

In The
SUPREME COURT OF FLORIDA

CASE NO. SC04-19

ERIC SIMMONS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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The Appellant, Eric Simmons, by his attorney and pursuant to Rules 9.140(h) of the Florida Rules of Appellate Procedure, hereby files his reply brief in the above-captioned case.

I. STATEMENT OF THE FACTS AND CASE

There is no dispute between the Appellant and the Appellee as to the statement of the case. Both parties have spent substantial time and effort on the statement of the facts. Appellee indicates that there are errors in the Appellant's statement of the facts. Appellant is of the opinion that Appellee has ignored many facts and slanted facts to support its position.

Appellant will not belabor the facts. The record speaks for itself. It is what the statements in the record represent and the context in which the record exists in its

current condition which warrant further comment. Appellant will rest upon the record and focus on the matters he believes to be of the greatest import in this reply.

II. SUMMARY OF ARGUMENT

The case at bar does not present any new and novel questions of law. The issues before this Court are those with established precedent which have been briefed by the Appellant in his Initial Brief. Therefore, this Reply Brief will focus on the issues raised by Appellee in its Answer Brief and the reasons behind the errors asserted by the Appellant in the lower court proceeding.

Contrary to the assertions of Appellee, this case is a circumstantial case premised upon the following circumstances:

1. The Appellant knew the victim and had seen her the day before it was determined that she was killed. A witness claims to have seen the Appellant with the victim at approximately 10:30pm.
2. A woman was seen by two witnesses in what both identified to be a white Chevrolet Corsica, wearing white, hollering for help at midnight. One identified the woman as the victim. Neither saw the driver.
3. There were some small specks of blood of the victim, some combined with the saliva of a canine, found on the passenger-side door jamb of the Appellant's vehicle.

4. The Appellant's vehicle, a Ford Taurus, was once a rental vehicle and was owned by another individual prior to his family acquiring the vehicle.
5. Under an unstained car seat cover, a large stain, most probably a blood stain was found on the passenger seat.
6. Mitochondrial DNA ("mtDNA") testing was done on the seat cushion and it was determined that the possibility existed that the mtDNA of the victim was on the seat cushion, although it cannot be determined if the mtDNA was from the stain and could be caused from any bodily fluid, including perspiration or the like. It was uncontroverted that the victim had ridden in the vehicle on several occasions and had worked with the Appellant and his father doing landscaping work.

From these facts, the State, from law enforcement through the Office of the State Attorney, determined that the Appellant was the last person to see the victim alive; the Corsica became a Taurus; and the blood stain on the otherwise dirty seat became a seat which had been cleaned off with the resultant degradation so that only mtDNA could be retrieved. Therefore, it was determined that the Appellant necessarily had to be the murderer.

These leaps of faith occurred due to the fact that law enforcement's investigation consisted virtually solely upon finding the person who they determined was the victim's boyfriend who they later concluded to be the Appellant. The object then became to find circumstances which could be employed to reach the ultimate goal, the conviction of the person who was predetermined to be the murderer, absent any facts in support of that nor, for that matter, any facts to the contrary. Other suspects were not sought. No direct evidence was found. Thus, it became necessary to shoehorn otherwise innocuous circumstances into evidence of guilt.

The lower court compounded the problem by erring in many rulings below. The combination of these factors resulted in an innocent man being found guilty of sexual battery, kidnapping and murder, and being sentenced to death. This result cannot be permitted to stand. The lower court's decisions must be reversed and the case remanded with instructions.

III. ARGUMENT

A. The Verdicts Are Not Supported By the Evidence

Appellee claims that the case at bar does not constitute a circumstantial evidence case because the Appellant confessed. It is incomprehensible that the

Appellant's alleged¹ statement to law enforcement that if they found blood he "must have did it" could be taken as a confession. There is no evidence that this statement was even made. It also must be the first confession to begin with the words "must have".

Appellee spends considerable time on this matter. However, as recently stated by this Court in Crain v. State, SC00-661 (October 28, 2004), the Court must review *de novo* the sufficiency of the evidence in a first-degree murder case. In support of its contention that this review is somehow not required, Appellee cites Floyd v. State, 850 So.2d 383 (Fla. 2002), and Philmore v. State, 820 So.2d 919 (Fla.), cert. denied, 537 U.S. 895 (2002). Both of those cases address the confession in the penalty phase review, after the Court had reviewed the sufficiency of the evidence in the guilt phase. Both arise in the discussion of the avoid arrest aggravator.

In order for a confession to be admissible, the *corpus delicti* of the crime must first be proven. Therefore, it is required that the Court review the evidence presented. It is the factors to be considered in this review which in discussed *infra*.

¹This is allegedly the statement made as there is no evidence of it having been made whatsoever. The detectives did not record the statement, did not ask the Appellant to make a written statement, did not endeavor to have the statement repeated once they realized that the recording devices were not on, nor did they do anything else to make any record of this alleged confession. If it were truly believed by the detectives that the statement, if made, was a confession, certainly it would not have been treated so cavalierly.

1. The Kidnapping Charge

The evidence presented by the State on this charge and which Appellee argues is sufficient to support the guilty verdict is that “eyewitnesses saw the victim in Appellant’s car . . . screaming for help.” Answer Brief at 32. The record reflects that one witness claims to have seen the victim, that witness being Ms. Renfro. The other witness could not identify the female. The car was described by both witnesses as a Chevy Corsica. Neither saw the driver although, as Appellee states, it was a well-lit intersection. The driver, whoever that may have been, allegedly pulled the victim back into the car. That is what Appellee claims is proof of kidnapping.² There was no evidence of any taking of the victim nor was there any evidence of any intent by the person who may have been driving to do bodily harm or to terrorize the victim. In fact, it could just as easily be surmised that the driver was trying to keep the passenger safe by preventing her from falling out of the vehicle. First and foremost, however, there was no evidence that the Appellant was even in the vehicle. It was not until after the show-up conducted by law enforcement that the vehicle changed from a Corsica to a Taurus and became identified as the Appellant’s vehicle.³

²Appellee claims that venue on the kidnapping charge was proper since it alleges that the kidnapping occurred at that intersection. Answer Brief at 41.

³This will be addressed by fully *infra* in the discussion on the lower court’s error on admitting the identification testimony and failing to admit expert testimony concerning eye witness testimony.

Both witnesses identified the female seen as wearing all white, a fact admitted by Appellee. More specifically, as to the shirt the female was wearing, both witnesses stated that the female was wearing a white T-shirt. The victim was wearing a gray sweatshirt and black pants.

There is no evidence which would support a guilty finding on the charge of kidnapping. The conviction on this count must be reversed.

2. The Sexual Battery Charge

Similarly, there is no evidence that the Appellant committed sexual assault on the victim. The results of sexual assault were found. However, no evidence as to where the crime was committed, what was used to commit the crime, or who committed it was adduced. The only way the guilt of the Appellant could be concluded would be to assume that somehow, somewhere, with something, he did it. There was a complete lack of evidence on this charge. The only evidence was the resultant injury to the victim.

Certainly there can be no conviction of an individual for the commission of a crime by simply proving that the crime occurred. There is no proof that the sexual battery was committed by the same person who murdered the victim. There is no proof of anything relating to the crime. A conviction on the basis of nothing but

assumption and allegation cannot be upheld. The decision on this count must be reversed.

3. The Premeditated/Felony Murder Charge

As with the other charges, there is no evidence to support the guilty verdict on this charge. If the jury were to have found premeditated murder, there was no evidence presented on premeditation. Felony murder would not be possible as the underlying felonies were not proven as demonstrated herein. The murder itself was not proven to have been committed by the Appellant.

Law enforcement did not find a weapon, or in the instant case, weapons⁴ which caused the injuries to the victim. The time of death was not ascertained and could well have been in the period of time in which it would have been impossible for the Appellant to have done it.⁵

Appellee seems to place credence in the tire impressions found at the location where the body was found. However, as stated even by Appellee, the crime scene unit

⁴According to the medical examiner, there was a knife used, at least one blunt object, and a T-shaped object of some type. Tr. 2165-2193. The use of multiple weapons would lead to a far more reasonable conclusion that there were more than one perpetrator of these crimes.

⁵This is admitted by Appellee in its statement of facts. The medical examiner stated that the body was in rigor mortis at approximately 2:00pm on December 3, 2001. According to the testimony of the medical examiner, rigor mortis lasts from between 24 to 48 hours. The Appellant was with his father on his way to Orlando, Florida, to work at 5:30am on December 2, 2001, a fact to which the State stipulated at the trial.

took casts of the “best” tire tracks, not necessarily those which had any relevance to the placement of the body. In fact, the crime scene technician testified that other tire tracks later crossed those which were cast. The tracks closest to the body were not cast. Even the randomly-selected tire tracks did not match all of the tires on the Appellant’s car. This would cause one to have to conclude that the vehicle was proceeding with fewer than four tires.

The only “evidence” on any of these charges was that the Appellant knew the victim and the victim had had a scratch or cut of some kind which resulted in a very slight amount of blood – specks as they were characterized – being found in his vehicle. This is not unusual since it was undisputed that the victim was assisting in the moving of large limbs while assisting in the Appellant father’s business at the time of her murder. It is equally undisputed that the Appellant generally had a large puppy with him. The mixture of canine saliva with the victim’s blood specks supports this hypothesis.

Appellee claims that the prosecutor’s statement in closing argument at the trial that the blood on the cushion of the car was caused by the victim’s head lying on it while the sexual battery occurred is a correct conclusion which can be drawn from the “evidence” presented during the trial. Quite to the contrary, the statement is belied by the testimony. As Appellee itself states, the medical examiner concluded that the

sexual battery occurred first as demonstrated by the hemorrhaging which occurred. Tr. 2185.

To reach a guilty verdict on any, let alone all, of these charges requires a tremendous amount of speculation based upon no facts. Nothing is known of what occurred from the time the Appellant left the victim to the time the body was found a few days later. Law enforcement did not nothing to locate evidence, but rather sought to locate the Appellant. That was accomplished. No evidence was ever found. To permit the guilty verdicts to stand and the Appellant to be put to death on the basis of such a complete lack of evidence cannot be permitted.

B. The Trial Court Lacked Jurisdiction to Hear the Case

The medical examiner testified that the location where there body was found was not the location where the murder occurred. The State conceded that it had no knowledge as to where the crimes occurred. While there is no question that a circuit court can hear a first-degree murder case, it does not have jurisdiction over nor is venue correct in *all* first-degree murder cases. It is set forth in Article I, Section 16 of Florida's Constitution and codified in Section 910.03 of the Florida Statutes that a case must be heard in the county in which the crime is committed. It is unknown where that is in the instant case. The only charge which arguably occurred within

Lake County is the kidnapping charge, and, as demonstrated by the Appellant, there is nothing which links the Appellant to the kidnapping charge.

Appellee argues in its Answer Brief at 40-41 that trial court properly denied the motion to dismiss on this issue because all inferences should be resolved against the defendant. That is not disputed, but this does not mean that the trial court can simply ignore the law and the facts of the case before it because a ruling would be contrary to the State's position. Nevertheless, that is what occurred in this case.

Initially, there was no kidnapping charge. There was nothing which gave the trial court any basis for the ruling that the case could be properly heard by it. Since there was no basis for the lower court's determination, there was equally nothing which would permit the jury to determine that venue was proper in Lake County on the murder and sexual battery charges. Appellee states that the burden on the State is lower for a venue determination. While that is correct, the burden is not non-existent. Something must be shown for a reasoned decision to be made by the jury. No evidence was presented since, as the State conceded, there was none.

The trial court erred in failing to grant the motions to dismiss filed below. Since that is the case, the decisions on the charges must be reversed.

C. There Was No Probable Cause for the Arrest of the Appellant

1. The Appellant Was Improperly Detained and the Lower Court Erred in Denying the Motion to Suppress the Appellant's Statements

Appellee argues, as did the State below, that the Appellant consented to his transportation to the Lake County Sheriff's Office and that his statements were voluntarily made. On the basis of this, along with the argument made by the lower court that there was probable cause for the arrest of the Appellant at the time he was taken into custody, Appellee concludes that the lower court's ruling on the motion to suppress was correct.

The two arguments espoused by Appellee and the lower court are distinct. The first argument concerns the voluntariness of the Appellant's going with law enforcement for questioning. Neither the lower court nor Appellee dispute the fact that a very large number of officers were at the Appellant's father's home when he was handcuffed and transported to the Lake County Sheriff's Office. Appellee seems to indicate in its Answer Brief at 44 that the number of armed officers and hovering helicopter were of no moment since they were not involved in the immediate questioning of the Appellant. Again, this defies logic. Appellee cites to United States v. Mendenhall, 446 U.S. 544 (1980), to support its contention that the Appellant was not "seized". However, the criteria set forth in Mendenhall for a determination of a

seizure are present in the instant case. The fact that a weapon may not have been fixed on the Appellant is of little import when surrounded by 15 to 20 armed officers, numerous marked and unmarked units, and a helicopter. It is difficult to imagine a more coercive situation.

Appellee states that the handcuffing was done for officer's safety. However, this wholly ignores the record in this case. As demonstrated in the Appellant's Initial Brief, the initial testimony was that the detectives handcuffed the Appellant and took him to the marked, locked unit for transport. This was later changed to be that the Appellant walked over on his own and was handcuffed by the uniformed officer for his safety. That argument is belied by the fact that he was surrounded by the "thundering herd" of armed officers at that time. The transporting officer testified that he removed the handcuffs from the Appellant as soon as they arrived at the Sheriff's Office where he was alone with the Appellant. The officer safety argument simply does not make any sense.

The lower court judge, on his own, made the determination that law enforcement had probable cause for the Appellant's arrest at the time he was detained so it was of no moment whether he was detained or voluntarily accompanied the officers. Law enforcement did not believe they had probable cause for the arrest as

they made it clear on several occasions that the Appellant was not under arrest. In fact, they did not have probable cause.

In support of the position that there was sufficient grounds for an arrest, the Appellee points to several matters which are wholly unsupported by the record. These include the alleged “fact” that the Appellant had recently “beaten up the victim”. No evidence of any such occurrence was presented. Certainly, had that been the case, that would have been presented at trial. Again, this is nothing more than a bare accusation which no basis in fact. The incident which occurred at the intersection of Routes 44 and 437, contrary to contentions of Appellee, could not have led to the conclusion that the Appellant or his vehicle were in any way involved. The witnesses specifically identified a Chevy Corsica as the vehicle involved in that incident. At that time, there was no indication of any description which would make the vehicle involved in that incident that of the Appellant’s. Since the time and place of the victim’s death was unknown, there could be no way for the conclusion to be reached that the Appellant was the last person to see her alive. In sum, there was no basis for the Appellant’s arrest as law enforcement properly concluded.

There can be no basis for concluding that the encounter with law enforcement was consensual. The Appellant was improperly detained. The lower court erred in failing to suppress any statements made to law enforcement following the illegal

detention. This error is certainly harmful as much was made of the so-called confession. The tape of the “interview” was played to the jury, the detectives were questioned at some length about the “interview”, and Appellee claims that it is what distinguishes this case from any other circumstantial case. The error is harmful if not fundamental. This Court should reverse and lower court and remand the case for a new trial.

2. There Was No Probable Cause for the Issuance of the Search Warrant for the Appellant’s Vehicle and the Lower Court Erred In Denying the Motion to Suppress

The lower court similarly erred in failing to suppress the evidence obtained from the search warrant on the Appellant’s vehicle. Appellee argues that the Appellant does not refute the factual findings of the lower court. That is simply incorrect. One can only assume that Appellee failed to read pages 33 to 40 of the Appellant’s Initial Brief. Franks v. Delaware, 48 U.S. 154 (1978), requires that the false information contained in an affidavit in support of a warrant be removed and the determination then made as to whether the search was proper. Here, as fully set forth in the Initial Brief, there is virtually nothing left of the supporting affidavit when the erroneous information is removed.

The reasons that there were four (4) days of hearings required on the motions to suppress are the very reasons that the lower court’s holdings on the motions to

suppress cannot be upheld. The testimony concerning whether or not, and then when and why the Appellant was handcuffed changed from hearing to hearing. The hearings on the motion to suppress on the vehicle were more egregious. The timing on the signing of the warrant was unknown and equivocal. It became abundantly clear, however, that the warrant was signed prior to the affiant for the warrant having viewed the vehicle. This accounts for the statement concerning the bloody sheet which had no blood on it whatsoever, let alone any other stains which could even arguably be said to look like blood. The stains were non-existent.

The reviewing magistrate should be able to rely upon the statements made in the affidavit in support of a warrant. Here, although the statements were shown to be misleading at best and outright false in many instances, those factors were simply ignored by the lower court. Instead, the lower court chose to come up with alternate ways which would support upholding the search warrants, substituting his judgment for that of law enforcement, and stretching factors to fit the desired result of upholding the State's evidence.

In the case of the search warrant on the vehicle, the lower court determined that probable cause existed for the Appellant's arrest and that the Carroll doctrine⁶

⁶Carroll v. United States, 267 U.S. 132 (1925). This doctrine is inapplicable in the instant case as there were no exigent circumstances and there was no risk of the vehicle going anywhere. Even absent that concern, there was no probable cause for the search established.

somehow permitted the search of the vehicle. These alternate theories are contrary to the evidence and are unsupported by law. The lower court's decisions cannot stand. The decisions on the motions to suppress must be reversed and the case remanded for a new trial consistent with this Court's holdings.

D. Mitochondrial DNA Was Improperly Submitted and Argued

Appellee spends much time arguing the law on the admissibility of DNA evidence under the current law. What it fails to look at, however, is the requirement of Magaletti v. State, 847 So.2d 523 (Fla. 2d DCA 2003), rev. denied, 858 So.2d 331 (Fla. 2003), on the necessity of the testifying expert to be qualified to give testimony on the quantitative analysis of the testing done. In the instant case, the person qualified from the State's laboratory to so testify was Dr. Staub who did not testify before the jury, but only to the lower court. Mr. Sloan was nevertheless permitted to opine as to the quantitative analysis as well as whether or not a stain which he did not test was blood. These were areas outside of his area of his expertise. Since he could not testify as to the quantitative analysis, he was improperly qualified as an expert in the field of mtDNA and his testimony should not have been permitted as such. The lower court erred in this ruling.

Appellee argues that any error should be overlooked as the determination as to who may testify is within the discretion of the trial court. Discretion conferred upon a lower court does not include actions which are contrary to law.⁷

As fully addressed in the Initial Brief, this error was compounded by the Assistant State Attorney arguing to the jury what would appear to the jury to be scientific information which in fact had no basis in science at all. It was improper for the prosecutor to mislead the jury on these issues as they were certainly areas in which the jurors would have no independent basis for making a determination as to the veracity of the statements being made.

The errors concerning the mtDNA testimony are of particular import in this case as the seat cushion, which was the subject of the mtDNA testimony, was the crux of the State's case against the Appellant. The misleading information which was given to the jury as the result of lower court error and prosecutorial misconduct cannot be permitted to stand.

⁷Appellee would apparently have this Court simply defer to the trial courts on all rulings which uphold the State's position. It is the job of Appellee to zealously represent his client. However, that zealotness must not include the blind following of any lower court decision which supports a conviction and upholds the State. This Court must not be dissuaded from looking closely at the record in this case and ruling consistent with justice and the law, not simply with conviction.

Appellee argues that this is harmless error as the matters could be addressed on cross examination. This is simply not sufficient. When an expert testifies in a way which is misleading to the jury, mere cross examination cannot overcome the prejudice that it causes. The possibility that the jury's verdict was impacted by this testimony is great and a new trial is required. See, Yates v. State, Case Nos. 02-01-00462 and 463-CR (1st Dist. Ct. of App. for the State of Texas, January 6, 2005).

E. The Lower Court Erred in Excluding the Defense's Eye Witness Expert

Once again, on the issue of whether the lower court erred in failing to permit the testimony of an eye witness expert, Appellee relies upon the "discretion of the court" argument. While it is within the discretion of the lower court to determine what witnesses shall be permitted to testify, that discretion must be tempered with regard to existing case law and concerns for a fair trial and due process for the defendant. This is particularly important when the very life of the defendant is at issue.

Appellee contends that the witnesses did not drastically change their testimony which made the testimony of the expert witness unnecessary. This is an incredulous statement. Unrelated witnesses both testified that the vehicle seen at the intersection of Routes 44 and 437 was a Chevrolet Corsica. These statements were independently made and were unequivocal. No mention was made of a flag in the window of the

vehicle by either witness. Yet, both witness miraculously changed their testimony to be absolutely convinced that the Appellant's Ford Taurus was the vehicle they saw at that intersection. The number of times that the Corsica-type vehicle phrase, one coined by law enforcement and not one ever used by a witness, was used throughout the record demonstrates the import of this. It is key to the State's case that the car seen was that of the Appellant's, even though the description originally given by the witnesses would lead to the conclusion that it was not.

It was not until after the show-up and conversations with law enforcement that the Chevrolet became a Ford, the flag appeared, the decal which would not have been visible to Ms. Renfro at the scene was remembered, the victim's hair became long and black instead of short and brown, and the like. It is impossible to assert that these changes in testimony are not substantial.⁸

Given the most serious nature of the instant case and the changes in testimony of the witnesses, it would have been most helpful to the jury to have the benefit of an expert on the reasons for the changes. Instead, the jury was left with only conflicting stories from otherwise generally believable witnesses so that it would be reasonable

⁸It is worthy of note that Ms. Renfro did not return to testify as required by the lower court in the defense case. This raises serious question concerning the testimony she gave during the presentation of the State's case which was contrary to her initial statements to law enforcement.

for the jury to believe that their initial statements were merely confused. The lower court erred in permitting this to go unrefuted by the defense expert. The error is harmful and requires a reversal for a new trial.

F. The State's Entomology Witness Was Improperly Qualified as an Expert

While the lower court deemed the defense expert on eye witness testimony irrelevant, it found the testimony of a State expert on entomology with no background in forensic entomology to be relevant. Appellee argues that because the lower court qualified Dr. Hogsette as an expert on the life cycle of flies as opposed to a forensic entomologist it is all right. A jury does not draw that type of distinction. Furthermore, the lower court permitted Dr. Hogsette to opine on the time of death, the decomposition of bodies and the growth of the larvae on a human body, areas in which he has admittedly had no experience or knowledge and areas upon which a forensic entomologist is qualified and would rightfully be permitted to opine.

Appellee states that, if the admission of the testimony of Dr. Hogsette was an error, it was harmless is disingenuous at best. Expert testimony is highly regarded by juries and the lower court's permitting the opinions to be given gives further weight to the testimony. It cannot be deemed to be harmless error when Dr. Hogsette was the only witness to put the time of the victim's death in the small window in which it

would have been even conceivable for the Appellant to have committed the murder. The error is harmful and the lower court's decision must be reversed and a new trial ordered.

G. In-Court Identifications of the Appellant's Vehicle Were Improperly Permitted

As discussed *supra*, the identification of the Appellant's vehicle were greatly influenced by law enforcement's employment of highly suggestive identification techniques. This gives rise to an analysis under Neil v. Biggers, 409 U.S. 188 (1972). That show-ups are highly suggestive cannot be denied. There were no circumstances which required the most highly suggestive means of identification to be employed by law enforcement. In fact, it was not until over one year later than Mr. Montz even looked at a photograph of the vehicle.

The changes in the recollections of the witnesses underscore the possibility for misidentification. In addition to those outlined above, Mr. Montz specifically recalled spoked wheels on the car he saw the night he was at the Circle K. However, the spoked wheels were replacement tires put on the Appellant's vehicle after the original tires had been sent for testing. He also recalled the car being dirty as shown in the photograph. However, the "dirt" was fingerprint material placed on the car by the

crime scene technicians. The effect of the show-up is obvious. The possibility for misidentification is great.

The test set forth in Kirby v. Illinois, 406 U.S. 682, 691 (1972), *citing* Stovall v. Denno, 388 U.S. 293 (1967), and Foster v. California, 394 U.S. 440 (1969), mandate that the identifications should not have been permitted in court. The court's allowing the identifications to be made was harmful error requiring a reversal of the decision and the ordering of a new trial.

H. The Death Penalty Was Improperly Imposed

The Appellant's position on the constitutionality of the death penalty and the aggravating factors imposed in this case are fully set forth in the Initial Brief. Appellant relies upon the arguments made therein. Appellee has added nothing to refute those arguments.

The Appellant would add that Appellee's contention that the death penalty is warranted in this case is contrary to any reasonable definition of justice. There can be no doubt that the victim in this case met with a terrible death. However, there is equally no doubt that there is nothing which ties this Appellant with the death.

There is almost always a way to convict someone of a crime when there is nothing more than circumstantial evidence, whether that individual is actually guilty or actually innocent. That this is the case is painfully underscored by the over one

hundred and fifty death row inmates who have been freed as their innocence has finally been proved by the Innocence Project alone. Most certainly, all of those individuals had to have been convicted on circumstantial evidence. Had there been direct evidence, the individuals would more than likely have been guilty. To sentence an individual to death on circumstantial evidence should not be permitted as it violates not only every sense of justice but also one's constitutional rights.

The confrontation clause of the Constitution requires that an individual be afforded the right to confront his accusers. The right to due process requires a fair trial to be afforded every individual. It is also a requirement of our system of justice that an individual is innocent until proven guilty and the burden of proof rests solely on the State to prove guilty beyond a reasonable doubt.

A trial based on purely circumstantial evidence circumvents those rights unless the safeguards which are to be afforded to a defendant in such a case are strictly followed. It is impossible to successfully argue against theories. Permitting unfounded theories to be espoused and inferences upon inferences piled to reach a desired result shifts the burden to the defendant. That burden is virtually impossible to meet since it is shooting at a moving object.

Calling the instant case a circumstantial case is putting a finer glow on it than it deserves. There is no well-connected chain of circumstances leading to an ultimate

and undisputable conclusion of guilt. There are virtually no circumstances at all. To find that it is within the letter and spirit of the Constitution of the United States and the State of Florida to permit the imposition of the ultimate penalty of death in such a case is a conclusion which the Appellant cannot reach and should not be able to be reached within a system which purports to set justice as its goal.

IV. CONCLUSION

This case presents a prime example of how an innocent man can be found guilty by a jury when the State puts forth a case which it presents under the veil of a circumstantial evidence case. The problems faced in a circumstantial case which is not properly presented and in which erroneous rulings are made by the lower court are glaringly shown in the case hereunder review.

Given the fact that there are no facts which are relevant to the commission of the crimes charged, “facts” must be assumed and inferred, the truth stretched at times beyond recognition, and missing links filled in as best the State can by whatever means. This can be seen in every phase of this case.

At the time of the Appellant’s detention, law enforcement was out *en masse* in this manhunt for the Appellant. The officers were not going to be content with just determining that he was not running, they were going to take him into custody.

However, they realized at some point in time that there was no probable cause. Thus, the change in stories as to when the Appellant was handcuffed and for what reasons.

The crime scene technicians did not even attempt to ascertain which tire tracks would most likely have been associated with the placement of the victim's body in the field. Instead, it was only the tire tracks of which the best impressions could be made which were used. To try to use these tire impressions to match to the Appellant's vehicle to somehow connect him to the murder is anything but an attempt to reach the truth.

Once the determination was made to arrest the Appellant, it became necessary to find some evidence to support that arrest. No blood or other evidence was found at the Appellant's house so the vehicle became the focus. The Chevy became a Ford, the flag on the car was remembered, and even a bumper sticker which was out of view was recalled vividly.

The blood specks, particularly with the dog saliva, were not compelling thus the need for the seat cushion. No chances were taken here. The fact that DNA could not be extracted led to alternative means of finding the source. However, the laboratory employed by the State missed the DNA profiles which could be lifted from the stain from two (2) males. It also found the mtDNA to be unique. The victim's DNA was

not even sent to the laboratory, but instead the DNA of the victim's alleged mother was sent.

The record is replete with examples of this type of filling in to reach the desired result. The sad state of this case stems from the fact that the desired result is conviction, not truth or justice. The Appellant is not suggesting that there is some great conspiracy against the Appellant. Unfortunately, to the contrary, this has simply become the way cases are tried. It is not ill will by law enforcement or the prosecution. It is simply the overzealous need to win at all costs, no matter whether the right result is in fact reached.

The Appellant beseeches this Court to look carefully at this case and reach the correct result. The Appellant is not guilty and the State failed to prove to the contrary. During pre-trial hearings and during the course of the trial, the lower court erred in many regards. If the Defendant is not released, it is requested that the conviction be reversed and the case remanded for a new trial with instructions from this Court.

V. CERTIFICATION OF FONT COMPLIANCE

I hereby certify that this Initial Brief is typed in 14-point Times New Roman font in compliance with the Florida Rules of Appellate Procedure.

WHEREFORE, in light of the foregoing, it is respectfully requested that this Court reverse the decision of trial court and/or remand the case as outlined above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by U.S. Mail, postage prepaid, to the Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, this 11th day of January, 2005.

JANICE C. ORR