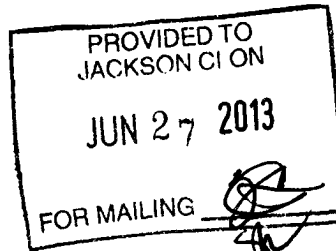


IN THE SUPREME COURT OF FLORIDA

CECIL TOLBERT,
Petitioner,

v.

STATE OF FLORIDA,
Respondent



CASE NO.: To Be Set
D.C.A. NO.: 4D12-309

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PETITIONER'S JURISDICTIONAL BRIEF

*On Review from the District Court of Appeal,
Fourth District, State of Florida*

Cecil Tolbert DC# 037846
Jackson Correctional Institution
5563 10th Street
Malone, Florida 32445

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I. STATEMENT OF THE CASE AND FACTS

The Petitioner was convicted of one count of armed kidnapping and two counts of sexual battery with the use or threatened use of a deadly weapon. The court sentenced the petitioner to life imprisonment for the kidnapping charge and thirty years each for the sexual battery charges, with all sentences to run concurrently.

On May 15, 2012, the Petitioner submitted his Initial Brief for Direct Review case # 4D12-309; he was represented by the Assistant Public Defender of the Fifteenth Judicial Circuit Attorney James W. McIntire. The brief consisted of

only one issue¹ The Fourth District Court of Appeal on May 1, 2013 denied Appellant Brief with an *affirmed* opinion decision citing: Bunche v. State, 5 So. 3rd 40 (Fla. App. 4th Dist. 2009)². The Petitioner raised a Motion for Rehearing *Pro Se*. The Fourth District Court of appeal denied the motion for rehearing on June 07, 2013.

II. SUMMARY OF THE ARGUMENT

In this case, the Fourth District Court of Appeal held that Petitioner was not entitled to relief because Petitioners' case is in contrast to Potts v. State, 57 So. 3rd 292 @ 294 (Fla. App. 4th Dist. 2011): Telfort v. State, 978 So. 2nd 225 @ 226-27 (Fla. App. 4th Dist. 2008): Miller v. State, 37 Fla. L. Weekly D2780 (Fla. App. 4th Dist. 2012) and the error of the trial court allowing inadmissible hearsay was in fact harmless.

The DNA analyst did not consult with the prior DNA analyst or rely on any of his conclusions whereas she independently retested the DNA sample and

¹ Did the judge abuse her discretion and reversibly err in allowing Florida's DNA expert to bolster herself with a non-testifying expert's opinion

² The District Court in its opinion agreed that the DNA expert testimony was in fact hearsay but ultimately denied Petitioners claim as being harmless error.

determined that it was a male DNA profile and matched it to the Petitioner whereas, the inadmissible hearsay did not establish the Petitioner guilt.

Thus, the Petitioner contends that the decision of the Fourth District Court of Appeal conflicts with the previous decision of Dufour v. State, 69 So. 3rd 235 @ 255 (Fla. 2011) quoting Linn v. Fossum, 946 So. 2nd 1032 (Fla. 2011) an expert may not testify that the expert opinion was formed by conferring with others in the same field, and expert may not bolster own opinion with other expert's opinion.

III. JURISDICTIONAL STATEMENT

The Florida Supreme Court has Discretionary Jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or another District Court of Appeal on the same point of law. Art. V, § 3(b) (3) Fla. Const. (1980): Fla.R.App.P. 9.030(a)(2)(A)(iv).

IV. ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE COURT IN LINN V. FOSSUM, 946 So. 2nd 1032 (Fla. 2011)

Unlike lay witness experts can rely on “facts or data” not admissible in evidence in forming their opinions; however, the “facts or data” must be of a type reasonably relied upon by experts in the subject to support the opinion expressed,

and an expert can not bolster his or her testimony by testifying that particular treaties supports an opinion. Fla. Stat. § 90.704

Under the evidence code, an expert is not permitted to testify on direct examination that the expert relied on consultations with colleagues or other experts in reaching his or her opinion Linn v. Fossum, 946 So. 2nd 1032 (Fla. 2011); Fla. Stat. § 90. 702- § 90.706 an expert may not testify that the expert formed the opinion by conferring with others Schwarz v. State, 695 So. 2nd 452 (Fla. App. 4th Dist. 1997)

Although experts may testify as to the things on which they rely, experts cannot bolster or corroborate their opinions with the opinions of other experts who do not testify because such testimony improperly permits one expert to become a conduit for the opinion of another expert who is not subject to cross examination see: Dufour v. State, 69 So. 3rd 235 (Fla. 2011).

Petitioners' issue came before the District Court of Appeal on the matter of did the judge abuse her discretion and reversibly err in allowing Florida's DNA expert to bolster herself with a non-testifying expert's opinion.

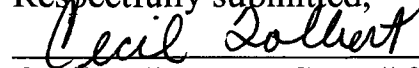
However, the Petitioner contends that based off of the above styled law that harmful error did in fact occur in his trial proceeding beyond the realm of what the District Court delivered its opinion on.

The Petitioner would like for the Honorable Court to take [Judicial Notice]³ concerning this matter for the reason that if not corrected presents a manifest injustice. This issue is one deserving of resolution by this Honorable Court being consistent by way of its written opinion.

V. CONCLUSION

This Court has Discretionary Jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the Petitioner's legal argument.

Respectfully submitted,



Cecil Tolbert *Pro Se* Dc# 037846

³ **Judicial Notice:** Harmful error applies in this case where the DNA analyst testified (T.T. Pgs. 307-310) that she relied on old and outdated DNA technology [R.F.L.P.] which caused her to consult with two other experts to make a determination, that retesting should be done in house. These other experts were never identified, nor able to be cross examined all in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

This testimony was not objected to by the defense but presents prejudicial and constitutional error that occurred at trial as described in *Chapman; DiGuilio; and Goodwin* [citations omitted]

CERTIFICATE OF MAILING/SERVICE

I HEREBY CERTIFY that I have mailed the foregoing Jurisdiction Brief to The Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee Florida 32399 and that a true and correct copy has been furnished to the Office of the Attorney General, 1515 N. Flagler Drive., Ste. 900, West Palm Beach, FL 33401, by placing them into the hands of institutional mailroom staff, postage pre-paid, for further delivery by U.S. Mail, on June 26, 2013.

Respectfully submitted,

Cecil Tolbert
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Appellant's Brief has been prepared using Times New Roman 14 Point Font in compliance with the font requirements of Fla. R. App. P. 9.210 (a) (2).

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