IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
Criminal Justice Division

STATE OF FLORIDA **CASE NO.: 93-9019-CF**

v.

MARK A. KOHUT and **DIVISION: U**
CHARLES P. ROURK,
Defendants.
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ORDER DENYING MOTIONS FOR POSTCONVICTION RELIEF

THIS MATTER is before the Court on Defendants Kohut's and Rourk's Motions for Postconviction Relief and Memorandum of Law in Support of Motion for Post-Conviction Relief Pursuant to Rule 3.850 Filed on Behalf of Petitioners[1] filed, through counsel, on February 23, 2010[2]. The basis for this postconviction motion is a 2001 report from the Federal Bureau of Investigation ("FBI") indicating that some of the FBI analysts who conducted forensic testing in this case may have engaged in improper conduct.

On March 3, 2010, the State filed State's Response to Order to Show Cause ("State's Response"). On February 23, 2010, Defendant's Kohut and Rourk filed, through counsel, Refiled Defendant's Response to the State's Response. On March 3, 2010, the State filed State's Amended Response to Order to Show Cause ("State's Amended Response") and Supplement to State's Amended Response. On February 10, 2010, Defendant Kohut filed, through counsel, Refiled Defendant's Reply to the State's Amended Response. On February 23,

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[1] Defendants Kohut and Rourk refiled the same memorandum on March 1, 2010.

[2] These pleadings were originally filed in the Thirteenth Judicial Circuit in case number 93-CF-000281, however, the Court found there was a potential jurisdictional issue, as the convictions the Defendants are moving to vacate were obtained in the Fifteenth Judicial Circuit. As a result of this jurisdictional concern, Chief Justice Peggy Quince of the Florida Supreme Court specially designated the Honorable Michelle Sisco as a Fifteenth Circuit Court judge for the purpose of hearing the pending postconviction motions. (*See,* November 9, 2009, Order of Chief Justice Quince, attached.) The Court subsequently ordered all parties to refile their pleadings in the Fifteenth Judicial Circuit in case number 93-0919-CF.

2010, Defendant Kohut filed, through counsel, Refiled Motion for Leave to Amend. On February 23, 2010, Defendant Kohut filed, through counsel, Refiled Amended Supplement to Defendant Kohut's Motion for Post Conviction Relief and Refiled Supplement to Defendant Kohut's Motion for Post Conviction Relief.

On February 23, 2010, Defendant Kohut filed, through counsel, Refiled Motion to Reconsider Order Denying Supplement to Defendant Mark A. Kohut's Motion for Post-Conviction Relief, and Refiled Notice of Filing Exhibits for Motion to Reconsider Order Denying Supplement to Defendant Mark A. Kohut's Motion for Post-Conviction Relief. On March 3, 2010, the State filed State's Response to Defendant's' Motion to Reconsider Order Denying Supplement to Defendant's Motion for Post Conviction Relief. On February 23, 2010, Defendant Kohut filed, through counsel, Refiled Defendant Kohut's Reply to State's Response to Defendant's Motion to Reconsider Order Denying Supplement to Defendant's Motion for Post-Conviction Relief and Refiled Defendant Kohut's Reply to State's Response to Defendant's Motion to Reconsider Order Denying Supplement to Defendant's Motion for Post-Conviction Relief.

On February 23, 2010, Defendant Kohut filed, through counsel, Refiled Defendant Kohut's Motion to Vacate or Set Aside Order Denying Motion to Reconsider Order Denying Supplement to Defendant Mark A. Kohut's Motion for Post-Conviction Relief filed June 30, 2009. On February 23, 2010, Defendant Kohut filed, through counsel, Refiled Notice of Filing Supplemental Exhibit to Defendant Kohut's Motion to Vacate or Set Aside Defendant's Order Denying Motion to Reconsider Order Denying Supplement to Defendant Mark A. Kohut's Motion for Post-Conviction Relief; Refiled Notice of Filing Second Supplemental Exhibits to Defendant Mark A. Kohut's Motion to Vacate or Set Aside Defendant's Order Denying Motion

to Reconsider Order Denying Supplement to Defendant Mark A. Kohut's Motion for Post-Conviction Relief; Refiled Notice of Filing Third Supplemental Exhibit to Defendant Mark A. Kohut's Motion to Vacate or Set Aside Defendant's Order Denying Motion to Reconsider Order Denying Supplement to Defendant Mark A. Kohut's Motion for Post-Conviction Relief; and Supplemental Exhibit to Defendant's Kohut's Motion to Vacate or Set Aside Order Denying Motion to Reconsider Order Denying Supplement to Defendant Mark A. Kohut's Motion for Post-Conviction Relief. On February 23, 2010, attorney Rick B. Levinson filed a Refiled Pro Hac Vice Motion. On February 23, 2010, Defendant Kohut filed, through counsel, a Refiled Waiver of Conflict. On February 23, 2010, Defendants Kohut and Rourk filed a Refiled Motion to Appoint the Public Defender to Represent the Petitioners During Post-Conviction Proceedings if an Evidentiary Hearing is Required. On February 23, 2010, Defendants Kohut and Rourk filed, through counsel, a Refiled Motion to Consolidate Post-Conviction Proceedings. On March 1, 2010, Defendant Rourk filed, through counsel, Defendant's Re-filed Motion to Allow Deposition of HCSO Sergeant Richard Figueredo. On March 3, 2010, the State filed State's Objection to Defendant's Motion to Allow Deposition of HCSO Sergeant Richard Figueredo.

On May 17, 2010, the Court granted an evidentiary hearing on Defendants' Motions for Postconviction Relief; granted Defendants Kohut's and Rourk's Refiled Motion to Consolidate Postconviction Proceedings; denied without prejudice Defendant Rourk's Re-filed Motion to Allow Deposition of HCSO Sergeant Richard Figueredo; and denied Defendant Kohut's Refiled Supplement to Defendant Kohut's Motion for Postconviction Relief, Refiled Amended Supplement to Defendant Kohut's Motion for Postconviction Relief, Refiled Motion to Reconsider Order Denying Supplement to Defendant Mark A. Kohut's Motion for Post-Conviction Relief, Refiled Defendant Kohut's Motion to Vacate or Set Aside Order Denying

Motion to Reconsider Order Denying Supplement to Defendant Mark A. Kohut's Motion for Post-Conviction Relief filed June 30, 2009, Defendants Kohut's and Rourk's Refiled Motion to Appoint the Public Defender to Represent the Petitioners During Post-Conviction Proceedings if an Evidentiary Hearing is Required, and Mr. Levinson's Refiled Pro Hac Vice Motion. On July 29, 2010, and July 30, 2010, the Court held the evidentiary hearing. (*See* July 29, 2010, transcript, July 30, 2010, transcript, attached). After reviewing Defendants' motions for postconviction relief, the testimony, evidence, and arguments presented at the July 29, 2010, and July 30, 2010, evidentiary hearing, the court file, and the record, the Court finds as follows:

In case 93-CF-00281 (Palm Beach County case 93-09019-CF), on September 7, 1993, a jury convicted Defendant Kohut of attempted murder in the first-degree with a deadly weapon (count one), kidnapping (count two), and robbery with a firearm (count three). (*See* verdict forms, attached). On October 22, 1993, the Honorable Donald Evans sentenced him to life imprisonment on count one, to twenty-seven (27) years' prison on count two, with count two to run consecutively to count one, and to twenty-seven (27) years' prison to be followed by life probation on count three, with count three to run concurrently with count two. (*See* amended judgment, sentence, attached). The Fourth District Court of Appeal affirmed the judgment and sentences, and the mandate issued May 26, 1995. *See Kohut v. State*, 654 So. 2d 932 (Fla. 4th DCA 1995) (table).

In case 93-CF-00281 (Palm Beach County case 93-09019-CF), on September 7, 1993, a jury convicted Defendant Rourk of attempted murder in the first-degree with a deadly weapon (count one), armed kidnapping with a firearm (count two), and robbery with a firearm (count three). (*See* verdict forms, attached). On October 22, 1993, the Honorable Donald Evans sentenced him to life imprisonment on count one, to twenty-seven (27) years' prison with a

three-year mandatory minimum to be followed by life probation on count two, with count two to run consecutively to count one, and to forty (40) years' prison with a three-year mandatory minimum to be followed by life probation on count three, with count three to run concurrently with count two. (*See* amended judgment, sentence, attached). The Fourth District Court of Appeal affirmed the judgment and sentences, and the mandate issued May 26, 1995. *See Rourk v. State*, 654 So. 2d 932 (Fla. 4th DCA 1995) (table).

In their sworn motions for postconviction relief and memoranda of law, Defendants Kohut and Rourk allege newly discovered evidence. "[I]n order to be considered newly discovered, the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of due diligence.'" *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (*quoting Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994)); *Robinson v. State*, 707 So. 2d 688, 691 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). Second, "the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991); *see also State v. Spaziano*, 692 So. 2d 174, 176 (Fla. 1997).

Specifically, Defendants claim the State violated Defendants Kohut's and Rourk's Fifth and Fourteenth Amendment rights by failing to provide all exculpatory evidence before or during the trial in violation of *Brady*.[3] To establish a *Brady* violation, Defendant must prove the following:

1. The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;

2. that evidence must have been suppressed by the State, either

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

willfully or inadvertently; and

3. prejudice must have ensued.

Way v. State, 760 So. 2d 903, 910 (Fla. 2000) (*quoting Strickler v. Greene*, 527 U.S. 263, 281 - 282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

Specifically, Defendant claims that on or about April 22, 2002, Attorney Levitt received a report from Defendant Kohut indicating that FBI special agents Michael Malone and Lynn Lasswell had engaged in improper conduct by providing false and misleading scientific evidence and by falsifying lab reports in this case. Defendant Kohut attached a copy of this report to his Memoranda. Attorney Levitt claims he did not receive the report from Defendant Kohut until after the filing of Defendant Kohut's and Defendant Rourk's initial briefs. Defendants claim that the extent of wrongdoing by the FBI was not made known to Defendants until recently and the government suppressed said evidence until nearly eight (8) years after Defendants' trial. Defendants claim the FBI conducted forensic and other relevant testing in the case. Therefore, Defendants claim all the evidence must be considered suspect given the admission that the lead agents conducted improper testing procedures and subsequently lied about the results. Defendants further claim an FBI agent testified in the case regarding Defendant Kohut's and Defendant Rourk's culpability and his testimony implicated both Defendants.

Moreover, Defendants claim the evidence of misconduct by the FBI is exculpatory in nature and serves to buttress both Defendants' position that they are innocent of the crimes. Defendant claims the fabricated lab reports would assist both Defendants in impeaching the State's case and they have not been afforded the opportunity to confront the FBI agents who fabricated their lab reports linking Defendants to the crime. Defendants claim that cross-examining Malone and Lasswell would illustrate for the jury the extent of prosecutorial misconduct in this case and that the testimony provided by State witness, Jeffrey Pellett, is also suspect. Defendants claim co-defendant Pellett changed his story several times prior to trial and that victim Christopher Wilson's statements were suspect and differed greatly from Pellett's statements.

Furthermore, Defendants claim that considering the totality of the evidence presented at Defendants' trial, and in the interest of justice, it is now imperative that Defendants have the opportunity to cross-examine the FBI agents who fabricated the physical evidence in the case to provide the jurors with a complete and accurate synopsis of the extent of prosecutorial misconduct. Lastly, Defendants claim that the newly disclosed evidence, when evaluated against the inconsistent testimony of Pellett and Wilson, puts the case in a different light and the verdicts returned are indeed compromised as well as undermined.

In its March 3, 2010, State's Response, the State asserts the Defendants' allegations lack merit. Specifically, the State asserts this entire motion is based on a false premise that the FBI was the lead investigative agency. The State asserts Defendants want the Court to believe that the FBI was part of the "prosecution team." However, the State asserts the prosecution team is defined as "the prosecutor or anyone over whom he has authority." The State asserts the State Attorney's Office has no authority or jurisdiction over the FBI and Defendants' suggestion to the contrary is baseless. The State asserts the FBI's limited role in providing scientific laboratory analysis of certain physical evidence does not elevate it to lead investigative agency.

Moreover, the State asserts even if the law was different and the State was responsible for information in possession of the FBI, Defendants' motions fail because the report on the lab analysis did not exist at the time of Defendants' trial. The State, relying on *Wright v. State*, 857 So. 2d 861 (Fla. 2003), asserts a basic premise of newly discovered evidence is that it must have existed at the time of Defendants' trial, and if the evidence did not exist at that time, then it does not qualify as newly discovered evidence. The State asserts the Defendants' own exhibits indicate that a review of the analysts' work was not conducted until May 22, 2001, and November 7, 2001. Therefore, the State asserts a report on the conduct of FBI lab analysts that was not prepared until eight (8) years after Defendants' trial does not meet the criteria set out in *Wright*. Additionally, the State asserts it cannot be deemed to have withheld evidence that simply did not exist. The State asserts that Defendants' suggestion that the State be held

responsible for turning over non-existent evidence is preposterous as the evidence did not come into existence until 2001.

In its February 23, 2010, Refiled Defendant's Response to the State's Response, Defendant's Kohut and Rourk assert that contrary to the State's argument, the date in which *Brady* material was disseminated to the Defendants is irrelevant. Defendants assert *Brady* remains a continuing legal obligation of the prosecution following trial. Defendants assert FBI misconduct that occurred during Defendants' trial was revealed following their convictions. Defendants further assert to claim that the FBI was not the lead investigative agency is both disingenuous and misleading and the State is now attempting to distance itself from the evidentiary misconduct of the FBI which served a critical role in these proceedings. Defendants cite *Kyles v. Whitley*, 514 U.S. 419 (1995) to support their position that any agent of the prosecutor, including the FBI as an investigative agency, is responsible for the release of timely exculpatory evidence and any failure to properly disseminate exculpatory evidence to the defense regardless of its timing is a violation of law.

In its March 3, 2010, Amended Response, the State asserts that while Defendants claim the 2001 report raises questions about the validity of the findings of both FBI examiners, Mike Malone and Lynn Lasswell, the 2001 report explicitly finds no fault with the testing or results of Lasswell. Therefore, the State asserts there is absolutely no merit to Defendants' claim as they relate to Lasswell as there was no finding of improper or incorrect testing or results.

With respect to Mike Malone, the State asserts it is clear that the 2001 report did not exist at the time of trial and Defendants cannot meet their burden of showing that the State had the evidence, and that they suppressed the evidence, prior to or during the trial. The State asserts Defendants also fail to meet their burden in showing that had the report been disclosed, the outcome of the trial would have been different. The State asserts the record evidence of the trial transcript reveals there is no reasonable probability that the outcome would have differed. The State asserts given the trial testimony of Malone, Lasswell, and other law enforcement personnel, it is not possible that the 2001 report could have, if known to counsel at the time of trial, affected

the outcome of the trial as neither Malone nor Lasswell were able to positively link Defendants to the crime scene or to the crimes committed against the victim. Consequently, the State asserts because the testimony of FBI examiners was immaterial to Defendants' guilty verdicts, Defendants fail to meet their burden in claiming a *Brady* violation.

Additionally, with respect to their newly discovered evidence claim, the State asserts the evidence did not exist at the time of trial, but the evidence was not of probative value and, in fact, was immaterial to the finding of Defendants' guilt. Therefore, the State asserts even with the newly discovered evidence, the outcome of the trial would not have differed. As such, the State asserts there is no valid ground for a newly discovered evidence claim.

In its March 3, 2010, Supplement to State's Amended Response, the State reiterates the fact, as pointed out in its Amended Response, that the 2001 report found absolutely no fault or wrongdoing by FBI examiner Lynn Lasswell and, therefore, Defendants' motions should be denied with respect to Lasswell. With respect to Malone, the State asserts, the Florida Supreme Court's opinion in *Rhodes v. State*, 986 So. 2d 501 (Fla. 2008), deals directly with new information regarding Malone's work. Specifically, the State asserts the 2001 report evaluating Malone's involvement raised issues solely with documentation of evidence and the content of Malone's notes and report. However, the State asserts there was no finding in the report that Malone's actual examination results were incorrect. The State further asserts even if Malone changed his testimony on what was or was not written in his reports or notes, his ultimate conclusion that none of the samples linked Defendants to this crime would remain unchanged. Consequently, the State asserts Defendants would not be entitled to relief under *Brady*.

Additionally, the State asserts the State and defense only learned of the errors in Malone's documentation and note-taking with the creation of the 2001 report, which was eight (8) years after the trial. The State asserts without demonstrating the State suppressed evidence, Defendants are not entitled to relief under *Brady*. The State further asserts Malone's testimony did not prejudice Defendants as Malone did not provide any testimony that went to determining Defendants' guilt or innocence.

In Defendant Kohut's February 23, 2010, Refiled Defendant's Reply to the Supplement to State's Amended Response, he asserts Defendants do not contend that the report itself was suppressed resulting in a *Brady* violation, but rather the misconduct of the FBI examiners is what was suppressed. He asserts the fact that the U.S. Department of Justice's Office of the Inspector General did not issue its report detailing Mr. Malone's actions in this case until 2001 is irrelevant, as it is the misconduct that was suppressed and not the report itself. Defendant also asserts Malone was the individual responsible for overseeing all of the one hundred plus pieces of evidence that were in the FBI's custody in this case. He asserts Malone's propensity to disregard scientific methods and to falsify reports and testimony certainly could have been used to challenge the evidence in the FBI's possession and under his supervision as being mixed or unreliable. Defendants allege such could have been used as impeachment evidence.

After reviewing Defendants Kohut's and Rourk's pleadings, the State's pleadings, the court file, and the record, the Court finds the original test results and underlying evidence was in existence at the time of trial, but the evidence that the testimony and test results that were presented to the jury were false and misleading was only recently discovered. Additionally, the Fifth District Court of Appeal of Florida held that an evidentiary hearing was necessary under similar allegations to determine whether a *Brady* violation occurred and whether the evidence was newly discovered in *Moss v. State*, 860 So. 2d 1007 (Fla. 5th DCA 2003). Therefore, the Court granted an evidentiary hearing to determine whether Defendants Kohut's and Rourk's allegations satisfy the newly discovered evidence and *Brady* requirements.

At the July 29, 2010, evidentiary hearing, Defendant Kohut's trial counsel Mr. Rick Levinson testified. (*See* July 29, 2010, transcript, pps. 107-164, attached). When asked about his understanding of the newly discovered evidence, he responded as follows:

> LEVINSON: Well, the appendix B is titled newly discovered evidence and contains the cover letter from -- I'm sorry, it's a letter addressed to Sharon Vollrath of the State Attorney's Office of the Thirteenth Judicial Circuit, sent to her by Eve Jabliner (ph) a trial attorney for the Department of Justice.

> It contains a [sic] attachment to independent case review report done by someone. And the independent case review indicates that the testimony that was being examined was not consistent with the laboratory reports and was not consistent with the bench notes. And that's the testimony of Michael Malone. Or at least that's what this report says. The independent review was conducted by Steve Robertson. It also says that the examiner failed to perform appropriate tests in a scientifically accepted manner and that the examination results were not supported and adequately documented in the bench notes. And then it goes on to explain the specifics of the evidence that the examiner was concerned with. But you should have a copy of the report, so I'm just reading from it.

(*See* July 29, 2010, transcript, pps. 113-114, attached). He admitted it was fair to say that he did not have knowledge of any of this information when the Kohut trial took place in the 1990s. (*See* July 29, 2010, transcript, p. 114, attached).

However, he admitted said information would have been important had he known the information at the time he tried the case. (*See* July 29, 2010, transcript, p. 114, attached). When asked why, he responded as follows:

> LEVINSON: Well, the reasons, I think, are succinctly set forth in Mr. Leavitt's (sic) memorandum. I do have an independent recollection that there was a significant concern about the prosecution's presentation of the case to the extent that in the middle of the trial the lead prosecutor resigned. And Judge Coe took over – then -- he was then the State Attorney, but I know him as Judge Coe -- took over prosecution of the case midstream. It was unprecedented in my career. Never happened before and hasn't happened since.
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> …
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> -- in the context of prosecutorial misconduct and the FBI's misconduct as it pertains to that. As the Court may remember from its review of the transcripts, one of the FBI agents was precluded from testifying. If we had had the information that Malone was acting inappropriately at best, it would have furthered the allegations in any event of misconduct on the part of the prosecution and gone to us establish the fact that Pellet's testimony was a creation of the prosecution and not truthful.

(*See* July 29, 2010, transcript, pps. 114-115, attached).

Additionally, Mr. Levinson testified he believed the two key witnesses were Jeffrey Pellett and the victim, Mr. Wilson. (*See* July 29, 2010, transcript, p. 116, attached). He testified "based on the evidence that we had at the time, Wilson obviously as the victim pointed out Mr. Kohut at trial as being one of the perpetrators, although he failed to identify him in a photo lineup done earlier, pretrial. And Mr. Pellet was the - - an alleged co-defendant and participant in the crime who testified that Kohut and Mr. Rourk were present during the events described by him." (*See* July 29, 2010, transcript, p. 116, attached). When asked if he believed that the newly discovered evidence would have furthered the argument that the prosecution was acting inappropriately, he responded, "[t]o the extent we could've tied the FBI actions to the prosecution, yes. You know, whether we could've done that or not, I don't know from the fact of what I have in front of me." (*See* July 29, 2010, transcript, pps. 116-117, attached).

He admitted the newly discovered evidence would have been used to impeach Mr. Malone. (*See* July 29, 2010, transcript, p. 117, attached). He admitted that Defendants Kohut and Rourk were prejudiced by the fact that this newly discovered evidence was not available during the time the trial took place, and explained as follows:

> LEVINSON: I've already talked about (indiscernible) on Pellet's testimony. In addition, there were hundreds of items of evidence that the prosecution had examined by the bureau in an attempt to tie either the vehicle that Kohut and Rourk were in to Wilson's vehicle or Wilson himself or vice versa, and which the prosecution had examined in an attempt to put either Kohut or Rourk at the scene. That was unsuccessful, according to Mr. Malone.
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> But Mr. Malone did not provide us with information that would've allowed us to develop our alternate suspect theory, which was a very viable theory at the time. And had Malone conducted an appropriate investigation of that independent -- I'm sorry, that alternate suspect theory could have been developed.
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> As the Court will remember, the prosecution gave the

Cadillac -- gave Mr. Wilson's car back to him before we had an opportunity to do our own independent analysis or investigation of the evidence. And Mr. Malone's failure to be truthful and/or failure to conduct appropriate tests exacerbated that destruction of evidence problem.

(*See* July 29, 2010, transcript, pps. 117-118, attached).

When asked if there were any other specific conclusions or findings that Mr. Malone made that now would be discredited and affect the outcome of the case, he responded as follows:

LEVINSON: Well, in my opinion it discredits everything that the bureau did, including, and importantly I think, their fingerprint analysis and DNA analysis. There were prints lifted. There could've been more that could've been lifted. But once again, we didn't have the vehicle. There was DNA found. One has to wonder whether any of what was done by the bureau was accurate.

(*See* July 29, 2010, transcript, pps. 119-120, attached). Specifically, regarding the statement in the report "With miscroscopic hair comparison, one cannot determine from the notes that the examination was conducted in an appropriate manner," when asked how that would have played in his defense of Defendant Kohut if he had that information, he responded as follows:

LEVINSON: We were attempting to establish that someone other than Mr. Kohut, or someones (ph) other than Mr. Kohut and Mr. Rourk, committed the offense described by Mr. Wilson. It would've been very helpful to us to demonstrate that the prosecution and its agents, in particular the FBI agents, did not do a thorough examination of the trace evidence. And as a result, did not allow us to develop the fact that the offense was in fact perpetrated by others. Hopefully, in addition, had the evidence been examined properly, we would've been able to match it to the alternative suspects that we had developed through our investigation.

(*See* July 29, 2010, transcript, pps. 120-121, attached).

Additionally, he testified he believed this newly discovered evidence would have made a difference in the outcome of the trial, and further elaborated as follows:

LEVINSON: Well, we had a case where, in my opinion, the testimony of Mr. Pellet was questionable at best. He had changed his story numerous times and had apparently changed his story based on input from the prosecution team.

We had Mr. Wilson who had failed to identify Mr. Kohut as the perpetrator at a line-up -- a photo line-up I believe, conducted prior to trial. I will admit that Mr. Wilson picked Mr. Kohut out at trial, but it's not difficult to do that if properly prepped since Mr. Kohut did not look like the attorneys at the table.

So, and although there were a hundred plus pieces of tangible evidence, none of which connected Mr. Kohut to the scene, there was no testimony from Mr. Malone that anyone was able to be connected to the scene. It's my recollection; Mr. Kohut did not have white hair at the time of the incident.

There is, of course, the fact that we switched prosecutors midstream.

The cumulative effect of the inability to have truthful testimony from Mr. Malone in and of itself would've been very useful if that -- if Mr. Malone had done what he was supposed to do, it is possible that we could have derived even more exculpatory evidence.

And then finally, we were faced with a difficult proposition in that we didn't have the vehicle for our own independent analysis.

(*See* July 29, 2010, transcript, pps. 122-123, attached).

On cross-examination, he admitted it was an essential part of his trial strategy to emphasize the lack of hard evidence connecting either Defendant with the crime scene and emphasized such during his opening statement to the jury. (*See* July 29, 2010, transcript, p. 125, attached). However, he admitted he did not know whether Mr. Robertson[4] recompared the tangible evidence that Malone had examined. (*See* July 29, 2010, transcript, p. 128, attached). He testified it would appear from Mr. Robertson's report that there were improper actions on the

[4] Steve Robertson is the independent forensic expert whom the FBI asked to review Mr. Malone's work in this case.

part of Mr. Malone and improper testimony. (*See* July 29, 2010, transcript, p. 129, attached). He also testified that his recollection was that Mr. Malone could not match the hairs to any known suspect and eliminated Defendant's Kohut and Rourk as the source of some of the hairs. (*See* July 29, 2010, transcript, p. 131, attached). He also testified that he believed Mr. Malone could not match any of the trace evidence to Defendants Kohut or Rourk. (*See* July 29, 2010, transcript, pps. 131-132, attached).

Additionally, he admitted that he emphasized during trial that there was no fingerprint evidence that connected Defendant Kohut to the scene. (*See* July 29, 2010, transcript, p. 132, attached). He also admitted the FBI's testimony was essential to his presentation that there was no hard evidence and no physical evidence upon which to rely. (*See* July 29, 2010, transcript, p. 133, attached). He testified he thought Mr. Malone, based on their trial strategy at the time, was helpful to Defendant's Kohut and Rourk and did not recall that any of his testimony incriminated either of them. (*See* July 29, 2010, transcript, p. 134, attached). He admitted he wanted the jury to believe the FBI agents as opposed to the other witnesses in this case. (*See* July 29, 2010, transcript, p. 134, attached).

Moreover, he admitted he did not do any independent testing of the evidence collected by the State. (*See* July 29, 2010, transcript, p. 136, attached). He admitted he was not aware of any other FBI agents testifying to any matters that would affirmatively incriminate either Defendant Kohut or Rourk. (*See* July 29, 2010, transcript, p. 143, attached). He also admitted the fact that there was no evidence to connect either of the Defendants to the crime scene was a central theme of his case. (*See* July 29, 2010, transcript, pps. 143-144, attached). However, he testified had Mr. Malone done what he should have, there might have been evidence of alternative suspects. (*See* July 29, 2010, transcript, p. 145, attached).

Furthermore, he testified the defense did not ask the FBI to compare any of the evidence to any particular suspect or person. (*See* July 29, 2010, transcript, p. 146, attached). When asked if the report would have changed his trial strategy, he responded, "If you're - - once again, I can't answer that yes or no. If you're referring to the trial strategy in its entirety, I think it would've changed aspects of it. But whether or not we would've done a 180 on, you know, the reliability of the FBI, the fact that nothing matches Mr. Kohut, I - - my impression and my opinion is we probably would've still emphasized the fact that there was no tangible physical evidence connecting Mr. Kohut to the scene." (*See* July 29, 2010, transcript, pps. 146-147, attached). He testified he believes the report says that Mr. Malone was not a competent FBI agent. (*See* July 29, 2010, transcript, p. 147, attached).

Mr. Levinson testified that if he had the information from Mr. Robertson's report prior to trial, he could have tweaked and reformulated his overall trial strategy. (*See* July 29, 2010, transcript, p. 148, attached). However, when asked if he could identify by name any potential alternate suspect, he responded, "I don't recall the person's name, Your Honor. But we did have a very viable alternate suspect whose name is in the - - I assume, is in the file that the public defender has, as and the investigative reports from my investigator, his first name was Bobby, and once again, I can't remember his last name." (*See* July 29, 2010, transcript, p. 156, attached). When asked about whether he could have requested that any of the evidence that was submitted to the FBI be matched or compared to the identity of any potential alternate suspect, he responded, "We could've made that request. Whether they could've followed through with it or not is problematic because - - " (*See* July 29, 2010, transcript, p. 157, attached). He admitted that at trial, a number of FBI agents testified they did testing on various items, Mr. Malone testified regarding the testing he did for the hair samples and the carpet fiber samples which

revealed no match to either Defendant, FBI Agent Mathis testified regarding handwriting samples, including that the handwriting on the note did not match either Defendant Kohut or Rourk, there was testimony regarding tire track comparisons and the fact that they did not match Mr. Rourk's Chevy Blazer, there was DNA testing testimony whereby cigarette butts left at the scene did not match either Defendants, and Agent Shiflet testified the latent prints found on the automobile did not match either Defendant and only matched Mr. Wilson. (*See* July 29, 2010, transcript, pps. 158-159, attached). On redirect examination, he identified a Mr. Christmas as a possible alternative suspect. (*See* July 29, 2010, transcript, pps. 161-162, attached).

At the same hearing, Defendant Rourk testified, and when asked if he believed the newly discovered evidence would have helped his trial counsel Ms. Kay McGucken, he responded, "All evidence disclosed is crucial, you know. When one side keeps stuff back or whatever, it means they've got something to hide. And that's what the - - it seems like the State's been doing." (*See* July 29, 2010, transcript, p. 200, attached). He testified that to his knowledge, Mr. Wilson did not ever make a positive identification of him as one of the assailants prior to trial. (*See* July 29, 2010, transcript, p. 201, attached). He testified Ms. McGucken had a theory that the actual perpetrators were probably someone else that Mr. Pellet knew and for whatever reason, he was covering for them. (*See* July 29, 2010, transcript, p. 203, attached).

At the hearing, Sergeant Richard Figueredo with the Hillsborough County Sheriff's Office testified he was the lead detective on the case who viewed Mr. Rourk's Chevy Blazer on January 7, 1993. (*See* July 29, 2010, transcript, pps. 212-213, attached). Photographs of the Blazer were admitted into evidence as State's exhibits 1-A, B, C, D, E, and F. (*See* July 29, 2010, transcript, pps. 213-214, attached). Booking photographs of Defendant Kohut were admitted into evidence as State's exhibits 2-A, B, C, D, and E. (*See* July 29, 2010, transcript,

pps. 214-216, attached). Booking photographs of Defendant Rourk were admitted into evidence as State's exhibits 3-A, B, C, and D. (*See* July 29, 2010, transcript, pps. 216-217, attached). An evidence destruction memorandum showing that the majority of the State's evidence in this case has been destroyed was admitted into evidence as State's Exhibit 4. (*See* July 29, 2010, transcript, pps. 217-218, attached).

Mr. Steve Robertson testified in November of 2001, he was asked by the FBI to look at the work done on various cases, including this case. (*See* July 29, 2010, transcript, pps. 229-230, attached). When asked what items or documents the FBI sent him to review, he responded, "There was the laboratory report by Mr. Malone, his trial testimony transcript, the bench notes of Mr. Malone and of two of his technicians, and there were two letters from the submitting agency that listed the items of evidence that they were given to the FBI for analysis." (*See* July 29, 2010, transcript, p. 230, attached). He testified he only did a paper review and the FBI did not send him actual pieces of evidence to do a second analysis on. (*See* July 29, 2010, transcript, p. 230, attached).

However, he testified his job was to only review the work performed by Mr. Malone and he did not interview any of the analysts in this case. (*See* July 29, 2010, transcript, p. 231, attached). He testified Mr. Malone did not perform the appropriate tests in a scientifically acceptable manner based on the methods, protocols, and analytic techniques available to Mr. Malone at the time. (*See* July 29, 2010, transcript, p. 231, attached). When asked about what he based his conclusion on, he responded as follows:

> ROBERTSON: There were mainly three things. One was his notes indicated that he was looking for a transfer of carpet from the Cadillac to the Blazer in this case, but not vice versa.
>
> He also did a hair comparison or a hair examination and I

> can't tell you from looking at his notes whether he performed that examination correctly or not. In a hair comparison, all you have are notes. In most other forensic comparisons you have analytical data such as a spectrum of an unknown white powder that you compare to a, let's say a cocaine standard. And if those spectra match then you identify that powder as cocaine.
>
> In a hair comparison, all you have is the examiner's written notes. And you cannot look at those notes and determine that he did the comparison and the examination correctly.

(*See* July 29, 2010, transcript, pps. 231-232, attached).

Mr. Robertson was critical of the fact that Mr. Malone failed to look for a transfer of carpet fibers from Defendant Rourk's Blazer to the victim's Cadillac, purportedly because law enforcement did not ask Mr. Malone to do so. Mr. Robertson disagreed with Mr. Malone's opinion that it was unlikely that such a transfer would occur. Mr. Robertson testified that he could not tell by Mr. Malone's notes whether the microscopic hair comparison was accurate or whether he did the comparisons correctly. Mr. Robertson testified that Mr. Malone's documentation was poor and did not meet the ASCLD/LAB accreditation standards because his notes were not dated, were in pencil, and contained abbreviations. Mr. Robertson also acknowledged, however, that in 1993 the FBI was not required to meet the ASCLD/LAB accreditation standards. (*See* July 29, 2010, transcript, pps. 232-236, attached). He also testified Mr. Malone's testimony was not consistent with the laboratory report. (*See* July 29, 2010, transcript, pps. 236-237, attached).

Additionally, Mr. Robertson testified Mr. Malone's testimony was also inconsistent with the lab reports because there was no description in Mr. Malone's bench notes of the hair found on the handwritten note left at the crime scene. (*See* July 29, 2010, transcript, p. 238, attached). He also testified that Mr. Malone's bench notes indicate he found a total of six Caucasian head

hairs (three brown and three white), but Mr. Malone only testified at trial that he found two brown and one white Caucasian head hair in the Cadillac. (*See* July 29, 2010, transcript, p. 238, attached). Mr. Robertson testified that although Mr. Malone testified that the victim's shirt was too charred to do any testing on, Mr. Malone's notes do reflect that hairs were recovered from the shirt. (*See* July 29, 2010, transcript, p. 239, attached).

Moreover, Mr. Robertson testified although Mr. Malone's notes are silent on this issue, Mr. Malone testified at trial that the carpet in the Cadillac and the carpet in the Blazer are very similar. (*See* July 29, 2010, transcript, p. 239, attached). Mr. Robertson's report was admitted into evidence as defense exhibit #8. (*See* July 29, 2010, transcript, p. 241, attached).

On cross-examination, Mr. Robertson admitted that in 1993, not all labs were accredited and not all labs, including the FBI, sought to be accredited. (*See* July 29, 2010, transcript, p. 243, attached). He also admitted that in 1993, there was no need for the FBI to comply with any kind of accreditation rules or regulations that ASCLD had established. (*See* July 29, 2010, transcript, p. 243, attached). Therefore, he admitted that in 1993 the FBI only had to comply with their internal protocol and regulations. (*See* July 29, 2010, transcript, p. 243, attached). However, he admitted that when he examined Mr. Malone's work, he used the ASCLD/LAB accreditation standards to review Mr. Malone's work. (*See* July 29, 2010, transcript, pos. 243-244, attached).

He admitted he never looked at the evidence in this case, never talked to Mr. Malone about the case, never talked to Mr. Malone's unit chief at the FBI, never talked to any investigators involved in processing the scene, never saw any of the photographs of the crime scene, and never saw any photographs of the evidence or anything else. (*See* July 29, 2010, transcript, pps. 245-246, attached). He testified the only things the FBI asked him to do was to

examine the trial transcript, the lab report, and the bench notes. (*See* July 29, 2010, transcript, p. 246, attached).

He admitted he had no idea what the condition of the Blazer was, and said condition could have been a factor as to why Mr. Malone did not look for a transfer of fibers from the Blazer to the Cadillac. (*See* July 29, 2010, transcript, pps. 248-249, attached). He also admitted that while he could not tell from Mr. Malone's bench notes whether the hair comparison was conducted in an appropriate manner, he could not, however, affirmatively testify that the hair comparison was done in an inappropriate manner. (*See* July 29, 2010, transcript, p. 249, attached). Mr. Robertson also admitted Mr. Malone's documentation was not out of the ordinary and his notes were typical of a hair comparison. (*See* July 29, 2010, transcript, pps. 249-250, attached). Mr. Robertson did point out though that Mr. Malone's notes were in pencil, not dated and did not describe recovering hair from most of the questioned items. (*See* July 29, 2010, transcript, p. 250, attached). However, Mr. Robertson admitted that these particular requirements are part of the ASCLD/LAB standards. (*See* July 29, 2010, transcript, pps. 250-251, attached).

Additionally, he admitted he found really almost nothing wrong with Mr. Malone's testimony as far as his expertise, but was concerned about his documentation. (*See* July 29, 2010, transcript, pps. 253-255, attached). He admitted that Mr. Malone's conclusion from his lab report and trial testimony was that he found nothing linking either Defendant to the crime. (*See* July 29, 2010, transcript, p. 254, attached). He testified that hair analysis is done under a subjective standard. (*See* July 29, 2010, transcript, p. 257, attached).

At the hearing, Mr. Kohut was recalled, and when asked if the ability to discredit or shed light on the testimony of Mr. Malone would have affected or supported the elements of

prosecutorial misconduct, he responded, "Clearly, if they knew that Mr. Malone was giving false testimony, they could've used it to impeach him, discredited - - had his testimony stricken as being false and, but, you know, they let the FBI get up there, buttressed them through everything, and there's the jury, oh, yes, the FBI. They're number one." (*See* July 29, 2010, transcript, p. 262, attached). When asked whether there was any other prejudice besides the prejudice Mr. Levinson testified to, he responded as follows:

> KOHUT: You know, I don't know. I asked Miss Holt several times, if she could have alternative people's fingerprints run. Specifically, the Christmas brothers. There were 75 other so-called suspects. And she kept telling me, no, we can't have evidence run like that. It's a violation of their civil rights. You know, and I just couldn't understand how it could be a violation of their civil rights to have their fingerprints run. But I'm on trial for something and I'm not allowed to try and present evidence.

(*See* July 29, 2010, transcript, pps. 262-263, attached).

Additionally, when asked if the newly discovered evidence had been known at the time of trial and used during the trial, if he believed it would have made a difference in the outcome of his case, he responded, "I think - - you know, if I was a juror and I knew the FB - - the State was knowingly putting on false testimony, yeah; I'd really question it myself. But I can't say what the jury sitting on my trial would've done." (*See* July 29, 2010, transcript, p. 263, attached). On cross-examination, he admitted that Mr. Malone testified that he could not tell if Defendants were at the crime scene, but also argued that Mr. Malone could not exclude the Defendants from being at the crime scene either. (*See* July 29, 2010, transcript, p. 265, attached).

At the July 30, 2010, evidentiary hearing, Mr. Michael Malone testified regarding his background and training with the FBI, his educational background before joining the FBI, articles he published, his teaching experience at the FBI Academy, and his professional

memberships. (*See* July 30, 2010, transcript, pps. 277-280, attached). He testified that in 1993, he became involved in the Kohut and Rourk case and further testified as follows:

> MALONE: I became involved in two ways. I received a call concerning the case. I was told to fly down to Tampa to assist in the crime scenes. And then I was named the primary examiner back at the lab so that when all the evidence came back in to the FBI lab, I was in charge of the evidence. And I also did the hair and fiber exams.

(*See* July 30, 2010, transcript, p. 280, attached). He testified that he processed Defendant Rourk's Blazer and did a crime scene evaluation on the vehicle. (*See* July 30, 2010, transcript, p. 281, attached). He testified he also assisted in the search of a trailer that Defendants allegedly lived in. (*See* July 30, 2010, transcript, p. 281, attached).

Additionally, he testified all the evidence taken from Defendant Rourk's Blazer and trailer was turned over to the Hillsborough County Sheriff's Office ("HCSO"), and representatives from HCSO personally delivered the evidence to him at the lab in Washington. (*See* July 30, 2010, transcript, p. 281, attached). He testified he prepared bench notes at approximately the time as he was examining the evidence. (*See* July 30, 2010, transcript, p. 281, attached). When asked whether he felt it was important to have examined for fibers transferred from the Blazer back to the victim's Cadillac, he responded as follows:

> MALONE: No. One of the things when I was conferring with the detectives down there and looking at the Blazer, when we actually got into the Blazer there were -- it looked like somebody had been living in there. There were just layers of junk on all the floors throughout the car. So that if you sat in the car, your feet weren't even touching the carpet.
>
> But first of all, a transfer of carpet fibers from one car to another would kind of be unlikely. It involves a double indirect transfer. Which means you would have to go in one car, pick up the fibers on your shoes. Walk out of the car and get into the other car. Then the -- another -- there's

> another transfer from your shoes back to that other car's carpeting.
>
> Well, number one, shoes are not a good medium for finding carpet fibers. Where we usually find carpet fibers is on clothing.
>
> And number two, the act of just walking from one vehicle to the other, if you had, you're going to probably lose them. So, while it's not impossible, I had to say the chances of that is unlikely.
>
> Well, in the case of the Blazer, it looked like you couldn't even touch the carpet because of all the junk that was on the floor. So we decided that it's not worth doing. As far as the transfer from the Cadillac to the Blazer, we felt that if there were going to be carpet fibers transferred to the Blazer, they would be on the items that were laying on the floor.

(*See* July 30, 2010, transcript, pps. 284-285, attached). He testified he discussed with the HCSO detective the possibility of examining transfers of fiber from the Blazer to the Cadillac and based on his recollection, they both agreed not to do the exam for transfers of carpet fiber from the Blazer to the Cadillac. (*See* July 30, 2010, transcript, pps. 285-286, attached).

Moreover, he testified regarding nine photographs of various portions of the Blazer, including photographs of the outside of the vehicle, photographs from the front seat of the Blazer, and photographs of the back seat and rear compartment of the Blazer, which were admitted into evidence as State's exhibits 1-G, 1-H, and 1-I. (*See* July 30, 2010, transcript, pps. 286-289, attached). He testified regarding various items strewn around in the car, including a container, papers, a milk carton, a boot, a coca-cola can, a spare tire, and electronic equipment. (*See* July 30, 2010, transcript, pps. 286-289, attached).

When asked if everything done in this case was appropriate as to how the items of evidence were examined, he responded, "Yes. This is how it was taught by the FBI to take notes

in hair examinations, and this is the way we taught our students how to take notes. And very simply, to record the notes from the known samples first, record all of their characteristics. Then you do examination of the unknown items second. You record what is on the slides that was removed from the unknown items. And then if you find items that look like the knowns, you then go back and do the comparisons between the knowns and the unknowns." (*See* July 30, 2010, transcript, pps. 289-290, attached). When asked if there was any kind of a regulation, procedure, or policy in the FBI as far as the contents of the notes, he responded, "No. It's - - with respect to the notes, we can do them in pencil or in ink, whatever we wanted. We could use abbreviations as long as we could understand the abbreviations. And we did not date the notes. The only document that was dated was the report." (*See* July 30, 2010, transcript, p. 290, attached).

Furthermore, when asked if there were different parts to the note sections of the bench notes, he responded as follows:

MALONE: Yes. The - - in this case, there were probably - - there could've been 30 to 40 pages of notes. The notes consist of what's called a worksheet. The worksheet basically lists the contributor, who they were, the dates of their submittal letters. It has all the pertinent FBI numbers and file numbers. And then it - - the title of the case. And then it - - the title of the case. And then it lists all of the evidence in the case with the - - normally, the "Q," or the unknown items coming first, and the "K," or the known items coming second.

Now, if there are items that our unit or our section did not examine, but let's say the fingerprint section, which is a totally different section, would examine, they were called "also submitted items" and they were listed last.

Now, on the worksheet, that's where we kept our chain of custody records about what items went to what examiner on what date and the date they were returned. The worksheet is also where we would write any comments

> we'd had, conversations with the police agency, submitting agencies, or anybody else.
>
> Now, the second part of the notes would be my technicians' exam. I had a technician who worked directly under me. The function of the technician was to process the evidence. So every item that the technician processed, they would take detailed notes on that item, how they processed it, whether or not they removed hairs and fibers, whether or not they prepared slides from those hairs and fibers. Everything that they processed.
>
> Then the third part of the notes would be my notes, which I just described where I described the known items, the unknown items, and what exams that I actually did.

(*See* July 30, 2010, transcript, pps. 290-291, attached). He also explained that he used abbreviations because he had thirty pages of notes using abbreviations and if he tried to write everything out in longhand, it would have been a novel. (*See* July 30, 2010, transcript, p. 291, attached). He testified he used abbreviations that he was familiar with and that he could read because the notes were used to refresh his recollection. (*See* July 30, 2010, transcript, pps. 291-292, attached). He further testified the notes, including the abbreviations, were consistent with procedures in the FBI lab at that time. (*See* July 30, 2010, transcript, p. 292, attached).

Additionally, he testified he would have been happy to explain to Mr. Robertson anything about his notes, worksheet, or anything else, but Mr. Robertson never asked him to. (*See* July 30, 2010, transcript, p. 292, attached). He testified that after he prepared the notes and did the examination, the results of the examination were put in a report. (*See* July 30, 2010, transcript, p. 292, attached). He testified, "Now in this case, since I was the - - what's called a primary examination [sic], not only would the hair and fiber results - - which I did - - be in the report, but all of the other examiners were bringing their results and their notes back to me. So, I believe we had, in this one case we had hair and fiber examinations, (indiscernible) examinations,

handwriting examinations, DNA examinations, firearms examinations, and fingerprint examinations. And with the exception of the fingerprint reports, all the other reports went out through me." (*See* July 30, 2010, transcript, pps. 292-293, attached).

When asked whether there was a review process by the FBI of his notes and the report, he responded, "Yes. Every unit within the FBI lab has called - - has what is called a unit chief. The job of the unit chief [is] to review the report and the notes of every report that goes out. And then the unit chief will sign off on it. And it's only then that the report's mailed back to the contributor. So every single report that goes out is reviewed by the unit chief." (*See* July 30, 2010, transcript, p. 293, attached). He confirmed that his notes, his bench notes, and his report in this case was signed off by his unit chief as being correct. (*See* July 30, 2010, transcript, p. 293, attached).

He testified they never requested a hair fiber exam on the handwritten note left at the crime scene, which was identified in Mr. Malone's bench notes as item Q-1. (*See* July 30, 2010, transcript, p. 294, attached). He testified the purpose of the examination was for the handwriting on the note to be compared to handwriting exemplars from Defendants, and the note was to be processed for fingerprints by the latent fingerprint section. (*See* July 30, 2010, transcript, p. 294, attached). When asked if he ever received information that there may have been a hair on the note, he responded, "Yes. While the document examiner, Special Agent Mathis (ph), was examining the note, he found a small hair fragment attached to the note. He then brought the hair fragment back to me. I put it on a slide and concluded it was just a small hair fragment. No value for comparison." (*See* July 30, 2010, transcript, pps. 294-295, attached). Therefore, he testified there was no way to link it to anybody, including anybody in this case. (*See* July 30, 2010, transcript, p. 295, attached). Although he admitted he forgot to send out a supplemental

report about item Q-1 reflecting such findings, he testified the report that was sent out was correct. (*See* July 30, 2010, transcript, p. 295, attached).

With respect to the number of hairs of comparison found in the victim's Cadillac, Mr. Malone testified as follows:

> MALONE: Well, what we're talking about here is Caucasian hairs. Since the victim in this case was Negroid, I wasn't looking for Negroid hairs; I was looking for Caucasian hairs. When I examined the items from the Cadillac, and there were numerous items - - and I'm reconstructing this from my testimony - - I found three Caucasian head hairs that were suitable for comparison. I found one brown Caucasian head hair in the vacuum sweepings from the Cadillac. And I found a white Caucasian head hair on the rear seat of the Cadillac. I found a brown Caucasian head hair on the rear carpet of the Cadillac. So I found a total of three.

(*See* July 30, 2010, transcript, p. 296, attached). He admitted that at the trial of this case in 1993, he testified about the two brown and one white Caucasian head hairs and those were the ones that were hairs of value that he could actually compare to the known hairs he had. (*See* July 30, 2010, transcript, pps. 296-297, attached). He testified he eliminated both Defendant Kohut and Defendant Rourk as the source of those hairs. (*See* July 30, 2010, transcript, p. 300, attached). When asked if the other hairs referred to in his report and Mr. Robertson's comments were not hairs of value that he could actually compare to anybody, he responded as follows:

> MALONE: That's correct. I mean there's two kind - - hairs have to have a sufficient number of characteristics to be of value for comparison. Formally, there's around 20 classes of characteristics. If they don't have that, we put them in what's called the known not suitable for comparison category. And there were probably a lot of other Caucasian hairs that were just not suitable. Whether Mr. Robertson could tell the difference between the suitable hairs and the not suitable hairs in my notes, I don't know.

(*See* July 30, 2010, transcript, p. 297, attached).

At the hearing, Mr. Malone was asked about his trial testimony that it was impossible to do any type of hair and fiber exam on the victim's shirt because it was too badly charred. (*See* July 30, 2010, transcript, pps. 297-298, attached). He testified he was actually referring to the fact that he could not do any microscopic exam. (*See* July 30, 2010, transcript, p. 298, attached). When asked about the hairs found on the shirt, he responded as follows:

> MALONE: Well, first of all would be the shirt was in terrible shape. It was very badly charred. Any fibers on that shirt would've melted. Any hairs on that shirt would basically have been destroyed. Now, my notes said there was a brown hair, not suitable, and an animal hair.
>
> Well, just from my experience, I probably knew immediately that those hairs were not the original hairs that were on that shirt. Any hairs on that shirt would've been destroyed. So these would've been hairs picked up maybe later on in the handling of the evidence. So basically, the - - according to my notes, I said there was just two hairs. Not - - one not suitable and one animal hair.

(*See* July 30, 2010, transcript, p. 298, attached).

He testified that when he testified at the trial in 1993, he had his bench notes with him on the stand while he was testifying. (*See* July 30, 2010, transcript, pps. 298-299, attached). He also admitted the carpet in both the Cadillac and Blazer was the same color and that both vehicles were General Motors products. (*See* July 30, 2010, transcript, p. 299, attached). He further testified as follows:

> MALONE: But I would've taken a known standard out of each one of those carpets, added them on slides. So the first thing I would've done was compared the two carpets to see if I could tell them apart. And if I could not tell them apart, there's no point in doing anything else. But I looked at them microscopically. They were very similar, but I could tell them apart microscopically.
>
> Since later on I did not match these carpet fibers to any unknown carpet fibers, I didn't go ahead and do the

> probably half a dozen other tests that we do to carpet fibers to differentiate them, because there was no need to do that.

(*See* July 30, 2010, transcript, pps. 299-300, attached). When asked if he found anything in the course of the hair and fiber examinations that incriminated or linked either Defendant Kohut or Defendant Rourk to the crime, he responded, "No. There were no hair transfers between Mr. Kohut and Mr. Rourk, and the victim or his Cadillac. Vice versa, there were no hair transfers between the Cadillac and the victim to Mr. Rourk or the Blazer that I could detect." (*See* July 30, 2010, transcript, p. 300, attached).

On cross-examination, Mr. Malone testified he looked for the Caucasian hair in the Cadillac because the victim was black and he did mainly what HCSO asked him to do. (*See* July 30, 2010, transcript, p. 303, attached). When asked about why he testified that the animal hair and limb hair on the charred shirt would not have been there before the charring took place, he responded, "Well, number one, they were not useful. And number two, if they had a been there when the shirt was set ablaze, they would've been destroyed. I looked at the shirt very carefully and determined that there was nothing left on the shirt of value." (*See* July 30, 2010, transcript, p. 304, attached).

Court's Findings

After reviewing the allegations, the testimony, evidence, and arguments presented at the July 29, 2010, and July 30, 2010, evidentiary hearing, the court file, and the record, the Court finds this alleged newly discovered evidence would not produce an acquittal on retrial. *See Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991); *see also State v. Spaziano*, 692 So. 2d 174, 176 (Fla. 1997). Specifically, the Court finds the alleged newly discovered evidence, Mr. Steve Robertson's report, takes issue with the way Mr. Malone documented his bench notes, but not

necessarily the findings in Mr. Malone's report. The Court finds any such testimony attacking Mr. Malone's documentation in his bench notes would go to impeachment and not to the merits of the case.

The Court finds the Defendants' theory of defense was that the FBI had no evidence linking either one of them to the crime scene, and both Defendants relied on the FBI's findings throughout the trial to support their defense. The Court further finds Mr. Malone did not give any incriminating testimony against either Defendant Kohut or Defendant Rourk at trial. (*See* trial transcript, pps. 2200-2286, attached). The Court also finds Mr. Levinson admitted that he wanted the jury to believe the FBI. Therefore, the Court finds any attempts to impeach the FBI agents with either testimony from Mr. Robertson or Mr. Robertson's report, would have gone against the very theory of defense the Defendants were pursuing throughout the trial. The Court finds Mr. Robertson's report is cumulative of the evidence presented at trial which consistently resulted in negative matches for the Defendants to the samples taken from the crime scene.

The Court finds Mr. Robertson's report does not discredit Mr. Malone's findings in Mr. Malone's report or the results of Mr. Malone's testing. The Court further finds Mr. Robertson's report does not find that Mr. Malone gave false testimony or lied on material issues, including issues of identifying Defendants as not being at the crime scene. The Court finds any discrepancies in the report are, at best, omissions or were clarified by Mr. Malone's evidentiary hearing testimony. The Court finds the fact that Mr. Malone did not follow the same protocols that Mr. Robertson would have does not invalidate Mr. Malone's examination, documentation, or findings given the fact that Mr. Malone abided by the protocols of the FBI at the time of his examination. The Court finds Mr. Robertson's report would not have helped Mr. Levinson

advance an alternate suspect theory. **Therefore, the Court finds there is nothing material or relevant about Mr. Robertson's report that would produce an acquittal upon retrial.**

Furthermore, the Defendants assert the State's suppression of the alleged misconduct of FBI examiners Mr. Michael Malone and Ms. Lynn Lasswell is the basis of their *Brady* claim is in this motion. The Court finds, however, Defendants have failed to prove that either Mr. Malone or Ms. Lasswell engaged in improper conduct by providing false and misleading scientific evidence and falsifying lab reports in this case. The Court further finds Defendants have failed to prove that either Mr. Malone or Ms. Lasswell did incomplete work or failed to adhere to FBI standards at the time they conducted their examinations. **Therefore, the Court finds Defendants failed to prove any such *Brady* violation occurred and no relief is warranted.**

It is therefore **ORDERED AND ADJUDGED** that Defendants Kohut's and Rourk's motions for postconviction relief are hereby **DENIED.**

Defendants Kohut and Rourk have thirty (30) days to appeal this order and the Court's May 17, 2010, order.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this 17th day of Nov., 2010.

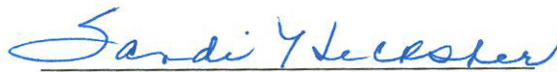
MICHELLE SISCO, Circuit Judge

Attachments:

Order of Chief Justice
verdict forms
amended judgments
sentences
July 29, 2010, transcript
July 30, 2010, transcript
exhibits
trial transcripts (excerpts of)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished to Daniel Hernandez, Attorney for Defendant Mark Kohut, 902 North Armenia Avenue, Tampa, Florida 33609, by regular U.S. Mail; Robert Mactavish, Assistant Public Defender, Attorney for Defendant Charles Rourk, 700 East Twiggs Street, Tampa, Florida 33602, by inter-office mail; James Hellickson and Kristen J. Howatt, Assistant State Attorneys for the Sixth Judicial Circuit, Post Office Box 5028, Clearwater, Florida 33758, by regular U.S. Mail; on this 17th day of Nov, 2010.



Sandi Hecksher, Judicial Assistant