IN THE SUPREME COURT OF FLORIDA

DAVID MILLER,

Appellant,

v. **CASE NO. 93,792**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 201170

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PRELIMINARY STATEMENT

Appellant, David Miller, relies on his Initial Brief to reply to the State's Answer Brief with the following additions concerning Issue I.

This brief has been prepared using courier new, 12 point, a font which is not proportionally spaced.

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING MILLER'S MOTION FOR JUDGMENT OF ACQUITTAL TO THE PREMEDITATION THEORY FOR THE FIRST DEGREE MURDER COUNT SINCE THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION.

The State in its Answer Brief suggests that this Court should abandon the circumstantial evidence rule as an appellate review standard for ruling on sufficiency of evidence issues. This suggestion is without merit for a number of reasons. First, this Court has already considered and rejected this proposition in State v. Law, 559 So.2d 187 (Fla. 1990). Second, the circumstantial evidence standard of review has long been founded in the due process and common law history of Florida. The standard has served Florida Courts well, and this Court should continue to follow this well-established working precedent under the principles of stare decisis. Third, the State has mischaracterized the review standard this Court employs and as explained in State v. Law. Contrary to the State' contention, the circumstantial evidence standard is consistent with and gives effect to Jackson v. Virginia, 443 U.S. 307 (1979). Fourth, the State's brief has overstated the number of states that do not use the circumstantial evidence rule. In fact, there is considerable diversity. At least 24 states use the circumstantial evidence rule as a jury or appellate review

standard. Fifth, the State's proposal would create an intolerable imbalance placing Florida in the most defense-adverse posture of eliminating the circumstantial evidence rule from the jury instructions and from appellate review, coupled with no appellate review of weight of the evidence.

1. This Court Considered And Rejected The State's Proposal In State v. Law.

In State v. Law, 559 So.2d 187 (Fla. 1990), this Court considered the same issue the State now poses in this case:

> The question presented is whether a trial judge may send a criminal case to the jury if all of the state's evidence is circumstantial in nature and the state has failed to present competent evidence sufficient to enable the jury to exclude every reasonable hypothesis of innocence. Stated another way, does the common law circumstantial evidence rule apply when a trial judge rules on a motion for judgment of acquittal?

State v. Law, 559 So.2d at 188. This Court held that the circumstantial evidence rule applies and wrote:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. [footnote omitted] A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. Jaramillo v. State, 417 So.2d 257 (Fla.1982). Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla.1977); Mayo v. State, 71 So.2d 899 (Fla.1954). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will

not reverse. Heiney v. State, 447 So.2d 210 (Fla.), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); Rose v. State, 425 So.2d 521 (Fla.1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), disapproved on other grounds, Williams v. State, 488 So.2d 62 (Fla.1986).

The state contends that applying this rule when considering a defendant's motion for judgment of acquittal would run afoul of previous statements from this Court regarding the standard of review applicable to such motions. The state argues that the standard applied by the district court in Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986), review denied, 503 So.2d 328 (Fla.1987), upon which its Law opinion is founded, conflicts with this Court's holding in Lynch. [footnote omitted] The state contends that because a defendant, in moving for a judgment of acquittal, admits not only the facts as adduced at trial, but also every conclusion which is favorable to the state which may be reasonably inferred from the evidence, the trial court should not be required to grant a judgment of acquittal simply because the state has failed to present evidence which is inconsistent with the defendant's reasonable hypotheses of innocence.

Upon careful consideration, we find that the view expressed in Lynch and that expressed by the district court below in the instant case and in Fowler are harmonious. A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. See Wilson v. State, 493 So.2d 1019, 1022 (Fla.1986). Consistent with the standard set forth in Lynch, if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." 293 So.2d at 45. The state's evidence would be as a matter of law "insufficient to warrant a conviction." Fla.R.Crim.P. 3.380.

It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. Spinkellink v. State, 313 So.2d 666, 670

> (Fla.1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The state is not required to "rebut conclusively every possible variation" [Allen v. State, 335 So.2d 823, 826 (Fla. 1976)] of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See Toole v. State, 472 So.2d 1174, 1176 (Fla.1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Law, 559 So.2d at 188-189. The reasoning in Law remains sound, and the State has offered no basis to recede from Law other than the argument that some jurisdictions employ a different standard. Answer Brief at 21-31.

2. The Circumstantial Evidence Standard Of Review Is Founded In The Due Process And Common Law History Of Florida And This Court Should Adhere To This Standard Under The Principles Of Stare Decisis.

The appellate courts of Florida have used the circumstantial evidence rule in appellate review for well over 100 years. See, Whetston v. State, 31 Fla. 240, 12 So. 661 (1893); Joe v. State, 6 Fla. 591 (1856). There have been at least 589 reported appellate decisions in Florida referencing and using the circumstantial evidence rule.[1] In 1893, in Whetston, this Court discussed the value and purpose of the rule as follows:

> The state relies entirely upon circumstantial evidence to connect the accused with the burning of the

[1] A Westlaw term search produced 589 appellate cases dating back to 1856. (Appendix A)

> cotton house. That this character of evidence may establish guilt is beyond question, and our own court has approved the statement that 'a well-connected train of circumstances is as conclusive of he existence of a fact as is the greatest array of positive evidence.' Whitfield v. State, 25 Fla. 289, 5 South. Rep. 805. The value of this kind of evidence consists in the conclusive nature and tendency of the circumstances relied upon to establish any controverted fact. They may not only be consistent with guilt, but must be inconsistent with innocence, Mr. Starkie says, in his book on Evidence, that 'such evidence is always insufficient where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof...

Whetston, 12 So. 661, 663; see,also, Mayo v. State, 71 So.2d 899, 904 (Fla. 1954)(citing Whetston.) Employing this standard for testing the sufficiency of evidence protects against the improper compounding of inferences and the danger of an improper conviction on nothing stronger than a suspicion. E.g., Brown v. State, 428 So.2d 250 (Fla. 1983); Diecidue v. State, 131 So.2d 7 (Fla. 1961); Moffat v. State, 583 So.2d 779 (Fla. 1st DCA 1991); Weeks v. State, 492 So.2d 719 (Fla. 1st DCA 1986); Williams v. State, 713 So.2d 1109 (Fla. 2d DCA 1998); Collins v. State, 438 So.2d 1036 (Fla. 2d DCA 1983). These purposes apply with equal force today.

This Court should continue to follow this established, working precedent under the principles of stare decisis. See, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Perez v. State, 620 So.2d 1256 (Fla. 1993)(Overton, J. concurring); Haag v. State, 591 So.2d 614 (Fla. 1992); Old Plantation Corp. v. Maule

Industries, 68 So.2d 180 (Fla. 1953). Stare decisis requires the adherence to prior precedent to insure stability, predictability and confidence in the judicial system. Ibid. "The precedent must be followed except when departure is necessary to vindicate other principles of law or to remedy continued injustice." Haag v. State, 591 So.2d 614, 618 (Fla. 1992). The United States Supreme Court in Planned Parenthood v. Casey stated four considerations to test whether a prior decision should be overturned:

> [1]... whether the rule has proven to be intolerable simply in defying practical workability ...[2]... whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation....[3]... whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine ....[4]... whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification....

Planned Parenthood v. Casey, 505 U.S. at 854-855.

Applying these criteria to the present issue demonstrates that stare decisis requires adherence to the circumstantial evidence rule review standard. This review standard has served Florida Courts well and is an important safeguard to give effect to the constitutional due process proof beyond a reasonable doubt requirement in criminal cases. See, Art. I, Sec. 9, 16 Fla. Const.; State v. Cohen, 568 So.2d 49 (Fla. 1990). The rule remains a practical and workable standard. There is no indication that the

appellate courts are experiencing difficulty reviewing cases using this long-established, workable and balanced test. See, e.g., Washington v. State, case. no. 97-4538 (Fla. 1st DCA July 27, 1999); Leonard v. State, 731 So.2d 712 (Fla. 2d DCA 1999); Jimenez v. State, 715 So.2d 1038 (Fla. 3d DCA 1998); James v. State, case no. 98-2034 (Fla. 4th DCA July 21, 1999); Nelson v. State, 725 So.2d 412 (Fla. 5th DCA 1999). Moreover, hundreds of trial court judges have been schooled and practiced in applying this standard of review of evidentiary sufficiency. A change in the standard would result in an enormous upheaval in both the trial and appellate courts. The State can point to no injustice a change in the standard would remedy or to a greater legal principle a change would secure. There has been no change in the need to protect the due process right of the accused to have the state prove its case beyond a reasonable doubt. The circumstantial evidence rule standard of review has protected this right for well over 100 years. Stare decisis commands adherence to the rule.

3. The State Has Mischaracterized The Circumstantial Evidence Rule Review Standard This Court Employs And As Explained In State v. Law.

The State has premised part of its argument on some mischaracterizations of Florida law. As this Court explained in State v. Law, 559 So.2d 187 (Fla. 1990), the role of the trial judge in ruling on a motion for judgment of acquittal and the

appellate court on review is whether the State has presented competent evidence inconsistent with the hypothesis of innocence upon which the jury could rely to exclude the hypothesis of innocence.

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. Spinkellink v. State, 313 So.2d 666, 670 (Fla.1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The state is not required to "rebut conclusively every possible variation" [Allen v. State, 335 So.2d 823, 826 (Fla. 1976)] of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See Toole v. State, 472 So.2d 1174, 1176 (Fla.1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Law, 559 So.2d at 189. Given the review standards outlined in Law, the possible misapplication concerns that the State presents in its Answer Brief at pages 26-31 simply are not applicable. What other courts may or may not have done in applying the circumstantial evidence appellate review standard has no bearing on the argument of how it applies in Florida. This Court has said that Florida courts view the evidence in the light most favorable to the State. Ibid. The fact that other courts may take the view that the evidence be viewed in favor of the accused is irrelevant to the discussion about Florida’s standard.

In Florida, there is no misunderstanding about the deference afforded to a jury's verdict. As stated in Law, after the State has presented the threshold quantum of evidence from which the jury could infer a position inconsistent with the hypothesis of innocence, a jury question is created, and then, the jury decides if the evidence excludes every reasonable hypothesis of innocence beyond a reasonable doubt. Law, 559 So.2d at 189. This standard also answers the concerns of the State that the appellate court would reweigh the evidence and become a "thirteenth juror". Answer Brief at 27-28. The reviewing court gives the State the benefit of all the inferences from the evidence in its favor, and when any reasonable hypothesis remains, requires only that the State present some evidence inconsistent with that hypothesis of innocence from which the jury could exclude that hypothesis. Law, 559 So.2d at 188-189. Finally, there is no merit to the concern that the standard would require the State to prove its case beyond all doubt. Answer Brief at 28-29. The Florida standard merely requires the state to present some competent evidence inconsistent with the defense theory, which is supported by evidence, of a reasonable hypothesis of innocence. Ibid.

On pages 21 through 26 of the Answer Brief, the State contends that employing the circumstantial evidence rule as part of the appellate review standard is inconsistent because this Court

abolished the circumstantial evidence rule jury instruction. See, Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). This contention has no merit since this Court did not *abolish* the circumstantial evidence jury instruction. Ibid. at 595. The instruction was dropped from the standard instructions as unnecessary. However, as this Court wrote:

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case. However, the giving of the proposed instruction on reasonable doubt and burden of proof, in our opinion, renders an instruction on circumstantial evidence unnecessary.

Ibid. at 595. The circumstantial evidence rule is still the appropriate standard for a jury to use and trial judges have the discretion to give the circumstantial evidence instruction. Contrary to the State's contention, the circumstantial evidence standard is employed consistently throughout the process -- the trial court in ruling on a motion for judgment of acquittal, the jury in reaching a verdict and the appellate court in reviewing the the legal sufficiency of the evidence.

Contrary to the State' contention, Florida's circumstantial evidence standard is consistent with and gives effect to Jackson v. Virginia, 443 U.S. 307 (1979). Initially, the court in Jackson was fashioning a minimum due process standard to be used by federal

courts reviewing state court convictions in habeas corpus proceedings. Ibid. The standard Jackson created provided greater protection to the accused than the "no evidence" test which had been employed earlier. Ibid. at 318-324. Consequently, the Jackson standard was designed as the constitutional minimum to protect the due process right of the accused to have his case proved beyond a reasonable doubt. See, In re Winship, 397 U.S. 358 (1970). Although the Jackson court declined to adopt a standard requiring the prosecution to be "under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt," Jackson, 443 U.S. at 326, there was, of course, no bar to states fashioning their own due process standards which could incorporate some version of the circumstantial evidence reasonable hypothesis standard. This Court has a history of preserving Florida constitutional guarantees which may afford greater protections than the federal constitution may minimally require. E.g., Traylor v. State, 596 So.2d 957 (Fla. 1992); Walls v. State, 580 So.2d 131 (Fla. 1991); Haliburton v. State, 514 So.2d 1088 (Fla. 1987). After Jackson, this Court has seen fit to continue Florida's constitutional due process jurisprudence employing the circumstantial evidence rule standard. Fourteen other states also expressly employ a version of the circumstantial evidence rule in the appellate review of sufficiency of evidence issues. See,

Section 4 of this argument, *infra*, for a list of those states. Indeed, even the State of Virginia continues to use the circumstantial evidence rule in appellate review of sufficiency of the evidence after Jackson. Dukes v. Commonwealth, 227 Va. 119, 313 S.E.2d 382 (1984); Inge v. Commonwealth, 217 Va. 360, 228 S.E.2d 563 (1976); Rice v. Commonwealth, 16 Va.App. 370, 429 S.E.2d 879 (1993).

4. The State's Brief Has Overstated The Number Of States That Do Not Use The Circumstantial Evidence Rule As Part Of An Appellate Review Standard.

I.

The State contends that forty states do not use the circumstantial evidence rule as part of the appellate review process. Answer Brief at 23-24. This is an overstatement. In fact, five of those forty states expressly do use the circumstantial evidence rule in appellate review of sufficiency issues:

1. **Alaska.** The Alaska Supreme Court ruled that the jury instruction on circumstantial evidence was unnecessary. Allen v. State, 420 P.2d 465 (Alaska 1966). However, Alaska retained the circumstantial evidence rule analysis for appellate review. Martinez v. State, 423 P.2d 700 (Alaska 1967); Jennings v. State, 404 P.2d 652 (Alaska 1965).

2. **Connecticut**. The Supreme Court of Connecticut uses the circumstantial evidence rule when reviewing the sufficiency of evidence issues. State v. Ford, 230 Conn. 686,692-696, 646 A.2d 147, 150-152 (1994); State v. Little, 194 Conn. 665, 671-672, 485 A.2d 913, 916-917 (1884). The Connecticut lower appellate court decision the State cites in its Appendix to the Answer Brief is not inconsistent. State v. Marshall, 51 Conn. App. 489, 495-496,723 A.2d 1156,1160-1161 (1999)(reciting the same language of the Connecticut Supreme Court in State v. Ford, 230 Conn. at 692-693, 646 A.2d at 150).

3. **Georgia**. The circumstantial evidence standard is included in the Georgia code:

> 24-4-6 When conviction may be had on circumstantial evidence.
>
> To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of guilt of the accused.

Sec. 24-4-6, Ga. Stat. Ann. (1999). This provision was derived from Georgia common law dating back to 1868 and the case of Martin v. State, 38 Ga. 293 (1868). Harris v. State, 236 Ga. 242, 244, 223 S.E.2d 643, 644 (1976). Georgia requires that the jury be instructed on the circumstantial evidence rule. E.g., Mims v. State, 264 Ga. 271, 443 S.E.2d 845 (1994). Georgia also requires that the circumstantial evidence rule be applied on appellate review of the sufficiency of the evidence to legally support a

conviction. E.g., Harris v. State, 236 Ga. 242, 244-245 S.E.2d 643, 644-645 (1976); Pugh v. State, 250 Ga. 668, 300 S.E.2d 504 (1983); Pattillo v. State, 250 Ga. 510, 299 S.E.2d 710 (1983).

4. **Iowa**. The standard of review of sufficiency of the evidence in Iowa is whether there is substantial evidence reasonably supporting the charge. State v. Schmidt, 588 N.W.2d 416 (Iowa 1998); State v. Robinson, 288 N.W.2d 337 (Iowa 1980); State v. Lewis, 242 N.W.2d 711 (Iowa 1976). "Substantial evidence" is defined as "such evidence as could convince a rational trier of fact that defendant is guilty beyond a reasonable doubt." State v. Robinson, 288 N.W.2d at 339. For circumstantial evidence to be deemed substantial, the evidence must be inconsistent with any reasonable hypothesis of innocence before a rational trier of fact could conclude that the defendant is guilty beyond a reasonable doubt. State v. Lewis, 242 N.W. 2d at 724. In 1980, the Iowa Supreme Court reconsidered its standard of review in light of Jackson v. Virginia, 443 U.S. 307 (1979), and concluded its substantial evidence standard was consistent with Jackson. State v. Robinson, 288 N.W.2d at 338-340.

5. **Louisiana**. Louisiana uses the circumstantial evidence rule in appellate review of sufficiency issues. State v. Sutton, 436 So.2d 471 (La. 1983); State v. Bullard, 700 So.2d 1051 (La. App. 2d Cir. 1997); Daniels v. State, 607 So.2d 620 (La. App. 2d

Cir. 1992). Louisiana also recognized that there is no inconsistency between the circumstantial evidence rule standard and the standard in Jackson v. Virginia, because evidence of an unrebutted reasonable hypothesis of innocence necessarily leads a rational fact finder to have a reasonable doubt at to guilt. Sutton; Bullard; Daniels.

II.

There are ten states in addition to the five mentioned above which also expressly use the circumstantial rule on appellate review, bringing the total number of states to do so to fifteen:

6. **Alabama**. Lockhart v. State, 715 So.2d 895 (Ala. Crim. App.1997); Lucas v. State, case no. CC-97-266 (Ala. Crim. App. July 9, 1999).

7. **Arkansas**. Chism v. State, 312 Ark. 559, 853 S.W.2d 255 (1993); Thomas v. State, 312 Ark. 158, 847 S.W.2d 695 (1993).

8. **Florida**. State v. Law, 559 So.2d 187 (Fla. 1989).

9. **Minnesota**. State v. Bauer, case no. C3-98-786 (Minn. July 29, 1999); State v. Bias, 419 N.W.2d 480 (Minn. 1988).

10. **New Hampshire**. State v. Merrit, case no. 96-786 (N.H. July 8, 1999); State v. Danskin, 122 N.H. 817, 451 A.2d 396 (1982).

11. **Oklahoma**. Washington v. State, 729 P.2d 509 (Okl. Crim. App. 1986); Smith v. State, 695 P.2d 1360 (Okl. Crim. App. 1985).

12. **Tennessee**. State v. Williams, 657 S.W.2d 405 (Tenn. 1983). State v. Durham, case no. 03c01-9802-cr-00063 (Tenn. Crim. App. July 26, 1999).

13. **South Dakota**. State v. Esslinger, 357 N.W.2d 525 (S.D. 1984).

14. **Utah**. State v. Brown, 328 Utah Adv. Rep. 14, 948 P.2d 337 (1997).

15. **Virginia**. Dukes v. Commonwealth, 227 Va. 119, 313 S.E.2d 382 (1984); Inge v. Commonwealth, 217 Va. 360, 228 S.E.2d 563 (1976); Rice v. Commonwealth, 16 Va.App. 370, 429 S.E.2d 879 (1993).

III.

Among the remaining thirty-five states using another standard for appellate review, there is considerable diversity:

A. ***Seven states have expressly considered and changed to their current appellate review standard from the circumstantial evidence rule standard***:

Illinois. State v. Pintos, 133 Ill.2d 286, 549 N.E.2d 344 (1989).

Maryland. Finke v. State, 56 Md.App.450, 468 A.2d 353 (1983).

Missouri. State v. Grim, 854 S.W.2d 403 (Mo. 1993).

Nebraska. State v. Pierce, 248 Neb. 536, 537 N.W.2d 323 (1995).

Rhode Island. State v. Caruolo, 524 A.2d 575 (R.I. 1987).

Texas. Geesa v. State, 820 S.W.2d 154 (Tex. Crim. App. 1991).

Vermont. State v. Derouchie, 140 Vt. 437, 440 A.2d 146 (1981).

B. ***At least nine of the states retain the circumstantial evidence rule as an issue for the jury***:

California: Towler v. State, 181 Cal. Rptr. 391, 641 P.2d 1253 (Cal. 1982).

Idaho: State v. Randles, 117 Idaho 344, 787 P.2d 1152 (1990).

Mississippi. Stokes v. Mississippi, 518 So.2d 1224 (Miss. 1988); Gavin v. Mississippi, 473 So.2d 952 (Miss. 1985).

Montana. State v. Moore, 268 Mont. 20, 885 P.2d 457 (1994).

Nebraska. State v. Pierce, 248 Neb. 536, 537 N.W.2d 323 (1995).

New York. People v. Potter, 682 N.Y.S.2d 238, 255 A.2d 763 (1998).

North Dakota. State v. Matuska, 379 N.W.2d 273 (N.D. 1985); State v. Carroll, 123 N.W.2d 659 (N.D. 1963).

South Carolina. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998); State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

Wisconsin. State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

C. ***Ten states have neither the circumstantial evidence rule instruction to the jury nor the appellate review standard***:

Illinois. State v. Pintos, 133 Ill.2d 286, 549 N.E.2d 344 (1989).

Michigan. People v. Johnson, 137 Mich.App. 295, 357 N.W.2d 675 (1984).

Missouri. State v. Grim, 854 S.W.2d 403 (Mo. 1993).

New Jersey. State v. Fiorello, 36 N.J. 80, 174 A.2d 900 (1961).

Rhode Island. State v. Caruolo, 524 A.2d 575 (R.I. 1987).

Texas. Geesa v. State, 820 S.W.2d 154 (Tex. Crim. App. 1991).

Vermont. State v. Derouchie, 140 Vt. 437, 440 A.2d 146 (1981).

Washington. State v. Gosby, 85 Wash. 758, 539 P.2d 680 (1975).

West Virginia. State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Wyoming. Lobatos v. State, 875 P.2d 716 (Wyo. 1994).

D. *Additionally, at least four of the states have an even broader appellate review because the appellate court retains the authority to reverse for a new trial on weight of the evidence*:

Mississippi. McFee v. State, 511 So.2d 130 (Miss. 1987).

New Jersey. State v. Fiorello, 36 N.J. 80, 174 A.2d 900 (1961).

Ohio. State v. Smith, 80 Ohio St.3d 89, 684 N.E.2d 668 (Ohio 1997).

Pennsylvania. Commonwealth v. Murphy, 418 Pa.Super. 140, 613 A.2d 1215 (1992).

5. The Position The State Advocates Would Create An Intolerable Imbalance Placing Florida In The Most Defense Adverse Posture Of Eliminating The Circumstantial Evidence Rule From The Jury Instructions And From Appellate Review Coupled With No Appellate Review Of Weight Of The Evidence.

The State has urged this Court to reject the circumstantial evidence rule as part of the appellate review standard. Answer Brief at 24-25, 31-32. However, the State is asking for this Court to join the distinct minority of states which: (1) prohibit instructing the jury on the circumstantial evidence rule; (2) remove the circumstantial rule as part of the legal standard for the trial judge to employ in ruling on a motion for judgment of acquittal; (3) remove the circumstantial evidence rule as part of the legal standard on appellate review; and (4) prohibit an appellate court from reversing for a new trial based on the weight

of the evidence. Adopting the State's position would place Florida's standards among the most prosecution-favored, defense-adverse ones in the country. Adopting the State's position would dismantle the balanced, well-working standards Florida has developed over past 100 plus years. See, Section 2 of this argument, *supra*. Adopting the State's position would make the applicable review standards constitutionally suspect. Art. I, Sec. 9, 16 Fla. Const.

As discussed in Section 4, Part III of this argument, *supra*., the 35 states which do not use the circumstantial evidence rule for appellate review are not marching in lockstep to the position the State now advocates in this Court. For example, nine states retain the circumstantial evidence rule as an issue for the jury and four states permit the appellate courts to reverse convictions based on the weight of the evidence. See, Section 4, Part III of this argument, *supra*. If this Court should decide to entertain the State's suggestion to change the appellate review standard to eliminate the circumstantial evidence rule, this Court should also reconsider its prior decisions removing the circumstantial evidence rule instruction from the standard jury instructions and prohibiting appellate courts from reversing for a new trial on the weight of the evidence. Use by Trial Courts of Standard Jury

Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981); Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, David Miller asks this Court to reverse his judgment and sentence and remand his case to the trial court for a new trial or, alternatively, the imposition of a life sentence.

Respectfully submitted,
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
Assistant Public Defender
Florida Bar No. 201170
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Curtis M. French, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, on this ____ day of September, 1999.

W. C. McLAIN
Assistant Public Defender