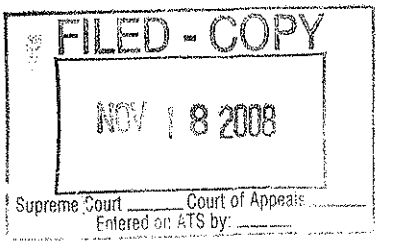
11-18-2008

Rhoades v. State Appellant's Reply Brief Dckt. 35021

IN THE SUPREME COURT OF THE STATE OF IDAHO

PAUL EZRA RHOADES,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. 35021**
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	
	)	
	)	



APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR BONNEVILLE COUNTY HONORABLE JON J. SHINDURLING PRESIDING

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the district court abused its discretion in summarily dismissing the Petition For Post-Conviction Relief for untimely filing even though Appellant had no notice of the prosecutorial misconduct claims ("First Ground") or the scientific basis for his actual innocence claim ("Second Ground"), his ineffective assistance of counsel claim ("Third Ground"), or his claim to test the biological evidence for DNA ("Fourth Ground") until he consulted an expert out of an abundance of caution, and even though neither trial defendants nor postconviction petitioners have any obligation to search for evidence of prosecutorial misdeeds, absent notice of their existence.**

2. **Whether the district court applied the wrong legal standard to determine whether Appellant was entitled to equitable tolling and, alternatively, whether in any event Appellant met the standard the district court erroneously employed.**

ARGUMENT

THE PROSECUTION ENGAGED IN PROFOUND MISCONDUCT INCLUDING BUT NOT LIMITED TO THE SUPPRESSION OF EXONERATING EVIDENCE AND THE ELICITING OF FALSE TESTIMONY CRITICAL TO MR. RHOADES' CONVICTION AND WHICH IT KNEW OR SHOULD HAVE KNOWN WAS FALSE, ALL OF WHICH SHOULD HAVE BEEN FOUND TO EQUITABLY TOLL THE FILING DEADLINE FOR MR. RHOADES' POSTCONVICTION PETITION IN WHICH HE SOUGHT RELIEF BASED ON THAT SAME PROFOUND MISCONDUCT.

In the court below, Mr. Rhoades contended that he is entitled to equitable tolling of the limitations period for filing his post-conviction petition because his grounds for relief were based on plainly exculpatory facts suppressed by the prosecution and because he was entitled as a matter of state and federal constitutional law to rely on the prosecution abiding its legal obligations and, therefore, was under no obligation to hunt for prosecutorial misconduct absent notice of same. He also contended that he filed his post-conviction petition soon after uncovering the illegally suppressed exculpatory evidence. The State correctly notes that the district court summarily dismissed Mr. Rhoades's post-conviction petition on the ground that he had "failed to establish any factual basis warranting equitable tolling." *Brief of Respondent* at 10. As the court below put it, Petitioner's contention that the prosecution had withheld exculpatory evidence and suborned perjury was an "illogical and grandiose inference drawn from one expert's opinion." R. 90 (*Memorandum Decision and Order on Motion for Summary Dismissal* ["*Memorandum Decision*"] at 6). That court continued:

> Petitioner has failed to present an iota of evidence that the prosecution knew of an alternative interpretation of the FBI's PGM report at the time of trial and deliberately withheld that information form Petitioner. Petitioner has failed to present even a scintilla of evidence of [sic] that the serological expert's testimony was perjured, let alone at the elicitation of the prosecution. Simply put, Petitioner

> has not presented any evidence to the Court of wrongdoing on the part of the prosecution.
>
> . . . .
>
> [Thus,] Petitioner has wholly failed to establish that he is entitled to equitable tolling of I.C. §§19-4902(a) and (b). Absent equitable tolling, Petitioner has not met the timeliness requirements of those statutes and the instant petition is summarily dismissed, with prejudice.

R. 91 (*Memorandum Decision* at 7).

In fact, however, Mr. Rhoades presented substantial material evidence and factual allegations to the court below which demonstrates that court's clear error in finding that Mr. Rhoades is not entitled to equitable tolling of the applicable limitations period. The State does not dispute any of Mr. Rhoades's factual allegations and other supporting documents made in support of equitable tolling. Specifically, other than transcript excerpts, Mr. Rhoades filed with the court below the following documents in support of his post-conviction petition:

> (1) the FBI document dated about six months pre-trial which memorialized the results of its more refined PGM testing, as compared to the PGM testing for the prosecution by the state laboratory, of swabs of semen removed from the victim's mouth and vagina[1] (*see* R. 30, *Supporting Affidavit* at Appendix 1);
>
> (2) a June 20, 2005, sworn statement from Greg Hampikian, Ph.D., an expert in forensic biology and then a Boise University associate professor with a joint appointment in Biology and Criminal Justice Administration,[2] in which he noted that **while the State of Idaho Forensic Laboratory testing on swabs of semen removed from the victim "did not exclude Mr. Rhoades as a potential**

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[1]The state laboratory and the FBI both conducted what is referred to phosophoglucomutase ("PGM") testing. PGM is a kind of genetic marker which may be found in bodily fluids. Bodily fluids containing PGM can be analyzed to determine the contributor's particular PGM features. There are less refined and more refined kinds of PGM testing. As noted in the text, the FBI testing was more refined, as compared to that conducted by the state laboratory.

[2]Since attesting to that statement, Boise State University has promoted Dr. Hampikian to full professor and granted him tenure.

contributor of the semen[,] . . .the more refined test performed by the FBI[3], at the request of the Idaho lab, did absolutely exclude Mr. Rhoades as a contributor of the semen." R. at 34 (*Supporting Affidavit* at Exhibit 2, p. 2, para. 6) (emphasis added).

(3) A December 21, 2006, sworn statement from Dr. Hampikian noting that the FBI's more refined testing was the more discriminating (as compared to the state laboratory's testing) and the then-established state of the art forensic PGM subtyping test. Dr. Hampikian continued:

> It is accepted forensic science that less discriminating test results must be interpreted in light of subsequent more discriminating test results. Considering less discriminating test results and ignoring subsequent, more discriminating and, therefore, definitive results in unacceptable forensic scientific practice. Basing a conclusion solely on the State laboratory's PGM test when the FBI's more discriminating test results were available would make little sense, assuming that the goal was a *reliable* conclusion. I have read Mr. Wyckoff's and all other relevant trial testimony regarding the State's PGM testing as well as the State's and FBI laboratory reports and correspondence. It is troubling that while Mr. Rhoades' jurors learned of the State's PGM test results, they were never presented testimony or documents regarding the FBI's more discriminating PGM test results. This omission promoted the incorrect inference that Mr. Rhoades was a possible contributor of the detected PGM; in fact, the FBI's results excluded him.

R. at 84 (Attachment to *Affidavit In Support Of Opposition To Motion For Summary Dismissal Based Upon Statute of Limitations* at 2).

The State disputes none of these assertions. Instead, it advances four arguments why the evidence just noted together with the transcript excerpts filed by Mr. Rhoades do not entitle him to equitable tolling, i.e.- why they fail to establish that the prosecution withheld exculpatory evidence and/or suborned perjury. *Brief of Respondent* at 13. Generally, the State's arguments suffer from a failure to account for two long-settled legal rules. First, the State fails to account

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[3]Here, Dr. Hampikian is referring to the same FBI test results memorialized in the FBI document attached to the affidavit as Exhibit 1 and dated about six months pre-trial.

for the legal rule that a prosecutor's duty to seek out exculpatory information from all government agents acting on behalf of the prosecution in a case is not satisfied merely because the prosecution's expert fails to obtain available exculpatory evidence, fails to understand the obvious exculpatory import of that evidence, or fails to communicate his knowledge of that evidence and its exculpatory import to the prosecuting attorneys. This Court as well as the Supreme Court have addressed this in no uncertain terms. *State v. Avelar*, 132 Idaho 775, 781, 979 P.2d 648, 654 (Idaho 1999) ("The duty of disclosure enunciated in *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] is an obligation of not just the individual prosecutor assigned to the case, but of all the government agents having a significant role in investigating and prosecuting the offense.") (quoting *State v. Gardner*, 126 Idaho 428, 433, 885 p.2d 1144, 1149 (Ct.App., 1994)); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (Individual prosecutors are duty-bound "to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady* [], the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."). Second, the State's arguments fail to account for the legal rule that defendants are entitled to rely on the government's representations as truthful. *Banks v. Dretke*, 540 U.S. 668, 698 (2004). In *Banks*, the State urged "that 'the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence,' ... so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected." *Id.* at 696. The Supreme Court rejected that position, explaining:

A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable

> in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley,* 520 U.S. 899, 909 (1997) (quoting *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14-15 (1926)). We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler* [*v. Greene*], 527 U.S. [263,] 281 [1999]; accord, *Kyles,* 514 U.S., at 439-440; *United States v. Bagley,* 473 U.S. 667, 675, n. 6 (1985); *Berger* [*v. United States*], 295 U.S.[78], 88 [1935]. See also *Olmstead v. United States,* 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting). Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." *Berger,* 295 U.S., at 88. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. See *Kyles,* 514 U.S., at 440 ("The prudence of the careful prosecutor should not ... be discouraged.").

The State's arguments also fail to distinguish between the legal impact the prosecution's forensic expert's actual knowledge or ignorance of operative facts would have on the different grounds for relief Mr. Rhoades set out in his *Petition for Post-Conviction Relief.* For example, while his ignorance of operative facts would mean his testimony contradicting those facts was not perjurious, it would have no effect on Mr. Rhoades' prosecutorial misconduct or ineffective assistance of counsel claims. *See, e.g., Blanton v. Blackburn*, 494 F.Supp. 895 (M..D. La. 1980), *aff'd*, 654 F.2d 719 (5th Cir. 1981) (new trial ordered where, among other things, prosecutor failed to correct testimony which it knew or should have known was false, even though witnesses' answer to questions were technically correct); *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995) (prosecutor's failure to correct representations he made to jury which were damaging to duress defense was *Brady* violation requiring new trial); *United States v. Vozzella*, 124 F.3d 389 (2nd Cir. 1997) (conviction reversed where prosecution presented false evidence and elicited misleading testimony concerning that evidence which was vital to prove the charge); *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986) (*habeas* relief granted under *Giglio* where

prosecution allowed its key witness to testify falsely, failed to correct that testimony, and exploited it in closing argument). In what follows, Mr. Rhoades demonstrates that the State's four arguments that Mr. Rhoades is not entitled to equitable tolling fail, largely because they cannot be squared with these legal principles.

First, the State argues, "if the prosecuting attorneys should have known of the report's meaning, [Mr.] Rhoades' attorney should also have known of its meaning." *Brief of Respondent* at 13. Even assuming Mr. Rhoades' trial counsel should have known of the FBI report's meaning, defense counsel's ignorance of its meaning does not release the prosecution from either its duty to correct false testimony from its witnesses or its duty to provide exculpatory information to the defense. *Benn v. Lambert*, 283 F.3d 1040, 1061-62 (9th Cir.), *cert. denied*, 537 U.S. 942 (2002) (*Brady* violation found where defense knew of the existence of prosecution expert but did not know that the expert's opinion was exculpatory); *Paradis v. Arave*, 130 F.3d 385, 392 (9th Cir. 1997) (same); *Turner v. Schriver*, 327 F.Supp.2d 174 (E.D.N.Y. 2004) (violation of due process based upon admission of perjured testimony which the prosecutor should have known was false). Further, there can be no disputing in this case that defense counsel did not know that the FBI report was exculpatory. As the State notes in its answering brief, Mr. Rhoades' post-conviction petition makes plain that trial counsel consulted a serology expert. *Brief of Respondent* at 14. However, because trial counsel failed to provide that expert with sufficient and available information regarding the FBI testing to allow that expert to discern that the testing exonerated Petitioner, it is beyond question that trial counsel did *not* appreciate the FBI report's exculpatory value. R. 12-13 (*Petition For Post-Conviction Relief* at 10-11. Additionally, the prosecuting attorneys *should* have known of the report's meaning. *Kyles*;

Avelar; *Gantt v. Roe*, 389 F.3d 908, 912-13 (9th Cir. 2004) ("While the defense could have been more diligent. . .this does not absolve the prosecution of its *Brady* responsibilities."). Though he disputes the State's suggestion that whatever the prosecution should know about a report's meaning, the defense necessarily should know as well, Mr. Rhoades agrees that on the facts of this case, his trial counsel should have known that the FBI's report was exculpatory. Because there can be no serious question that but for this woefully inadequate performance in this regard, the outcome would have been different. The Court should vacate Mr. Rhoades' conviction and remand for further proceedings in this case. See R. 12-13 (*Petition For Post-Conviction Relief* at 10-11 (stating third ground for relief that trial counsel rendered ineffective assistance of counsel in failing to provide defense expert with sufficient and available information regarding the FBI testing to allow that expert to discern that the testing exonerated Petitioner). *Strickland v. Washington*, 466 U.S. 668 (1984).

Second, the State asserts that "there is no evidence establishing Wyckoff was ever given a copy of the FBI report[.]" *Id.* In fact, however, the evidence is plain that the State's forensic expert Mr. Wyckoff either knew what the FBI PGM test results were and/or had a copy of the FBI test report. That report was sent to the state crime lab, and Mr. Wyckoff was the state crime lab employee in charge of the forensic investigation in this case. Further, in testifying at the Michelbacher trial, he made clear that he was aware of the report. R. 7 (*Petition For Post-Conviction Relief* at 5 (quoting Michelbacher trial Tr. at 1779)). As the forensic expert in the case, it strains credulity to contend that he may have been unaware of the results of FBI testing done at the instance of the state crime laboratory, which results were sent to that lab.

Most important, however, except for the claim that Mr. Wyckoff committed the

functional equivalent of perjury, it does not matter whether Mr. Wyckoff had a copy of the FBI report, or was aware of its contents or even its contents' implications. It is black letter law that "the duty of disclosure enunciated in *Brady* is an obligation of not just the individual prosecutor assigned to the case, but of *all the government agents having a significant role in investigating and prosecuting the offense.*" *State v. Gardner*, 126 Idaho 428, 885 P.2d 1144 (Ct.App. 1994) (citing *Fambo v. Smith*, 433 F.Supp. 590, 598 (W.D.N.Y. 1977), *aff'd*, 565 F.2d 233 (2d Cir. 1977)) (emphasis added). *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case[.]"). Even supposing Mr. Wyckoff somehow remained ignorant of the results of FBI testing conducted and sent to the state crime lab on a major piece of evidence in a case in which he was the forensic expert, that does not work to excuse the prosecuting attorneys from their duty to learn of the report and its implications. A corollary to that obligation is the prosecution's duty to correct false testimony. The prosecution did the exact opposite. It failed to correct Mr. Wyckoff's patently false testimony that PGM testing inculpated Mr. Rhoades when it knew or should have known that FBI testing exculpated him. *Kyles*, 514 U.S. at 433 (*Brady* violated "where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, [*United States v. Agurs*,] 427 U.S. [97,] 103-04 [1976]").

Third, the State contends that there is "no evidence establishing that [Mr. Wyckoff, the prosecution's forensic expert,] could not have reviewed the report and simply arrived at a different conclusion or not recognized the meaning of the report as alleged by Dr. Hampikian." *Brief of Respondent* at 13-14. This contention is flawed at the start because it wrongly assumes

that unless Mr. Wyckoff arrived at the same conclusions as Dr. Hampikian, Mr. Rhoades's claims fail. While Mr. Wyckoff may not have committed perjury unless he recognized the exculpatory nature of the FBI's testing results, that does not in any way excuse the prosecution from its due process obligation to learn of all exculpatory information known to those acting on behalf of the prosecution. *State v. Gardner*, 126 Idaho 428, 885 P.2d 1144 (Ct.App. 1994) ("all the government agents having a significant role in investigating and prosecuting the offense" are subject to the duty of disclosure); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case[.]").

Even on its own terms, however, the State's contention fails. The *only* evidence before the court below relevant to this question came from Dr. Hampikian, who earned a doctorate in Genetics, completed post-doctoral training at La Trobe University in Australia and the Worcester Foundation for Developmental Biology in Massachusetts, completed the Mitochondrial DNA Analysis workshop offered by the American Academy of Forensic Sciences, was trained at Yale University in the technique used in PGM analysis used in this case, has been a researcher at Yale University Medical School, the Centers for Disease Control and Prevention, and the Georgia Institute of Technology, and has trained law enforcement officers and other professionals in DNA analysis. In those parts of his sworn statements regarding the FBI's PGM testing before the court below, Dr. Hampikian makes plain that once the PGM values–specifically, pluses and minuses–are known, determining that the two samples in this case came from different single sources is elementary because Mr. Rhoades PGM has both a plus and a minus and the sample from the victim had only a plus. As Dr. Hampikian stated it:

> The PGM subtype was PGM1+; Mr. Rhoades is PGM1-1+. This means that Mr. Rhodes [sic] has both the + and - (acid and basic) forms of the PGM 1 protein. The semen sample was from someone who has only the 1+ form.

R. 83 (Dr. Hampikian 12/21/06 sworn statement at para. 1). There is no room for interpretation here. Likewise, there is no room for disagreement on whether the FBI more refined testing results trump the state laboratory's less refined testing results. As Dr. Hampikian averred:

> While the State's PGM testing in its own labs suggested that Mr. Rhoades was within the universe of individuals who might have deposited the semen, the FBI's more discriminating and established state of the art forensic PGM subtyping test gave a contrary result. It is accepted forensic science that less discriminating test results must be interpreted in light of subsequent more discriminating test results. Considering less discriminating test results and ignoring subsequent, more discriminating and, therefore, definitive results is unacceptable forensic scientific practice.

R. 84 (Dr. Hampikian 12/21/06 sworn statement at para. 3). Finally, in light of Mr. Wyckoff's holding himself out to be a serological expert with particularized knowledge of PGM analysis, it is so improbable as to be an absurd suggestion that Mr. Wyckoff did not recognize the exculpatory nature of the report.

An inescapable conclusion from Dr. Hampikian's statements noted in the last paragraph is that any serological expert would agree that the FBI PGM testing results exculpated Mr. Rhoades. For, as is clear from the first block quotation, each person has only one form of the PGM 1 protein, and Mr. Rhoades's was not the same form as that tested by the FBI. Though Dr. Hampikian's statements noted above compel the conclusion that any serological expert would have reached the same conclusion as he did, thus making the express conclusion unnecessary, Mr. Rhoades notes that Dr. Hampikian did expressly reach that conclusion in his June, 2005, affidavit filed in the Michelbacher capital case post-conviction proceedings regarding DNA

testing and now before this Court on review as Case No. 34235.[4] There, Dr. Hampikian averred that:

> [T]he kind of analysis I conducted to arrive at the conclusions I reached in my June 20, 2005, affidavit was not only universally accepted by forensic biologists and forensic serologists in 1987, it also was a basic tool known to and employed by forensic experts in investigating offenses where evidence containing body fluids might help uncover a perpetrators identity. The kind of analysis I employed using the FBI PGM subtyping test results was, in 1987, on a par with similar uses of blood typing test results. Indeed, the State crime laboratory letter to the FBI Laboratory's Forensic Serology Unit requesting PGM subtyping was a standard and typical request when it was made on June 3, 1987. *See* Appendix 1 (State of Idaho Department of Health and Welfare Bureau of Laboratories' senior Criminalist Ms. Pamela J. Marcum's letter to FBI). . . .Ms. Marcum's correspondence shows clearly that the State of Idaho crime laboratory reflected the universal acceptance by forensic biologists and forensic serologists of PGM subtyping and the kind of analysis I conducted to reach the conclusion I arrived at in my June 20, 2005, affidavit. The results reported by the FBI in its July 13, 1987, letter to Ms. Marcum were clear, unambiguous, and used a standard reporting language that would be understood by any forensic serologist or forensic biologist of the day. *See* appendix 2 (FBI Laboratory report to Ms. Marcum). . . .This result completely excludes Mr. Rhodes [sic] from being the donor of the semen sample found on the victim[.] . .furthermore, there is no indication in the FBI report that this finding could be an artifact, or that there was any evidence of a mixture in the sample. **The standard and universally accepted conclusion in 1987 (as today) is that the known sample from Paul Rhoades [sic] does not match the questioned semen sample (Q1) taken from the victim's body. Paul Rhoades is excluded as a contributor of the semen sample Q1.**

R. Vol. I, p.199-202 (emphasis added). The State's contends that the Court should disregard this statement because it is not part of the record in this case. The court below certainly considered the Michelbacher file while presiding over this case. Not only was the same judge on both cases and the cases heard simultaneously on a variety of occasions, the judge also quoted from his order in that case. R. 90-91 (*Memorandum Decision* at 6-7). It is axiomatic that appellate courts

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[4] Of course, the Michelbacher capital conviction, obtained through prosecutorial misconduct with respect to the PGM testing, is what led Mr. Rhoades to enter an *Alford* plea in this case. *See Appellant's Opening Brief* at 11 and *Petition for Post-Conviction Relief.*

review the record considered by the courts below. Mr. Rhoades will file in the immediate future a motion asking that the Court either take judicial notice of, among other things, Dr. Hampikian's June, 2005, affidavit filed in the Michelbacher DNA proceeding or expand the record to include that affidavit. He notes that the court below obviously considered those proceedings inasmuch as it quoted an from order it entered in them.

Fourth, the State notes that Mr. Rhoades's allegations in his post-conviction petition reveal that he provided the FBI testing report to a defense expert. From this, the State concludes that either Mr. Rhoades was aware of the exculpatory nature of the FBI report at trial "or his expert agreed with Wyckoff, if he was actually provided a copy of the report, that it failed to alter the conclusion that Rhoades could not be excluded as a semen donor in the Michelbacher case." *Brief of Respondent* at 14. The State's contention fails for two reasons. First, there is no record evidence whatsoever supporting in any way the State's assertion that Mr. Wyckoff concluded that the FBI testing results "failed to alter the conclusion that Rhoades could not be excluded as a semen donor in the Michelbacher case." *Id.* In fact, the only record evidence on this issue is Mr. Wyckoff's Michelbacher trial testimony regarding the FBI test results: "I can't address those results, I did not do the analysis." R. 7 (*Petition For Post-Conviction Relief* at 5). Second, the State's summary of Mr. Rhoades's allegations in his post-conviction petition omits critical information. The devil is in the details, and the details here demonstrate that the defense expert's presumed agreement with Mr. Wyckoff's false testimony was based on a critical lack of information –information which defense expert *did not* but which Wyckoff *did* have. In particular, Mr. Rhoades alleged in his post-conviction petition that:

They [i.e.-trial counsel] failed to provide their forensic expert in the companion

> [i.e.-the Michelbacher] case] with sufficient and available information regarding the PGM testing conducted by the FBI on the swabs collected from the victim and the samples conducted from Petitioner and others to allow that expert to discern that the FBI PGM report exonerated Petitioner. Likewise, in the underlying case [i.e.-the case underlying the instant case before this Court], they failed to provide a forensic expert with sufficient and available information regarding the PGM testing conducted by the FBI on the swabs collected from the victim and the samples conducted from Petitioner and others to allow that expert to discern that the FBI PGM report exonerated Petitioner. Their expert questioned whether the swab contained spermatozoa or, instead, the victim's cells. Trial counsel had information available to them that each of the swabs represented excellent semen samples. Upon information and belief, had this information been provided to the defense expert, he would have modified his opinion from one which neutralize the FBI report to one which viewed it as plainly exculpatory. Upon information and belief, this failure also precluded counsel from appreciating the critical need to pursue forensic testing of all available biological evidence.

R. 13 (*Petition for Post-Conviction Relief* at 11). The State's contention that the defense expert agreed with Wyckoff regarding the FBI PGM testing results is a highly superficial and extremely misleading account of what in fact occurred.

CONCLUSION

For all these reasons and all the reasons advanced in Mr. Rhoades's opening brief, considered together and independently, the Court should either grant post-conviction relief or remand the case to the district court with instructions to conduct further proceedings on the *Petition For Post-Conviction Relief.*

Dated this 14TH day of November, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2008, I caused to be served a true and correct copy of the attached document upon the attorneys named below by the method indicated below, first-class postage prepaid where applicable.

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