girl and then claims that his name was Donald Smith. I would have been suspicious had I had exhibit 18 that not Donald Smith that maybe Donald Smith was Pine even.

MR. MCCLAIN: Right, okay, and I'm going to hand you well first let me show this to the state. I'm going to hand you what has been marked as Exhibit Number 31 and 32. I'm going to offer them into evidence as well.

THE COURT: Any objection, Mr. Chalu?

MR. CHALU: No, Your Honor.

THE COURT: They will be so received, 31 and 32.

BY MR. MCCLAIN:

Q If you could just for the record look at those and explain what those documents are.

A Both 31 and 32 are my notes. I can't really tell from them when I made them or why I made them.

Q It's your handwriting?

A It is my handwriting.

Q From your trial file?

A Yes.

Q Okay.

A It's definitely on this case. On 32 I've written down Pine lose. I've got put, put Pine then there's dark fat, I can't tell if there's anything else there.

Q So because you indicated you had some information regarding Pine you wrote it down?

A Yes, there is also there's some Darryl is listed on there and you reminded me that Darryl was the father of Katrina Graddy's --

Q Angry boyfriend?

A Boyfriend, I think he may have been the father of a child by her.

Q Okay.

A Going to say -- well let me look at my notes from my meeting with him if I can even tell.

Q Okay, and the thirty?

A The 30?

Q Thirty-one.

A And 31 I can't read 31. I can't read one word but there is a little line again Pine choking her and then a little line it says "N" and then I can't read the next word oh, it's an "x" at bottom.

Q There is also on the back of this motion you had filed information you had regarding Pine perhaps sexually assaulted the victim previously?

A Yes, I have got Terry Hayes written on the top of that who I think was the father of her child. I have got Terry Hayes in here at the bottom so it may be we were not interested in interviewing him. I think certainly if I had got the information concerning after the pieces of information about Pine choking her and something about a sexual assault that would be a material source of that especially saying that it was Pine that had done this to her earlier.

MR. MCCLAIN: Now, I'm going to provide you with Exhibit Number 33 which the State I believe has indicated --

THE COURT: Any objection?

MR. CHALU: No, Your Honor.

THE COURT: It will be so received number 33.

BY MR. MCCLAIN:

Q The deposition of Pam Woods. And do you recall first of all the question do you remember Pamela Woods?

A Yes, she was the girl unfortunately she did not show up on the day she was supposed to testify but she was, she was a friend of Katrina and I think basically more than friends. I know they worked the streets together a lot.

Q Okay. Now I'm going to show you the deposition and I believe it has a date on it of October 22nd, 1986. I'm just calling your attention to a couple of passages. On page 28 of the deposition I believe there's reference to, um, Pine?

A Um --

Q I might have flipped it back.

A I think yes, there is a question by Mr. Episcopo and it says the question, Yeah, he brought some, brought that night he was with a black guy; do you remember that? The witness, Well then he probably would have been with Pine or something but I don't remember him. I know I had seen him somewhere but I didn't you know, know them or nothing. I don't know what you're talking about. Pine is mentioned.

Q Okay so there is reference to a white guy being in the neighborhood?

A Yes.

Q Do you remember at the trial of a person by the name of Carl Schenck testifying?

A Yes, he was a white guy that the, that was parked out in front of the house where the fire was and the body was found.

Q Okay, now if you had that information regarding Pine and the name for Pine then available or would you have wanted to try to determine whether or not Carl Schenck may have seen Pine that night?

A I think I would have. Well, I would know there was a photograph on file with I think a police report and I had an I.D. number, you got a booking photo and it's not any better photo and I would have possibly shown it to Mr. Schenck.

Q Okay. I am showing you Exhibit Number 26 which has been admitted into evidence and it is an affidavit of Carl Schenck and I attached to it an affidavit. The last two pages are actually booking photos. Does this -- are these things you would have wanted to show Mr. Schenck?

A Yes.

Q In that second photo I believe it is on the very last page marked "b" is a booking photo of Pine or David Pearson. Is that, I guess that's -- what would you have wanted to do with it?

A I would have wanted to show that to him.

Q And you would have done that?

A I would have.

Q Okay. I'm showing you information regarding Pine's identity, David Pearson you would have done a check on his criminal record?

A We would have, yeah, we would especially we would run his criminal record and we would have tried to interview him even though I'm realistic that he probably wouldn't have confessed.

Q Now I'm going to provide you first with Exhibit Number 15 which is already been admitted into evidence and it's a deposition in David Pearson's case taken in April of 1986. I call to your attention because it contains some information regarding a criminal matter and obviously in April of 1986 regarding Mr. Pearson you would have tried to ascertain what criminal charges were pending; is that correct?

A Yes, I would have.

Q In looking at that is there anything you notice in terms of who the attorneys are that are involved in Mr. Pearson's case that would be significant to you?

A Yes, Brian Donerly was a defense attorney back at that time and Brian and I own property together. We are still close friends. We don't see each other now but then we saw each other on a very regular basis and spoke regularly. I probably I would bet that I ran the facts of the Holton case past him probably even consulted with him for advise on how to deal with evidentiary matters.

Q Now, I am going to hand you what has been introduced as Exhibit Number 16 and this is a police report and I believe it is connected with the criminal case that you have the depo from and I just want to call your attention to if I can to line on the second page and it says, I noticed black, brown leather pouch in the defendant's possession. Is that the kind of information in reference to David Pearson and his possession of such a pouch that would have been significant to you in representing Mr. Holton?

A It would have been. This Schenck the man who picked up him hitchhiking and let out of the car and by the scene of the crime had a little black pouch and I had looked at the pouch and there was all kinds of things in the pouch and none of them appeared to be related to Rudolph Holton, none of the things that you would likely to have in a pouch. I know one thing that there was a Gibb's High School reunion notice and looking at the age for Mr. Holton I would probably looked to see if Pine had any relationship with someone from Gibb's High School and if he went to Gibb's High School and if in fact that he carried a little pouch I would have wanted to get into evidence.

Q As a matter of fact do you remember that black pouch or black shaving kit was it in fact taken into police custody from Mr. Schenck?

A Yes.

Q Just for the record I now have from the trial State's Exhibit 13 and just so you can see to refresh your recollection was that actually introduced?

A Yes, that looks like it.

Q And so, um, there what you would want to know if there is a photo of David Pearson?

A Yes, if he's the one tied with Katrina Graddy I know that.

Q Okay. This police report there are some things that may be worth pursuing in that regard?

A Yes, at the time of this arrest of Mr. Pearson he had a black, brown little shaving pouch or a pouch, yes.

Q Actually I had began to get to the deposition of Pam Woods and I just want to draw your attention to page 36 of it. And in fact at that point in time does Pam Woods say something in reference to Pine regarding the bag?

A Yes there's something on page 35 too.

Q Okay so she indicates that Pine was known to carry such a bag?

A To carry a bag around in his hand.

Q Okay.

A There's a question of a black bag and she says I don't know I think so a black case type bag, you know, shaving kit is what she says yeah one of them little cases, right, it was a bigger bag. There was a bigger bag and she's talking about a bag but I can't tell if it's a little one or a big one.

Q Thank you. Just to first of all --

THE COURT: How much longer are you going to be?

MR. MCCLAIN: I think we're going to finish that matter now.

THE COURT: Is this your last witness?

BY MR. MCCLAIN:

Q Yes, Your Honor. Um, Ms. Morgan, again your representation of Mr. Holton did you become familiar with a person by the name of Flemmie Birkins?

A Yes, I did. He was the jail house snitch.

Q Okay, and do you recall that he testified against Mr. Holton?

A Yes.

Q Do you recall the testimony or his representations in court to you as to what consideration if any he was receiving?

A Yes, he claimed he wasn't cutting any deal, that there weren't any promises or anything. Basically he was expecting I believe to get a three year sentence however.

Q And I'll hand you what has been marked or been introduced at trial as Exhibit Number Eight which is a presentence investigation report regarding Mr. Birkins. And I'm going to hand you Exhibit Number Nine which is a score sheet and looking at the score sheet first of all what does it indicate was the range of the sentence?

A 185 points.

Q And then -- what does it have on there?

A I'm not sure, I'm sorry, these things have changed so much over the years. I didn't know where to look. It looks like nine to twelve year range.

Q Is that what -- did you know that at the time?

A No, I thought the guidelines would -- I was thinking maybe three and a half to four and a half or three and a half to four that was the range that I was told.

Q Were you ever provided with a presentence investigation regarding Mr. Birkins his criminal history?

A No.

Q No? But if you had been provided with that information would you have been able to determine where Mr. Birkins fell on the score sheet?

A I should have been able. I think if I had looked I would have at least been suspicious of a three and a half, four and a half range on him. I would have known it should have been higher than that probably.

Q And I'm going to hand you Exhibit Number Six which has already been introduced into evidence which is a handwritten motion for probation. Do you recognize that document? Do you know if you were familiar with that document at the time of trial?

A I didn't have it at the time of trial. I saw this last night for the first time.

Q I'm going to provide you with Exhibit Number Seven which is a FDLE report dated November 29th, 1986 so that would have been written prior to the trial of Mr. Holton. Did you have that information?

A No, I don't believe I did. It's, it's a criminal rap sheet. I think he couldn't, I could have counted up the convictions and figured out that the guidelines I was given could not have been right.

Q And I'm going to provide to you what has been introduced as Exhibit Number Ten which is a transcript of the sentencing proceeding that occurred on December 19th, 1986 which was obviously after Mr. Holton's trial. Do you recall ever having access to that transcript?

A Not until, not until CCR got involved in the case and I'm not sure when I first saw this. I know I looked at it last night but I think someone in your office had shown it to me before.

Q And would you have -- do you know when your representation of Mr. Holton ended?

A Probably about early, early January of 1987 I would think.

Q When you filed the notice of appeal? I'm going to hand you what has been marked and it's from the record page 894 which is actually the notice of appeal.

A That's my signature. That's my signature right there.

Q So January of '87?

A Yes, or early January.

Q So to you were never made aware of the sentencing that happened in December of Flemmie Birkins?

A No, it was within the last few years that I found out what a good deal he eventually got.

Q Okay, and also just to complete that Exhibit Number 11 which is actually the judgment labeled judgment of guilt and I believe it's also dated December of 1986, December 19th.

A That's the final judgment of guilt placing the defendant on probation.

Q So again you would not have ever been provided with that document?

A No.

MR. MCCLAIN: I'm going to show Exhibit Number 34 and I have shown it to the state and I don't believe they have objection to it.

MR. CHALU: No.

THE COURT: It'll be so received number 34.

BY MR. MCCLAIN:

Q And I'm handing you Exhibit Number 34 which is a police report and I believe it's within the pages you can see actually 18 pages long but it's, um, one of 18 and it's also signed by Detective Durkin.

A Okay.

Q Do you remember his involvement in the case?

A Yes, I do.

Q And I'm going to call your attention to the page that has a little green tab on it. Do you recall noticing before or do you recall that information the time frame that Mr. Holton was arrested?

A No, I recall the last thing Birkins is saying that he's talking to Holton's statement, that Holton is really talking about these two detectives.

Q Okay.

A About Noblitt and Durkin. I didn't notice that at the time of trial.

Q Do you recall actually trying to examine Mr. Birkins regarding the police report indicating that Mr. Birkins instead might have talked to Mr. Holton and trying to cross him and that these photographs were inconsistent with what his testimony at trial that was around 5:30?

A Yes, because at the time he said it was 5:30 but when he left the or talked to the officer in the police report he said another time. He said it was 1:30.

Q So there was a point of doubt, you noticed that was inconsistent testimony and when Mr. Holton was actually arrested?

A I know I hadn't noticed it.

MR. MCCLAIN: Your Honor, I'm going to move in this case Number 35 into evidence and I don't think the state has an objection.

THE COURT: Any objection, Mr. Chalu?

MR. CHALU: Not for purposes of this hearing, Your Honor.

THE COURT: Thirty-five will be received.

BY MR. MCCLAIN:

Q And again quickly it's property from 1984, 1984 regarding Flemmie Birkins in which he indicates that he has worked for the police as a C.I. Did you have any information regarding that?

A No, and I deposed Flemmie Birkins.

Q Had he told you that he was a C.I. for the sheriff's office or TPD that would have been significant information for you?

A Yes.

MR. CHALU: Judge, it's a very bad copy.

THE COURT: What is it?

MR. CHALU: It's a DOC report which is an attached letter which purports to be Flemmie Birkins and it's just a difficult copy to read. The last page of the letter is largely impossible to decipher except for the signature. Well actually the second line, past the page, the last page you can't decipher and I'm going to object just for that reason.

THE COURT: What is it for?

MR. MCCLAIN: Your Honor, the handwritten letter that is attached is indicating that he is telling the, the Department of Corrections there that to look at my record and to call on me it will explain all about my assistance in helping the Tampa Police Department to cut down the crime rate.

THE COURT: I'll let it in.

MR. MCCLAIN: Number 36.

THE COURT: Thirty-six will be received over the State's objection.

BY MR. MCCLAIN:

Q I just point out to you the reference I believe shown to you last night regarding Mr. Birkins representation that he had helped the Tampa Police Department cut down the crime rate. Did you have information like that?

A No.

Q What about this would have been significant to you?

A It would have been if had the letter and I would have been able to cross-examine.

MR. MCCLAIN: I'm going to show you Exhibit Number 37 which I have shown the state and the State hopefully has no objection.

THE COURT: Any objection, Mr. Chalu?

MR. CHALU: Your Honor, not for this hearing.

THE COURT: It'll will be so received.

BY MR. MCCLAIN:

Q This is a police report dated after the trial so it obviously didn't exist at the time on the 20th of 1987. I just call your attention to the fact that it's a sexual battery allegation being filed against Mr. Birkins and I'm turning to the page where there is an interview of him and he's asking for Detective Noblitt. Is that significant information as Mr. Holton's defense attorney even though obviously it didn't come into existence until after the trial but would it have been relevant so that you would have wanted to know or the information that Birkins provided against Mr. Holton?

A It would have been relevant to me in that Detective Noblitt and Detective Durkin were the lead detectives in the case against Mr. Holton.

Q Okay. Do you remember Red Clemmons?

A Yes, I do.

Q And in fact did you actually call Red Clemmons as a witness?

A Yes.

Q To some extent as an alibi witness?

A Yes.

Q I'm going to provide you with Exhibit Number 17 which has already been admitted into evidence and I believe that is from your trial file. Look at those documents and do you recall that?

A Yes.

Q Could you explain what that is?

A That would be a transcript of the taped conversation that we had with Red.

Q Okay. And do you recall that it was at the time of trial and you made sure that it was an accurate rendition of the statement but for identifying who the questioner is?

A Yes, and Red had signed this as being accurate but what I did, I recall this being difficult because Red it was hard to understand him. I don't know if he talks fast or if something about the dialect problem but I know that I had the transcript and tape as I was listening to the tape I was looking at the transcript.

Q Okay.

A Whether it's word for word or a little different this is the transcript of what he said and it's accurate.

Q Okay.

A It's accurate.

Q In fact these are cassette tapes that go with that transcript?

A Yes.

Q And again just to try speed things along I don't think I'll be much longer but in reference to that do you recall that Red provided you information in reference to a cigarette pack?

A Yes, he did.

Q And the cigarette pack was significant in what way in this case?

A It was significant that we had testimony from a detective that he had found the cigarette pack in the room adjacent to the room where the body was found and I think several days after the body was found there was a pack of Kools and it was sent off and it was Rudolph Holton's fingerprint on the back of Kools.

Q And so that was a physical link of Mr. Holton to that house there where the body was found?

A Yes.

Q And what did Red, what information did Red provide you in reference to that?

A Red told us that one of the detectives had come to the house, his house and I think he may have been looking for some of Mr. Holton's clothing because Mr. Holton had been staying there and Red said that one of the detectives had picked up a pack of cigarettes that was there and took it out of his house and it was taken when they left the house.

Q Now I'm going to show you State's Exhibit Number Seven from the trial. Do you recall that picture or pictures like it or that being the scene inside that house?

A Yes, I can't tell you if that's one of their's or one of ours but I don't know. You can tell me.

Q It's State's Exhibit Number Seven from the trial and indicates it was taken June 23rd of 1986 at 722 hours.

A I went there naturally long after it happened and it still looked basically like that. This was one interesting thing in the trial there was all kinds of junk there, various people using drugs there and numerous packs of cigarettes when I went in and three months later I bet four or five packs of cigarettes in that house.

Q Okay. Obviously, you chose not to present testimony from Red regarding his observations regarding the police officer?

A Yes.

Q And just so for the record could you explain how you would reach that conclusion?

A Red was very threatened by the Tampa Police Department. Um, he didn't want to testify in court. He thought one of them took the cigarette from his house. I was, I was afraid that if I did put him on he would say well, that's not what I meant and he can up the testimony or that I would, you know showing him a prior statement and I didn't want to sell that to an average Hillsborough County jury that a police officer would have taken evidence and planted it. I didn't think it would sell.

Q Was it your position that the cigarette pack really didn't show anything any way?

A Yes, because Rudolph Holton had been in the house before and he said that he went in there to use drugs and he went to smoke cocaine.

Q Okay, there were many cigarette packages laying around?

A As you look everyone in the neighborhood was there using drugs. There were Cola cans in the middle of the floor, burn marks, used crack pipes. This was a drug hang out an abandoned house where people go to use drugs.

Q I want to show you and I'm going to point out on Exhibit Number 12 to you and there's a name Willie Simmons that is on that. Do you recall who Willie Simmons was in this case?

A I can't remember who he was.

Q Okay.

A That wasn't his real name, was it?

Q No, and actually I'm going to hand you something that may help. This is Exhibit Number 23 and it's already been admitted into evidence. And you can notice it is a deposition of Carrie Nelson. Do you remember Carrie Nelson?

A Yes.

Q And I'm calling your attention to page 313 of this deposition.

A Okay, yes, he was someone who Carrie Nelson was with her when she saw Rudolph Holton on the date of the killing there by the vacant house where the body was found.

Q Do you remember were you ever able to locate Mr. Simmons?

A We weren't able to. I know Sonny was trying to locate him.

Q And were you successful when you made an attempt to find him?

A No, we were looking for him. I was, I was afraid that he might just bolster Carrie Nelson's testimony.

Q But not having talked to him obviously you didn't know whether to worry?

A I wanted to talk to him and then not really expect to get a whole lot from him probably.

Q Was this a situation where you just ran out of time?

A Yes.

Q I'm going to hand you Exhibit Number 24 back and I'm trying to find my place. This is number 34 which is a police report by Detective Durkin. I'm turning and I think it's on page ten of that. I can't tell what number it is but it's regarding the officers at 1400 hours on June 26th of reference to Mr. Newsome.

A Yes.

Q Now do you recall this report in terms of it indicating Mr. Newsome saw the, claimed to have seen Mr. Holton in possession of the black bag after the homicide?

A Yes.

Q And in relationship to the trial do you recall how that would be significant for impeachment of Mr. Nelson?

A It would have been significant because he claimed to have seen Rudolph Holton with a bag after the bag would have already been either locked to Mr. Schenck's case or TPD custody after they searched that car.

Q Mr. Schenck had in fact had the bag in his vehicle with him when the police were knocking on the window?

A Yes.

Q When the body was found?

A Yes.

Q So that would, that would have been impeachment of Mr. Newsome's version. Do you recall whether you presented that?

A I didn't present that.

Q Did you have any reason for not presenting it?

A No, I think I should have presented that.

MR. MCCLAIN: I'm showing you what is marked as Exhibit Number 38 and I've shown it to the state and I don't believe there's an objection.

THE COURT: Any objection?

MR. CHALU: No, Your Honor.

THE COURT: Number 38 will be received.

BY MR. MCCLAIN:

Q Just calling your attention to that document to that regarding Mr. Newsome and it shows charges pending against him in that time period between the homicide and his testimony at trial. After reviewing that do you recall knowing that there were that amount of charges that he picked up during this time period?

A I don't think I knew.

Q Okay. And in terms of is there any strategic reason if you did know for not asking him about them?

A No, there wouldn't have been. It's Johnny Lee Newsome's motion to continue and he was one witness that I was given the name or his true address very late. I was late in deposing him and when I did depose him it was at the end of Dr. Reese's trial waiting for a jury. I don't specifically remember. I don't have a motion to continue but I'm thinking there might have been.

MR. MCCLAIN: In fact, we would introduce the deposition of Johnny Lee Newsome dated the 25th, 1986 as Number 39.

THE COURT: Thirty-nine?

MR. MCCLAIN: Just a second.

THE WITNESS: I think the record should reflect the depo was taken three days before the trial.

BY MR. MCCLAIN:

Q What are you referring to?

A I think it was taken late. I think the motion to continue in September indicates or one of the motions to continue indicates I had just gotten his address and yes, we took him very late.

Q Okay.

A At the time I took it I was already close to totally exhaustion.

THE COURT: You got anything else you're going to admit?

MR. MCCLAIN: We're just about done, Your Honor.

THE COURT: Okay.

BY MR. MCCLAIN:

Q Um, now did you also in representing Mr. Holton did you learn that he had dentures?

THE COURT: That he had what?

Q Dentures?

A I don't remember.

MR. MCCLAIN: I'm going to and I've shown the state.

THE COURT: Are you going to admit his teeth? Are you going to admit 40?

MR. MCCLAIN: Yes.

THE COURT: Any objection?

MR. CHALU: No, Your Honor.

THE COURT: It will be so received.

BY MR. MCCLAIN:

Q I'm showing you the police department crime scene supplement and I'm calling your attention to the two pages and pointing to the paragraph that starts the 25th, 1986 regarding the activity of Detective Durkin in looking for a denture plate.

A He returned to the crime scene for a denture and there's my handwriting over to the right and it's written with a triangle defendant missing upper plate so I must have known.

Q And is that significant in this case in terms of Mr. Schenck's testimony that was presented by the state to try to establish that Mr. Holton was the hitchhiker that he had picked up?

A I can't recall if there was something about him. I don't know if he remembered something unusual about the hitchhiker's teeth.

Q Okay, right off the top of your head you don't remember?

A I don't remember.

MR. MCCLAIN: If I may just have a moment I think I'm just about done. I may be done.

THE COURT: Do you remember one gold tooth?

MR. MCCLAIN: Your Honor, at this time I have no further questions.

THE COURT: All right, Mr. Chalup?

MR. CHALU: Can I request a very brief recess for two reasons? I want to get the clerk to pull some exhibits and it will make cross-examination go fast and two, I need to notify one of the witnesses to come down here so when you want to start again we can start calling my witnesses.

THE COURT: How long are they going to take?

MR. CHALU: Judge, I don't think any more than an hour or so.

THE COURT: Okay, let's get them here within the hour, all right, and we'll take a ten minute recess.

(Whereupon, court was in recess)

(Whereupon, court was back in session)

THE COURT: You may inquire.

CROSS-EXAMINATION

BY MR. CHALU:

Q Ms. Morgan, referring to Defense Exhibit 39 which is the Newsome depo, do you have that in front of you?

A I don't.

MR. MCCLAIN: I'll help you put these exhibits, I'll be happy to put them in order to maybe help in the future.

MR. CHALU: That'll be fine, thank you. I want to see the last thing he showed to you.

MR. MCCLAIN: I think I left it up over here.

BY MR. CHALU:

Q Thank you very much. Referring to Defense Exhibit 39 which is in evidence which is a deposition of Johnny Lee Newsome. Ms. Morgan, you indicated that you had not been made aware of the fact that Mr. Newsome might have some pending charges during this period of 1986 when this case was pending or during the trial is that what you stated?

A I don't remember any.

Q Okay. Would you -- referring to pages 20 and 21 would you begin reading at page at line 19 on page 20. Just read that to yourself and then all of page 21 and all of 23 and I'll have a question for you.

A I'm just reading he's talking about being a witness and things. I don't see anything where it clearly says there's something against him.

Q He indicates to you on page 20 when you asked him line 19, on page 20, do you have kind of charges pending against you now? He said me? You said, yes. He said, no, well, hold, wait a minute let me see and then it goes on to talk about another case and then on page 21 at the bottom he is talking he thought he had where he knocked somebody down and beat him up and so on and so forth.

A When I read it he's talking about how he's a witness in something and he doesn't understand the difference between the charges he's on and the charges against him and --

Q Okay.

A In the knock down I couldn't, I thought he was talking about one of the cases he was a witness in.

Q Now when you moved for a continuous, Ms. Morgan, again this was late November early December that wasn't the first time you had requested a continuous in this case, correct?

A I think a motion in September and then that one in either late October or early November.

Q So you had filed a motion for a continuous prior and it had been granted, correct?

A Yes.

Q Okay, and wasn't the motion for continuous that was denied to you a new subject on direct appeal at the Florida Supreme Court that it was error for the trial judge to deny a continuous in the case?

A Yes.

Q Okay didn't the Florida Supreme Court deny relief based on that found and affirm his conviction?

A They did but they didn't have before them some of the things that I found out since then, things that I didn't find out that I now believe I could have found out if I had more time. I just knew I didn't have time to do an adequate investigation. I knew I was too tired to be trying a first degree murder case.

Q Well you put all those factors including that you had been through your schedule that you had right before the trial leading up to the trial and all those things were put in your motion for a continuous weren't they and presented to the judge?

A They were I didn't, I didn't put in there something that I know now. I knew that the witness here we have a two page report Donald Smith that we didn't find and that wasn't in there because I didn't know about him but he is someone I think I could have found out had we gotten the continuous but the Florida Supreme Court didn't know that when they reviewed it.

Q All right. You then also had requested in your motion for continuous more time because you needed to find this Pine fellow, right?

A Yes.

Q And so if you had more time to find Pine then you might also had more time to find Donald Smith, right?

A Yes, I would have known to look for him if I had that report.

Q And in any event you didn't go to trial in December because you failed to request a continuous, did you?

A I got -- I went to trial in December because I was dragged there screaming and kicking and knowing that I wasn't adequately prepared.

Q And you moved for a continuous and the judge denied it?

A Yes.

Q Now regarding Mr. Donerlly's representation of David Pearson also known as Pine in an unrelated case you recall being asked about that subject matter on direct examination?

A Yes, in looking at the deposition from that case.

Q Would you have expected the attorney for Mr. Pearson or Pine in this case Mr. Donerlly to have informed you of facts that would have incriminated his client to a first degree murder?

A No.

Q So the fact that Mr. Donerlly might have known that David Pearson was Pine would not have helped you, correct?

A No, I just thought it one of the many ironies.

Q Because he would not have told you that?

A No, I don't think he, he certainly wouldn't have intentionally told me that.

Q All right. Regarding the questioning about Flemmie Birkins and we're talking about the Defense Exhibits Six, Seven, Eight, Nine, Ten and Eleven. This is Defense Exhibit Six in evidence, ma'am. Does he state anywhere in this exhibit where he's asking the judge for an ROR that one of his grounds is that he is a witness in a murder case or assisting the state in a murder case?

A No, he just says he is a TPD informant that he's helped fight drugs basically.

Q Fight drugs. This is Defense Exhibit Number Seven in evidence, ma'am, which reports to be a rap sheet of Mr. Birkins. You were asked before about the if you had known about all these convictions you could have impeached Mr. Birkins at trial you remember saying that?

A I think I would if I had this I would have been suspicions of a three and a half to four and a half year guidelines.

Q Okay. Well would you mind taking a look at this, ma'am, and the reason I want you to take a look at it is my question to you is isn't it a fact that on many rap sheets there are no dispositions or actual sentences showing or often times is even a conviction shown if there is a conviction?

A That's right and Birkins was local though so you got case numbers you could order the files from the clerk and sometimes you could find out.

Q Okay. This is Defense Exhibit, Defense Exhibit Number Eight in evidence. Let me draw your attention to the second page. Actually it's labeled page one. It is the page after the face sheet and what type of plea does that indicate Mr. Birkins entered in his pending charges?

A It says an open plea.

Q Open plea. What is your understanding of an open plea is?

A The judge will determine the sentence.

Q In other words that he did not have a deal from the state, correct?

A Yes.

Q This is Defense Exhibit Ten in evidence. Ma'am, do you recall that being shown to you on direct examination?

A Yes.

Q Okay, on page two of this transcript which purports to be the transcript of Mr. Birkins' sentencing on his charges in December of 1986, would you read this first paragraph here where Mr. Peavyhouse addresses the Court. Mr. Peavyhouse being Mr. Birkins' counsel at that time.

A Yes, Your Honor, as I think I advised the Court before when Mr. Birkins tendered a plea to this charge he was before Judge Spicola. There was an offer made of three years Florida State Prison by the attorney at that time. My best recollection is that we tendered a plea open to the stipulated guideline range of two and a half to three and a half years. The actual guidelines that was given to me at that time indicates three and half to four and a half years Florida State Prison.

Q Okay. Then later on he goes onto to say the guidelines were in fact higher they were nine to twelve?

A Yes.

Q Do you recall that?

A Yes.

Q In any event it was an open plea Mr. Birkins entered apparently, correct?

A Yes.

Q From everything we can determine. Now, were you aware at trial, ma'am, when you cross-examined Mr. Birkins that Mr. Birkins qualified as a habitual felony offender?

A Yes.

Q So isn't it a fact that when you cross-examined Mr. Birkins you didn't just talk about his alleged three and a half to four and a half guidelines range, correct?

A No, I talked to him also about did he understand what habitualizing meant and that he could get a higher sentence.

MR. CHALU: And, Your Honor, I'm going to request and I'm sure CCR would not object to the Court being supplied the full record on appeal in this case.

MR. MCCLAIN: I assumed that, yes, that goes without saying that the full record should be given to Your Honor.

BY MR. CHALU:

Q Okay and for the record, Ms. Morgan, do you recall when you cross-examined Flemmie Birkins at trial that you didn't rely on the guidelines in crossing Mr. Birkins so much as relying on the fact that he was facing greatly enhanced penalties as a habitual felony offender which could even be run consecutive?

A Yes.

Q Ma'am, let me show you what was shown on direct examination which is State's Exhibit Trial Number Seven and do you see a package of Kool cigarettes in this picture?

A No, and I remember it didn't turn up in any of the photographs, oh, wait, there's one in the right corner another Kool light.

Q Yes, okay. What is the date that it indicates that this photograph was taken on the back of that exhibit, ma'am?

A June 23rd of '86.

Q What day, what is the significance of June 23rd, of '86?

A The body, I can't recall the date, the date of the death certificate is 3-29. No, that's the birth. I can't remember the date of the offense.

Q Okay but, ma'am, if I told you the date of offense was June 23rd of '86 would that sound correct to you?

A Yes, it would. What was the date on the photograph?

Q The date of the photograph was June 23rd of '86.

A Same day.

Q Let me show you what was also previously admitted into evidence at trial as State's Exhibit Number Six and would you mind taking a look at the particular photograph?

A Yes.

Q What -- is there anything an object here in the photograph here in the lower left-hand corner?

A There a pack of Kool lights but it looks different. I don't know if it's the angle of the camera or what but this one isn't squished up and that one is.

Q All right. What's the date according to the back of this exhibit that this photograph was taken?

A June '86.

Q June?

A I'm sorry June 23rd 1986.

Q Which was the date of the offense was it not?

A Yes.

Q Would that have been the first day that would police officers, crime scene technicians would have responded to the scene, correct?

A Yes.

Q So does it appear that Kool package was at the crime scene on June 23rd, 1986?

A Could I look at both photographs?

Q Sure can.

THE COURT: I think it's been established that the Kool cigarette packet could have been there in 1986 so let's move on.

A It's just the pack looks different in the two photographs.

Q All right, thank you.

A It's the same general location but the pack itself looks different.

Q At trial, ma'am, regarding Mr. Schenck the gentleman who dropped off somebody who he testified to looked like Mr. Holton, is it true is it not he never made a positive I.D. of Mr. Holton at trial?

A No, he didn't.

Q All right. In fact he stuck to his guns when he stated at trial as he stated in depo that he could not positively identify Mr. Holton as the person he dropped off there, right?

A That's correct.

Q Okay. And in fact when you cross-examined concerning or argued concerning this black bag didn't it appear that there was an item in there indicating a Gibbs High School reunion for graduates of 1966 from Gibbs High school?

A Yes, there was.

Q Okay and didn't you point out to the jury that, that could not have anything to do with Mr. Holton because Mr. Holton would only have been thirteen years old in 1966?

A Probably.

Q Or that he was too young to have graduated from high school in 1966?

A I don't remember exactly what the testimony was but I know we were trying to link the Gibbs High School reunion to anyone and I couldn't think of any conceivable reason why Rudolph Holton would have it and keep it.

Q They never found any of Mr. Holton's fingerprints on that black bag did they, ma'am?

A No.

Q They never ever tied any of the items found in that black bag to Mr. Holton your client, correct?

A No, but it still, it was still damaging that we had a witness say they had seen Holton with a black bag. It was maybe Johnny Lee Newsome said that I can't recall.

Q I'm sorry, Your Honor, I need to check the exhibit number. Do you remember taking the deposition of Flemmie Birkins, ma'am?

A Yes.

Q Do you recall Mr. Birkins telling you that he actually had two separate conversations with Mr. Holton in the jail?

A I don't remember now.

Q Okay.

A I remember that, I remember there was a police report indicating that the time of one was at eleven something.

Q Okay. Let me show you what has been marked for identification only at this point as State's Exhibit Number Four for this hearing. Let me draw your quick attention if you would just read to yourself here, okay and then --

A Yes, it indicates that he talked to him about five and then after he went to the clinic he did talk to him again.

Q So there was actually two separate conversations that he had with Mr. Holton according to Mr. Birkins' testimony?

A It appears that way, yes.

MR. CHALU: If there is no objection I'll ask that State's Exhibit Number Four will be offered into evidence.

MR. MCCLAIN: No objection.

BY MR. CHALU:

Q Let me show you what has been marked for identification only at this point as State's Exhibit Number Five. Do you recognize that, ma'am?

A Yes, it's a report by Detective Noblitt and it's a rendition of Mr. Birkins' conversation with Mr. Holton.

Q Does it indicate that there were actually two separate conversations however separated in time?

A I may have to read it to be able to say.

Q All right well let me ask you the next question just to speed things up. The part here concerning that is circled here would you read that to yourself please.

A Yes.

Q Does it indicate why it is that he was coming forward?

A He said that he was coming forward because he believed it wasn't, it wasn't right for anyone to kill a 17 year old girl.

Q Did he offer to take a polygraph test?

A Yes.

MR. CHALU: All right. If there's no objection, Your Honor, I would offer State's Exhibit Number Five into evidence.

THE COURT: Any objection?

MR. MCCLAIN: No objection.

THE COURT: It'll be so received.

BY MR. CHALU:

Q Ma'am, do you recall Johnny Lee Newsome actually putting your client Mr. Holton in the house during the time of the offense?

A I don't think so. I thought it was Newsome who put him with Katrina Graddy but not in the house.

Q Okay but he was not able to testify and did not testify that your client assaulted Ms. Graddy in any matter, correct?

A Right.

Q Or that he saw Ms. Graddy and Mr. Holton in the house together?

A Right.

Q And in fact Mr. Newsome knew your client very well for quite a number of years, correct?

A I believe so.

Q And you knew that Mr. Birkins had known your client for quite a number of years?

A Yes, I knew that.

Q Does it seem odd to you that an inmate might discuss his case with the other inmates that he had known for years?

A No, but I also understood that they didn't get along.

Q Well, in your experience as a criminal defense attorney, ma'am, of how many years now?

A About 25.

Q Haven't you had experience where clients have talked to other inmates in the jail about their cases particular inmates who are there who are well acquainted?

A Yes, but not people that they were well acquainted with but didn't like, and had a bad history with them in high school.

Q Regarding Ms. Carrie Nelson wasn't her testimony that all she saw was your client approaching the house in question and that she didn't actually see him, see him enter the house?

A Yes, she was a problem because she had him approaching the house at that time he said he wasn't there.

Q But she did not have him approaching the house with the victim in this case, correct?

A That's right.

Q In fact she testified that she did not see your client and the victim that night, right?

A That's right.

Q Okay, and, ma'am, you can estimate approximately how many hours you spent working on this case from the time you were reported until the time you were discharged as counsel?

A I can't but if I was court appointed there is a record in the file and I would accept that would be, would be accurate.

Q All right. And weren't you paid hourly on capital cases?

A Yes.

Q Rather than there being a cap of a certain fee put on capital cases?

A Yes

Q Okay. And, ma'am, didn't you take numerous depositions of state's witnesses in this case?

A Yes.

Q And in fact you deposed all the key State's witnesses in this case, didn't you?

A I think Pine would have been a key state witness and I didn't depose him and I think Donald Smith would have been an absolute necessary key witness and I didn't depose him.

Q You deposed Mr. Clemmons?

A Yes.

Q Ms. Nelson?

A I'm sure if I deposed Mr. Clemmons or not.

Q Okay let me show you what has been marked for identification as State's Exhibit Number Eight.

A I may have confused the names again.

Q Okay.

A Mr. Clemmons is Red?

Q Yes. Do you recognize State's Exhibit Number Eight for identification?

A Yes.

Q What is State's Exhibit Number Eight?

A It's a deposition of Solodon Clemmons, Jr.

Q Also known as Red?

A Yes.

Q Does that indicate that you in fact did depose Mr. Clemmons?

A Yes, I did.

MR. CHALU: Okay, thank you, ma'am. Without objection I'll offer State's Exhibit Eight into evidence.

THE COURT: Any objection?

MR. MCCLAIN: No objection.

THE COURT: It will be so received.

BY MR. CHALU:

Q So you deposed Mr. Clemmons?

A Yes.

Q You deposed Ms. Nelson?

A Yes.

Q You deposed Mr. Newsome?

A Yes, late but yes.

Q You deposed Mr. Birkins?

A Yes.

Q Okay. You looked at all the exhibits the state had and you saw that before you went?

A I looked at all the exhibits that the state had that I was ever made aware of. I can never be sure in this case in particular all the exhibits but I may have.

Q You demanded discovery?

A Yes.

Q Okay. How many times would you say you saw your client in jail before the trial?

A I have no idea but I think my time records that are in the file would indicate that.

Q Is it fair to say a great number of times, numerous times?

A Probably, yes. There are some cases when you feel like you wish you had more time with a client and this is one of those.

Q At the trial you cross-examined all the state witnesses, correct?

A Yes.

Q You cross-examined Ms. Nelson?

A Yes.

Q All right. And you cross-examined, you attacked her credibility regarding to how she could have seen your client go in the house in question because of her location on her porch, correct?

A Yes.

Q All right. And so you impeached her in that regard didn't you?

A Yes, but if I had found the person that was supposedly on her porch with I now know that person would have said she wasn't even on her porch then she was somewhere else. I think it was damaging to have Rudolph there at the time she said he was there mainly because it conflicted with the statement he had made.

Q So --

A I was able to cross-examine her but I think I could have, there was more material available that I was unaware of that I could have used.

Q You cross-examined Mr. Newsome, correct?

A Yes.

Q You cross-examined Mr. Birkins, correct?

A Yes.

Q You attacked his credibility concerning the fact that he had pending charges against him and was looking at a habitual offender sentencing, correct?

A Yes.

MR. CHALU: I don't have any other questions, Your Honor.

THE COURT: Any further questions?

MR. MCCLAIN: Just one, Your Honor.

RE-DIRECT EXAMINATION

BY MR. MCCLAIN:

Q After all that work and after the case was done how did you feel?

MR. CHALU: Judge, I object to that it's argumentative.

THE COURT: I think this Court can take notice of how she felt.

MR. MCCLAIN: Thank you, Your Honor.

THE COURT: Thank you.

MR. MCCLAIN: Nothing further.

THE COURT: Any further questions?

MR. CHALU: No, Your Honor.

THE COURT: All right, Mr. Chalu, you got the next witness out there?

MR. CHALU: Jack Mehl.

THE COURT: Jack Mehl.

MR. CHALU: May I have one moment, please?

THE COURT: Uh-huh. Step up here and have a seat, please, sir. Raise your right hand, please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Jack Evans Mehl, M-E-H-L.

THE COURT: You may inquire.

Whereupon,

JACK MEHL,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHALU:

Q State your full name, please.

A Jack Evans Mehl, M-E-H-L.

Q How are you currently employed?

A I am director of law enforcement program for the Pasco and Hernando Community College.

Q All right, sir, would you give the Court some outline of your work history, please?

A I've been in the criminal justice for 43 years. Started in the military police during the Korean War and went from there to four years a parole and probation officer in Miami, 22 years as a special agent with the FBI. Eight years with the state attorney's office here in Hillsborough County as an investigator and since then I have worked with the Pasco County Sheriff's Office and director of the police academy in Pasco County which is part of the Pasco Hernando Community College.

Q Okay. Sir, do you have any specialized training in polygraphy?

A Yes, I do.

Q Could you give the Court some kind of indication of your training background in polygraphy.

A I started my polygraph career in the FBI in 1974 by attending the polygraph school at the FBI academy. I then attended a four and a half month school that the Department of Army puts on and have attended many, many advanced and specialized courses over the years.

Q All right. Are you certified by any state or national organizations in polygraphy?

A We used to be certified through the State of Florida but the State doesn't require that anymore so I'm not.

Q All right. What --

MR. MCCLAIN: Just for the record I just wanted to preserve my objection earlier to this testimony Your Honor, and note it for the record.

THE COURT: All right.

BY MR. CHALU:

Q What period of time were you certified by the State of Florida?

A I honestly don't remember when the certification, I think I was certified at the time I was working at the state attorney's office.

Q All right, and while you were at the state attorney's office did you have occasion to do polygraph tests?

A Yes, I did.

Q And would you explain to the Court what a polygraph protocol is in terms of determining whether an individual is suitable for polygraph testing?

A Well, we do an extensive pre test interview prior to the test. I also do an interview with the people that requested the test to see if the person has any physical or mental problems that would cause the test to be inconclusive or not an affirmative test.

Q Um, sir, do you recall or had an opportunity to refresh your memory regarding the polygraph test in 1986 on one individual known to you as Flemmie Birkins?

A Yes, I do.

Q Let me show you what has been marked for identification as State's Exhibit Number One and ask can you identify this exhibit?

A Yes, I can.

Q What is State Exhibit Number One report to be?

A This is a polygraph examination report of polygraph examination conducted on July 18th, 1986 of an individual by the name of Flemmie Birkins.

MR. CHALU: All right, sir. I'm going to show this to the defense now, Your Honor, and I'll offer it as State's Exhibit Number One into evidence.

THE COURT: Any further objection?

MR. MCCLAIN: Nothing beyond what I've previously stated, Your Honor.

THE COURT: All right, well, I'm going to admit it for purposes of that he did in fact give a polygraph examination not for the accuracy or anything like that of the polygraph.

BY MR. CHALU:

Q All right and, sir, what is the -- when you question before you do a polygraph test on a person do you attempt to ascertain if the person is under the influence of any medication of any kind?

A Yes, as I said we do a pre, pre-test interview and ask the question regarding that. I also ask the, whoever is requesting the exam if they have any evidence of that. We don't do anything physical but we do ask questions concerning that.

Q Let's assume that a person indicated that he's taken some type of tranquilizer or psychotropic medication would you administer the test to that person?

A No, sir, I would not.

Q Why not?

A Because it would make the test inconclusive. It would not be a fair test. People that take drugs or on drugs whether prescription or illegal drugs or they have taken tranquilizers or anything of that nature the test would not be a good test, positive, not be a good or affirmative.

Q Let's assume that a person, let's assume hypothetically that a person were to lie to you about that, that the person had taken some type of psychotropic medication or tranquilizer but told you in the pre-test interview he had not taken any such medication, would you be able to pick that up on the polygraph test?

A Yes, most likely we would. The reason I say that is we have, the way the polygraph works is I ask a relevant question followed by a control question and then we look at the results and see which were psychological set is which is relevant area or control area. And if someone is under the influence of some type of drugs or tranquilizer there wouldn't be any reaction to either of the questions.

It would be what we refer to as a flat chart. We monitor the breathing and the chest and the stomach. We monitor the heart rate, the blood pressure, opening and closing valves within the heart and what's known as a galvon (phonetic) skin response which is the measuring of a person's skin resistance to a small electronic impulse and if someone was on a tranquilizer all those things would be flattened out and the test would be inconclusive.

Q All right. Having an opportunity to examine State's Exhibit Number One in evidence would Mr. Birkins charts have indicated a flat response thus perhaps suggesting he was under the influence of some type of medication when he took the test?

A No, sir.

Q Why is that?

A Because he showed reaction to the control questions. There were marked reaction to indicate he was reacting to them. And that was the reason also that the test was determined to be noted no deception indicated because he was, his psychological set was in a control area and he wasn't reacting appropriately to the control questions as opposed to the relevant questions which would indicate that he was telling the truth.

Q All right. So the charts indicated to you the conclusion that you drew, sir, was first of all he was not under the influence of any medication?

A That's correct.

Q Secondly that he did pass the polygraph?

A That's correct.

Q Which means that he did not indicate deception?

A That's correct.

Q And what were the questions that he indicated no deception on, sir?

A We asked three relevant questions first one was did man tell you he had killed a girl? He answered that yes. Did man tell you he had choked a girl while having sex with her? Answered that yes. Did man tell you he set fire to a house with a girl in it and he answered that yes.

Q He showed no deception to any of those questions?

A That's correct.

MR. CHALU: I have nothing further.

THE COURT: Anything of this witness?

CROSS-EXAMINATION

BY MR. MCCLAIN:

Q Just one question. Sir, do you -- are you familiar with the fact that under Florida law polygraph examinations are not admissible in Florida courts?

MR. CHALU: Object as to the ground it calls for the witness to draw a legal conclusion.

A Well, I'll be happy to answer it.

THE COURT: Well --

MR. CHALU: I'll withdraw the objection.

THE COURT: Go ahead.

THE WITNESS: It is admissible in some states as and it is admissible in some judicial circuits and in my experience with the FBI I have testified in federal courts to results of polygraph examinations.

BY MR. MCCLAIN:

Q It's not admissible in Florida?

A It depends on the state and it depends upon the judicial history and the federal system.

Q In Florida it is not admissible?

A No, it's not.

MR. MCCLAIN: Thank you.

THE COURT: Thank you, sir, may this witness be excused?

MR. CHALU: Yes, Your Honor.

THE COURT: Call your next witness, thank you.

MR. CHALU: Sandy Noblitt.

THE COURT: Sandy Noblitt. Step up here and have a seat in the witness chair, please. Go ahead and have a seat. If you'd raise your right hand please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing nut the truth?

THE WITNESS: I do.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: James S. Noblitt, N-O-B-L-I-T-T.

THE COURT: You may inquire.

Whereupon,

JAMES NOBLITT,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHALU:

Q State your occupation, please. Sir.

A I'm a detective with the Tampa Police Department.

Q How long have you been employed with the Tampa Police Department?

A I became employed September of '75 so about 25 1/2 years.

Q And have you an experience in homicide?

A Yes.

Q How long?

A Thirteen years.

Q All right, sir. Let me draw your attention to 1986. Did you investigate the alleged death of Katrina Graddy in a burnt out house on Scott Street in Hillsborough County, Florida?

A Yes, along with numerous other detectives.

Q All right, sir. Did you develop evidence which tended to suggest that Mr Rudolph Holton was a suspect?

A I conducted an interview that morning on the 23rd. I interviewed a female at the rear of the residence or the burned out residence. She lived just north of there a lady by the name of Carrie Nelson. She gave me an interview and I don't know if I'm supposed to tell the Court what she said.

Q No.

A Based on her interview I began to look for Mr. Holton.

Q Do you see Mr. Holton in the courtroom today?

A Yes.

Q Is that the gentleman over here in the jail uniform?

A Yes, the computer is blocking me but he's looking at me yes, sir.

MR. CHALU: May the record reflect he's identified the defendant, Your Honor?

THE COURT: Let the record reflect he's identified the defendant.

BY MR. CHALU:

Q During the course of your investigation did you look at the house the burnt out house of the crime scene?

A Yes, I went there for the first time on the 26th of June.

Q All right. And that was three days after the homicide, sir?

A Yes.

Q All right, sir.

A Well, it's Ms. Graddy was located on Monday morning.

Q Right.

A This was Thursday afternoon.

Q Yes, sir. Did you find a package of Kool or Kool light cigarettes there?

A Yes.

Q All right. Let me show you what has been marked as and previously received at trial State Exhibit Six and Seven. Can you identify those, sir?

A Yes, number six would be looking in the south east direction and number seven I guess this is number seven would be looking in an easterly direction.

Q All right, sir. Is there a pack of Kool cigarettes in both those pictures?

A Yes.

Q Would you flip those pictures over and tell me what the exhibit indicates and what date is on them?

A I'm looking for the date it was taken. It's on the, I was looking at the evidence slip. They were taken on the 23rd, 722 hours and on the 23rd of June of '86 at 722 hours.

Q Okay, they were both marked the 23rd of June?

A Yes, sir.

Q Did you have occasion to interview Rudolph Holton at the Hillsborough County Jail?

A Actually I interviewed him at our office.

Q All right. Was he at that time in the Hillsborough County Jail house there?

A He was in custody yes he was.

Q All right, sir. The first time you interviewed did you properly advise him of his Miranda warnings?

A Yes.

Q Did he waive his rights and agree to talk to you?

A Yes, he did.

Q All right. That first time did you ask him whether, whether he knew the victim?

A Yes.

Q What did he say?

A He said he did not.

MR. MCCLAIN: Just for the record all of this came out at the trial I think.

THE COURT: Where are we going, Mr. Chalu?

MR. CHALU: Judge, we're going is we're trying to show the various inconsistencies which caused the State to focus the investigation on Mr. Holton so as to explain why it was that the police and State acted in good faith here because there's been a great deal of evidence to the effect that we had the wrong person and we were chasing the wrong person and that we had evidence of another person and that we failed to investigate that.

THE COURT: All right.

MR. MCCLAIN: Your Honor, just for the record Rogers v. State good faith doesn't matter. We're not alleging bad faith. I'm saying there was a Brady violation and whether it was bad faith it's totally not relevant and kind of a waste of time but --

THE COURT: All right, go ahead, Mr. Chalu.

BY MR. CHALU:

Q All right, did he initially deny ever having been in the front room of the house?

A He did in the first interview on the 24th.

Q Okay. And, sir, where is this Kool pack in State's Exhibit Trial Number Six located? Is that in the front room of the house?

A Actually the Kool pack is right around the door way from this room, this burnt out where the victim was found inside this doorway and the pack of cigarettes that was collected that day is on that wall.

Q Okay. Was there any significance about Kool cigarettes being at the crime scene as far as your interview with Mr. Holton was concerned?

A What happened with that unfortunately I'm a smoker myself not proud of it but during that interview we could smoke in the police department in 1986. Back then I smoked Winston Ultralight 100.

During the interview Mr. Holton on the 24th he smoked some of my cigarettes. When we took Mr. Holton back to the jail he made a statement to myself and Detective Durkins if you come back and see me bring back a pack of Kool cigarettes because he liked menthol because he complained about my cigarettes.

Q All right. And ultimately were those pack of cigarettes depicted in State's Exhibit Trial Exhibit Six and Seven processed for prints?

A Yes, they were on the 26th.

Q What did that Kool pack in fact have a print on it?

A Yes, I don't know how many I think it had one print on it I don't know the specifics but there was a latent print developed and it was compared by the latent fingerprint examiner and myself and Detective Durkin were notified on the 26th that it was a latent print that was identified as Mr. Holton's.

Q All right. Those were the -- that was located at the crime scene where Katrina Graddy had been raped and murdered, correct?

A Yes.

Q And the house burned?

A Yes.

Q Did you have occasion to interview a Red Clemmons?

A I went there. I wouldn't say I interviewed him. I went with Detective Durkin. The purpose of going there was in response to the original interview with Mr. Holton on the 24th. He gave us a statement as to where he was on Saturday night Sunday morning the 22nd and 23rd.

Q Right.

A He said he rented a room from Mr. from Red and he didn't know his last name. He described the location and said that he went to bed that night and stayed there all night until the next day. Our purpose in going there was to either confirm that or eliminate that as a possibility. When we went there Mr. Clemmons that I know now but Red was there. He allowed us to look in the room.

Detective Durkin and myself were in there. He was interviewed by Detective Durkin but I was there listening to his interview. He did rent a room to him and said he went to bed that night. He didn't know anything beyond when he went to bed that night. We were allowed to look in the room and Detective Durkin collected a white t-shirt with the City of Clearwater emblem on it.

Q Was that item introduced at trial in this case, sir?

A Honestly I do not know. The rule was invoked and I wasn't in there at that time so I don't have an answer to that.

Q I can ask Detective Durkin that. The whole time you were there did you, did you pick up a cigarette pack of any kind?

A No.

Q At Red Clemmons' house? Did you observe Detective Durkin pick up a cigarette pack there?

A No, he's a non-smoker. He doesn't smoke.

Q Did he pick up anything as evidence there?

A The white t-shirt.

Q Anything else?

A No, sir.

Q All right. There was some testimony earlier in the evidentiary hearing concerning somebody inquiring of a police officer, did Anita or Katrina get choked? How would somebody in the area of the crime scene, sir given your training and experience and background as a homicide detective be able to know that fact that somebody had actually gotten choked in a crime scene?

A I've testified many times that original responders to these types of scenes over the years, I mean, they get there and determine what has occurred. In this particular case this was a call to the fire department based on the smoldering and the smoke from the burnt out house.

When the firemen once they found Ms. Graddy in her condition they had to come out as the police department dispatched uniformed officers. When they came out -- this house sits about four feet off of the road,

enough for a sidewalk two feet of grass. And my belief is there is no barrier at that point in time and the firemen have to relay to the police officers what we have and the firemen are not thinking in terms of years down the road and criminal investigations but it was early in the morning and probably told the police officers there's a young girl in here and she has a ligature around her neck so it wouldn't be uncommon to say she had been strangled and anyone and this is a high foot traffic area at that time in the morning could have overheard that.

MR. MCCLAIN: I object and ask that be stricken because it's all speculation. It's not -- there's not any actual knowledge this is speculation as to what could have happened.

MR. CHALU: It's based on his education and experience in working --

THE COURT: I'll overrule the objection at this time for purposes of this hearing. Let's move on.

BY MR. CHALU:

Q Did Mr. Holton later admit that he knew the victim?

A That he knew the victim?

Q Yes?

A No.

Q Well when -- was it pointed out to him that Johnny Newsome had seen him in the area of the house with the victim?

A That was pointed out in the second interview.

Q Did he then admit that he had some at least passing acquaintance with her?

A With Johnny Newsome.

Q Right, did he initially state that he had not been to that house for about a week?

A His point of reference was a week before he was arrested.

Q Right.

A Which would have been the 24th and then he backed it up seven days.

Q All right. Did he later state that he had been near the house that night when he was confronted with Ms. Nelson's statement putting him there?

A When he was confronted with -- what happened in the second interview we advised him that Mr. Newsome had told us that he had seen him there with the victim. He admitted that he saw Mr. Newsome there but he placed the time earlier in the afternoon. But he also said he saw Mr. Newsome on the east side of the house where Mr. Newsome said he saw him.

Q So he put Mr. Newsome at the scene on the same day as the day before the homicide?

A He actually backed it up. We told him that Mr. Newsome saw him at night time and he said it was it the daylight hours.

Q The evening immediately prior to the homicide?

A Yes.

Q Okay. Was he able to accurately describe some of the items that were located in the house, some of the debris and so on?

A What he described was what was, what he remembered being in the front room. After confronting him with Mr. Newsome and Ms. Nelson and it was actually after I pointed out to him that I had found a pack of cigarettes there which contained his fingerprints he responded that those were not his cigarettes. He didn't smoke that kind of cigarettes and that they're not his fingerprints.

He then said he had been in the front room a week before and then he claimed or told us that he left syringes there two of them and that he had seen an old can, a blanket and a tin, pipe tin that type. That was in response to pointing that out to him now that not only we had witnesses that said he was there but when I confronted him with the fact that I had his fingerprints on the pack of cigarettes is when he changed and said, yes, he had been in the front room and described items contained within the room.

Q Regarding Flemmie Birkins just very quickly did you go out to see Flemmie Birkins or did he ask to see you?

A How I came into contact I had previously known Mr. Birkins from other cases that other detectives I worked with in the robbery in '82 and '83 and that he had been arrested for. On this particular morning my sergeant then Sergeant Price asked myself and Detective Childers to go interview an inmate reference this case. Flemmie Birkins had one of the correction officers contact the police department and we went and conducted an interview of Flemmie Birkins.

Q All right. And he advised you that Mr. Holton had confessed to him, correct?

A Yes.

Q Did you suggest to Mr. Birkins that he take a polygraph or did Mr. Birkins indicate to you he would be willing to take a polygraph?

A I actually, well that interview with Mr. Birkins I knew him and he knew me. I was surprised when he was going to help us out. I asked him why because I had known of him trying to stay away from the police in the past. His answer was that he didn't think it was right for a 17 year old to be killed.

I asked him tell me happened which he did about his meeting with Mr. Holton when he was being booked on the night of the 26th.

Q Okay.

A I don't know if I should go on or not.

Q No, because it's already in the record.

A Okay.

Q And did he offer to take a polygraph then?

A I asked him if he would and he without hesitation said yes, he would.

Q He did?

A And he did.

MR. CHALU: All right. No further questions of this witness at this time, Your Honor.

THE COURT: Any questions of this witness?

MR. MCCLAIN: Very briefly, Your Honor.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. MCCLAIN:

Q Officer, were you one of the lead detectives on the case?

A Sir, I don't know your name but --

Q My name is Martin McClain.

A Mr. McClain, many times I have explained why there is no lead detective. That was a term created by attorneys. This case was worked by ten detectives and everybody's part was just as important as everybody else's.

Q Would it be fair to say you weren't one of the main detectives?

A No, I assisted.

Q You assisted.

A What I've testified to the court is what I participated in which was a small part of this investigation.

Q I'm calling your attention to Exhibit Number 18 which is a report that has the name Lawless and Southwick. Are you familiar with them?

A Is this reference -- I know who Southwick is. I do not know who Lawless is.

Q I'm just calling your attention to this paragraph here regarding a person by the name I think it has his name in there Donald Lamar Smith?

A Yes, sir.

Q Is that information that you were familiar with in this case?

A Not in 1986.

Q So you did not do any follow up any investigation or contact Donald Lamar Smith?

A I was not aware of this information in 1986.

MR. MCCLAIN: No further questions.

THE COURT: Any questions, Mr. Chalu?

MR. CHALU: No, Your Honor.

THE COURT: May this witness be excused?

MR. CHALU: Yes.

THE COURT: You're excused, thank you. Call your next witness.

THE WITNESS: Thank you, Your Honor.

THE COURT: Call your next witness.

MR. CHALU: Detective Durkin.

THE COURT: Detective Durkin. You can go ahead and have a seat right here, Detective. Raise your right hand please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: Put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: My name is Kevin Durkin, D-U-R-K-I-N.

THE COURT: You may inquire.

Whereupon,

KEVIN DURKIN,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHALU:

Q How are you employed, sir?

A I work for the City of Tampa Police Department.

Q How long have you been with the City of Tampa Police Department?

A Nineteen years.

Q All right. How long have you been a detective?

A Fifteen years.

Q And what period of time how many years experience in investigating homicide cases?

A Eleven years.

Q Did you assist in the investigation of the death of Katrina Graddy in 1986?

A Yes, sir.

Q In Hillsborough County, Florida. During the course of that investigation did you have occasion to go to the home of Juan Red Clemmons?

A Yes, sir, I did.

Q What was the purpose of going there?

A To interview Mr. Clemmons about any fact he may have pertaining to this investigation.

Q All right, sir. And while you were there, were you there with Detective Noblitt?

A Yes.

Q All right. Did you collect any evidence there?

A Yes.

Q What did you collect?

A A white t-shirt with an emblem on the front of it.

Q All right, sir. Showing you what has been marked for identification and received in evidence at the original trial which is State's Exhibit Number 31 and ask you if you can identify that exhibit?

A Yes, sir, I can.

Q What is that exhibit?

A This is the t-shirt that I collected.

Q Where?

A From Red Clemmons' boarding house from one of the rooms there.

Q What was the significance of that piece of evidence in your mind at that time?

A It was our belief that Mr. Holton was the owner and the wearer of that shirt.

Q All right. Had there been any identification that he had been wearing the shirt on the, on the day of the homicide or the day before the homicide?

A I believe some witnesses may have seen him in a light colored shirt.

Q Now while you were there in Mr. Clemmons' house did you collect any other evidence?

A No, sir.

Q Did you collect any cigarette packs?

A No, I did not.

Q Did you place any cigarette packs at the crime scene that were not already located there?

A No, sir.

MR. CHALU: One moment, Your Honor.

THE COURT: Sure.

MR. CHALU: I have nothing further of this witness, Your Honor.

THE COURT: Mr. McClain?

CROSS-EXAMINATION

BY MR. MCCLAIN:

Q Briefly, Your Honor. Officer, I'm going to hand you what has been marked as Exhibit Number 18 and I don't know if you are familiar with this document but to just sort of help or alert you there is a date of the report and there are the officers names. Are you familiar with Lawless or Southwick?

A Yes, I am.

Q Okay, I'm calling your attention to the paragraph on the second page, um, starting right here. If you could just sort of briefly read that and see if you remember that?

A I've seen the supplement in the last couple of days but it doesn't spark any recollection, no, sir, I don't.

Q That indicates that you did, you yourself did talk to Donald Lamar Smith but you have no memory of that; is that correct?

A Yes, sir, that's right.

Q But you don't dispute that appears that you had spoken to him?

A It appears that I spoke to him yes, sir.

Q And you don't recall any follow up investigation regarding that because you don't even obviously don't remember any follow up investigation on it?

A That's correct.

MR. MCCLAIN: Thank you, no further questions.

THE COURT: Any further questions of this witness?

RE-DIRECT EXAMINATION

BY MR. CHALU:

Q Have you had an opportunity to view the original report, Detective Durkin?

A Yes, sir.

Q Did you see this particular supplement in that report?

A Yes, sir, I did.

Q All right. And who showed you this report a couple days ago?

A You did.

Q If you had been unaware that the defense had this report would you have sent them a copy?

A If I had known of its existence of course.

MR. CHALU: Okay, thank you, sir.

THE COURT: Anything else?

MR. MCCLAIN: Nothing further.

THE COURT: May this witness be excused?

MR. CHALU: Yes, sir.

THE COURT: You're excused, thank you. Call your next witness.

MR. CHALU: Judge, if I may just have one minute I may rest.

THE COURT: Okay.

MR. CHALU: Gene Black.

THE COURT: Gene Black. Step up here to the witness chair, please, sir. Raise your right hand, please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: You can put your hand down.

Whereupon,

AUBREY E. BLACK,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHALU:

Q If you'd state your name for the record.

A Sure, Aubrey E. Black.

Q And your employment?

A I am a homicide detective for the City of Tampa Police Department.

Q How long have you been with the City of Tampa Police Department?

A Approximately 23 years.

Q How long as a homicide detective?

A Approximately seventeen.

Q Did you occasion to participate in the investigation of the death of one Katrina Graddy back in 1986?

A Yes, I did.

Q All right, during the course of that investigation did you have contact with a witness who later became known to you as Schenck?

A Yes.

Q Okay. And did you interview Mr. Schenck?

A Yes, I did.

Q Were you able to ascertain from whether he was able to make a positive I.D. of the defendant Mr. Holton in this case?

A Not a positive one but he said that Mr. Holton appeared to be the man. He looked similar to but there were certain, little differences there.

Q Okay.

A One being that he appeared to be, the person that he picked up that particular day appeared to be a little more rugged and it appeared he had razor burns on his face more so than the photograph had.

MR. CHALU: All right, nothing further, Your Honor.

THE COURT: Anything else from this witness?

MR. MCCLAIN: No, Your Honor.

THE COURT: May this witness be excused?

MR. MCCLAIN: Yes, Your Honor.

THE COURT: Thank you, you're excused. Any further witnesses?

MR. CHALU: Your Honor, I just want to introduce some exhibits and I'm going to rest.

THE COURT: All right.

MR. CHALU: Judge, I would like to introduce certified copies of judgment and sentences on Donald Lamar who testified here today. He did confirm his date of birth as 9-25-57 and these are judgments and sentences of a Donald Lamar Smith date of birth 9-25-57, and these are for purposes of credibility impeachment.

THE COURT: Any objection?

MR. MCCLAIN: No objection.

THE COURT: They'll be so received.

MR. CHALU: That's State's Exhibit Number Seven. Judge, I also would like to introduce into evidence if there is no objection the police interview, the police report of the interview of Johnny Lee Newsome and this is marked as State's Exhibit Number Two.

THE COURT: All right.

MR. MCCLAIN: No objection.

MR. CHALU: State's Exhibit Number Two.

THE COURT: All right, it will be so received. Anything else?

MR. CHALU: Just one more minute, Your Honor.

THE COURT: All right.

MR. CHALU: State's Exhibit Number Three is a group of certified copies of judgments and sentences on Johnny Newsome.

THE COURT: All right.

MR. MCCLAIN: No objection.

THE COURT: They'll be so received.

MR. CHALU: And number six, Your Honor, State's Exhibit Number Six would be the judgments and sentences on Flemmie Birkins.

THE COURT: All right.

MR. MCCLAIN: No objection.

THE COURT: They'll be so received. Anything else?

MR. CHALU: Let me just check, Your Honor. Your Honor, I believe that's all, the State would rest.

THE COURT: All right, just a couple of things just some housekeeping matters and I don't think it matters but in going through this file in looking at some of Mr. Holton's convictions there are certified copies of prior to this Mr. Bogus and Mr. Conrad, John Conrad and Jim Bogus assistant public defender's represented Mr. Holton in Division "B." At that time is when I was their supervisor in Division "B."

I have no recollection of Mr. Holton but just in this type of case I think it's best to disclose anything I may know. And in addition to that in looking through the file and looking at the list of the evidence that was introduced a couple of things that strike me and I was looking at them over here, in the, in the evidence and there is a toothbrush that was in this thing.

MR. MCCLAIN: I believe it was in the black shaving kit, yes, Your Honor.

THE COURT: And you know I don't know if it's been contaminated or that sort of thing and it may have and I don't want to get down the road again and with DNA stuff again.

MR. MCCLAIN: I understand, Your Honor.

THE COURT: And in addition to that there are a couple of combs which I didn't see any hairs in but are also listed number twenty-two and number twenty-three, two -- an earring and a color wire ring with hair and the hair is still in it.

MR. CHALU: Yes, Your Honor, that was actually brought to the attention of the court I think by Mr. Morgan back at the time of the trial.

THE COURT: Well, and I know but we --

MR. MCCLAIN: My understanding was that the hair had disappeared over the course of the years.

THE COURT: There's hair in there.

MR. MCCLAIN: It's still there?

THE COURT: It appears to me. You're welcome to look at it.

MR. MCCLAIN: I would be happy to make a motion to have it tested.

THE COURT: Well, I just don't want to get down the road again and get in a situation again.

MR. CHALU: Judge, at this point in time the State certainly is not going to object to any DNA testing of anything.

THE COURT: Well, I think we need to get an order and we need to seal those things up and release them from evidence and have them sent out and see what, who they belong to. I would think the toothbrush, there is a small black comb and a large black comb which I didn't see any hairs but that doesn't mean there's not because if the other ones stick to it there may be hair that I don't know. I didn't want to look at it.

MR. CHALU: This is in the black bag, Your Honor?

THE COURT: This was all in the black bag.

MR. CHALU: Were those actually contained in the black bag?

THE COURT: Yes, they're not in the black bag now. They are all separate. Most of them are sitting on that tray right there. But if you look in there you can see an earring and a ring which are number 22 and 23 and they're in white envelopes.

MR. CHALU: Trial exhibits.

THE COURT: Yes, but they still have hair in them.

MR. MCCLAIN: Um, Your Honor, we would be happy to draft up an order having the same DNA who has already testified an examination be done if Mr. Chalou is agreeable to that and seal everything up and send it to her for examination.

MR. CHALU: Um, Judge, I think that it should be examined but just let me --

THE COURT: Well, what I'm going to do right now --

MR. CHALU: Who should be doing the examination.

THE COURT: Well, what I'm going to do right now is just tell the clerk to keep that evidence segregated and in a separate box probably and seal it up so we don't lose it and, you know, you all may want to go through there and decide on your own what you think needs to be there and you may want to take a look at it but I just think before we get any further down the road we need to do that.

MR. MCCLAIN: Yes, Your Honor.

THE COURT: Okay, all right.

MR. CHALU: The State has no objection.

THE COURT: Anything else? You all want to argue?

MR. MCCLAIN: I'm always --

MR. CHALU: I think we should defer argument until later.

MR. MCCLAIN: I'll willing to argue.

THE COURT: Most attorneys are. I think at this point we may want, we may want to do that first and then do your arguments and, you know, if anybody wants to provide me with any written memorandum of any kind you're more than welcome to do that but I think at this point in time we've already given him a new sentencing hearing.

MR. MCCLAIN: Yes.

THE COURT: And the only thing we're here on now is whether or not we're going to have another trial.

MR. CHALU: Right.

THE COURT: And I think it's one of things before I make a ruling on that I think we ought to look at this stuff.

MR. MCCLAIN: Um, well, and I have.

THE COURT: It may change both.

MR. MCCLAIN: I have no problem with looking at that and having the DNA analysis. I think in terms of the Brady claim and the ineffective assistance of counsel claim they are issues that are separate and apart from whatever the results of that -- if I were to prevail and a new trial was ordered the DNA testing would take place and I recognize that and so I have no problem with doing it but I still think that Mr. Holton is entitled a new trial based on the evidence that has been presented and I would be happy to argue it or do it in a written memorandum. My preference is because I think in some ways it's better able to explain to the audience which is Your Honor in person than necessarily in writing because in writing I cover things that I don't necessarily need to so I would like for the opportunity to orally argue but I'm willing to defer that until the results are in even though I'm not sure it's necessarily going to change what the argument is.

THE COURT: Well, I think I would prefer to hear that after we do this, okay?

MR. MCCLAIN: Absolutely, Your Honor.

THE COURT: Anything else?

MR. CHALU: No, sir.

THE COURT: All right, as far as the hearing that we had set for I thinking the 11th --

MS. MCDERMOTT: May first.

THE COURT: We can cancel that, correct?

MS. MCDERMOTT: Yes, Your Honor.

THE COURT: We heard from him.

MR. CHALU: Yes, Your Honor, we did.

MR. MCCLAIN: We'll try to get together and either work out an agreement as to who would do the testing or come to Your Honor and explain what our differences are.

THE COURT: Okay.

MR. MCCLAIN: We'll try to do that within the next week.

THE COURT: Mr. Holton, you want to send him back to the state prison?

MS. MCDERMOTT: Yes, Your Honor, that would be very helpful to us.

THE COURT: Madam Clerk, write on the docket that he is to be released back to UCI. Anything else?

MR. CHALU: The only thing is an order to -- I have no idea how this evidence may have been contaminated.

THE COURT: I have no idea either.

MR. CHALU: From 14 years ago and in order to prevent any further contamination assuming there's been any I think we need to do is make sure that these items are segregated from the other pieces of evidence and that they're individually packaged.

THE COURT: Get somebody down here to package them and seal them while you all are here.

MR. CHALU: Yes, sir.

THE COURT: Let's do that. Any problem with that?

MR. MCCLAIN: I will wait right here.

THE COURT: Okay, all right, thank you all.

(Conclusion of proceedings)

CERTIFICATE OF COURT REPORTER

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, COLLEEN MERRITT, OFFICIAL COURT REPORTER for the Circuit Court of
the Thirteenth Judicial Circuit

of the State of Florida,

DO HEREBY CERTIFY that I was authorized to, and did report the
proceedings and evidence in this hereinbefore-styled cause, as stated
in the caption attached, and that the preceding transcript attached
hereto is a true, accurate and correct computerized transcription of my
report of the proceedings had at said session.

I FURTHER CERTIFY that I am not employed by or related to the parties
to this matter nor interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal in Tampa,
Hillsborough County, Florida, this 26th day of November, 2001.

Colleen Merritt, Official Court Reporter

<http://www.oranous.com/innocence/RudolphHolton/HoltonhearingApril192001.htm>

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL
CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY
CRIMINAL JUSTICE DIVISION

THE STATE OF FLORIDA

vs. CASE NO: 86-8931

DIVISION: "A"

RUDOLPH HOLTON,

Defendant.

This cause came on to be heard before the **HONORABLE DANIEL L. PERRY**,
Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa,
Florida, on

April 19, 2001, as follows:

APPEARANCES:

Wayne Chalu, Assistant State Attorney, 800 E. Kennedy Blvd., Tampa,
Florida 33602, in behalf of the State;

Linda McDermott, Martin McClain, and Scott Mario, Esquires, Asst. CCC -
Northern Region, 1533 - B Monroe Street, Tallahassee, Florida, 32301, in
behalf of the defendant.

COLLEEN MERRITT, OFFICIAL COURT REPORTER

800 EAST KENNEDY BLVD., COURTHOUSE ANNEX

CA-1-124, TAMPA, FLORIDA 33602

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P-R-O-C-E-E-D-I-N-G-S

THE COURT: Ready to proceed?

MS. MCDERMOTT: We would like to call Flemmie Birkins.

THE COURT: Flemmie Birkins. Mr. Birkins, if you'd step up here to the witness chair, please. Raise your right hand, please. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, sir.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Flemmie Birkins, B-I-R-K-I-N-S.

THE COURT: You may inquire.

Whereupon,

FLEMMIE BIRKINS,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Good afternoon, Mr. Birkins. How are you doing? Mr. Birkins, did you testify at Rudolph Holton's trial in 1986?

A Yes, ma'am, I did.

Q And do you know Rudolph Holton?

A Yes, ma'am.

Q How long before 1986 did you know him?

A Um, back all my life. We grew up together.

Q You grew up together? Now in June of 1986 were you up incarcerated at the jail?

A Yes, ma'am.

Q And did there come a time when you saw Rudolph Holton in the jail?

A Yes, ma'am.

Q Was this the first time to your knowledge?

A It was.

Q Now were you aware that when you saw Rudolph Holton he was in there for first degree murder?

A No, I wasn't aware then.

Q And what was your status at the jail? Did you have a sort of a special status?

A Trustee.

Q When you're a trustee at the jail, what does it mean to be a trustee?

A You're a trustee you pass clearance, the cat walk and what not.

Q What kind of benefits come with being a trustee?

A Um, get time off, a little time off.

Q When you're a trustee do you have a lot of mobility in the jail?

A Yes.

Q You get to move around without bailiffs escorting?

A Yes.

Q Why were you in jail?

A At that time it was, um, I don't recollect the charge right off.

Q Okay, that's fine. Now was this the first time you had been arrested?

A No.

Q And was this the first time you had been charged with a crime?

A No.

Q Had you previously been convicted of a crime?

A Other times, yes.

Q What did that mean to you the fact you had previously been convicted of a crime and then you were charged with a new crime what significance did that have to you?

A That I was charged as a habitual criminal.

Q You thought that might be a possibility that you were a habitual criminal?

A Yes.

Q And when you're a habitual criminal does that mean it increases your punishment if you get found guilty?

A Yes.

Q Now were you aware of how many years you were facing on the charges which you don't remember and that's okay but do you remember what kind of time you were 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 the 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 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 trial or case or anything.

Q Okay. At the time of the trial you testified that Rudolph confessed to you; is that correct?

A Yes.

Q In your testimony you provided some details about the crime that you said he had given to you?

A Yes.

Q How did you get those details?

A Through the news.

Q Through the news?

A Through the news, the guards and others.

Q The guards?

A By guards, you know.

Q Is there at some point you came to learn that he was charged with first degree murder?

A Yes.

Q You came to learn more about the crime he was charged?

A Yes.

Q Now after you obtained the information about Mr. Holton's case what did you do with that information?

A I used it to my benefit.

Q Did you contact the state?

A Yes.

Q And after you contacted the state did they, did someone come to talk to you?

A Yes.

Q And throughout the course of time did various people come and talk with you about what you said you knew about Rudolph Holton's case?

A Yes.

Q Did anyone ever provide with you additional information about Mr. Holton's case?

A I seen pictures of the crime.

Q Someone showed you some pictures of the crime?

A Yes.

Q And what pictures did they show you?

A Pictures of a woman black girl, you know, well certain pictures of her face that was at, you know.

Q Okay, and um after you contacted the state was it your understanding that the state was going to assist you in your charges?

A Yes.

Q How were they going to go about that?

A Through an officer.

Q And when you testified at Rudolph Holton's trial was it your expectation that you would benefit from that testimony?

A Yes.

Q It isn't that true that thirty days after you testified --

MR. CHALU: Objection to the leading nature of the questions on direct examination.

THE COURT: Don't lead your witness.

BY MS. MCDERMOTT:

Q Mr. Birkins, do you recall the time frame between when you testified at Mr. Holton's trial and when you were released from jail?

A Um, yes, I think so.

Q How much time do you recall that you spent?

A A few months.

Q You were --

A Violation of probation parole rather.

Q Also during that time period that we have been discussing were you a confidential informant for the police?

A I worked with them.

Q Okay. How long had you been a confidential informant?

A A while.

MR. CHALU: Excuse me, Your Honor, his response was I worked with them. He did not admit to being a confidential informant.

BY MS. MCDERMOTT:

Q Mr. Birkins, were you a confidential informant?

A Yes.

Q And what does that mean you work with them?

A That you know work with them with information through the years.

Q How long had you been a confidential informant for them?

A Off and on around.

Q And whenever -- because you were a confidential informant did you use that to try to get out of charges whenever you were arrested?

A Yes.

Q And when you testified against Mr. Holton were you only testifying because your understanding was that you were going to be getting out of jail?

A Yes.

Q And the testimony that you provided regarding the confession that is your, the confession you testified to was that true?

A No.

MS. MCDERMOTT: Thank you, Mr. Birkins.

THE COURT: Mr. Chalu, you may inquire.

MR. CHALU: All right, thank you, Your Honor. Request just a second.

THE COURT: Sure.

CROSS-EXAMINATION

BY MR. CHALU:

Q Mr. Birkins, do you remember who came out to see you at the jail what officers came to see you at the jail?

A No, not right.

Q Do you recall that?

A No.

Q Does the name Detective Noblitt sound familiar to you?

A Yeah, it might.

Q I beg your pardon?

A It might.

Q Now when the detective came out to you see you did you tell him that Mr. Holton had confessed this homicide to you?

A Yes, sir.

Q All right. Did you also tell him that it was a strangulation murder?

A Yes, sir.

Q She died from strangulation?

A Yes, sir.

Q Did you tell him that he burned the house afterwards?

A Yes, sir.

Q How long had you known Mr. Holton at that period of time when you saw him in the jail in 1986?

A Um, I would say I had known him ever since I was about five years old.

Q You had known him a very long time, correct?

A Yes.

Q You guys were not strangers, correct?

A No.

Q You were friendly with each other?

A Correct.

Q Did you ask him, Mr. Birkins, what he was in jail for?

A No.

Q You ever ask anybody what they're in jail for?

A Yes.

Q But in Mr. Holton's case you didn't do that?

A No, it was on T.V.

Q Do you recall seeing Mr. Holton on the first floor of the jail when you first spoke with him?

A Yes, I seen him several times.

Q Was that one place you saw him?

A Probably was.

Q Do you recall talking to Mr. Holton when he was in the, getting his mattress and blanket when he just came in the jail; do you recall that, sir?

A Probably was, I was a trustee I don't know.

Q Do you remember talking with Mr. Holton in the central area of the jail before he was being processed?

A I talked to him in the jail in his cell.

Q Did you telling Detective Noblitt that you knew who Rudolph Holton was and that he was in there for a homicide?

A I told them what they wanted to hear, that was his name and I told him exactly what they wanted to hear.

Q Did you tell Detective Noblitt that you asked Rudolph Holton what he was in there for? Did you tell him that?

A Yes.

Q Did you tell him that Mr. Holton told you that he was in there for murder?

A Yes.

Q Did you also tell Detective Noblitt that you asked Mr. Holton if he did it?

A Yes. I told him exactly what he wanted to hear.

Q Did you tell Detective Noblitt Mr. Holton told you yes, that he in fact committed the murder of the girl in the house that was set on fire?

A Yes, I told him what he wanted to hear.

Q Detective Noblitt you called him out there?

A It was a call made to him to his office.

Q All right. You called his office and he came out there to see you at your request, correct?

A Yes.

Q He didn't go, he didn't come on his own will to see you, correct?

A No.

Q Do you recall telling Detective Noblitt that you met, you had met the girl, that Holton had met the girl and that he was going, he and the girl were going to the house on Scott Street for purposes of having sex for drugs, did you tell him that?

A Yes, it was on TV.

Q Did you tell Detective Noblitt that Rudolph Holton said that he did not have any drugs at that time; do you remember that?

A No, I don't recall that.

Q All right, would it refresh your recollection if you reviewed a copy of the police report?

A Sure.

Q You made a statement to Detective Noblitt?

A Sure.

MR. CHALU: May I approach the witness?

THE COURT: Sure, go ahead.

BY MR. CHALU:

Q Now, do you remember having looked at the police report do you recall telling Detective Noblitt?

A I recall just what he told me.

Q That Holton said that he did not have any drugs to give the girl for sex?

A I recall just what you showed me, sir.

Q All right.

A What you just said she was he told me, you know.

Q Holton told you this?

A No, he told me, I did not see Holton.

Q Do you recall telling Detective Noblitt that Holton told you that he was in the house having sex with her, do you remember telling Detective Noblitt Holton said that?

A Yes, sir.

Q Do you remember telling Detective Noblitt that Holton told you that while he was having sex with her he put his hands around her throat and strangled her?

A Yes, sir.

Q Do you remember telling Detective Noblitt that Holton told you that once he realized the woman was dead he went to the gas station and got some gas and set the house on fire; do you remember that?

A I remember about the fire the gasoline. I don't remember you know that she was dead.

Q Do you remember Detective Noblitt asking you why you had come forward with this information?

A Yes.

Q Do you remember what you told him?

A Yes.

Q What did you tell him?

A No, that I was doing, you know.

Q Well let me ask you this. Do you remember telling him that you did not want anything in exchange for that information?

A No.

Q Okay. Would it refresh your recollection if I showed you a copy of the interview?

A Yes.

MR. CHALU: May I approach, Your Honor?

THE COURT: Sure, go ahead.

BY MR. CHALU:

Q Do you remember saying you don't want anything? Do you recall that, sir?

A It's there.

Q You said you didn't think it was right to kill, to kill a young girl?

A Yep.

Q Isn't it true that's what you said? Didn't you also tell him that you would be willing to snitch to take a polygraph test?

A Yes.

Q And in fact, sir, did you take a polygraph test?

A Yes.

Q And, just let me make reference to Defense Exhibit Number Ten which was brought into evidence by the defense, Defense Number Ten where it states where Mr. Episcopo states that the polygraph that the defendant did in our office concerning that statement to the police and he came out truthful. Now did you take that polygraph, sir?

A Yes.

Q Did you pass that polygraph concerning the statement you had made to Detective Noblitt?

A I said, I did.

Q Now did you give a deposition in this case to the defense attorney Mina Morgan?

A Mina Morgan?

Q The defense attorney Mina Morgan did you give a statement to her where there was a court reporter like this present and the prosecutor was present and your statement was taken?

A I don't recall.

Q Well, would it refresh your memory if I showed you the deposition, sir?

A Sure.

MR. CHALU: May I approach the witness, Your Honor?

THE COURT: Go ahead.

BY MR. CHALU:

Q For the record I'm showing you a copy of the deposition which purports to be your deposition taken on September 25th, 1986, in the office of the state attorney court house annex. Now do you remember that, sir? You looked does it refresh your memory?

A Sure.

Q I beg your pardon?

A Yes, that is it.

Q That's what you made, the statement, right?

A Yes.

Q All right. Now were you under oath, sir when you made this statement?

A Yes.

Q Remember the court reporter swearing you in and you swearing to tell the truth, correct?

A Right, I think so.

Q And, sir, in that statement which you made under oath back in September of 1986, did you tell the defense attorney on page eight of the deposition beginning at line one, did you tell the defense attorney after the officer was done and we are still talking about me and Mr. Holton and he lit a cigarette and turned around and told me that he was in there for murder?

A I didn't write it down there.

Q And continuing line five, question, did he tell you who it was that he was supposed to have killed? Your answer, just some young lady. Do you remember that?

A If it's in there.

Q On page eight line 17, counsel, do you remember telling the defense attorney in this deposition that him that meaning Holton and her the victim had went there and he was supposed to have had sex with her, do you remember that, sir?

A Probably.

Q And continuing on page 19 you remember telling the defense attorney that this took place at some house over there on Scott Street; do you remember that, sir?

A Yes.

Q Do you remember telling her over on page 11, counsel, that you asked him, I said man you're kidding right and he said no and then you asked him exactly what happened and then he told me again that he forced her to have sex and he put his hands around her throat. Do you remember telling the defense attorney that in this sworn deposition?

A If it's in the deposition that's what I said.

Q Over on page 12 of the deposition did you tell the defense attorney that he got gas at the Star Service Station and then burned the house?

A Yes.

Q Do you recall telling her that under oath?

A Yes.

Q Do you remember telling her that you contacted jail authorities so they could contact the Tampa Police Department and send a detective out to talk to you?

A Yeah.

Q And now Detective Noblitt came out there, sir, did he promise you anything in exchange for your statement? Did he make any promises in exchange for your statement?

A There was no promise.

Q Well --

A He knew what I wanted at the time.

Q Well, what's your answer? Did he promise you anything or not and if so what did he promise you?

A I wouldn't do no time.

Q So he promised you that or is that what you asked for?

A That he would help me, he could.

Q You didn't discuss that earlier. You recall telling Detective Noblitt that you didn't want anything?

A That's what you said. That's what's on the paper.

Q Okay.

A I told him what I knew he wanted to hear.

Q So you told Detective Noblitt that you didn't want anything; is that right, that's what you said?

A Yeah.

Q He didn't offer you anything did he, sir?

A Not, not in writing not that way.

Q And on your charges, sir, you were originally offered a three year deal, right?

A Right.

Q But you rejected a three year deal and you pled open to the judge, right?

A Right.

Q So you didn't accept the three year deal, correct?

A Right.

Q You rejected that and pled open to the judge, right?

A Yes.

Q Then when you got to sentencing you got jail house, community control house arrest plus probation, right?

A Community control house arrest and probation. I never took it all --

Q I couldn't hear you.

A I wouldn't have never took all that there.

Q On an open plea, sir, you took what the judge gives on an open plea, right?

A Yeah.

Q All right.

A Open I wouldn't have taken an open plea like that though.

Q And, sir, isn't it true that you testified at trial the trial Mr. Holton subsequently the same as you did when you told Detective Noblitt about the crime and when you gave that sworn deposition under oath to Ms. Morgan you said pretty much the same thing at trial, didn't you?

A Yes, sir, pretty much.

Q So three times, sir, the statement to Detective Noblitt, the sworn deposition, and the trial you stated the same thing, didn't you, sir?

A Right.

Q And at trial you were under oath too weren't you?

A Right.

Q Now, sir, how many times have you been convicted of a crime since 1986 when after you gave your testimony in Mr. Holton's case?

A I think once.

Q Only once? Would it refresh your recollection if I showed you your certified copies of judgment and sentences?

A Sure.

Q Sir, I'm going to show you some paper work and ask you if you recall being convicted of these crimes. After your testimony in 1986 were you convicted of this crime in 1987, sir, and I'm referring to case number 87-13647.

A I don't remember.

Q You don't remember that, sir?

A No.

Q All right. You're saying you weren't or you don't recall?

A Yeah.

Q All right.

A In 1987 I just got out in '93.

Q I'm talking about after the trial, sir.

A That's what I'm saying.

Q How about case number days 81-2062, do you recall being convicted of that offense, sir, that felony offense you don't?

A Shook head in the negative.

Q Okay. How about --

A I went to prison you know.

Q All right.

A I got out on in '93.

Q All right, sir. Would you deny that you perhaps have been convicted more than once since the time of the trial, sir?

A It's hard to say, you know, I don't think so.

Q You don't just remember, right?

A No.

Q Okay.

A I know sometimes in the '80's after the trial I got sentenced again and went to prison, you know.

Q When were you released from prison, sir, last?

A Last time I was released from prison?

Q Yes?

A '93.

Q You had been in prison or jail since that time since '93?

A Yeah, I was in prison at that time.

Q Once you were released from prison have you been to prison or jail since then?

A Since '90?

Q Since '93?

A No.

Q All right. Now, sir, how long ago were you contacted in regard to this case to make a statement here today?

A Um, about three weeks.

Q Just three weeks ago?

A About three weeks.

Q Was the first time?

A Yes.

Q Nobody talked to you before that?

A Nobody talked to me.

Q Who came out to see you three weeks ago?

A Um, a young man.

Q Is he in the courtroom today?

A Yes, sir.

Q Which one is he?

A Young man, blue shirt right there.

Q In the front row?

A Yes, sir.

Q And did he ask you questions about this murder?

A No.

Q Okay.

A He did not.

Q I beg your pardon?

A He did not.

Q All right. Well did he come out to see you or did you contact him?

A No, he was looking for me.

Q All right, sir.

A Because I'm homeless and he was looking for me and he was in the area that I be in and that's how he spotted me because my neighbor had told him.

Q How long did you speak with him?

A Um maybe roughly five, ten minutes.

Q All right, sir. Did you ever talk to him or any other colleagues after that?

A No.

Q You only spoke one time for five to ten minutes?

A Yes.

Q Nobody since that time has spoken with you at all?

A No.

Q Before today?

A Before today.

Q Did somebody talk to you before you walked into court today?

A Oh --

Q Do you remember that?

A I'd be okay and to calm down, you know.

Q Were you told, were you -- did you tell anybody else, sir, that you had not told the truth in the Holton trial?

A No.

Q So the only people you told are the folks who are here the defense to Mr. Holton today?

A That's the only --

Q I'm sorry?

A The only man that was here.

Q The gentleman?

A He found me.

Q The person he identified?

A That found me.

Q Only you told?

A Right.

Q You never told anybody else that you had lied at this trial for the past fifteen years?

A Nobody in the neighborhood.

Q What did you discuss, sir, at that meeting?

A What was discussed?

Q What was discussed when you talked for ten minutes?

A My name, Flemmie Birkins. Yes, you're a hard man to find, yes. Um, I am investigating you know for Rudolph Holton you know are you ready to come tell the truth.

Q Well did he ask you whether you told the truth at trial?

A Yeah, he did.

Q All right and so he told you that you lied?

A Yeah.

Q That was the first time you had met this young man?

A First time I met him.

Q Never talked to him before in your life?

A Never talked to him before in my life.

Q So you were talking to him after five or ten minutes the conversation that you had you committed perjury under oath in a murder trial; is that what you're telling us?

A Yeah.

Q What do you for a living, sir?

A Homeless.

Q You're homeless? Where do you stay now?

A I'm homeless.

Q So you have no place to stay?

A No, I'm homeless.

Q Okay. Where did they find you, sir?

A On the streets.

Q Have you been promised anything in exchange for your testimony here today?

A No.

Q You have had contact with these folks over here by phone or by letter or anything like that?

A No.

MR. CHALU: Can I have just a moment, Your Honor?

THE COURT: Sure.

BY MR. CHALU:

Q So in fact the evidence at trial you didn't have a deal did you because the charge that you pled to you pled open to the judge correct, sir?

A Yes, sir.

MR. CHALU: All right, thank you, Your Honor.

THE COURT: Anything further of this witness?

MS. MCDERMOTT: Briefly, Your Honor.

RE-DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Mr. Birkins?

A Yes, ma'am.

Q You had worked with the police before; is that correct?

A Yes, ma'am.

Q You know how the whole system works, right?

A Yes, ma'am.

Q Convicted all those times?

A Yes, ma'am.

Q When you took the polygraph did you know, um, how to beat it?

A Yes, ma'am.

Q What did you take on the polygraph to make sure it came out accurate?

A Take a relax pill to relax your total body.

Q And you did that when you were given the polygraph?

A Yes.

Q Everything you told the police that Rudolph Holton allegedly told you was a lie, correct?

A Yes.

Q Everything you said in the depo that Rudolph Holton allegedly told you was a lie?

A Yes.

MS. MCDERMOTT: Thank you, Mr. Birkins, nothing further.

THE COURT: Anything further?

MR. CHALU: No, Your Honor.

THE COURT: May this witness be excused?

MS. MCDERMOTT: Yes, sir.

THE COURT: You're excused, sir, thank you. Call your next witness.

MS. MCDERMOTT: We're going to call Bernoris Smith.

THE COURT: Come up here and you can have a seat in the witness chair, please. Raise your right hand, please. Do you swear or affirm testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes, sir.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Bernoris Smith.

THE COURT: Why don't you spell your first and last name for us.

THE WITNESS: Bernoris, B-E-R-N-O-R-I-S Smith, S-M-I-T-H.

THE COURT: You may inquire.

Whereupon,

BERNORIS SMITH,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Thank you. Ms. Smith, where do you reside?

A Pardon me?

Q Where do you live?

A I live here in town on Harrison Street.

Q How long have you resided at Harrison Street?

A Thirty years.

Q And what do you do for a living?

A Child caretaker.

Q How long have you been doing that?

A About six years.

Q In fact you're on break right now?

A Mm-mm.

Q Do you know a man named Donald Smith?

A Yes.

Q How do you know Donald Smith?

A Well, I went to school he is my kid's father.

Q Are you married to him?

A Yes.

Q How long have you been married?

A About five, six years now.

Q Okay. In 1986 was Donald living with you?

A Uh-huh.

Q He was living with you?

A Yes.

Q Do you know a man named David Pearson?

A Yes.

Q And does he have a nickname?

A Pine.

Q Pine?

A Mm-mm.

Q How did you know David Pearson?

A We went to school together.

Q High school or?

A Grade school through high school.

Q Now did you know Katrina Graddy?

A Yes, I did.

Q And how did you know Ms. Graddy?

A Through high school, her sister and her brother and me we all went to school together.

Q And did you and David Pearson and Katrina Graddy all live in the same area?

A Uh-huh.

Q And in June 1986, did there come a time when Ms. Graddy came to your house?

A Yes.

Q And who answered the door?

A I did.

Q What did Ms. Graddy want?

A She asked for Big Donald and I had went to go get him so she could talk to Big Donald.

Q So she was looking for your husband?

A Uh-huh.

Q Did Ms. Graddy speak to your husband?

A Yes, I walked to him and told she wanted him.

Q Were you present for that conversation?

A Yes.

Q What did Katrina Graddy tell your husband?

A That David Pearson who is known as Pine he was, he told his name, told the police he was the one that was there with Katrina.

Q What incident is he referring to?

A Um.

Q What do you mean?

A The rape.

Q The rape?

A Mm-mm.

Q So did she tell Donald that Pine had raped her?

A Uh-huh.

Q That Pine had used Donald Smith's name when the police came?

A Yes.

Q Was she scared Donald was going to get in trouble because Pine was using his name?

A No, because Pine always used his name.

Q Okay, she didn't know --

A She knew what Pine said to the police that he did it but she came to let him know that and whether or not he did it and I verified she said that.

Q Okay. How did your husband Donald Smith react to that information?

A Well, he said he was going to find him and he was going to straighten it out right there.

Q And what happened next?

A Excuse me, him and Katrina had left to go find him. I don't know, you know if exactly where they met up at with him.

Q But did they find them?

A No, they didn't.

Q Now at some point after when Katrina came over did you eventually find out she had been killed?

A Yes.

Q How long did it seem between those dates that she came to your house that day and when she was killed?

A It wasn't long a week, maybe a week or two.

Q Now in 1986, Ms. Smith, did anyone speak with you about the information we just discussed here?

A Yes.

Q Someone did speak with you?

A Well, not me but as we went start investigating they started talking to my husband first about what happened and --

Q The police spoke to your husband?

A Yeah.

Q Now did anyone from the defense Mr. Holton's attorneys or investigator come to talk to you about that information?

A No.

Q And had they come to you and talked to you and asked you to testify in Mr. Holton's behalf would you have done that?

A Yes, if I knew. He didn't do it. I heard who did it, you know what I'm saying right out the horse's mouth you know I don't want to see nobody get -- you know.

MS. MCDERMOTT: Okay, thank you, Ms. Smith.

THE COURT: Wait just a second. He's going to ask you a few questions. Mr. Chalu, you may inquire.

CROSS-EXAMINATION

BY MR. CHALU:

Q Thank you. Now you're married to Donald Smith, ma'am?

A Yes, sir.

Q Your date of birth?

A September 20, '54, September 20th, '58.

Q September 20th, 1958?

A Uh-huh.

Q Where does your husband stay now, where does he reside?

A Incarcerated.

Q You know where?

A Wakulla Institution.

Q Florida State Prison?

A Uh-huh.

Q Have you ever been convicted of a crime, ma'am?

A No, sir.

Q All right. Now this person David Pearson was he known to you as Pine or just known around the neighborhood as Pine?

A Known to me as Pine. David Pearson was known everywhere.

Q All right. You went to school with him?

A Yes, sir.

Q You are married to Donald Smith?

A Yes, sir.

Q Okay. Now this incident that Katrina came to talk to you about was not, was about a rape, correct?

A Correct.

Q And how long before the murder was that?

A About two weeks or two.

Q Okay, and then you learned about a week or two later that Katrina had been killed correct?

A Yes, sir.

Q And you talked to your husband about that?

A Yes, sir.

Q And you say your husband told the police about this?

A He told the police what Katrina told him.

Q All right. Were you there for that, for that conversation?

A No, I wasn't there. I was there when he was talking to her but I was standing back.

Q Where did this conversation take place?

A Right in front of my house.

Q Of your house?

A Mm-mm.

Q Do you remember what police officer this was, ma'am?

A No, sir.

Q Do you remember if he was a uniform officer or was wearing a suit?

A I believe uniform if I'm not mistaken. It's been so long now.

Q Did he leave you a card or anything like that with his name on it?

A He talked to him. He could left him one but I don't know.

Q Do you know to this date who that police officer is?

A No, sir.

Q Was it Tampa Police or sheriff's office?

A Tampa Police.

Q Now did you also learn after Katrina was killed that this man over here Mr. Holton had been arrested for that murder?

A Yes.

Q All right. And you knew your husband had told the police about Pine raping her a week or two before the murder, right?

A Yes.

Q Now did you make any statements to the police, ma'am?

A No, sir.

Q Did you contact Mr. Holton's defense lawyer?

A I don't know him personally.

Q So your -- did your husband contact Mr. Holton's defense lawyer?

A No, as far as I know no.

Q So to your knowledge did your husband contact Mr. Holton's investigator?

A No as far as I know I guess not.

Q You didn't either, right?

A No.

Q Did you suspect that Mr. Holton was wrong the man?

A When I heard I did.

Q You did?

A Nodded affirmatively.

Q Then I ask you, ma'am, why your husband didn't come forward and speak to the defense in this case if you thought they arrested the wrong man for a rape and a murder?

A Well, I don't know about that but as far as Katrina told Donald she called the police and told them so what was I supposed to do then? They were supposed to get the man that did it.

MR. CHALU: Nothing further.

THE COURT: Anything further?

MS. MCDERMOTT: Yes, Judge.

RE-DIRECT EXAMINATION

MS. MCDERMOTT: Ms. Smith, -- Your Honor, can I approach the witness?

THE COURT: Go ahead.

BY MS. MCDERMOTT:

Q I want to show you a photograph and ask you if recognize that person?

A That's him.

Q Who is that?

A David Pearson.

Q Can you read what it says there on this line? Does it say Photo (b)?

A Yeah.

MS. MCDERMOTT: Thank you, ma'am. That's all Your Honor, and I'm sure we're up to this but this is --

MR. CHALU: State's Exhibit 26.

MS. MCDERMOTT: I'll hand it with this Your Honor but just to mark it for identification. Thank you. Thank you, Ms. Smith.

THE COURT: Anything else from this lady?

MS. MCDERMOTT: No, Your Honor, she can be excused.

THE COURT: You're excused, thank you.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MS. MCDERMOTT: Carl Schenck.

THE COURT: Mr. Schenck, if you'd step up here and have a seat in the witness chair, please, sir. Raise your right hand, please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: So help me God.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Carl Edward Schenck, S-C-H-E-N-C-K.

THE COURT: You may inquire.

Whereupon,

CARL SCHENCK,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MCCLAIN:

Q Mr. Schenck, do you recall testifying at Rudolph Holton's trial back in 1986?

A Yes, I do.

Q And at that point in time do you recall testifying regarding an incident that occurred in June of 1986?

A Yes, I do..

Q Okay, and at that point in time in terms of the incident in June of 1986 do you recall what happened just not in detail but you were in a truck in front of a house that caught fire?

A I was in a car.

Q In a car?

A A Toyota.

Q Okay, and in the morning the police knocked on the window and woke you up?

A Right.

Q And you testified at Mr. Holton's trial regarding how you got to that location and the events of the night leading up to that, correct?

A Yes.

Q Now leading up to the trial do you recall the police wanting you to identify or wanting you to look at photographs of the black hitchhiker that you picked up that night?

A Yes.

Q Can you explain what happened in terms of that photograph situation?

A Um, they called me in I don't know what it is in a debriefing area or booking area I think but it was an area there where they have the prisoners and maybe you know booking and stuff and there was a detective there. It was kind of a confined space coffee mugs here and that and I guess their work space and they sat the photos down and one of the officers came and said he had the photos and I that if I would take a look at them and see if anybody was recognizable. I picked out the one that I thought closely resembled him but never was absolutely sure.

Q So you weren't sure that was the person?

A Right, never absolutely sure.

Q This was just a person of how many photographs were shown to you?

A Six I believe.

Q Was it on one sheet of paper or were they lose?

A They were lose photographs.

Q Of the six the one you identified was the one that looked most like?

A Yes.

MR. MCCLAIN: Okay, just a moment, Your Honor?

THE COURT: Sure.

BY MR. MCCLAIN:

Q I'm going to hand you what has been marked as Exhibit Number 26 and ask you if you recognize that?

A Yes, I do.

Q And it's what four sheets of paper?

A One, two, three, four, yes.

Q And it has an affidavit is it not?

A That's correct.

Q Is that your affidavit?

A Yeah.

Q How did the affidavit come to be drafted; can you explain?

A Well, the most recent testimony by the -- whoever was helping Mr. Holton I guess trying to come to the truth they came to ask me questions, Ms. Jeff came to the house and asked me about the case and stuff and we went over some of the statements that were made and um, he remarked that it was, you know at least consistent with my statement and everything and he brought up the part about me testifying of who it was that was picked.

Q The person that was in the vehicle with you?

A Right, and um asked me about how I identified him in the photo and everything and I said well, always said that they, you know, closely resembled him the best, you know and I described, you know that he had facial hair and looked like razor burns or complexion problem and he asked me if I recalled it well and then if I could remember him in my mind and what the guy looked like and I say I'm, you know, pretty sure about that one.

I would have liked to have been shown a lineup or something at the time instead of looking at photos and he asked me, he brought out the photos for me to look at them and he said I'm going to cover up the names and that pertinent information at the bottom of it so you don't know which one is the, which one he showed me the two photos are in here.

Q Okay.

A I picked the one on my left which I believe is marked (b).

Q Okay. Okay so he asked you to look at the photos?

A This one right here.

Q And this one that is the page, the last page of the affidavit; is that correct?

A Yes, some yellow thing here.

Q And that's the person that it looked to you?

A Yes.

Q Most like the person who was in your vehicle?

A Right, right and the gentleman I picked before he was the closest one that I had picked back then.

Q Right.

A And then the officer were generally telling me, you know, I want to make sure, make the right choice now. I want you to choose, he wanted closure on the case and they wanted to make sure they got the right guy I guess and this one I picked out the best when Jeff showed me the photos there and covered them up and I said well, this gentleman here looks closer because of his facial hair and his complexion and his age.

Q Okay.

A This gentleman over here is too young.

Q Okay.

A He's much too young. I asked and after he showed me one of the pictures and after he realized that I, after I had chosen (b) which was on my left he showed me that was the one that they that, he thinks could possibly be the real one.

Q In fact that photo has a date on them when the photographs were taken?

A Here this one is 7-18-86 and the one more close to the date where I picked him out is was a couple days before the 22nd.

Q It's what date?

A June 19th, 1986.

Q So about within a month?

A Been a month each time yeah.

Q Okay. And the person you recall had facial hair?

A That's correct.

Q And do you recall in terms of his teeth if he had any missing teeth?

A No missing teeth. I told the police officer I thought he had a gold tooth or one of the photographs there was gold.

Q Okay.

A And that he said his name was Maurice.

Q Okay, and was there a black bag?

A Yes, there was. I didn't um, when I first picked him up I recall, I thought it was a towel but I guess it was a little black bag that the police officer found that was in the back seat of my car the next morning.

Q Okay. Now just one last thing about this document. You swore to that document is the affidavit from you that, your statement and everything that is there you meant to say; is that correct?

A That's correct.

MR. MCCLAIN: Okay, Your Honor, actually I'll move it into evidence Exhibit 26.

THE COURT: Any objection?

MR. CHALU: No objection.

THE COURT: It will be so received. Any further questions? Mr. Chalu, any questions?

MR. CHALU: Just a couple, Your Honor.

THE COURT: You may inquire.

CROSS-EXAMINATION

BY MR. CHALU:

Q Mr. Schenck, were you, were you ever asked to identify Mr. Holton at trial; do you remember that?

A No, I was not.

Q All right.

A I mean I don't recall.

Q Now when the officers showed you the group of photographs back in 1986 do you remember how many there were?

A I believe there were six.

Q Six photographs. And at any time did any of these officers or the detective who was there with you indicate to you in any manner which picture you should choose?

A No, they never made it like they were pointing or they never made it clear my idea is they were trying to draw my attention to the photographs, you know.

Q All the photographs?

A Well I had at one time had picked up one and thought it was the one I eventually picked up.

Q That would be?

A A.

Q Photo (A) State's Exhibit, Defense Exhibit 26?

A Right, I picked it up and I put it back down and I said it could be but I'm not really sure. I believe the officer produced the photos on the opposite side of that particular picked it up and put it back down and he asked me to make sure, take your time be sure you're making the right decision like again I told him it was close as I can remember.

Q He wasn't, he was asking you to make a positive I.D. and you weren't positive, sir?

A No.

Q Okay, he just wanted --

A He wanted me to make sure of my decision.

Q Right and you told him you were not sure?

A That's right.

Q That he was out of the people that were there in the photos he was the closest one?

A Closest one, yes.

Q Do you recall back then seeing a picture of the man depicted in photograph (b) Defense Number 26, do you remember that picture?

A No, I don't.

Q Okay. And I believe you stated that you thought the photograph (a) was too young is that what you said, sir?

A His features were young. He didn't have the facial hair and the speed bumps is what I call them rash that a black man gets when they shave sometimes the complexion area.

Q Do you know the actual age of these two individuals, sir?

A No, but the man I picked out to me he looked to be 31 or somewhere around.

Q Which photograph (a)?

A B.

Q The one you picked originally, sir?

A Yeah but I was asked to remember him in my mind and when I look back at that time when Jeff asked me I said I thought it was (b) was closer to the age.

Q All right. You didn't make a positive identification at trial either, sir, did you?

A I said I wasn't absolutely sure.

Q All right, you can't make a positive identification now, can you?

A He's the closest possible, closer than the other one.

Q You're not sure that this is the man that committed the crime?

A Not without seeing them. I'd like to see the person before me not a picture because there is not a lot there.

Q When you saw Mr. Holton's picture which is picture (a) on the 26th you saw the picture within a very short time after the crime was committed?

A Yes, the police officer, I said that he cleaned up and he agreed with me that he had cleaned up and they had to do everything they can to change his appearance.

Q And you didn't see the picture depicted in (b) Defense Exhibit 26 until when, sir?

A Until Jeff came to my house.

Q When was that, sir?

A The day of that the 16th.

Q Of?

A This month.

Q Which would be approximately fourteen and a half years after the crime, sir?

A That's correct.

MR. CHALU: All right. I don't have any further questions, Your Honor.

THE COURT: Mr. McClain?

MR. MCCLAIN: Just briefly, Your Honor.

RE-DIRECT EXAMINATION

BY MR. MCCLAIN:

Q Mr. Schenck, before you testified at the trial did either the police or the prosecutor say they had the right guy?

A They made the statement that they had.

MR. CHALU: Excuse me, Your Honor, I have an objection. I don't know who they is.

BY MR. MCCLAIN:

Q Clarify, could you?

A The police officers.

Q The police officers?

A Yes.

Q What was it that they conveyed to you?

A They had the man in custody and, um, that they told me that he was a burglar and he had like a two or three hundred a day habit of cocaine and, um, they were pretty sure that was their man.

Q And actually before you testified at the trial were there any other discussions in terms of the need of your testimony?

A No, I guess the photo representation was enough for them, I mean --

Q Did they show you a photograph of the victim?

A Um, during the time there was a state attorney, I can't recall his name for sure, um, Episcopo or something like that and he flashed out a picture of the lady that had been murdered in the nude and it was pretty awful stuff and said I don't want to see anything like that. I don't want to see it. I may have been a witness but I didn't have to see that. I was very repulsed at that.

MR. MCCLAIN: Thank you, I have nothing further.

THE COURT: Anything further?

MR. CHALU: Just a few, Your Honor.

RE-CROSS EXAMINATION

BY MR. CHALU:

Q This incident where the police told you they had somebody in custody they thought he was the man this was after you had already made your selection of the photograph, correct?

A Right I had.

Q So it was after you already picked out the photograph?

A Yes, sir.

Q And you told them then that you were not sure?

A They didn't tell me they had him in custody until I had picked out the photograph.

Q Right and notwithstanding that you still testified at trial that you were not sure, correct?

A That's correct.

Q Just picked out the photograph?

A That's correct.

MR. CHALU: Thank you, nothing further.

THE COURT: Thank you, sir. Can he be excused?

MR. MCCLAIN: Yes, Your Honor.

THE COURT: You're excused, you can step down. Call your next witness.

MS. MCDERMOTT: Johnny Newsome. I think he's in custody.

THE COURT: Well, we'll take a short break. We'll be in a fifteen minute recess.

(Whereupon, court was in a recess)

(Whereupon, court was back in session)

THE COURT: Raise your right hand, please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: Put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Johnny Newsome, N-E-W-S-O-M-E.

THE COURT: You may inquire.

Whereupon,

JOHNNY NEWSOME,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Are you also known by the name of Georgia Boy?

A Yes, I am.

Q Do you know Rudolph Holton?

A Yes, I know him.

Q Did you testify at his trial in 1986?

A Yes, I did.

Q Now Mr. Newsome, did you see Rudolph Holton at the vacant house on Scott Street the night of the murder?

A Yes, I did, no not at the night of the murder but I saw him at the house.

Q On the night of the murder did you see Rudolph Holton at the vacant house?

A No, I didn't.

Q Now was there a night where you did see Mr. Rudolph Holton at the vacant house on Scott Street?

A I never saw him that night.

Q Okay. You did see him at the vacant house though?

A I did see him at the vacant house.

Q And do you recall how many days before that before the murder and in what relation to the murder that was when you saw him?

A About, about three days ago I saw him. I walked by, past by the house and I was standing up by the door.

Q This was three days before the murder?

A Yes.

Q Okay. And when you saw him there what was he doing?

A Standing up there n leaning against the wall smoking crack.

Q Did you talk to him?

A Yes, I asked him to get me some and he didn't get me none.

Q Now did there come a time when the police came to you and asked you if you knew Rudolph Holton?

A Yes.

Q And this was after the murder?

A Yes.

Q When was it?

A After the murder.

Q Did you tell the -- what did you tell the police when they first came to you and asked you if you knew Rudolph Holton?

A They asked me, they took me down to the police station and they showed me a photo of him and asked me again if I know him and I said yes I know him and they asked have you seen him and I told him yeah, I saw him standing up by the house and they asked me um --

Q Did you tell them -- when did you tell them that you saw him at the house?

A Um about three days before the murder.

Q Now, Mr. Newsome, had you been in that house before on Scott Street?

A Yes, I have.

Q And to your knowledge were there quite a few people in and out of that house?

A Yes.

Q And what was that house used for?

A Smoking crack.

Q Now the day that you did see Holton when you walked by what time did you see him?

A Between five and six o'clock.

Q Now, Mr. Newsome at trial you testified that you saw Mr. Holton at the house at eleven p.m.; is that correct on the night of the murder?

A That's incorrect.

Q But is that correct that you testified that you saw him the night of the murder?

A Yes, I did testify.

Q And why did you testify that you saw him on the night of the murder at the house at eleven p.m.?

A Well, um, I was um --

Q Was that true, Mr. Newsome?

A No, that wasn't true.

Q So you lied at his trial?

A Yes.

Q Now do you know a Katrina Graddy?

A Yes, I know of her.

Q You know of her? Did you see Katrina Graddy at the vacant house on Scott Street the night of the murder?

A No, I didn't.

Q Now Mr. Newsome, you told -- did you tell the jury that you saw Mr. Holton with Ms. Graddy at the vacant house on the night of the murder? You testified to that; is that correct?

A No, that's incorrect.

Q Did you testify that way at Mr. Holton's trial?

A Yes, yes.

Q That was a lie?

A That was a lie.

Q Did you ever see Mr. Holton with Ms. Graddy on the night before the murder?

A No, I didn't.

Q Had you ever seen them together at all?

A No.

Q Now why did you lie at Mr. Holton's trial?

A Well, I was kind of bias and, um, kind of scared that they would probably look for me for something you know,

Q You were afraid?

A Yes.

Q Now did you also lie to the police about seeing Mr. Holton at the house on the night of the murder?

A Yes, I did.

Q And in 1986 in that time frame did you -- what was your pattern as far as when you go home at night?

A Go straight to the house, go straight to the house.

Q Where did you live?

A In Central Park.

Q Central Park, what time did you usually go home at night?

A Between eleven o'clock, eleven.

MS. MCDERMOTT: Okay, but okay thank you, Mr. Newsome.

THE COURT: Mr. Chalú?

MR. CHALU: Thank you, Judge.

CROSS-EXAMINATION

BY MR. CHALU:

Q Mr. Newsome, when you first get up on the stand you told Ms. McDermott asked you if you saw Mr. Holton on the vacant, at the vacant house on the night of the murder and you said yes, didn't you?

A No, I didn't.

Q You changed it and said no, right?

A No, I didn't.

Q You don't remember that?

A Yes, I remember.

Q Okay, now do you remember speaking to the police in June of 1986 about this murder?

A Yes.

Q All right, do you remember where you spoke to the police?

A Yes.

Q Where?

A At the police station.

Q All right. How did you get there?

A They was coming out through the path and they walked up to me and told me they wanted to talk to me, they want to talk to me and one of them knew my name.

Q So you went with them, right?

A Yes, I did. They told me that --

Q You weren't in jail at the time, were you?

A No, I wasn't in no jail.

Q No, do you remember the detective you spoke to, sir?

A Not right offhand.

Q Were they uniform people or were they in suits?

A Suits.

Q Two of them?

A Yes.

Q Did you tell them that you knew Rudolph Holton as Man?

A No, I didn't.

Q You didn't tell them that you knew Rudolph Holton as Man?

A No.

Q Man was his street name?

A I never knew his street name.

Q But you told him you knew Rudolph Holton, right?

A Not at that particular time until they showed me a photo of him.

Q So when they show you the photo did you recognize him?

A Yes, I did.

Q And how did you know him?

A Because we practically raised up.

Q What name did you know him by?

A Holton.

Q Holton?

A Holton.

Q You remember practically raised up together?

A Mm-mm.

Q So you knew him when you saw him, right?

A And when I saw his photo.

Q And he was around the same neighborhood you were around, correct?

A What do you mean?

Q Well, you would see him around the same neighborhoods that you were around, correct?

A When we were younger.

Q Now this vacant house on Scott Street that Ms. McDermott has asked you about you have been there yourself, correct?

A I have.

Q All right. And in fact you told the detectives, sir, that you had seen Mr. Holton at that vacant house on Scott Street on prior occasions on several occasions, didn't you?

A No, I didn't.

Q You're saying you didn't tell them that?

A I can't, I'm saying I did tell them that.

Q Let me ask you this, sir. Did the detectives promise you anything in exchange for your statement?

A What detective promised me anything on what?

Q I'm asking you if they promised you anything?

A No, they didn't.

Q They were just talking to you, weren't they?

A I guess so.

Q Okay, they weren't threatening you or anything?

A They weren't threatening me.

Q All right. But you admitted to -- do you remember telling them that you had seen Mr. Holton around that house?

A Yeah, I remember called and telling them I had seen cene him up around the house. I do remember that.

Q Do you remember telling them that you believed that Mr. Holton went in there to shoot drugs?

A No, I never told them a statement like that. I told them I saw Mr. Holton smoking rock.

Q All right.

A I never told them he was shooting nothing.

Q Did you tell the detectives -- well first of all did they show you a picture of the victim in this case Katrina Grady or Graddy?

A Yes, they did.

Q Did you recognize her too?

A Not like in that condition, no.

Q Well, not in that condition but did you know her before she was killed?

A Yes, I know her, of her.

Q From around the neighborhood?

A Yes.

Q You recognized her when you saw her?

A Well on the picture?

Q Well you know who we're talking about, right, you know she was the girl that was killed?

A She ay was friends with my daughter.

Q You knew she was the girl that was killed.

A Yes, I knew that.

Q Did you tell the detectives that you saw her and Mr. Holton on the east side of this vacant house on Scott Street on Sunday night, June 22nd, 1986?

A No, sir.

Q You don't remember telling them that or are you saying that you don't remember?

A I'm telling you I didn't tell them that.

Q You didn't tell them that, right?

A That's right.

Q Did you tell them that you said hello to him that night to Mr. Holton?

A I didn't tell them nothing. I didn't see him that night.

Q All right. Did you tell him that you saw him there with a black bag or a shaving kit?

A Yes, I did state that.

Q All right, so you're saying you didn't see him there but you saw him with a black bag?

A I'm saying that and I'll state it again I repeat I told you I saw him around six o'clock, between five or six o'clock standing up in the front of the door.

Q On what day?

A On, um, I couldn't be too sure about the day. It was three days before the murder.

Q Did you describe the shaving kit at the trial, sir?

A I sure couldn't, all I know it was a little black bag.

Q All right. You don't remember being shown that shaving kit at trial and identifying it as the shaving kit that Mr. Holton had in his possession on Sunday the 22nd of June?

A No, I don't recall that but I recall that the police officer showed me the bag at the jail house.

Q Do you remember being shown it in trial by the prosecutor for identifying it as the one that Mr. Holton had?

A Um, the little black bag that hung on his shoulder, yes.

Q Do you remember identifying that?

A Yes.

Q Do you remember identifying that bag as the one that Mr. Holton had in his possession?

A Yes.

Q Now the last time you saw Mr. Holton, sir, do you remember what he was wearing?

A Nope.

Q Well, did you tell the police the last time you saw him that he was wearing light shorts sleeve shirt and blue shorts?

A No, I didn't tell them nothing like that. Like I said I didn't pay attention to his color.

Q Now do you remember giving a deposition, sir, a sworn deposition or statement to Mina Morgan a female defense attorney who did an interview of you with a court reporter present and Mr. Episcopo, the prosecutor and the defense attorney Ms. Morgan present; do you remember an interview like that?

A Yes.

Q Okay. Do you remember being sworn, sir, to tell the truth?

A Yes.

Q Yes?

A That's right.

Q You were under oath, right, sir?

A That's correct.

Q All right. Do you remember telling on page five, counsel, do you remember stating in that deposition that you saw Mr. Holton together with the victim on Sunday night?

A That was a lie. I never saw him there.

Q Are you saying you didn't say it or are you saying it was a lie when you said it?

A I never said it. I never saw him with nobody.

Q You never said that?

A No.

Q Do you remember saying that they were standing in that vacant house both of them talking together standing next to the house?

A They who?

Q The victim and Mr. Holton?

A No, I didn't say that.

Q Do you remember telling the defense attorney at the same deposition on page eight that Mr. Holton was wearing a short sleeve shirt with a design on it like a circle with writing?

A Sorry, sir, but I don't remember stating nothing like that.

Q Do you remember seeing Mr. Holton wearing or ever wearing a shirt, white shirt with circles on it and writing in it?

A I don't remember no kind, I don't remember no clothes he was wearing period.

Q On page ten of the deposition, do you remember telling the defense attorney in this deposition that Mr. Holton and the victim were close together and that he was leaning on the wall on the side of the house of the vacant house standing up talking to her. Do you remember saying that, sir, under oath?

A I did not say that.

Q You did not say that?

A No.

Q Do you remember walking, telling them that you walked by and you said what's happening and they called you Georgia Boy?

A That's right.

Q Okay you remember that?

A Yes, I remember that.

Q You remember being called Georgia Boy?

A Of course that's my name.

Q Do you recall talking to Mr. Holton that night and he called you Georgia Boy?

A No, I remember walking by and seeing him standing up in the door.

Q You remember that?

A I remember that.

Q You said that?

A Mm-mm.

Q Is -- and then you remember, sir, finding out the next day that she had gotten killed?

A Nope, sure don't.

Q You didn't tell them that in the deposition, sir?

A No, sir, I sure didn't.

Q Do you remember being questioned by some detectives about this offense just like we talked about?

A Yes.

Q And do you remember stating in the deposition that you told the detectives the very same thing that you told the defense attorney in this deposition, do you remember saying that?

A Excuse me, to be more specific I don't understand what you're talking about.

Q In this sworn statement you gave to the defense attorney with the court reporter do you remember telling the defense attorney that you gave the very same statement to the detectives that you were giving here; do you remember that?

A No.

Q Do you remember telling them that in deposition on page thirteen that you saw Mr. Holton with a black bag on Sunday night, the night before the murder?

A Like I said before and I indicate again I never said I saw Mr. Holton that night. I didn't see him that night. I saw him and I'll repeat between five o'clock, between five and six o'clock.

Q On what night?

A I don't want remember the date but it was three days before the murder. He was standing and I kept going back to my business.

Q Do you remember them asking you in the deposition page 26 whether you had, whether you knew a person by the name of Carrie Nelson?

A Who?

Q Carrie Nelson?

A I don't know that.

Q You didn't know Carrie Nelson?

A No.

Q You never talked to Carrie Nelson?

A Carrie Nelson?

Q Carrie Nelson?

A I don't know Carrie Nelson. Well, I know Carrie.

Q All right, did you ever talk to Carrie?

A Yes.

Q Did you ever talk to her about this offense?

A No.

Q You remember testifying at Mr. Holton's trial, sir?

A Sir?

Q Do you remember testifying at Mr. Holton's trial?

A Yes, I remember testifying at trial.

Q Do you remember being sworn to tell the truth?

A The whole truth and nothing but the truth.

Q All right. That's what you did?

A That's what I did and doing it now.

Q Well, did you swear to tell the truth back in 1986 when you testified at Mr. Holton's trial, sir?

A Yes, I did.

Q You were under oath then, right, sir?

A Yes, I'm under oath.

Q Do you remember how many times you have been convicted of a crime, sir, at the time of the trial?

A Um, I don't think, no, I don't think that's really relevant right now.

THE COURT: Whether you think it's relevant or not answer the question.

THE WITNESS: No, I don't.

BY MR. CHALU:

Q All right. Page 352, do you remember telling them that you had been convicted of felonies three times at the time you testified, sir?

A Who?

Q You said you had been convicted of a felony three times at the time of this trial; do you remember that?

A No, I don't remember that.

Q Do you remember whether that's true or not?

A I know it's not true.

Q It's not true? You hadn't been convicted of three felonies at the time of the trial?

A I had been convicted of a felony but not all three felonies.

Q Well how many have you been convicted of, sir?

A I don't remember.

Q Why is that?

A Why should I?

Q Well, is it too many to count is that the reason you don't remember?

A Maybe.

Q Maybe? Now do you remember testifying at the trial on page 353 of the transcript that you had absolutely nothing against Mr. Holton?

A That's right.

Q No fights?

A Never had.

Q Okay. So you had no reason to lie?

A That's right.

Q Against Mr. Holton did you, sir?

A That's right.

Q And do you remember also, sir, that nobody ever gave you anything in exchange for your testimony did they?

A That is correct.

Q Nobody promised you anything?

A Nobody promised me nothing.

Q Nobody threatened you at all, right?

A That's right.

Q You had nothing against Mr. Holton no reason to lie against him?

A That's correct.

MR. CHALU: Nothing further, Your Honor.

THE COURT: Anything further of this witness?

MS. MCDERMOTT: One moment, Your Honor.

THE COURT: Sure.

RE-DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Mr. Newsome, when you spoke to the police did you have an outstanding charge?

A Excuse me?

Q When you spoke to the police originally did you have an outstanding charge?

A No.

Q Had you been charged with a crime at the time that you spoke to the police?

A Um, no.

Q Okay, and um --

A I had a charge but it was taken care of.

Q So when you spoke to them though you had a charge?

A I was on probation. I was on probation.

Q Okay and, Mr. Newsome, so the bottom line did you see Rudolph Holton with Katrina Graddy on June 22nd 1986?

A I keep saying no, I never saw Rudolph Holton with Ms. Graddy.

Q Now, you didn't lie because you have a grudge against Mr. Holton, right?

A That's correct.

Q Why did you lie?

A Well, I was scared because the police I thought they were going to get me for something, some for things I be doing out there.

MS. MCDERMOTT: At that time -- okay, thank you.

MR. CHALU: Just one question, Your Honor.

THE COURT: Go ahead.

RE-CROSS EXAMINATION

BY MR. CHALU:

Q Well, aren't you scared today, sir?

A For what?

Q Well, if you were scared to not cooperate with the police then how come you're not scared to not cooperate with the police today?

A I am willing to cooperate with the police. What is the problem?

Q All right. You were willing to do that back in 1986, sir, weren't you?

A I am willing to do that now.

THE COURT: Anything else?

MS. MCDERMOTT: No, Your Honor.

THE COURT: May this witness be excused?

MS. MCDERMOTT: Yes, Your Honor.

THE COURT: May he be sent back to his place of incarceration?

MS. MCDERMOTT: Yes, Your Honor.

THE COURT: All right, Madam Clerk, if you would write on the docket to release him back and let them know back there when you take him back to where he came from. Call your next witness.

MS. MCDERMOTT: We would like to call George Dewey Smith.

THE COURT: George Dewey Smith. Mr. Smith, if you'd step up here and have a seat in this witness chair, please. Go ahead and have a seat. Raise your right hand, please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes.

THE COURT: Okay, you can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: George Smith, S-M-I-T-H.

THE COURT: You may inquire.

Whereupon,

GEORGE SMITH,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Mr. Smith, do you live in Tampa?

A Yes.

Q Do you know Donald Smith?

A Yes, I do.

Q How do you know Donald Smith?

A Grew up together.

Q You grew up together?

A Yeah.

Q In 1986 okay, I'm sorry, strike that. Do you know David Pearson?

A Yes.

Q How do you know -- does he have a nickname?

A Pine.

Q Pine?

A Yeah.

Q How do you know David Pearson?

A All of us grew up together in the same neighborhood.

Q Okay. Did you know Katrina Graddy?

A Yes, I did.

Q How did you know Ms. Graddy?

A All of us stayed in the same area.

Q Now do you remember when Ms. Graddy was killed?

A Yes.

Q And after you learned that Ms. Graddy was killed did you have a conversation with Donald Smith about the murder?

A Yes, I did.

Q What did Donald Smith tell you?

A He said that Pine had told him that he had did it and he had told me.

Q Okay, and after you learned of that did you go and talk to David Pearson about this your friend Pine?

A Yes, I asked him about it.

Q How did he react?

A He didn't say nothing he just walked away.

Q He didn't deny it?

A He didn't say nothing. He just walked away.

Q Now you have known David Pearson your whole life, correct?

A Yes.

Q And after Katrina Graddy's death did you notice anything different about Mr. Pearson?

A He wasn't never the same.

Q What do you mean by that?

A Well, he started doing drugs.

MR. CHALU: Judge, excuse me, I can't hear the witness.

THE COURT: He started doing drugs. You have to speak up a little bit, sir.

THE WITNESS: He started doing drugs and he never was the same anymore.

BY MS. MCDERMOTT:

Q Okay. Mr. Smith, I'd like to show you, I'd like to show you this photograph and can you tell me who this individual is in the photograph?

A David Pearson.

Q Can you just read this right here what it says?

A Photo.

Q Photo (b)?

A Yes, photo (b).

MS. MCDERMOTT: For the record this is the Defense Exhibit Number or has it already been moved into, it's already been moved into evidence as Exhibit Number 26. Thank you, Mr. Smith.

THE COURT: Did it come into evidence through, wait just a second, Mr. Smith.

MS. MCDERMOTT: Through Mr. Schenck I believe.

THE COURT: Okay, just want to make sure. He has a few questions for you.

CROSS-EXAMINATION

BY MR. CHALU:

Q Hi, Mr. Smith, let me ask you just a routine question. Have you ever been convicted of a felony before?

A Yes, I have.

Q How many times?

A Once.

Q Once? Now you know Donald Smith, right?

A Yes.

Q And also David Pearson, right?

A Yes.

Q You all grew up together?

A Yes.

Q Now as I understand it Donald Smith told you that Pine had told him?

A Yeah.

Q That he committed the murder?

A Yes.

Q Pine never told you that he committed the murder, did he?

A No, he didn't.

Q Sir, what do you do for a living?

A I work at Sonny's Barbecue Pit in Brandon.

Q All right, sir. When were you first contacted about this case?

A Well, they had been trying get me for a long time. They was trying to talk to me a long time but I was never around.

Q All right. Who is they?

A I guess what his name I can't remember his name.

Q An investigator?

A Yes.

Q Okay. Since what time within the last few months, a year or what?

A Couple years back up until now.

Q When did you first speak to the gentleman regarding this case?

A Yesterday.

Q Yesterday?

A Yes.

MR. CHALU: Okay, thank you, sir.

THE COURT: Any further questions of this witness?

MS. MCDERMOTT: No, Your Honor.

THE COURT: May this witness be excused?

MS. MCDERMOTT: Yes, Your Honor.

THE COURT: You're excused, sir. Call your next witness.

MS. MCDERMOTT: Debra Williams.

THE COURT: Debra Williams. Ms. Williams, if you'd step up here and have a seat in the witness chair, please, ma'am. Raise your right hand, please, ma'am. Do you swear or affirm testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: My name is Debra Ann Williams, W-I-L-L-I-A-M-S.

THE COURT: You may inquire.

MS. MCDERMOTT: Thank you, Judge. Let me find an exhibit real quickly.

THE COURT: All right.

Whereupon,

DEBRA WILLIAMS,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Ms. Smith, where do you live?

A I live in Tallahassee, Florida.

Q And what is your occupation?

A I'm currently a staff assistant with the Office of Capital Collateral Counsel for the Northern Region.

Q How long have you been working with the office of CCR?

A Total?

Q Right now?

A Since October of 2000.

Q And prior to your most recent employment with the agency did you work for the Capital Collateral as a representative?

A Yes, I did.

Q In what capacity did you work with them?

A I worked as an investigator beginning in September of 1996.

Q Okay.

A Then the agency was split into three separate regions and I went to the Tampa office and that was in September of 1997.

Q Okay, and you continued to work for the office at that time?

A Right.

Q As an investigator?

A Yes.

Q Do you know -- are you familiar with the Rudolph Holton case?

A Yes, I am.

Q How are you familiar with his case?

A I was assigned that case when I was an investigator with CCR.

Q And what were some of your responsibilities as an investigator on the case?

A To collect and review records and then also to do investigative work which includes interviewing witnesses.

Q In the process of reviewing records did at one point were you asked to review the state attorney's file for Flemmie Birkins?

A Yes.

Q And who was Flemmie Birkins at Mr. Holton's trial? What role did he play?

A The file reflected that Mr. Birkins was a jail house snitch who provided information in exchange for a lighter reduced sentence.

Q And in the process of reviewing that file -- I'm sorry, did you review the file regarding Mr. Birkins' charges that were pending at the time of Mr. Holton's trial?

A Yes, I did.

Q When you reviewed that file did you locate any guideline sentence score sheets?

A Yes.

MS. MCDERMOTT: I'd like to show you an exhibit marked as Exhibit Number Nine.

MR. CHALU: Can I see that, Counsel?

BY MS. MCDERMOTT:

Q I'm sorry. Ms. Williams, I'd like you to review that document for a moment.

A Okay.

Q Does that document look familiar?

A Yes, it does.

Q What is it?

A This is the score sheet for Flemmie Birkins on a burglary charge. It was a charge that he had pending at the time that Rudolph Holton was arrested for.

Q Were there any other score sheets in that file regarding Mr. Birkins' charges from June of 1986?

A No, not from June of 1986.

Q Okay. I want to ask you about a man named Willie Dan Simmons. Are you familiar with that name?

A Yes, I am.

Q And to your recollection how is Mr. Simmons involved in Mr. Holton's case or who is he?

A From the file I gathered that he was a friend of Carrie Nelson.

Q Okay, Carrie Nelson, who was Carrie Nelson?

A Carrie Nelson was one woman who lived in the area at the scene of the murder who told the police that she had seen Mr. Holton entering the residence.

Q Did she testify at Mr. Holton's trial to your knowledge?

A I do not recall.

Q Now did you determine that you wanted to speak to Mr. Simmons?

A Yes, I did.

Q And what information did you have about Mr. Simmons -- what kind of identifying information did you have about him?

A Um, I knew he lived somewhere in the area within probably Central Park. That he was known as Sissy Dan and that he was somewhere between 45 and 50 at whatever time this case was coming to trial.

Q When you he lived in Central Park could you explain what is Central Park?

A Central Park is a housing project located near or sort of downtown Tampa.

Q Now how did you go about trying to locate Mr. Simmons?

A Um, first I did a run using data base technology, auto track system which provides information that is gathered from public records so you know instead of going to various agencies trying to call information as where a person maybe located or prior addresses it just kind of gives it all to you just by logging into their system and then it gives you the information.

Q And what results did you achieve by using that system to try to find Mr. Simmons?

A Um, I got some hits but nothing that was a sure hit. I mean, there are -- you get addresses but there are dates that are attached so you can't be sure that you will be what the likelihood is that you will actually find that person at that address.

Q Okay. What did you decide to do next?

A Decided that I would go to Central Park and take a look around and go near where Carrie Nelson lived because I knew that Mr. Simmons at least at the time of the crime had been living somewhere near there as well and that I would go see if maybe there might be somebody around who might know where I could find him.

Q Okay. Then what happened when you did that?

A I drove around, um, saw some people outside. I was actually then on Scott Street. I parked the car and got out and walked up to this group of men and said, do you know Sissy Dan and they said, yeah, and I said do you know where I can find him and said he lives right here.

Q So where was that?

A They were pointing to a building and a corner I believe was like in sort of this sprayed paint penciled sort of 1239 Scott Street.

Q Where was Dan Simmons, where was Dan Simmons when you spoke to him in proximity to where Carrie Nelson lived at the time of Mr. Holton's trial?

A He said he was just maybe like across the street and down like a block or two.

Q Okay, I think --

A Where he was living at that time, at the time of the murder.

Q At the time of the murder I was living, he was not living at 1239 Scott Street?

A Correct, I think he moved at some point.

Q But when you spoke to him he was living at 1239?

A Yes.

Q Is that all in the same area?

A Yes.

Q Now did you interview Mr. Simmons?

A Yes, I did.

Q What did you learn from Mr. Simmons?

A That he was with Carrie Nelson the night that this incident occurred. That they saw Mr. Holton walking along the street passed Carrie Nelson's house and Mr. Simmons said that he was headed towards the hole.

Q What is the hole?

A The hole is an area that was known for I think drugs sales.

Q Okay and what else did Mr. Simmons inform you about that night?

A Well, he said that he saw Mr. Holton but they saw Mr. Holton pass the house at about nine a.m., excuse me, nine p.m. and am I talking too loud for you, okay and um that they did not see Mr. Holton anymore that night and that he did not leave Ms. Nelson's house until 4:30 a.m.

Q Okay and did he also tell you anything about the next morning?

A Yes.

Q What did he tell you about the next morning?

A He got up the next morning. He was headed over to Carrie Nelson's house. He saw the police cars and, you know, guess saw what probably was this crime scene of course, you know if you've ever been to a fire scene and he went to Ms. Nelson and she told him that you know she had finally found a way to stop Rudolph from stealing from her and that she had told the police that she had seen Mr. Holton enter the house that night.

Q What was Mr. Simmons' reaction when he heard that?

A Um, he told her that, you know, she was lying and they had an argument and so he -- but he went over and tried to tell the police officer that Carrie Nelson was lying when she said that she saw Rudolph Holton enter that house.

Q Okay. Did you ask Mr. Simmons if someone had come to speak to him someone from Mr. Holton's defense team at the time of trial if someone had come to talk to him at that time?

A Yes, I did ask him.

Q What was his answer?

A He said no one came to see him.

Q Did he tell you that he would be willing to testify for Mr. Holton?

A Yes.

Q One last thing when you were working as Mr. Holton's investigator did you attempt to find Flemmie Birkins?

A Yes, I did.

Q How did you do that?

A I also ran data base technology auto track program looking for Mr. Birkins and it had two different spellings because I wasn't sure if F-L-E-M-N-I-E was the correct spelling.

Q Okay. Did you have any luck finding him?

A Didn't get anything that was near. I prompted that date that would, you know, led me to believe it would be easy to go and pin point an address for him at that time.

Q Okay. Was there anything in the file similar to Mr. Simmons that you thought was fruitful to attempt to locate him other than the data base search?

A Yes, just, um, in terms of an address or just why I would want to find him?

Q No, in terms of an address or more, you know an address?

A No, um, you know at the time I mean it just various addresses and it was just really hard to pin point with Mr. Birkins actually given his criminal record it was a number of addresses so it's kind of, sort of, it was going to take a lot of time to try to find him because he could have been almost anywhere.

MS. MCDERMOTT: Okay, thank you, MS. Williams.

THE COURT: Mr. Chalu, any questions?

MR. CHALU: Just a couple.

THE COURT: You may inquire.

CROSS-EXAMINATION

BY MR. CHALU:

Q Did you examine the file and all the police reports in the Rudolph Holton case in this particular proceeding?

A For this trial?

Q Yes, ma'am.

A Yes.

Q Did you find any police reports where Mr. Simmons gave a statement to the police?

A No.

Q Okay. So if there's no police report made of Mr. Simmons statement to the police then defense counsel would not have had that statement, correct, if in fact one was never written, correct?

A I would assume that you would be correct, yeah.

Q And if a police report was never written regarding Mr. Simmons' statements the prosecutor would not have had such a statement either in his possession, correct?

A If it was never written.

Q Yes, well you examined the file and found no such statement, correct?

A You know at this point, you know, I don't recall that.

Q So you're not sure?

A It's been a while since I've looked at the file.

Q You were mentioning running auto tracks. Do you how long auto tracks have been in existence?

A No, I don't know how long they have actually been in existence. I know that they were in existence when I became an investigator.

Q Which was what year?

A 1996.

Q So you don't know whether they were in existence 1986?

A No, I don't.

Q Now when you interviewed Mr. Simmons he told you that he and Carrie Nelson saw Mr. Holton on the street on the night of the murder at about nine p.m., Correct?

A Yes, correct.

Q That was Sunday June 22nd, 1986, right, the night of the murder?

A Yes, the night of the murder.

Q Regardless of the date it was the night of the murder?

A Correct.

Q Do you recall talking to Carrie Nelson?

A I did not speak to Carrie Nelson because I believe she was dead by the time I got on the case.

Q All right. Now Mr. Simmons has also died since you spoke to him, correct?

A Yes.

Q So he's not available to testify here, correct?

A Correct.

Q Either is Ms. Nelson?

A Right.

Q Do you recall Mr. Simmons telling you when he left Carrie Nelson's house that night, the night of the murder?

A He said he left the house around 4:30 a.m.

Q 4:30 a.m.?

A Yes.

Q Do you recall Ms. Nelson mentioning that she had gone to bed early that evening?

A I'm not sure exactly. I mean, at this point I haven't a chance to review the files so I'm not exactly sure what her statement was.

Q Okay. Did you ask Mr. Simmons where in Ms. Nelson's house he was until four o'clock in the morning on the 23rd?

A He did mention that they had been sitting out on the porch.

Q Okay. Did you get specific with him about whether he was on the porch the whole time he was there?

A I don't remember, I may have.

Q Okay, so you don't know whether at some point he might have gone into the house according to his statement?

A He didn't tell me that he had gone in the house.

Q I beg your pardon?

A I don't recall him telling me he had gone into the house but, um, I mean he said he was with Ms. Nelson.

Q All right. But you don't know whether they were out on the porch the whole time until four o'clock in the morning when he left or not, right?

A No, I don't.

Q Correct and since they saw Mr. Holton in that area -- by the way that area is near Scott Street house is it not where this homicide occurred?

A Which area? He said that they saw him heading towards the hole and actually, um, my understanding is that the hole is located -- you're on Scott Street it's closer to The Red Top Bar.

Q Right, it's all within walking distance from each other, right, The Red Top Bar?

A Sure.

Q Scott Street?

A Absolutely.

Q Carrie Nelson's house and Carrie Nelson's house was very close to this Scott Street house where this murder occurred, correct?

A Yes.

Q In fact you can see that house from Carrie Nelson's --

A Right.

Q -- house, correct? So Mr. Holton was seen in the area of Carrie Holton's house, I'm sorry, Carrie Nelson's house and the house where the murder occurred at nine p.m. that night, right?

A He was walking in the direction towards the hole which was away from that house.

Q But he's in the area at nine o'clock, right?

A Certainly.

Q And since we don't know whether Mr. Simmons was outside the hole the whole time watching the neighborhood he could not tell you for sure whether or not Mr. Holton ever went into that house later that night, correct? He couldn't tell you that, right?

A Right but he did say that, you know, I mean Ms. Nelson apparently had not given him any reason to think she had actually seen Mr. Holton.

Q Well, but Mr. Simmons, but Mr. Simmons since we don't know whether Mr. Simmons was outside watching, watching the Scott Street house where the murder occurred the entire time he was there until four a.m. we don't know whether or not Mr. Holton could have gone in there without him Mr. Simmons seeing him, right, it could have happened?

A It's possible.

MR. CHALU: Okay, nothing further.

THE COURT: Anything further?

MS. MCDERMOTT: Yes, Your Honor.

RE-DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Ms. Williams, I would like to show you and look at an exhibit marked for identification as Defense Exhibit Number 27. Can you tell me what that document is?

A This is the death certificate of Carrie Nelson.

Q What is the date of the death that is reflected on that document?

A June 15th, 1992.

MS. MCDERMOTT: Okay, I'd like to, I'm sorry, I'd like to move it into evidence.

MR. CHALU: No objection.

THE COURT: It'll be so received. What number is it?

THE CLERK: Twenty-seven.

THE COURT: Twenty-seven, okay.

BY MS. MCDERMOTT:

Q I also you to look at Exhibit Number 23 which has already been introduced into evidence. Can you identify this document for me?

A It's a deposition of Carrie Nelson.

Q As an investigator for Mr. Holton did you review the information in his files?

A Yes.

Q Do you recall reading this deposition?

A Yes.

Q I'd like to point to page number twelve of this deposition and during this deposition did Ms. Nelson mention that Willie Dan Simmons was on

the porch with her the night of June 22nd, 1986 and I think it continues onto page 13?

A Yes, she does.

Q Okay. I'd like you to look at another exhibit and it's already been admitted into evidence as Exhibit Number 12 and I'd like for you to look at the second page and there's some handwritten notes. Could you and I'm going to point to this area what is that notation say?

A Willie Simmons, 47 years of age.

Q Okay. Ms. Williams, when you spoke to Mr. Simmons he told you he confronted Ms. Nelson about her statement; is that right?

A That's correct.

Q And did Ms. Nelson explain to him why she made the statement she did?

A Yes.

Q What was her explanation?

A She wanted to stop him from stealing from her.

Q Who is him?

A She wanted to stop Mr. Rudolph from stealing from her.

MS. MCDERMOTT: Okay, thank you.

THE COURT: Any further questions, Mr. Chalu?

MR. CHALU: No, Your Honor.

THE COURT: May this witness be excused?

MS. MCDERMOTT: Yes, Your Honor.

THE COURT: You're excused, ma'am. Call your next witness.

MS. MCDERMOTT: Can I have one moment, Your Honor?

THE COURT: Sure.

MS. MCDERMOTT: Darrell Jackson.

THE COURT: Darryl Jackson. Mr. Jackson, if you'd step up here and have a seat in the witness chair, please. Raise your right hand, please, sir. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: Okay, you can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: Darryl Jackson, J-A-C-K-S-O-N.

THE COURT: You may inquire.

Whereupon,

DARRYL JACKSON,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Good afternoon, Mr. Jackson.

A Good afternoon.

Q Mr. Jackson, what is your current occupation?

A Investigator for the Capital Collateral Regional Counsel Tampa, Florida.

Q Was this your occupation in 1998?

A Yes.

Q While working for Capital Collateral Counsel were you assigned to assist in the investigation of the Rudolph Holton case?

A Yes, I was.

Q And in the first half of 1998 do you recall what the procedural posture of the case was at that time?

A It was in the 3.850 process.

Q Okay. We had a 3.850 date deadline?

A Yes.

Q Now, in preparing the file on Mr. Holton's 3.850 did you consult with the attorney on the case about what types of investigation you should do?

A Yes, I did.

Q And do you recognize the name Donald Lamar Smith?

A Yes.

Q How do you recognize that name?

A Donald Lamar Smith's name when I researched the files the police reports his name was mentioned on them.

Q Okay. I'd like to show you what's been previously been marked and entered into evidence as exhibit eighteen. And this is a police report dated June 23rd, 1986 authored by Officer Wallace. Do you remember reviewing that report during, while we were preparing the 3.850?

A Yes.

Q Okay, I'd like you to take a look at page two of that report and is there a note on that report that refers to a Donald Lamar Smith?

A Yes.

Q Okay. Does that note indicate that Donald Lamar Smith seemed to have some knowledge about the crime?

A Yes, it did.

Q Is that why you wanted to go see Donald Lamar Smith?

A That's correct.

Q Did you locate Donald Lamar Smith?

A Yes.

Q Did you locate him at a house on Harrison Street?

A Yes.

Q Was your it understanding that this was the house he was living in 1996?

A Yes, ma'am.

Q And did Mr. Smith speak to you?

A Yes, he did.

Q Okay. Now did there also come a time when you wanted to interview a man named Willie Dan Simmons?

A Yes.

Q And we had already -- somebody from CCR had already interviewed Mr. Simmons was that your recollection?

A Yes.

Q And we wanted to go or why did you go back to interview him then? Did we just want to confirm some of the information that he had previously given?

A Yes.

Q And where did you find Mr. Simmons?

A I ran his name on auto track and came up with an address where he was living in that area.

Q Okay. And did you go interview Mr. Simmons?

A Yes, I did.

Q Did Mr. Simmons provide you with some information about the night of the crime?

A Yes, he did.

Q Okay. What information did he relay to you that he had knowledge about?

A He had knowledge of he saw Mr. Holton earlier that night and the following day after the murder happened and maybe Ms. Nelson.

Q Correct.

A They got in an argument because she stated she told the police officer that Mr. Holton was in the area and he was like, well, you're lying because you didn't see him because we were together all night so why would you tell him this?

Q But they did see Mr. Holton walk by?

A Yes.

Q But he was telling her that she didn't see him go into the house when she told them, she had told the police then?

A Yes.

Q Did -- after they had that confrontation did he tell you what Carrie told him was her reason for telling the police that they saw Rudolph go into the house?

A Her reason was Rudolph had recently stolen some items from her house and she wanted to get back at Mr. Holton.

Q Okay. Did he mention anything about his health to you?

A At that time, um, Mr. Simmons stated that it would be best if we got back in contact with him as soon as possible because at the time he wasn't, his health was deteriorating.

Q Okay. And are you aware of what happened next as far as the court pleadings went and what we did in the case?

A I relayed that message to the attorney and we filed for a motion to do a depo on Mr. Simmons.

Q Okay. And at some point were you directed to go and find Mr. Simmons to set up the time where we could take the deposition?

A Yes, I was.

Q And what did you learn?

A At that time I found out that Mr. Simmons was deceased.

Q Okay. Mr. Jackson, I would like to show you a document marked for identification as Defense Exhibit 28. Do you recognize this document?

A Yes, I do.

Q What is this document?

A It's a death certificate of Willie Dan Simmons.

Q Can you tell me what the date of death was?

A August 20th, 1998.

MS. MCDERMOTT: Okay, thank you. I'd like to move this into evidence, Your Honor.

THE COURT: Any objection?

MR. CHALU: No, Your Honor.

THE COURT: It will be so received.

BY MS. MCDERMOTT:

Q Mr. Jackson, in the course of your investigation did you attempt to locate a nam named Flemmie Birkins?

A Yes, I did.

Q How did you go about trying to locate Mr. Birkins?

A I also ran his name on auto track which I didn't come up with anything but his mother's address.

Q Okay. Did you go see his mother?

A Yes, I finally found her in a retirement home.

Q Okay. She hadn't seen Flemmie in a long time, correct?

A No, she hadn't seen him.

Q Did you also check the Hillsborough County Jail?

A Yes, I did.

Q When you spoke to his mother did you, did you obtain any information about what Mr. Birkins status was at the time you were looking for him?

A At that time his mother said he was homeless.

Q Okay.

A She didn't have any address for him.

Q Okay. Did you ever locate Mr. Birkins?

A No.

MS. MCDERMOTT: Thank you, Mr. Jackson.

THE COURT: Any further questions of this witness?

MR. CHALU: Just a second, Your Honor.

THE COURT: Sure.

CROSS-EXAMINATION

BY MR. CHALU:

Q Mr. Jackson, did you have an opportunity to review the file in this case Rudolph Holton's case?

A No.

Q Did you review the deposition of Carrie May Nelson?

A Yes, I have.

Q All right. Do you recall and I'm referring to page 15, counsel. I'm going to show you a copy just to refresh your memory on page 15. Draw your attention to lines 13, 14 and 15 and 16. Would you read that, sir?

A You can be assured --

Q No, just read it to yourself. That seems to indicate that Ms. Nelson's statement in her sworn deposition that when she saw Mr. Holton going in the house that he was not with the victim?

A Yes.

MR. CHALU: Okay, thank you, nothing further.

THE COURT: Anything further of this witness?

MS. MCDERMOTT: Nothing further, Your Honor.

THE COURT: May this witness be excused?

MS. MCDERMOTT: Yes, sir.

THE COURT: You're excused, sir. Call your next witness.

MS. MCDERMOTT: Janita Whitehead.

THE COURT: Janita Whitehead. Ma'am, if you'd step up here and have a seat in the witness chair right here, please. Raise your right hand please, ma'am. Do you swear or affirm testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, sir.

THE COURT: You can put your hand down. If you'd state your name for the record and spell your last name.

THE WITNESS: My name is Janita Whitehead, W-H-I-T-E-H-E-A-D.

THE COURT: You may inquire.

Whereupon,

JANITA WHITEHEAD,

after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MCDERMOTT:

Q Thank you, Your Honor. Ms. Whitehead, what is your occupation?

A I'm an investigator with Capital Collateral Northern Region.

Q And within the past few weeks have you been assigned to assist a defense team in representing Mr. Holton?

A Yes, ma'am.

Q And have I asked you to do some investigation for us?

A Yes, ma'am.

Q Okay. Are you familiar with the name Renetta Johnson?

A Yes, I am.

Q Okay. What is your understanding of who Ms. Johnson is?

A I first saw Ms. Johnson's name in a police report. She was a person who was at the time the victim was not known she was reported missing at the time they were trying to find out, I guess what, who the victim was. She was reported missing by her mother and she was someone who said she was on Scott Street the night of the crime.

Q Okay. Ms. Whitehead, I would like to show you what has been marked for identification as Defense Exhibit Number 29. Is this the police report that you are referring to regarding information on Renetta Johnson?

A Yes, ma'am.

MS. MCDERMOTT: Okay, I would like to move this into evidence, Your Honor.

THE COURT: Any objection, Mr. Chalu?

MR. CHALU: No, Your Honor.

THE COURT: It will be so received.

BY MS. MCDERMOTT:

Q Ms. Whitehead, so it was from your understanding from this report that Renetta Johnson was in the area the night of June 22, 1986?

A Yes, ma'am.

Q And in that report did she tell the police officer that she saw several individuals in the area of the Scott Street house?

A Yes, ma'am.

Q Okay and what efforts did you take to find Ms. Johnson?

A Well, um, I ran an auto track report which is a data base that uses credit information driver's license bureau information, land transactions, vehicle investigations and probably a few other sources I can't enumerate right now but and they provide identifying information on people and addresses. I was unable to locate her with the information that they provided.

Q Did you find Renetta Johnson's mother?

A Yes, ma'am.

Q Did you speak with her mother?

A Yes, I spoke with her mother.

Q Did her mother know where her daughter was residing at this point?

A No, her mother indicated that they were estranged and she had no idea where her daughter was living.

Q Did you also look at the county jail the web cite for the county jail?

A Yes, ma'am.

Q Was Ms. Johnson residing at the county jail?

A No, ma'am.

Q Did you also go to the Tampa post office, post office -- well on the auto track did it indicate that there was a post office box associated with Renetta Johnson?

A Yes, ma'am, there was a post office box that was listed as her address on her driver's license here in Florida.

Q Okay, and did you try to determine what her street address was by going to the post office and asking them if they had any better information?

A Yes, ma'am.

Q Okay, and did they have any other information on Ms. Johnson?

A No, ma'am, they gave me an address that I had already checked and Ms. Johnson did not live there.

Q So ultimately did you ever have the opportunity to speak with Ms. Johnson?

A No, ma'am.

MS. MCDERMOTT: Okay, thank you.

MR. CHALU: No questions, Your Honor.

THE COURT: May this witness be excused?

MS. MCDERMOTT: Yes, Your Honor.

THE COURT: You're excused, ma'am, thank you. Call your next witness.

MS. MCDERMOTT: Your Honor, at this time I think we're out of witnesses. I did try to speak with Ms. Morgan again and she was -- I never did get in contact with her so, um, at this time I would ask that just out of an abundance of caution just in case I haven't moved any exhibits in I would like at this time to ask that all the exhibits we referred to today be moved into evidence.

THE COURT: Any objection, Mr. Chalup?

MR. CHALU: No, Your Honor.

THE COURT: They'll be so received.

MS. MCDERMOTT: And I would ask to adjourn until tomorrow afternoon.

THE COURT: Tomorrow morning?

MS. MCDERMOTT: Tomorrow morning?

THE COURT: Yeah, Wednesday afternoon, Thursday afternoon and all day Friday.

MS. MCDERMOTT: Um, that's fine, Your Honor, we'll have Ms. Morgan here early.

THE COURT: I have a short docket if you all want to come in at 9:30.

MS. MCDERMOTT: Okay.

THE COURT: Okay, is that all you have left is Ms. Morgan?

MS. MCDERMOTT: Um, we may have -- we may have a couple of more witnesses but it will be short. It will be short witnesses.

THE COURT: You got any witnesses tomorrow?

MR. CHALU: In all probability, yes.

THE COURT: How many you got?

MR. CHALU: Right now it looks like three.

THE COURT: Okay.

MR. CHALU: Possibly four.

THE COURT: Okay, all right.

MS. MCDERMOTT: Judge. I'm sorry one housekeeping matter. Yesterday you directed us to give you a new Writ of Habeas Corpus to transport Donald Lamar Smith to Hillsborough County so I have prepared that for your signature.

THE COURT: All right. Madam Clerk, make sure they get that over at the jail. Anything else?

MR. CHALU: No, sir.

MS. MCDERMOTT: No, sir.

THE COURT: All right, see you all tomorrow.

(Conclusion of proceedings)

CERTIFICATE OF COURT REPORTER

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, COLLEEN MERRITT, OFFICIAL COURT REPORTER for the Circuit Court of the Thirteenth Judicial Circuit

of the State of Florida,

DO HEREBY CERTIFY that I was authorized to, and did report the proceedings and evidence in this hereinbefore-styled cause, as stated in the caption attached, and that the preceding transcript attached hereto is a true, accurate and correct computerized transcription of my report of the proceedings had at said session.

I FURTHER CERTIFY that I am not employed by or related to the parties to this matter nor interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal in Tampa, Hillsborough County, Florida, this 26th day of November, 2001.

Colleen Merritt, Official Court Reporter