IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-1241
LT CASE NO.: 92-3708

GERALD D. MURRAY
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

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

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PRELIMINARY STATEMENT

Appellant, Gerald D. Murray, will be referred to herein by name as "Defendant", "Appellant", or "Murray". The Appellee, State of Florida, will be referred to herein as the "State" or "prosecution". References to the Record on Appeal will be designated by the symbol "R", the supplement to the record will be referred to as SR, and reference to relevant page set forth in brackets.

STATEMENT OF THE CASE AND FACTS

Appellant was arrested for first degree murder, burglary, and sexual battery on September 18, 1993. This Appeal is from the Appellant's fourth trial. The first trial was reversed at **Murray vs. State**, 692 So. 2d 157 (Fla. 1997) (referred to as Murray I); the second trial resulted in a hung jury; the third trial was reversed at **Murray vs. State**, 838 So. 2d 1073 (Fla. 2002) (referred to as Murray II). The jury in the fourth trial returned a verdict of guilty of Murder in the First Degree as to Count I, guilty of Burglary with an Assault as to Count II, and guilty of Sexual Battery with great force as to Count III (V. 402-404).

At trial, the State initially called Linda Engler, who testified that she was a friend of the victim, Alice Vest. She testified that she had gone shopping with her on Saturday, September 15, 1990. She testified the victim called at about 11:30 and told her she had gotten home and that she was safe. (V. 12 P.403). She testified

that the following morning, Sunday, September 16th, 1990, she called Ms. Vest and was not able to reach her on the telephone (V. 12 P. 404).

The State introduced evidence at trial that on September 15, 1990, the Appellant, Gerald Delane Murray, and his neighbor, James Fisher, picked up Steven Taylor and drove to The Corner Pocket on San Jose Boulevard in Jacksonville, Florida. (V. 12 P. 410-415). Afterwards, Mr. Fisher dropped off Mr. Murray and Mr. Taylor at the corner of Deeder and Herdon Streets, near Mr. Murray's home. (V. 12 P. 420-421).

On September 16, 1990, the Jacksonville Sheriff's Office was contacted after neighbors of Ms. Vest found her dead in her mobile home, which was uncharacteristically in disarray. Jacksonville Sheriff's Office evidence technicians took photographs and collected physical evidence on September 16 and 18, 1990. At the scene of the alleged crime, pruning shears were found lying beneath cut telephone wires. Ms. Vest was found lying on her bed with a wire or cord wrapped around her neck. She had slice wounds and puncture wounds about her upper body. Other evidence seized from Ms. Vest's bedroom included a metal bar, a broken bottle, a paring knife, a brass candelabra, a pair of scissors and a web belt.

Two hairs were collected from the left leg and chest of Ms. Vest and sealed in an envelope. (V.5 P.792-804). The defense objected to any and all testimony regarding two hairs that were taken from the victim's body as evidence that had

been tampered with. (V. P. 514). Detective Chase testified that he personally removed two hair samples from the victim's body; one from the left leg and one from the chest area. Detective Chase also testified that at the time he took the two hairs, he didn't have a microscope, but it appeared to be two hairs. He testified he used a pair of rubber gloves and a pair of tweezers to actually lift the hairs off the body. He testified that he was not positive as to the number of hairs from each location. (V.5 P.792-804).

Upon cross-examination, he admitted that he had previously stated that it was two hairs he collected. He also admitted that when he wrote his initial report, shortly after actually seeing the hairs he retrieved, he wrote that he retrieved two hairs. When he testified in Murray's first trial, he testified he lifted two hairs from the victim's body. Detective Chase further testified that the envelope had been altered. He testified that he put his evidence tape on it and stapled it back in 1990 after placing the two hairs inside and now the envelope is missing his evidence tape. Detective Chase ended his testimony by confirming that at the time he collected the two hairs, he thought it was two hairs. (V.5 P.792-804). The State moved the exhibit into evidence over the defense's objection.

Anthony Smith, an inmate in the Duval County Jail, who escaped with Mr. Murray on November 22, 1992, testified for the State. Smith testified that Mr. Murray told Smith that Murray and a friend went to rob a house, had sexual

intercourse with the female occupant, stabbed and strangled the woman, and subsequently gathered valuables and left. (V.15 P.1010-1015). In exchange for that testimony, the State of Florida agreed to waive the death penalty in Mr. Smith's case. Mr. Smith pled guilty to first degree murder and was sentenced to life imprisonment with a minimum mandatory of 25 years. At the time of his trial testimony, he was an eight-time convicted felon (V. 15 P.1l5). During sentencing in one of his eight felonies, he testified that he asked the Federal Judge "Who the fuck do you think you are? How can you sentence me to something I haven't been convicted of yet?"(V. 15 P.1019). Anthony Smith testified he would do anything to get out the death penalty "even if it meant deception". (V. 15 P. 1040).

The State called James Fisher, who testified that he drove the Appellant and co-defendant Taylor the evening of September 15, 1990. (V. 13 P. 633). He also testified that they were left at a business called The Corner Pocket, located on San Jose Boulevard, around 10:30 or 11:00 p.m. Fisher testified that he woke up the next morning and did not see Mr. Murray for a couple of weeks. (V.13 P. 637).

The State called Juanita White to testify. Mrs. White died before Murray's fourth trial. The State requested permission to read her testimony from a previous trial. The court allowed the testimony to be read over the defense objection. The defense later renewed their objection and moved for a mistrial when the testimony of Juanita White and the prior testimony of Dr. Floro were read to the jury. The

court indicated that he would rule on the Motion for Mistrial later on in the trial. (V.13 P. 661).

Ms. White's testimony that was read to the jury was as follows, "[o]n September 15, 1990, at about twenty minutes until 1:00 a.m., she sent her dog into the barn and observed the Appellant and co-defendant Taylor run out of the barn away from the dog". She testified that she had a shotgun at the time. (V. 13 P. 652).

The State then called Cheavin Murray to testify. Cheavin Murray, the Appellant's brother, testified that on Sunday afternoon, September 16, 1990, he walked up to the Appellant and co-defendant Taylor and they "shooed" him away. (V.13 P.665).

John Wilson testified that, in his opinion, there was a shoeprint at the scene that was left by a Britannia make of shoe. (V.13 P.693). Following Mr. Wilson's testimony, the defense moved to strike the testimony, arguing that he did not have enough information to have an opinion one way or another as to whether the print depicted in the State's exhibit was a Britannia or not a Britannia. The Motion was denied. (V.13 P.744). Mr. Wilson testified that no evidence of Murray's fingerprints was found on any of the evidence seized. (V.13 P.681-715). The court noted the ongoing objection of the tampered hair evidence coming into evidence. (V.13 P.748).

The State showed a video of the crime scene and asked Officer LaForte about the scene while showing the video. (V.12 P.542). Officer Laforte testified that he collected a bottle of hand lotion and a white garment (nightie, rag) from the sink of the master bathroom and placed both items in a paper bag and sealed it with evidence tape. (V. 12 P.438). LaForte testified that because he found the items together, he wanted to keep them together for continuity. (V.12 P.430&542). However, he testified that the hand lotion was now in a plastic bag, but he did not put it in a plastic bag (V.12 P.469). LaForte testified that the lotion bottle was placed in the same paper bag and not a plastic bag, because plastic promotes the growth of mold and mildew and destroys evidence. (V.12 P.478). He further testified that he had never seen the plastic bag or the additional brown bag.(V.12 P.469).

Officer Powers testified that he, Officer LaForte, and Detective Chase were at the scene, and that he had no idea where the plastic bag containing the hand lotion came from (V.12 P.505). Powers testified he did not recall putting the plastic bag containing the lotion bottle inside a brown bag marked "States Exhibit 26" that had his initials and evidence tape on it. (V.12 P.505). Following his testimony, the defense renewed their objection to Detective Chase's testimony, arguing that the evidence had been tampered with.

In obtaining a search warrant, Detective O'Steen prepared an affidavit stating that Mr. Murray, with James Fisher, picked up Steven Taylor at a house where a pendant and English gold coin were found buried in the backyard. (V.15 P.960). The pendant and coin were alleged to have been missing from Ms. Vest's home. Detective O'Steen stated in his affidavit that Mr. Murray and Steven Taylor left town a few days after Ms. Vest's death.

Circuit Judge Santora signed the search warrant permitting the taking of blood, saliva, and hair samples. Subsequently, on February 15, 1991, Mr. Murray, who was incarcerated at Montgomery Correctional Center on an unrelated offense, was transported to the Police Memorial Building where he was questioned by Jacksonville Sheriff's Office personnel. Detective O'Steen requested Mr. Murray's consent for blood, saliva and hair samples. According to the detective, Mr. Murray acquiesced. Mr. Murray was taken to the clinic of the Duval County Jail. Murray asked to see the search warrant, which Detective O'Steen produced. The blood, saliva and hair samples were then collected. Detective O'Steen testified that after being read his Miranda Warnings, Murray stated the hair at the scene possibly came from when he pulled a bag of reefer out of his crotch and gave it to Taylor. (V.15 P.950-960).

The State called Joseph A. Dizinno to testify. Murray moved to exclude the testimony of Joseph A. Dizinno, a hair and fiber examination expert, on the basis

that his comparison of Mr. Murray's hairs to hairs found at the crime scene was irrelevant, as it failed to determine any degree of probability or certainty. (Vol. 14, P.876-943). The trial court denied this Motion.

During the State's presentation of its case, Dr. Bonafacio Floro's testimony was read to the jury over defense objection. Floro testified, as an expert, that Ms. Vest's death was a homicide caused by ligature strangulation and multiple stab wounds. Dr. Floro testified that Ms. Vest had bruising and abrasions on her breast and stab wounds on her chest, abdomen, back and thigh. (Vol. 13, P. 591-592). Dr. Floro stated that, in his opinion, the stab wounds were inflicted before the strangulation. Ms. Vest had a lacerated and broken jaw consistent with being hit with a broken bottle neck. Upon being given a hypothetical by the State, Dr. Floro stated that the evidence was consistent with Ms. Vest being strangled with three objects; a web belt, a leather belt, and a cord. Upon cross-examination, Dr. Floro was unsure as to how many individuals participated in the strangling. While he had testified at a previous trial that only one knife was utilized, at this trial he indicated scissors were used as well. Dr. Floro also testified that Ms. Vest suffered no defensive wounds, and that the medical evidence was consistent with her having been unconscious from near the onset of her attack. (Vol. 13, P. 591-592).

The State called Diane Hanson, a forensic serologist with the Florida Department of Law Enforcement (FDLE) (V.14 P.842). She stated that seminal

stains found on the victim's blouse and bed comforter were consistent with Steven Taylor, but not with Mr. Murray. (V.14 P.858). Hanson testified that when she received the bag that contained the "white garment", she did not open it. She marked the bag and forwarded it to Katherine Warniment. Hanson testified that when she received the "white garment" back from Warniment, she tested it for blood and seminal stains and that neither were identified. Mr. Murray was eliminated as a donor of all blood and semen samplings found by Ms. Hanson. (V. 14 P.858).

Katherine Warniment, in the microanalysis section of FDLE, testified that on October 16, 1990, Dianne Hanson delivered six sealed items to her section. One of the six sealed items contained the "white garment". It was in a folded, stapled, sealed brown paper bag. When Warniment opened the sealed bag, there was no bottle of lotion inside. She never received a lotion bottle. (S.R. 4, P. 528). When Warniment opened the sealed bag containing the white garment that Evidence Technician LaForte had packaged, the lotion bottle was inside a plastic bag within the paper bag. The white garment was inspected for the presence of trace evidence. Hair was discovered on the garment, and those hairs were later forwarded for testing. Joseph Dizinno, a hair and fiber expert for the FBI, testified, over objection, that a Caucasian pubic hair found on the body of the victim had the same microscopic characteristics as the pubic hair of Mr. Murray. (Vol. 14, P.

905). Defense counsel objected on the basis of tampering in that Mr. Dizinno testified that the package he received had more than two hairs, even though the evidence technician who seized the hairs only obtained two. (Vol. 14, P .932). Mr. Dizinno did not count the hairs, but based on his notes, he received between five and twenty-one hairs. Mr. Dizinno stated that the comparison of hair did not reveal an absolute positive identification. (Vol. 14, P. 933). Mr. Dizinno could not discount the possibility that the hair from the crime scene could have come from someone other than Mr. Murray. (Vol. 14, P. 933) Mr. Dizinno changed the name of the person he believes mounted the slides from the last trial to this trial. Dizinno testified on direct examination that his initials were on the envelope that Chase put the two hairs into. On cross-examination it was revealed he did not actually put his own initials on the envelope.

The jury found Gerald Murray guilty. Mr. Murray filed a Motion for New Trial. That Motion was denied. The penalty phase was conducted, and Mr. Murray presented no evidence on his behalf and instructed his lawyer not to present any evidence on his behalf. The jury returned a recommendation of a death sentence with a vote of 11 to 1. (Vol. 13, P. 1550). The Trial Judge sentenced the Defendant to death. (Vol. 9, P 1603). After the verdict, but before the penalty phase, the issue of Juror Misconduct was raised. The foreman was ultimately removed from the panel because after the verdict he went to his spiritual mentor to talk about the

verdict and the upcoming penalty phase. His spiritual mentor was Chief of Detectives Mackesy, from the Jacksonville Sheriff's Office.

Juror interviews were conducted to determine the extent of the other juror misconduct that occurred. It was then learned that the foreman had inquired of the bailiff if the jury could pray in the jury room. The foreman testified that the bailiff responded that they could indeed pray in the jury room. (Vol. 7, P. 1253). He further testified that the bailiff said as long as it was all right with everybody else (Vol. 7, P. 1252). Additionally, it was learned that a separate uniformed bailiff overheard the jury reach an agreement regarding the penalty phase prior to reaching a verdict in the guilt phase of the trial. The bailiff testified that the jury agreed to convict only if it was agreed that they would recommend a life sentence. Juror interviews were then conducted on that issue as well.

Mr. Murray timely filed his Notice of Appeal, and this appeal follows. There has been a lengthy delay due to the substitution of counsel and numerous attempts to supplement the record with transcripts from the previous three trials in this cause.

SUMMARY OF THE ARGUMENT

1. The trial court erred by permitting the admission of hair evidence relating to slide Q42, despite indications of probable tampering. The Evidence Technician testified that his original testimony was that he took two hairs off the body of the victim. However, he changed his testimony after hearing the FBI Analyst testified that there were between 5 – 21 hairs in the evidence envelope.

2. The trial court erred by permitting the admission of hair evidence from slide Q20 despite indications of probable tampering and discovery violation regarding evidence. The State called a surprise witness to explain the discrepancy this Court acknowledged in **Murray vs. State**, 838 So.2d 1073 (2002).

3. The trial court erred by permitting Dizinno's hair and fiber testimony for the following reasons:

   (a) His testimony did not meet the Frye standard. There were no protocols for hair and fiber analysis at the time of testing.

   (b) There was no basis for Dizinno to testify that it was "rare" that he could not distinguish hairs from two separate individuals. Approximately 10 – 15% are not confirmed by DNA analysis.

   (c) The court improperly denied Murray's request to cross-examine Dizinno on the fact that the FBI lab had been under investigation when Murray's hairs were in the lab.

   (d) The court improperly denied Murray's request to cross-examine Dizinno on the fact that the lab Dizinno was supervising was under investigation at the time he was testifying.

   (e) The court denied Murray's request to cross-examine Dizinno on the fact the lab he was supervising was under investigation at the time of Murray's trial.

4. The trial court erred by denying appellant's motion to dismiss the indictment for the following reasons:

   (a) The indictment was returned by the Grand Jury based upon inadmissible, tampered, and misleading evidence.

(b) The trial court erred by denying appellant's motion to dismiss the indictment based on double jeopardy. The defendant had been through three (3) separate trials and was forced to face his fourth; that several witnesses changed their testimony to conform to this Court's opinions reversing the previous convictions; that the passage of time prejudiced the appellant in that two witnesses were unavailable for trial and their testimony was read to the jury over the appellant's objection.

5. The court erred by denying the appellant's right to interview witnesses, about what evidence was presented to the Grand Jury.

6. The evidence was insufficient to convict Appellant of the offenses charged.

7. The court erred during jury selection in allowing the state to strike an African-American juror without providing a legitimate race neutral reason.

8. The trial court erred by denying the motion for mistrial based on juror misconduct.

9. The trial court erred by not explaining the reasonable doubt jury instruction upon request of the jury.

10. The trial court erred by allowing the testimony of the Medical Examiner and Juanita White to be read into evidence.

POINTS ON APPEAL

I. THE TRIAL COURT ERRED BY PERMITTING THE ADMISSION OF HAIR EVIDENCE RELATING TO SLIDE Q42 DESPITE INDICATIONS OF PROBABLE TAMPERING OR ALTERING CONTRARY TO ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. THE TRIAL COURT ERRED BY PERMITTING THE ADMISSION OF HAIR EVIDENCE FROM SLIDE Q-20 DESPITE INDICATIONS OF PROBABLE TAMPERING, ALTERING, AND DISCOVERY VIOLATION REGARDING EVIDENCE.

III. THE TRIAL COURT ERRED BY NOT EXCLUDING THE TESTIMONY OF FBI HAIR AND FIBER EXPERT JOSEPH A. DIZINNO. THE TRIAL COURT ALSO ERRED BY LIMITING APPELLANT'S CROSS-EXAMINATION OF DIZINNO FOR THE FOLLOWING REASONS:

(A) THE TESTIMONY DID NOT MEET THE FRYE STANDARD.

(B) DIZINNO SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY THAT IT WAS "RARE" THAT HE COULD NOT DISTINGUISH HAIRS FROM TWO SEPARATE INDIVIDUALS.

(C) DIZINNO AFFIRMATIVELY MISLED THE TRIAL COURT REGARDING CHAIN OF CUSTODY AND THE EXTENT OF THE DEPARTMENT OF JUSTICE INVESTIGATION.

(D) THE COURT DENIED MURRAY'S REQUEST TO CROSS-EXAMINE DIZINNO WITH INFORMATION THAT THE FBI LAB HAD BEEN UNDER INVESTIGATION WHEN MURRAY'S HAIRS WERE IN THE LAB.

(E) THE COURT DENIED MURRAY'S REQUEST TO CROSS-EXAMINE DIZINNO ON THE FACT THE LAB HE WAS SUPERVISING WAS UNDER INVESTIGATION AT THE TIME OF THIS TRIAL.

IV. THE TRIAL COURT ERRED BY DENYING THE MOTION TO DISMISS THE INDICTMENT:

(A) THE INDICTMENT WAS RETURNED BY THE GRAND JURY RELYING ON INADMISSABLE, TAMPERED, AND MISLEADING EVIDENCE.

(B) BY DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT BASED ON DOUBLE JEOPARDY. THE DEFENDANT HAD BEEN THROUGH THREE (3) SEPARATE TRIALS AND WAS FORCED TO FACE HIS FOURTH.

V. THE COURT ERRED BY DENYING THE APPELLANT'S RIGHT TO INTERVIEW WITNESSES.

VI. THE EVIDENCE WAS INSUFFICIENT TO CONVICT GERALD MURRAY OF THE OFFENSES CHARGED.

VII. COURT ERRED DURING JURY SELECTION IN ALLOWING THE STATE TO STRIKE AN AFRICAN-AMERICAN JUROR WITHOUT PROVIDING A LEGITIMATE RACE NEUTRAL REASON.

VIII. THE TRIAL COURT ERRED BY DENYING THE MOTION FOR MISTRIAL BASED ON JUROR MISCONDUCT.

IX. THE TRIAL COURT ERRED BY NOT EXPLAINING THE REASONABLE DOUBT JURY INSTRUCTION UPON REQUEST OF THE JURY.

X. THE TRIAL COURT ERRED BY ALLOWING THE TESTIMONY OF THE FOLLOWING WITNESSES TO BE READ TO THE JURY OVER DEFENSE OBJECTION:

(A) MEDICAL EXAMINER TO BE READ INTO EVIDENCE.

(B) JUANITA WHITE.

ARGUMENT

I. THE TRIAL COURT ERRED BY PERMITTING THE ADMISSION OF HAIR EVIDENCE RELATING TO SLIDE Q42, DESPITE INDICATIONS OF PROBABLE TAMPERING OR ALTERING CONTRARY TO ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court committed reversible error by denying Murray's motion to exclude any hair evidence due to the probability of tampering. (V. 2, P. 357-362). The trial court further erred by denying defendant's motion to compel the State to produce any and all handwritten notes of the evidence technicians. (V.1, P.139-142). The trial court should have entered said order to compel the notes even though the State advised they did not exist. (V.4, P. 649).

Evidence Technician Chase testified that while at the crime scene he removed hair evidence from the body of the victim. (V.5, P.794). Said hairs were subsequently compared microscopically to the known hairs of Murray. (V. 14, P.904-908). Murray alleges that the number of hairs recovered changed significantly by the time the hairs were inspected by the prosecution's witness, Dizinno. Murray argues he has established the probability of tampering. At that point, the burden to call all of the witnesses in the chain of custody to explain away any discrepancy shifts to the State before the evidence is admissible. The trial court erred when it did not shift the burden to the State.

Appellant raises four issues regarding this evidence. First, Evidence Technician Chase changed his testimony to fit the prosecution's theory. Second, FBI laboratory technician Dizinno changed his testimony to fit the prosecution's theory. Third, the prosecution changed the explanation for the discrepancy given during the trials. Fourth, the problems with the chain of custody and the actual probability of tampering that caused the change in testimony.

HISTORY OF THE TAMPERING ISSUE REGARDING Q-42

During Murray's first trial, Chase testified regarding his processing of the crime scene and recovery of the hair evidence. The testimony consumed a mere five (5) pages. (S.R. V. 1, P 4-8). He simply and directly testified that he collected one hair from the victim's left leg and one hair from the victim's chest. He testified that he collected the two hairs with tweezers, placed them in a manila envelope, and placed them in the evidence room of the Jacksonville Sheriff's Office. Chase's entire testimony from the previous three trials has been included in this Record on Appeal. (S.R. V. 1).

Later in the same trial, Joseph Dizinno, a hair and fiber expert for the Federal Bureau of Investigation, testified that when he inspected the hairs Chase recovered, he observed several Caucasian head hairs, several Caucasian body hairs, and a Caucasian pubic hair. (S.R.V. 5, P.584). Therefore, there were between five and twenty-one (5-21) hairs in the envelope, not two (2).

In the middle of that trial, the prosecution explained the discrepancy to the trial court. The explanation was not that Chase was wrong or that he was not sure of his testimony. When the tampering issue was raised for the very first time in Murray's first trial, the prosecutor told the trial court the following:

> Judge, just for purposes of the record, I show you this envelope which shows a CCR number and it shows hairs 22, 23, and 33 were inside those, also two other things, and that's where that came from. Rather than put the whole thing in since these are not germane to this, I only introduced those two and that's how it was. There's no issue here as to chain of custody or anybody tampering with it.

(S.R. V.5, P.588).

The trial Judge ruled that, "I'm going to deny your motion. I think that the chain of custody is established. If there is a discrepancy, it's an apparent one to be argued and for the jury to decide." (S.R. V.5, P.588). This tampering issue was raised, overruled and subsequently argued on appeal in Murray I. (S.R. Vol. 5, P. 586-590).

The explanation given at trial regarding 22, 23, and 33 wasn't going to get the prosecution the result they wanted. Therefore, that argument and those additional numbers were not mentioned during the appeal, were not mentioned during the next three trials, and certainly will not be explained during this appeal.

This Court reversed Murray's convictions in Murray I due to faulty DNA testing and did not reach the tampering issue. That is unfortunate for Murray

because during the subsequent trials, when Chase was questioned by the prosecution, he began to testify he was not positive as to the number of hairs recovered from each location. (S.R. V. 1, P. 27), and he began using the words "hair samples" instead of "hairs" when asked what he removed from the body of the victim. (V.12, P. 523-527).

In the second trial, when the tampering argument was raised pre-trial, the prosecution told the trial court, "The FBI guy is going to testify that when he got it, it was sealed and he opened it up." (S.R. P.33). The trial court then inquired, "Did it have tape and all that?" The prosecution responded, "Yes, sir." Id. Unfortunately, as will be pointed out momentarily, that was not true; Dizinno never saw the box, did not open the box and did not mount the critical evidence. That trial resulted in a hung jury.

The issue was raised again in the third trial, and the objection was overruled. The issue was raised on appeal, and this Court did not grant relief on this issue. Murray II, at 1082. The issue was raised again in the fourth trial and preserved for appellate review. The reason this Court should grant relief this time is based on the following changes in testimony and incredible testimony addressed herein.

The law in the State of Florida is clear that potentially relevant physical evidence is inadmissible when there is an indication of probable tampering. **Peek**

vs. State, 395 So.2d 492 (Fla. 1981); **Helton vs. State**, 424 So.2d 137 (Fla. 1st DCA 1982); **Armbruster vs. State**, 453 So.2d 833 (Fla. 4th DCA 1984).

CHANGE IN TESTIMONY BY EVIDENCE TECHNICIAN CHASE

During the first trial, Chase testified that he collected two hairs from the body. The State improperly attempts to mislead this Court into believing that he was unsure as to how many hairs he had collected from the victim's body. He testified that he collected hairs from the left leg and chest area of the victim. His testimony was certain.

Q: Do you recall how many pieces of hair you remember collecting?

A: Yes, sir, I think it was one from the left leg and one from the chest.

Q: So it would be a total of two?

A: Yes.

(SV1, P.6-8).

As stated above, during the subsequent trials, while being questioned by the prosecution, Chase began to testify that he was not positive as to the number of hairs from each location. (S.R. V. 1, P. 27). However, during cross-examination in each of the trials, he again confirms his original testimony, that there were two hairs retrieved. This wavering in testimony during direct examination has prevented the trial courts from appropriately excluding the evidence. This change in testimony is extremely troubling because the change in testimony was caused by

the prosecution. Chase testified during this trail that the prosecution told him what another witness testified to, and as a direct result the testimony changed.

Instead of a search for the truth, the State Attorney's Office advised Chase of the discrepancy and advised him of what another witness testified to. What happened as a direct result of the State's improper actions was that a critical State witness changed extremely critical testimony. Chase changed his testimony from "two hairs" to "two hair samples". (V.12, P.523-524).

During this trial, Evidence Technician Chase again testified he collected two hairs from the body of the victim. (V. 5, P. 799). In fact, the following new questions and new answers were given in this trial:

Q: And you indicated a minute ago that toward the end of your testimony, your recollection was there was actually two **hairs**, is that fair to say?

A: That's true.

Q: Okay. And that's been quite a number of years ago.

A: Yes, sir.

Q: When you wrote your report and when you testified the first time you testified, did you indicate that it was two **hairs** back then?

A: Yes sir, I believe I did.

Q: But then, over the passage of time, it's turned into two **samples**, and I was wondering when that started to happen, if you recall?

A: **I believe after another testimony that it was brought out possibility of possibly more hairs.**

Q: Okay.

A: **So, I changed it to hair samples**.

Q: Okay, because when you placed them in that envelope you have in front of you, your recollection was you placed two **hairs** in there, sealed it with evidence tape and stapled, is that correct?

A: Yes, sir.

Q: So, if they were opened later at some other laboratory or somewhere else and there was a number of hairs, you would be surprised to hear that, would you not?

A: **Probably would, yes, sir**.

Id. (emphasis supplied).

Instead of telling Chase what another witness testified to, the appropriate inquiry should have been directed to the FBI laboratory to establish an appropriate chain of custody to explain the obvious discrepancy. It is apparently easier to change testimony from two hairs to two hair samples than to try to explain how the FBI lab got approximately 5-21 hairs from an envelope that should have contained two hairs or to explain what the prosecution meant when they told the trial court during the first trial the following:

> Judge, just for purposes of the record, I show you this envelope which shows a CCR number and it shows hairs 22, 23, and 33 were inside those, also two other things, and that's where that came from. Rather than put the whole thing in since these are not germane to this, I only introduced those two and that's how it was. There's no issue here as to chain of custody or anybody tampering with it.

(S.R. V.5, P.588).

After the first trial, each subsequent trial court, three juries and this Court were misled by the change in testimony. The discrepancy still has not been

appropriately explained. Is the answer to why there is a discrepancy the prosecution's original explanation, or is it that Chase was wrong, or is it that no one in the FBI lab has any idea what happened to that evidence after it entered the FBI lab?

CHANGE IN TESTIMONY BY FBI ANALYST DIZINNO

The State's key witness Dizinno was called to testify at each trial as to his findings regarding the evidence in this case. Dizinno testified that when he viewed the evidence, he found ***several*** Caucasian head hairs, ***several*** Caucasian body hairs, and ***a*** Caucasian pubic hair. (V.14, P.916) (emphasis added). When asked for a specific number of hairs, Dizinno responded, "[i]n my notes there are two places where it says several, and one place where it says one. Several to me means in my notes 2 to 10. We don't count hairs, so anywhere -- there could be as few as five and as many as twenty-one, but we don't count hairs." The testimony was as follows:

> A: Several in my notes means anywhere from two to ten hairs; any more than ten, I would have said numerous. Two to ten would have been several.
>
> Q: Alright, so you observed several Caucasian head hairs, correct?
>
> A: Yes.
>
> Q: Several Caucasian body hairs?
>
> A: Yes.

Q: And a Caucasian pubic hair?

A: Yes.

Q: And so using your numbers there would be somewhere between five and twenty-one?

A: That's correct.

(V. 14, P. 916).

Q: Mr. Blyth [sic], why are your initials on Q42? You didn't open it, did you?

A: I think you addressed it to Mr. Blythe.

Q: I'm sorry, [Mr. Dizinno] you just told the jury your initials were on there.

A: That's correct.

Q: You didn't open it, though?

A: No, I didn't. The technician would put my initials on there.

Q: For that chain of custody portion on those initials on there, you didn't even put them on?

A: Sometimes I did, sometimes I didn't. **It doesn't look like my handwriting in this case**.

Q: Okay. So in this case you didn't open the slides, or open the box?

A: Correct.

Q: You didn't open the containers that have the slides in it?

A: Correct.

Q: You didn't mount the slides?

A: Correct.

Q: And you didn't put the slides or the evidence back in the envelope yourself?

A: I didn't put the slides back in the envelope.
(V. 14, P. 940)

It took thirteen (13) years and four trials to learn that each time Dizinno was asked about the critical evidence for chain of custody purposes he misled everyone by simply stating his initials were on the envelope. In actuality, he had nothing to do with the envelope. Dizinno's initials may have appeared on the envelope or the slide, but he testified, "I don't know if I struck anything out and put my name in, somebody possibly did, yes." (V. 14, P. 911).

Compare this testimony from the fourth trial to the testimony Dizinno gave in Murray's second trial, the trial that ended in a hung jury. In that trial Dizinno testified that he could recognize all of the evidence because his initials were on the items. (S.R. P. 625). During cross-examination in the second trial, he was asked the following:

Q: You're the one who mounted them all?

A: That's correct.

Id. at 636.

We now know that answer wasn't true. In the fourth trial, Dizinno admitted the following when asked directly:

Q: For chain of custody portion, those initials on there, you didn't even put them on?

A: Sometimes I did, sometimes I didn't. It doesn't look like my handwriting in this case.

(V. 14, P. 940) (emphasis added).

At each of the first three trials, to establish a chain of custody the prosecution asked if those were his initials on the evidence. At each trial he responded in the affirmative and the items were moved into evidence. Apparently, he never thought to tell anyone that though his initials were on the evidence, he didn't put them there. Chain of custody is not satisfied when someone merely places another witness' name or initials on a piece of evidence that the witness never sees or touches.

It is unknown who opened the box, opened the evidence, or mounted the slides. Dizinno's testimony about who actually made handwritten notes regarding the evidentiary slides changed from the third trial to the fourth trial. In Murray's third trial, he testified that it was Paula Frazier, and in the fourth trial it was Angela Moore. (V. 14, P. 910-914). It may have been one of these people who mounted the critical evidence, but we do not know.

Murray objected to this testimony prior to trial. (V. 2, P. 357-362). Murray renewed his objection moments before the testimony was presented to the jury.

(V. 12, P.898). When the new testimony was presented, Murray again objected. (V.12, P.946).

These obvious and crucial discrepancies are critical in this case, especially in light of the fact that this "hair evidence" is ***the only physical evidence whatsoever*** which allegedly links the Defendant to this crime. This Court has already stated that "[t]his evidence was particularly important to the State's case in light of the fact that Murray was eliminated as the donor of all the other seminal and blood stains found at the crime scene." Murray II at 158.

No argument can be made that this error was harmless. Dizinno changed his testimony that he mounted the evidence, admits that he didn't even handle the package the critical evidence came in, and he changed his testimony about another witness presumably in the chain of custody. In a medical malpractice case, if a surgeon testified that he only used two sponges but the patient later got sick and another surgeon operated and at least five sponges were found, the outcome of the claim would be obvious. Sadly, this hair evidence and its integrity is a matter of life and death.

CHANGES IN THE CHAIN OF CUSTODY

As to the crucial witnesses in the chain of custody, the Defendant established there were such witnesses the State neglected to call. It is uncontroverted that the person who performed the critical task of opening the box that contained Murray's

hairs and the unknown hairs taken from the crime scene did not testify. Dizinno testified he never even saw the box. (V. 14, P. 909). The person who mounted this critical evidence was never called to testify. Dizinno didn't see that either. Astoundingly, Dizinno gave a new name of the person who allegedly mounted the slides in this fourth trial. In the third trial, it was Paula Frazier, and in the fourth trial, it was Angela Moore. (V. 14, P. 910-914). The initials C.B., for Chet Blythe, appeared on the slides but were stricken out. Dizinno testified he recognized the envelope as being the envelope the critical hairs came in because his initials were on it, but then he admitted on cross-examination that he didn't open the envelope, didn't put his initials on the envelope, and didn't put anything back in the envelope. Someone else put his initials on the envelope to "create" a chain of custody. When asked directly during the fourth trial his answer is as follows:

> Q: For chain of custody portion, those initials on there, you didn't even put them on?
>
> A: Sometimes I did, sometimes I didn't. It doesn't look like my handwriting in this case.

(V. 14, P. 940) (emphasis added).

Further, this occurred at a time in which the FBI laboratory was being investigated by the Department of Justice. That investigation specifically involved an employee of the FBI Laboratory Hair and Fibers Unit, the unit in which these critical hairs were received, mounted and examined. (Office of Inspector General,

U.S. Dept. of Justice, The FBI Laboratory: An Investigation into Laboratory Practice and Misconduct). Murray's hairs were in the lab when the investigation was taking place and when these problems and discrepancies were occurring.

A case strikingly similar to Murray's is **State vs. Scott**, 33 S.W.3d 746 (Tenn. 2000), in which the Tennessee Supreme Court reversed Scott's conviction because the State failed to establish a chain of custody for two hairs taken to the FBI laboratory for analysis. In Scott, the court noted that the nurse practitioner who examined the victim placed the hairs in an envelope. The detective noted that there were two hairs in the envelope. Id. at 760. When the hairs were returned from the FBI, they were mounted on glass. Apparently, in Scott, the same number of hairs were mounted unlike the allegations herein. The Tennessee Supreme Court ruled:

> [t]he hairs were not identified by a witness with knowledge that the mounted hair samples were the same hairs as the ones originally taken from the victim. Further, we can find no evidence whatsoever to show how the hairs came to be mounted on the slides. We also can find no evidence to show who mounted the hairs on the slides or whether the hairs were mounted in a manner sufficiently free of contamination or alteration. Although the hairs were apparently mounted on glass slides by someone with the FBI, no one was able to establish this important "link" in the chain of custody. Without this knowledge, it is impossible to know whether anyone tampered with the evidence, or whether anyone had the opportunity to "confuse, misplace, damage, substitute, lose [or] replace" the hairs at issue.
>
> Id. at 761.

This tampering issue was also analyzed in **Dodd vs. State**, 537 So.2d 626 (Fla. 3rd DCA 1989), wherein there was a discrepancy as to the weight of the contraband seized. The seizing officer weighed the contraband and its container at 317.5 grams. The same officer transported the container to the FDLE office in Miami, where a contraband scale registered the combined weight at 249.5 grams.

According to his testimony, the officer then put the bags inside a single plastic bag, heat-sealed the bag, and marked the date and his initials on the outside of the bag. The officer used a secure evidence locker to store the contraband until such time as he removed the bag and turned it over to a special agent who was to hand deliver it to the crime lab in Orlando. A chemist from the crime lab testified that a heat-sealed plastic bag was delivered to the lab by the special agent. According to the chemist, the bag showed no markings whatsoever. The contraband, minus its packaging, registered a net weight of 220 grams on the lab scale. The State did not call the special agent to testify, nor was he listed as a potential witness in the State's pretrial catalog. In the course of three redirects, the officer who first seized and secured the contraband managed to explain some, but not all, of the discrepancies in weight and packaging. Id. at 627.

The court concluded that the conflicting descriptions of the bag and "gross discrepancies" in the recorded weights and packaging details indicated "probable tampering." The court noted, [i]t is plain that the contraband received by the crime

lab was *not* in the same condition as was testified to by the officer who seized the contraband. On this record, we cannot tell whether the cocaine Dodd sold and the cocaine introduced at trial are one and the same. Thus, it was error for the trial court to admit the cocaine into evidence without first receiving testimony from the special agent that would explain the changes in the condition of the evidence between the time of seizure and the time of trial. Lacking the testimony of the special agent, the State could not establish a sufficient chain of custody for the cocaine to be admitted in evidence against Dodd." Id. at 628.

This same issue was later addressed in **Cridland vs. State**, 693 So.2d 720 (Fla. 3rd DCA 1997). There the court ruled that while the general rule is that the State is not required to elicit testimony from every custodian in the chain, where there is some indication of probable tampering with the evidence, the evidence is inadmissible unless the State can establish a proper chain of custody. Id. at 721. In **Cridland,** the court held that, "[i]n this case, the State failed to present testimony from two witnesses who were critical links in the chain of custody. In light of the conflicting evidence as to the quantity of the cocaine seized, the State failed to prove that the cocaine seized and the cocaine introduced at trial were one and the same." Id. at 720. Likewise, it was clearly established in Murray's case that two critical witnesses who were critical links in the chain of custody were not called to testify.

It is now clear thirteen years later that there is a complete breakdown in the chain of custody. There is no way Dizinno could identify an item he never handled.

CHANGE IN THE PROSECUTION'S EXPLANATIONS

As detailed above, the prosecution changed their theory of how to defend the tampering issue. Instead of a full inquiry into the additional numbers on the envelope mentioned during the first trial, the prosecution told the evidence technician what another witness testified to. Instead of a full inquiry into the handling of the evidence in the FBI laboratory, the prosecution told the evidence technician what another witness testified to.

We now know that there was substantial physical evidence linking others to the crime. **Taylor vs. State,** 630 So. 2d 1038 (Fla. 1993). As to Murray, there were no fingerprints, no blood evidence, and no semen evidence linking Murray to this crime. The record is replete with a substantial number of items which the State claims were used as weapons against the victim. However, the State's best forensic investigators found no physical evidence relating to Gerald Murray on any of the alleged weapons.

Therefore, this "hair evidence" is, in effect, the State's entire case against Murray. Without the hair evidence, there is no case. The only other inculpatory

testimony against Murray was a snitch who had the death penalty waived in his own case in exchange for his testimony against Murray.

It is well established that a prosecutor must not knowingly rely on false information to obtain a conviction. **Alcorta vs. Texas**, 355 U.S. 28 (1957). In cases "involving knowing use of false evidence, the defendant's conviction must be set aside if the falsity could, in any reasonable likelihood, have affected the jury's verdict." **United States vs. Bagley**, 473 U.S. 667 (1985) quoting **United States vs. Agurs**, 427 U.S. 97 at 102 (1976). Thus, if there is "any reasonable likelihood" that uncorrected false and/or misleading argument affected the verdict (as to both guilt/innocence and penalty phase), relief must issue. Where the prosecution violates Giglio and knowingly presents either false evidence or false argument in order to secure a conviction, a reversal is required unless the error is proven harmless beyond a reasonable doubt. **United States vs Bagley**, 473 U.S. at 667 (1985). See **United States vs. Alzate**, 47 F.3d 1103 (11th Cir. 1995).

In order to insure that a constitutional adversarial testing and, hence, a fair trial occur, certain obligations are imposed upon the prosecuting attorney. The prosecutor is required to disclose evidence to the defense "that is both favorable to the accused and material either to guilt or punishment." **Bagley**, 473 U.S. 667 (1985), quoting, **Brady vs. Maryland**, 373 U.S. 83 (1963). In **Strickler vs. Greene**, 119 S.Ct. 1936 (1999), the Supreme Court reiterated the "special role

played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." See, **Hoffman vs. State**, 800 So.2d 174 (Fla. 2001).

In **Giglio vs. United States**, 405 U.S. 150 (1972), the United States Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." The United States Supreme Court has stated that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger vs. United States, 295 U.S. 78 (1935).

Accordingly, the court "forbade the prosecution to engage in a deliberate deception of court and jury". **Gray vs. Netherland**, 518 U.S. 152 (1996), quoting **Mooney vs. Holohan**, 294 U.S. 103 (1935). This Court has been clear that "[t]ruth is critical in the operation of our judicial system…" **The Florida Bar vs. Feinberg**, 760 So.2d 933 (Fla. 2000). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death

sentence must be set aside unless the error is harmless beyond a reasonable doubt. **Kyles vs. Whitley**, 514 U.S. 419 (1995).

This is a case in which the prosecution is seeking to execute one of the citizens of the State of Florida. For the death penalty process in the State of Florida to have any integrity whatsoever, it cannot be carried out in the manner described herein.

CONCLUSION

Respectfully, the questions Murray hopes will be answered during this appeal are as follows: First, with the knowledge from the previous trials and rulings by this Honorable Court, why does the State continue to refuse to call the technician who opened the box in the FBI lab that contained this critical evidence? Second, why does the State refuse to call the technician in the FBI lab that mounted the critical evidence to tell us what they saw and what they did? Third, knowing that Murray will continue to object to the chain of custody and argue tampering, why does the State not call Chet Blythe, whose initials appear on the critical slides which Dizinno testified about? Fourth, why does the State not call the technician who made handwritten notes of the observations on the slides? Fifth, why did the name of the person that made the handwritten notes about the observations change from Paula Frazier in trial three to Angela Moore in trial four? Sixth, why did someone other than Dizinno write Dizinno's initials on the evidence

envelope to create a "chain of custody"? Seventh, why has the prosecution's explanation changed, and eighth, what do the additional numbers on the envelope alleged to have contained the two hairs Chase retrieved represent? And finally, why did Chase change his testimony to comport with the prosecution theory?

The errors described herein were harmful. There can be no sincere contention that the error was harmless. Harmless error occurs when there is no possibility that the error contributed to the conviction. **State vs. Diguilio**, 491 So. 2d 1129 (Fla. 1986); **Murray vs. State**, 692 So. 2d 157 (Fla. 1997).

This Court should reverse with directions to discharge the Appellant. Murray should not be forced to face a fifth trial or, at the very least, this Court should reverse and remand this case to the trial court for a new trial.

II. THE TRIAL COURT ERRED BY PERMITTING THE ADMISSION OF HAIR EVIDENCE FROM SLIDE Q-20 DESPITE INDICATIONS OF PROBABLE TAMPERING, ALTERING, AND DISCOVERY VIOLATION REGARDING EVIDENCE.

The trial court committed reversible error by denying Murray's motion to enforce mandate. (V.2, P. 354-356). The trial court allowed the prosecution to relitigate the issues resolved by this Honorable Court in Murray II relating to the probability of tampering with item Q-20, the white garment and lotion bottle. This issue pertains to any and all hair evidence that allegedly could not exclude Murray microscopically. This hair evidence has never been testified to as "matching" Murray.

Murray raises the following three issues regarding this evidence: First, the principle of Res Judicata/Collateral Estoppel. Second, the chain of custody and undisclosed testimony intentionally withheld by the prosecution. Third, the denial of Due Process due to the prosecution's actions and the actions of the prosecution's witnesses.

HISTORY OF THE TAMPERING ISSUE OF Q-20

The issues pertaining to Q-20, white garment and lotion bottle, were first addressed in Murray's very first trial. In the first trial, Evidence Technician Laforte testified that he removed a white garment and a lotion bottle from the victim's master bathroom.

A: This depicts the white nightie, actually I think it is blue, in sink with lotion bottle.

Q: Has that been examined by anyone?

A: I believe yes, it's not in the package I put it in.

The defense objected to the admissibility and the following took place:

COURT: It's a chain of custody exception.

STATE: The original bag is, there's his initials right there.

COURT: I'm concerned because he said that's not the bag he put it in, those are not his initials.

STATE: Do you recall collecting that item and placing it in the property room?

WITNESS: Yes, I do.

(S.R., V.1, P.221-223).

Dizinno was later called to testify that "he received" a sealed box of evidence. (S.R. P.664-665). He went on to testify that he examined the unknown hairs from the body and the known pubic hairs of Murray and that he could not exclude Murray. (S.R. P.667-670).

During the second trial, the testimony was consistent with the first trial. However, during the third trial, Laforte was again called to testify and testified consistently with his previous testimony. (S.R. Vol. 1, Part 2 Pg. 299-300). Katherine Warniment from FDLE testified that when she opened the bag that was to contain the garment and lotion bottle, the lotion bottle was not present. (S.R. Vol. 1, Part 4). She testified that the bag had just one seal and that she did not see any indications of prior examination. (S.R. Vol.1, Part 4 Pg. 529-531).

The defense objected to the admissibility based on probable tampering. The trial court overruled the objection. The issue was properly preserved for appeal, and this Court reversed Murray's convictions in part due to this issue. **Murray vs. State**, 838 So. 2d 1073 (Fla. 2002). The case was remanded for a new trial in which the prosecution again attempted to introduce the same evidence. The defense again objected, and the objection was again overruled. The evidence was admitted and Murray was convicted. This appeal follows.

RES JUDICATA/COLLATERAL ESTOPPEL

This Court ruled in Murray II, that defense counsel had established the probability of tampering and that the testimony was improperly admitted in evidence. Murray raises the issue of *Res Judicata*. This Court has deemed the hairs inadmissible due to the probability of tampering. It is improper for the prosecution to perfect its evidence through successive attempts at conviction.

Res Judicata not only prohibits relitigation of claims, but also prohibits the litigation of claims that could have been raised in the prior action. **State vs. McBridge**, 848 So. 2d 287 (Fla. 2003). Further, collateral estoppel and res judicata are applicable in both the civil and criminal context. Id.

Tibbs vs. Florida, 457 U.S. 31, 102 S.Ct. 2211 (1982). The United States Supreme Court has ruled that it is fundamentally unfair to allow the State to hone its trial strategies and perfect its evidence through successive attempts. "Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." Id. This was the prosecution's fourth jury trial. Murray respectfully requests this Court not allow the prosecution a fifth bite at the apple.

The State has litigated this claim in each of Murray's four trials. The issue was raised in each and every trial. Therefore, the State was on notice the issue would be litigated again and had every opportunity to bring the best and most

competent evidence to the trial. The principle of res judicata, collateral estoppel and even the rule of sequestration were designed to prevent a party to litigation from honing their skills. The prosecution argued in Murray's third trial that there was no tampering and that all the items were properly collected, sealed and opened by the witnesses in the chain of custody. The following argument demonstrates the extent to which the prosecution went to obtain a conviction in this case.

CHAIN OF CUSTODY, TESTIMONY WITHHELD BY THE PROSECUTION AND FABRICATED TESTIMONY

The testimony regarding the collection and processing of the evidence during the fourth trial was as follows: Officer Michael Laforte testified that he recovered the garment and the lotion bottle. On cross-examination, Officer Laforte testified that he put both items in a paper bag because plastic promotes the growth of mold, mildew and destroys evidence. (V12. P.449).

Katherine Warniment from the Florida Department of Law Enforcement (FDLE) testified that she is employed at the Jacksonville Regional Crime Laboratory as a crime laboratory analyst, currently in the toxicology section but previously in the microanalysis section. At the time she opened the evidence bag sealed by Officer Laforte, Ms. Warniment testified that it did not contain a plastic lotion bottle. Officer Laforte testified that he picked up the garment and the lotion bottle and placed them both in the same paper bag. When they were opened by the FDLE analyst, Ms. Warniment, the garment had been separated from the bottle.

The garment was then placed in a separate bag within the initial bag. The lotion bottle was not present. What causes further concern is that Ms. Warniment testified that she did not see any indications of prior examination; ***the seal appeared intact***.

Based on that testimony, it is clear that someone tampered with the evidence by taking the initial bag that Officer Laforte had packaged the items in, destroyed that bag, separated the two items into two separate bags, one of which the garment from which the hairs in this case were derived. Additionally, someone placed the lotion bottle in a plastic bag, contrary to the procedure of Officer Laforte, who testified that he does not put evidence in plastic because plastic promotes the growth of mold, mildew and destroys evidence (V.12 P.449).

CHAIN OF CUSTODY HEARING

This Court in **Murray vs. State,** 838 So. 2d 1073 (Fla. 2002) held that the Defendant had met his burden of showing the probability of evidence tampering with respect to the bottle of lotion placed in the same evidence bag as the nightie/rag. Because of this Court's opinion in Murray II, a pre-trial hearing was conducted so that the State could then call all the witnesses in the chain of custody to explain away the discrepancies. However, no one was called to testify about the plastic bag. The State called Detective O'Steen and Officer Powers of the Jacksonville Sheriff's Office and FDLE analysts Warniment and Hanson.

The trial court ruled the State carried the burden, even though moments earlier the trial court noted that the "only purpose of this hearing is **to determine there was two things in one bag, and now there's two things in two bags**…" (V. 4, P.775)(emphasis supplied). Defense counsel went on to point out to the trial court that the State could not have carried its burden of explaining the discrepancy, because not only are there additional bags, but no one claimed responsibility for the plastic bag. Id. at 778.

Detective O'Steen and Evidence Technician Powers testified to separating the evidence at the FDLE prior to their actual submission. Neither witness had testified to those events in the previous three trials or in deposition. Neither O'Steen nor Powers had any notes or reports indicating such activity. However, after this Court's opinion in Murray II, when asked by the prosecutor, they were able to recall that thirteen (13) years earlier they separated the evidentiary items prior to their analysis.

Defense counsel continued to point out to the trial court that "not only do we have missing bags, we also have an additional bag, a plastic bag that nobody has been able to speak to. I mean, I've asked that question of every witness, not one witness can attest to having ever seen or touched a plastic bag, yet we have one here today." (V.4 778, L. 9-16).

Meanwhile, the prosecutor stood by quietly, intentionally concealing his plan to ambush the defense with surprise testimony of a latent print analyst. No other explanation is plausible under this set of facts. The prosecutor's case had just been reversed for the second time after the third trial by this Honorable Court. The most recent trial was reversed in part due to the probability of tampering. The trial court allowed the prosecutor to attempt to explain away the discrepancy. The trial court ruled it was satisfied. Instead of accepting the court's ruling, the State insisted on calling three more witnesses to explain the discrepancy. No mention of the plastic bag was made. The prosecutor then sat by in silence while defense counsel pointed out that no one had ever mentioned the plastic bag. The prosecutor's choice to lie in wait is an example of "dirty pool", which was condemned in **Scipio vs. State**, 867 So. 2d 427 (Fla. 5th DCA 2004), and affirmed earlier this year by this Honorable Court in **Scipio vs. State**, 928 So. 2d 1138 (Fla. 2006).

Further proof of this improper plan by the prosecutor is apparent just moments before the hearing when defense counsel on the record, points out the following to the trial court:

> **MR. KURITZ**: Before we begin one other issue because I spoke with the State at the end of the day Friday and asked what I think is an obvious question, how do you plan on doing it [explaining away the probability of tampering from this Court's Murray II opinion] because I believe all the witnesses in chain of custody had testified as far as what happened from the evidence technicians to bags being opened,

> and they indicated that Detective O'Steen would be able to assist in that regard. That has never been an issue that's been discussed. Again that goes to whether or not it's covered in his notes.
>
> I would ask for the opportunity to depose Mr. O'Steen on this issue before we begin a trial or, excuse me, a hearing in this regard. And again I know we discussed it last week, but I didn't know until Friday that the State was going to try to introduce another witness, and that was my own inquiry, not the State letting me know, that was my own inquiry.
>
> **THE COURT**: Okay, no more depositions, we're done with that on anything.
>
> **MR. KURITZ**: Thank you.

(V.4 P.700-701).

The Government not only stood by and didn't say a word, but they affirmatively misled defense counsel on the issue of who would be called in the chain of custody to explain away the discrepancies that established the probability of tampering. When defense counsel asked how they would do it, the State referred counsel to Detective O'Steen, not Latent Print Analyst Wilson. When defense counsel asked to take the deposition of Detective O'Steen, that request was denied. Id. The prosecutor never mentioned another witness, never mentioned Wilson and, therefore, knew the secret was safe; the defense would not have the opportunity to depose any witness regarding the plastic bag.

Defense counsel thereafter went into his opening statement, telling the jury, "[t]here's also another bag in there. This bag is plastic. That's an additional bag

that not one single witness on behalf of the State Attorney's Office, or the prosecution, or FDLE, or FBI, or anybody involved is going to tell you where that plastic bag came from, but it is with the other critical evidence in this case." (V.12 P.396). Defense counsel's credibility and integrity was undermined by the government's underhanded tactic.

CHANGES IN TESTIMONY OF THE FOLLOWING WITNESSES:

A: WILSON

The prosecutor later called Wilson, a latent print analyst with FDLE, to testify that he placed the lotion bottle in the plastic bag. The testimony was incredible and the prosecution did not disclose it to the defense prior to trial. Wilson testified **thirteen years later** that he placed the item in the plastic bag. There is no notation on the bag itself that he handled the bag. There was no evidence tape from JSO or FDLE on the plastic bag. Neither his name, his initials, nor the date appear on the plastic bag. The testimony was given for the first time thirteen years after he claims to have done so. He made no notation that he did so on any notes or reports. We are left to rely on only his memory after 13 years with nothing to refresh his recollection. He never said so in deposition in either Murray or Taylor. He never testified to that in any of the previous three Murray trials or Taylor's trial. Just as Chase's testimony changed after Murray I, Wilson's testimony changed after Murray II. As an FDLE laboratory analyst, Wilson would

have handled thousands of items by the time this Court handed down Murray II. He would have handled many more items after this Court's opinion in Murray II and prior to Murray's fourth trial. He did not testify that he had any contact with the lotion bottle or the plastic bag in any of the first three trials. The defense asks why. If Wilson was such a critical witness that evaluated this critical piece of evidence, why didn't he make any reports or notes, and why was he not called by the prosecution to testify as such in the previous three trials? Why is it that he was called to testify for the first time on this issue after this Court ruled that the defense had established the probability of tampering relating to this item? His initials do not appear on the plastic bag or any of the paper bags involved with the lotion bottle or the garment. He had no notes, reports, chain of custody forms, or initials on any of the bags to refresh his memory, yet he recalls that he violated FDLE protocols by placing an evidentiary item in a plastic bag allowing for the possibility of the growth of mold and mildew, which would destroy the evidence. (V.13 P.725, L. 10-15).

Wilson's conscience must have been bothering him, at least a small amount. When he was asked a direct question about the item being in plastic, he replied, "[n]o, **I believe** that's something that I put around this bag. Well, I put this bag around this bottle." (V.13 P.709). On cross-examination, Wilson was asked by the defense, "Mr. Wilson, I think you testified a few minutes ago, there you go, sir,

that you placed that bottle in that plastic bag, right?" Wilson then answered by saying, "**[t]o the best of my knowledge**, yes, sir." He is not certain, just as Chase began to change his testimony after Murray I, Wilson changed his after Murray II. (V.13 P.724). Wilson was asked "when is the first time anybody ever mentioned plastic bag to you in this case?" He responded, "**I don't remember**." (V.13, P.730). The testimony was altered to correct the problems pointed out by trial counsel, appellate counsel, and confirmed by this Court in Murray II.

B: FBI ANALYST DIZINNO

This issue also deals specifically with the State's witness Dizinno, his handling of evidence, and his inconsistent testimony that was discovered during the fourth trial that has been discussed above. Dizinno was clearly attempting to mislead the previous trial courts and juries by indicating that the evidence entered the lab in a sealed manner only to learn he never saw the evidence enter the lab. (V. 14, P. 904-905). He clearly misled the court in the second trial when he said he mounted the hair evidence as pointed out above. (V. 14, P. 909-910). He continued to attempt to mislead the trial court, the jury and the defense in the fourth trial until it was discovered that he did not even write his initials on the evidence in this case. Someone else wrote his initials on the evidence to create a "chain of custody".

During cross-examination in the second trial, he was asked the following:

Q: You're the one who mounted them all?

A: That's correct.

Id. at 636.

In the fourth trial, Dizinno admitted the following when asked directly:

Q: For chain of custody portion, those initials on there, you didn't even put them on?

A: Sometimes I did, sometimes I didn't. It doesn't look like my handwriting in this case.

(V. 14, P. 940) (emphasis added).

At each of the first three trials, to establish a chain of custody, the prosecution asked if those were his initials on the evidence. At each trial he responded in the affirmative, and the items were moved into evidence. He neglected to tell anyone that although his initials were on the evidence, he didn't put them there. Chain of custody is not satisfied when someone merely places another witness' name or initials on a piece of evidence that the witness never sees or touches. If defense counsel had not thought to ask what would seem to be an obscure question, no one would have ever known that he did not even write his own initials on the evidence. It was only on further recross-examination in the fourth trial that some portion of the truth was revealed.

After Dizinno testified defense counsel renewed the objection to the testimony and noted the discrepancies to the trial court and the fact that the witness

did not even put his own initials on the evidence. The trial court duly noted but overruled the objection. (V. 14, P. 946)

C: DETECTIVE O'STEEN AND EVIDENCE TECHNICIAN POWERS

At the pre-trial hearing on the tampering issue, Detective O'Steen and evidence technician Powers testified to separating the evidence at the FDLE prior to their actual submission. Neither witness had testified to those events in the previous three Murray trials, Taylor's trial, or in deposition. Neither O'Steen nor Powers had any notes or reports indicating such activity. However, after this Court's opinion in Murray II, when asked by the prosecutor, they were able to recall that thirteen (13) years earlier they separated the evidentiary items prior to their analysis. (V. 4, P. 718).

Murray suggests this testimony is incredible and points to the prosecution's own witnesses to establish it. O'Steen testified that Powers opened the bags and separated the evidence. (V.4, P. 739-740). However, Powers could not say exactly who separated the evidence. First, he testified that O'Steen opened it and separated the evidence to go to different sections of FDLE. (V. 4, P. 708). Second, he then changed that testimony to say that FDLE separated the evidence. (V. 4, P. 709). Third, he then goes on to testify that the bags were opened by FDLE, and that they bagged the items and put their tape on the bags. He then testifies that FDLE opened the bags to be sure what they were getting, and that

FDLE opened the bags and rebagged the evidence. (V.4, P. 714-717). After 13 years with no reports or notes to refresh his recollection how could he know for sure?

The testimony of FDLE analyst Warniment contradicted both Powers and O'Steen. Warniment testified that the State's exhibit had Jacksonville Sheriff's Office (JSO) tape, and that it was a broken seal. (V.4, P. 754). Powers said it was FDLE's tape. (V.4, 714-717). Hanson's testimony is at odds as well. Hanson testifies that when she received the exhibits, they were in a *sealed box* with a number of other bags, and that she opened the box and forwarded the item to Warniment. Hanson testified she never got a lotion bottle, and that she checked the sealed box that came from JSO, opened the sealed box, inventoried the evidence and then transferred the exhibits to their appropriate section of the FDLE laboratory. (V. 4, P. 765-770).

Just as Chase's testimony changed after Murray I to fit the prosecution's theory, the testimony of O'Steen, Powers and Wilson is suspect and incredible. Murray argues the testimony was fabricated after Murray II to fit the prosecution's theory. Because of this Court's ruling in Murray II, the prosecution had to create a chain of custody to have the evidence admitted at trial. With no reports, no notes, no prior testimony to refresh their recollection, Wilson, Powers and O'Steen

were able to remember intricate details of actions that occurred thirteen years earlier. Respectfully stated, that testimony is incredible.

Later in this brief, the change in testimony of the medical examiner will be discussed. Dr. Floro changed his original testimony from the victim being stabbed with one knife to the victim being stabbed with a knife and a pair of scissors to match the prosecution's theory that there was more than one assailant. (V.13, P. 591-592). This too is incredible.

DUE PROCESS

Murray's Due Process rights were violated by the State of Florida as a result of this prosecution and the handling of this issue by the prosecution. Because of the lengthy delay from the time of the first trial, the destruction of the actual hair evidence in this case, the prosecution's deception, the surprise testimony of Wilson, Dizinno's deception regarding the chain of custody, the trial court's denial of Murray's request for discovery depositions and the questionable testimony that defense counsel could not have anticipated and could not effectively prepare for on cross-examination. As a result, Murray's State and Federal Due Process rights were violated.

Interestingly, the only two pieces of evidence that have chain of custody problems relate to Q-42 and Q-20. Those are the only two items the prosecution can attempt to tie to Murray.

The Court denied the defense request for discovery depositions on this tampering issue and the prosecution intentionally deceived the defense on this specific issue. The State was given an opportunity to explain away the probability of tampering in a hearing the week before the fourth trial was to begin. In that hearing, the trial court advised the State that the court was satisfied and that the court would allow the testimony regarding this item after the State had called only one witness. (V.4, P.733, L. 17-20). Not satisfied, the prosecutor insisted on making a record to explain the discrepancy by calling Detective O'Steen and FDLE analysts Hanson and Warniment. The trial court again ruled that he was satisfied that the discrepancy had been explained. However, the trial court denied the defense request for discovery depositions on the issue. (Vol. 4. P. 776-777).

This Court has held that the chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid surprise or ambush. **State vs. Evans**, 770 So.2d 1174 (Fla. 2000). The language from this Court's opinion fits perfectly in this case. The policy of avoiding trial by ambush or surprise has even greater application in the criminal context where the stakes are much higher (execution) and the obligation of the State to see that justice is done is much greater than that of private litigants in a civil dispute. **Scipio vs. State**, 928 So. 2d at 1138. The stakes do not get any higher than when the government is seeking to execute one of its citizens.

The errors described herein were clearly harmful. There can be no contention that the error was harmless. Harmless error occurs when there is no possibility that the error contributed to the conviction. **State vs. Diguilio**, 491 So. 2d 1129 (Fla. 1986); **Murray vs. State**, 692 So. 2d 157 (Fla. 1997).

Based on the discovery violation, the new testimony of Dizinno regarding the lack of chain of custody and the totality of the circumstances cited herein, this Court should reverse this conviction and remand to the trial court with directions to discharge Murray or in the alternative remand for a fifth trial. For the death penalty process in the State of Florida to have any integrity whatsoever we must not allow the prosecution to manipulate evidence to fit their theory of the case.

III. THE TRIAL COURT ERRED BY NOT EXCLUDING THE TESTIMONY OF FBI HAIR AND FIBER EXPERT JOSEPH A. DIZINNO. THE TRIAL COURT ALSO ERRED BY LIMITING APPELLANT'S CROSS-EXAMINATION OF DIZINNO FOR THE FOLLOWING REASONS:

(A) THE TESTIMONY DID NOT MEET THE FRYE STANDARD.

(B) DIZINNO SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY THAT IT WAS "RARE" THAT HE COULD NOT DISTINGUISH HAIRS FROM TWO SEPARATE INDIVIDUALS.

(C) DIZINNO AFFIRMATIVELY MISLED THE TRIAL COURT REGARDING CHAIN OF CUSTODY AND THE EXTENT OF THE DEPARTMENT OF JUSTICE INVESTIGATION.

(D) THE COURT DENIED MURRAY'S REQUEST TO CROSS-EXAMINE DIZINNO WITH INFORMATION THAT THE FBI LAB HAD BEEN UNDER INVESTIGATION WHEN MURRAY'S HAIRS WERE IN THE LAB.

(E) THE COURT DENIED MURRAY'S REQUEST TO CROSS-EXAMINE DIZINNO ON THE FACT THE LAB HE WAS SUPERVISING WAS UNDER INVESTIGATION AT THE TIME OF THIS TRIAL.

The errors regarding the trial court allowing this testimony are numerous. The issues in this section can be separated into the following: (A) The defense objected to his testimony in its entirety because it did not meet the Frye standard. (V.14, P.896). (B) The defense filed a Motion in Limine to prevent Dizinno from testifying that it was "rare" that he could not distinguish hairs from two separate individuals. (V.2, P.365-366). (C) Dizinno affirmatively misled the trial court as to the chain of custody of the evidence and the extent of the Department of Justice (DOJ) investigation. (D) The trial court improperly prohibited the defense from cross-examining Dizinno on the fact that the FBI hair and fiber lab was under investigation at the time Murray's hairs were in the lab. (E) The trial court improperly prohibited the defense from cross-examining Dizinno on the fact that while he was testifying, the FBI DNA laboratory, of which he was the director, was under investigation. (V.14, P.899). These five issues are *inextricably intertwined* and will be discussed and explained herein and throughout.

DIZINNO'S TESTIMONY DID NOT MEET THE *FRYE* STANDARD AND DIZINNO'S USE OF THE TERM "RARE" WAS PREJUDICIAL AND MISLEADING

Prior to Dizinno testifying, Murray objected to his testimony based on Frye. That motion was denied. (V.14, P.896). Murray filed a Motion in Limine to preclude Dizinno from saying it was "rare" that he could not distinguish between hairs. (V. 2, p. 365-366). The motion pointed out what is now well settled, that hair and fiber comparison is not an exact science and there were no protocols in effect at the time of the analysis in this case. (V. 14, P. 879). The court erred by denying Appellant's Motion in Limine.

At the time Murray's hairs were in the lab, there was no protocol requiring the FBI to track who opened the evidence, no protocol to track who mounted the evidence, and there was no protocol requiring the tracking of who examine the evidence. (V.14, P.912). Dizinno testified that those are all very important steps. Additionally, that has all changed since the DOJ investigation and now there is a "better procedure in place". Id. Further, there are no databases to establish any probabilities to assist the jury in assessing the weight of the microscopic analysis. (V.14, P.888). In actuality, there were no written protocols whatsoever when Murray's hairs were examined. (V.14, P.879). The trial court erred allowing any testimony as to microscopic comparisons because the testing did not meet the standards in the scientific community. (V.14, P.896).

The trial court allowed Dizinno to testify that it was "rare" that he could not distinguish between hairs. He testified that "maybe once or twice in the eight years that I compared hairs that I couldn't distinguish between hairs from two different individuals. That's looking at hundreds of cases, thousands and thousands or hairs. So that's where rare comes from". (V.14, P.888).

That testimony is clearly misleading and prejudicial considering the fact that at the time he was doing microscopic analysis the FBI lab was not confirming the technician's analysis through DNA testing. Dizinno testified that process began in 1996 or 1997. Dizinno testified the last hair analysis he did was in "probably 1996 or 1997". (V.14, P.879). Even Dizinno testified that of the hair analysis that are being sent for DNA confirmation, at least 10-15% of hair analyses have not been confirmed by DNA analysis. (Vol. 14. P. 886). Therefore, he has no way of knowing if he was wrong 10-15% of the time he did an analyses. See: Correlation of Microscopic and Mitochondrial DNA Hair Comparisons, by Max M. Houck, M.A., and Bruce Budowle, Ph.D., Sept. 2002, Journal of Forensic Science Vol. 47, No. 5 at Page 1. See also: NRC II 1997, p. 20, 27 & 28.

It was error to allow Dizinno to surreptitiously provide his own statistics by saying that with the exception of *two times out of thousands and thousands of hairs* he has *always* been able to distinguish hairs from two individuals. Based on what

we know today about microscopic hair analysis, that statement in itself is simply incredible and clearly not 10-15%.

Dizinno testified that the FBI lab does not count characteristics and that he could not testify as to how many characteristics he observed on the known and unknown hairs he allegedly examined in this case. (V. 14, P. 888-889). Therefore, even if there was an independent analyst in this case there is no way of knowing what characteristics either of the analysts observed. Dizinno testified that his notes were simply to remind himself of what he observed and that there is no indication as to which characteristics were observed or how many were observed. (V. 14, P. 890-891). Unfortunately, there is no way for the defense to test or challenge the testimony because **all of the hair evidence has been destroyed** by the State in flawed DNA testing. (V. 6, P. 1089-1090); Murray, at 1081. Because of the lack of protocols, lack of note keeping and destruction of the hair evidence, the trial court erred by allowing the testimony to be presented to the jury.

FBI HAIR AND FIBER ANALYST DIZINNO AFFIRMATIVELY MISLED THE TRIAL COURT CAUSING THE COURT TO IMPROPERLY LIMIT CROSS-EXAMINATION

Murray attempted to cross-examine Dizinno regarding his lab being under investigation on two occasions. The trial court improperly limited that cross-examination. Dizinno was a critical witness for the prosecution. The jury should have been allowed to hear that the FBI lab was under investigation by the

Department of Justice at the time *Murray's hairs were actually in the laboratory*. Additionally, the FBI DNA lab was under investigation at the time of Dizinno's testimony in Murray's fourth trial. (V.14, P.899). Dizinno was in the hair and fiber section when it was under investigation in the early 1990's, and at the time of trial, Dizinno was the head of the FBI DNA laboratory under investigation by the Department of Justice. (V.14, P.899). As a result, Murray's Due Process rights were violated. **Crawford vs. U.S.**, 541 U. S. 36 (2004).

Appellant has established herein that the State's key witness Dizinno affirmatively misled everyone for 13 years regarding his handling of the evidence in this case. It was learned for the first time 13 years and four trials later during further recross-examination that he didn't even write his own initials on the evidence in this case. Thirteen years later he confessed that someone else wrote his initials on the evidence to "create a chain of custody". However, Dizinno's improper actions go further. Just as other experts have done in Murray's previous trials, Dizinno "affirmatively misled the trial court" about the extent of the DOJ investigation.

This Court in Murray I stated that the State's DNA expert Nippes "affirmatively misled the trial court". In Murray II, this Court found that the State's DNA expert, DeGuglielmo, was guilty of witness tampering and "[t]he unreliability of the testing procedures was compounded by the facts that (1) the

State's expert used all of the DNA found in the hair rendering it impossible for the defendant to conduct his own independent analysis; and (2) there was a general sloppiness in documenting the tests which even the analyst admitted was below the standards normally accepted." Murray II, at 1081.

The trial court stated that the reason he was not allowing the cross-examination about the investigation was "[a]ll right. It's my understanding as to the Malone matter, there was some sort of investigation involving one person, but didn't have anything to do with Doctor (sic) Dizinno or the techniques, protocols that he used. So for that reason I'll not permit you to go into that area." (V.14, P.897).

The investigation specifically dealt with the laboratory practices, protocols, credibility, and integrity of the hair and fiber unit of the FBI laboratory. The fact that the investigation occurred while these hairs were actually in the lab is an appropriate area for cross-examination. The allegations that prompted the DOJ investigation implicated fundamental aspects of law enforcement, the reliability of procedures employed by the FBI lab to analyze evidence, the integrity of the persons engaged in analysis, and trustworthiness of the testimony of the FBI examiners. The DOJ further investigated problems they found with the existing policies and practices. The DOJ reported that the policies were in substantial need of change. See: (Executive summary, opening page of "The FBI Laboratory: An

Investigation Into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases", Michael R. Bromwich, Inspector General, April 1997). (Dept. of Justice, Office of Inspector General, DOJ, 97-141A).

In June of 1998, the DOJ published a special report following up on the initial investigation. The initial report "contained 40 recommendations in the following 12 areas: (1) accreditation; (2) restructuring the explosive unit; (3) the roles of the laboratory examiners and resolutions of disputes; (4) report preparation; (5) peer review; (6) case documentation; (7) record retention; (8) examiner training and qualification; (9) examiner testimony; (10) protocols; (11) evidence handling; (12) the role of management". See: The FBI One Year Later: A Follow-Up to the Inspector General's April 1997 Report on FBI Laboratory Practices and Alleged Misconduct in Explosive-Related and Other Cases. The defense should have been able to cross-examine Dizinno on the investigation in light of the fact that ten of the twelve recommendations, issues 3-12, dealt with the issues raised in Murray's case.

The investigation was much more extensive than one person. The protocols have changed as a result of the investigation. In actuality, there were no written protocols when Murray's hairs were examined. (V.14, P.879). The protocols were created as a result of the investigation. A review of this court's rulings reveals this court is well informed of the FBI laboratory problems. **Hannon vs.**

State, 2006 WL 2567438 (Aug. 31, 2006). Especially with the problems dealing with FBI technician Malone. The particular issue that does not appear to have been investigated by the DOJ or anyone else is the fact that today's protocols require that a microscopic analysis be reviewed by a second qualified examiner. Allegedly that was done in this case by Douglas Dedrick. (V.14, P.881).

With all of the problems in the FBI lab, especially with Michael Malone, one must ask if a second qualified analyst actually looked at the evidence. Because the trial court erred in prohibiting defense counsel's cross-examination of Dizinno, it is unknown if Dizinno, Blythe or Dedrick was Malone's second qualified examiner. Apparently, someone approved the shoddy lab work Malone conducted.

What we do know happened after Murray's hairs arrived in the FBI lab in the same box as the unknown evidentiary samples is as follows:

a. The person who opened the box that contained the known hairs of Murray and the critical evidence from the crime scene (unknown hairs) in this case was not called to testify.

b. The person who mounted these critical slides was not called to testify.

c. The initials of laboratory analyst Chet Blythe were written on the slides that were analyzed and then stricken out. Chet Blythe was not called to testify as to what he did, if anything, with those critical hairs.

d. The identity of the person who allegedly took notes of what was placed on the slides changed from the third trial to the fourth trial. In the third trial, Dizinno testified that Paula Frazier made the notes. In the fourth trial, Dizinno testified that it was Angela Moore who wrote the notes. Neither Frazier nor Moore was called to testify as to what they did to these critical hairs.

e. Evidence Technician Chase originally testified that he placed two (2) hairs from the crime scene in an envelope. Dizinno testified that he received somewhere between five (5) and twenty-one (21) hairs. Chase testified in this trial that he changed his testimony from the two "hairs" to two "hair samples" only after it was learned that the FBI reported it contained between 5 to 21 hairs.

f. It was learned for the first time in the fourth trial that Dizinno's initials that were on the envelope that contained the two (2) hairs collected by Chase were not placed on the evidence by Dizinno at all. Someone else put his initials on the evidence in what appears to be an attempt to falsify a chain of custody. It is unknown who handled that envelope, who mounted the evidence or wrote Dizinno's initials on the critical envelope.

g. The FBI hair and fiber lab excluded co-defendant Taylor as a contributor of the hairs found at the scene, through microscopic analysis, only to be proven wrong by DNA testing confirming Taylor as a contributor. Murray II.

Cross-examination was the only tool left to Murray to challenge this microscopic testimony because the hairs were destroyed in flawed DNA testing. They were destroyed before the defense was allowed to have an independent microscopic analysis of the hairs. The intended cross-examination was to expose the motivation, prejudice and/or bias of the witness and was not for the purpose of harassing or embarrassing the witness. The questions were not to be on collateral matters.

CHET (CHESTER) BLYTHE

The Chet Blythe referred to in this trial is actually FBI analyst Chester Blythe. Dizinno testified that the initials "CB" for Chet Blythe appeared on the evidence slides in this case but were stricken out. A Westlaw search for reported cases involving Chester Blythe revealed three cases in which Blythe's name was mentioned. Two of those cases warrant discussion herein. First, in **Tennessee vs. Gussie Willis Vann**, 976 So. 2d 93 (Tenn. 1998), it appears that Blythe was not able to exclude a defendant because when he opened the envelope in the FBI lab that was to contain the defendant's known hair samples, it was empty when he opened it. Therefore, Blythe did not compare the recovered hair evidence to the defendant's hair and was unable to exclude the Defendant. It is unknown if that would have been exculpatory evidence.

The second case referencing Blythe is **Alton Coleman vs. State of Indiana**, 703 N.E. 2d 1022 (Ind. 1998). A jury found Alton guilty of murder, attempted murder, and child molesting, and Coleman was sentenced to death. In Alton's case, Blythe testified that he did a hair comparison of the hair found at the scene to the known hairs of the co-defendant, Brown. In that case:

> Blythe testified that the hair samples were consistent with one another, and although hair analysis is not a means of positive identification, the likelihood of the hair found at the scene belonging to someone other than Brown was 'very, very remote.' Following the trial and sentencing, the State requested that Blythe perform further analysis on the hair. During additional testing, Blythe compared the hair from the scene to both A.H.'s [victim] and Brown's [co-defendant] hair, concluding finally that the origin of the hair from the scene could not be determined, in contrast to his original conclusion that the hair belonged to Brown.

(emphasis supplied).

Therefore, after the conviction and sentence of death, when asked to compare the victim's known hair to Brown's hair and the hair from the crime scene, he was not able to make a determination whose hair it was. That was in direct contrast to his trial testimony that the hair belonged to Brown, and that odds against it were very, very remote. The evidence from these two cases was processed at or near the time Murray's hairs were in the FBI laboratory. Coleman's conviction was affirmed on direct appeal in 1990, and the date of offense in Vann was 1992.

It is well settled that "a full and fair cross-examination of a witness in a criminal trial is a **right** belonging to a defendant, not merely a privilege." **Rivera vs. State**, 462 So.2d 540 (Fla. 1st DCA 1985) (emphasis is original). "The right of full cross-examination is absolute, and denial of that right is harmful and fatal error." **Porter vs. State**, 386 So.2d 1209 (Fla. 3d DCA 1980); **Fannin vs. State**, 581 So.2d 974 (Fla. 1st DCA 1991). A primary interest secured by the confrontation clause of the Sixth Amendment is the right of cross-examination. **Douglas vs. Alabama**, 380 U.S. 415 (1965). The denial of the right to effective cross-examination is a "constitutional error of the first magnitude, and no amount of showing of want of prejudice would cure it. **Brookhart vs. Janis**, 384 U.S. 1 (1966); **Smith vs. Illinois**, 390 U.S. 129 (1968); **Davis vs. Alaska**, 415 U.S. 308 (1974). See also, **Lee vs. Illinois**, 476 U.S. 530 (1986).

This court actually addressed the issue of a full and fair cross-examination in Murray II. In Murray II, the trial court improperly limited defense counsel's cross-examination of one of the State's DNA witnesses. The State's DNA witness was improperly attempting to influence the testimony of the defense DNA expert. This Court stated in Murray II that "[i]n relevant part Section 90.608(2), Florida Statutes (1999), states: 'Any party, including the party calling the witness, may attack the credibility of a witness by . . .[s]howing that the witness is biased.' Denying a defendant the opportunity to present evidence that a witness is biased

not only violates Section 90.608(2), it also implicates a defendant's constitutional right to cross-examination, which is guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 16 of the Florida Constitution. 'Inherent within this right is a defendant's right to expose a witness's motivation in testifying, because it is the principal means by which the believability of a witness and the truth of his testimony are tested.' **Gibson vs. State**, 661 So.2d 288 (Fla. 1995).

In this case, Dizinno's DNA lab was under investigation while he was testifying. Because the trial court precluded defense counsel from effectively cross-examining Dizinno as to the investigation into his lab while he was testifying, little to nothing is reflected in Murray's record on appeal. However, if this Court looks outside the record for what would have been in the record, information is easily accessible. Just one month prior to Murray's fourth trial, Kathleen Lundy, an FBI lab analyst in the ballistics section was indicted. Additionally, "a FBI lab technician has resigned while under investigation for alleged improper testing of more than 100 DNA samples…" The jury should have been entitled to hear that the "FBI made widespread changes in the mid-1990's after its lab was rocked by a whistleblower's allegations and an investigation [by the DOJ] that found shoddy science by several lab examiners. One month prior to Dizinno's testimony it was reported that justice officials have identified about

3,000 cases that might have been affected by those earlier problems and have let prosecutors decide whether to notify convicted defendants. **Napier vs. Indiana**, 126 S.Ct. 1437 (2006).

Because defense counsel was not allowed to effectively cross-examine Dizinno on the allegations, the jury was not able to fully comprehend the potential bias or prejudice of the State's critical witness. Dizinno had a motivation to testify in a manner that would support the earlier testimony and he clearly would not want this Court to find fault with him or his laboratory as this Court did with the State's experts in Murray I and Murray II.

Defense counsel has herein demonstrated the general sloppiness of the FBI laboratory and at trial sought to cross-examine Dizinno on the second Department of Justice investigation prompted by the general sloppiness and falsification of results in the laboratory. He was the director of the lab under investigation. In light of the numerous errors, omissions, and changes in testimony, the trial court abused its discretion by improperly limiting cross-examination of a critical state witness. Juries often perceive experts as impartial witnesses seeking the truth and not necessarily associated with the State or the defense. Dizinno's interest in protecting the reputation of the FBI laboratory, as well as his job and reputation, is an issue that the jury should have been able to consider, especially in light of the

testimony that he is now the director of the FBI DNA laboratory that was under investigation at the very moment he was testifying.

It is well settled that a critical state witness under actual or threatened prosecution can be cross-examined on that issue. **Hernandez vs. Ptomey**, 549 So.2d 757 (3rd DCA 1989). It is now well known that lab analysts have been prosecuted for their acts and omissions in handling evidence. In **Lutherman vs. State,** 348 So.2d 624 (Fla. 3rd DCA 1977), it was held in error to deny defense counsel's questions of a police officer concerning whether he was under investigation for police brutality. Upon the jury hearing such testimony, the "perceived integrity" of the FBI laboratory and the credibility and motivation of the lab analyst could be placed in proper context.

The errors described herein were clearly harmful. There can be no contention that the error was harmless. Harmless error occurs when there is no possibility that the error contributed to the conviction. **State vs. Diguilio**, 491 So. 2d 1129 (Fla. 1986); **Murray vs. State**, 692 So. 2d 157 (Fla. 1997). The denial of such was an abuse of discretion. Therefore, this Court should reverse this conviction and remand to the trial court to discharge Murray or, in the alternative, remand for a fifth trial.

IV. THE TRIAL COURT ERRED BY DENYING THE MOTION TO DISMISS THE INDICTMENT:

(A) THE INDICTMENT WAS RETURNED BY THE GRAND JURY RELYING ON INADMISSABLE, TAMPERED, AND MISLEADING EVIDENCE.

(B) BY DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT BASED ON DOUBLE JEOPARDY. THE DEFENDANT HAD BEEN THROUGH THREE (3) SEPARATE TRIALS AND WAS FORCED TO FACE HIS FOURTH.

On April 17, 2003, Murray, through trial counsel, filed his Motion to Dismiss the Indictment against him. (V.2,P.196-212,213&226). Specifically, Murray stated in his Motion that the only incriminating evidence known to the State and presented to the Grand Jury has since been excluded by this Court in **Murray vs. State**, 692 So.2d 157 (Fla. 1997) (Murray I), and **Murray vs. State**, 838 So.2d 1073 (Fla. 2002) (Murray II). On May 13, 2003, this Court denied the Motion to Dismiss (V.2 P.309). A Motion for Rehearing was filed on May 19, 2003 and it was denied as well. (V.2, P. 309-312).

The Appellant filed a Motion to Compel Disclosure of Grand Jury Minutes (V.2, P. 240). The trial court ordered that the Grand Jury minutes/recordings be transcribed for the Defendant in this fourth trial. At that time, the State disclosed for the first time that the minutes/recordings were not recorded and there was no transcript to be offered to determine if any competent evidence was presented to the Grand Jury to obtain the indictment. The failure to record the

proceedings was violative of the Defendant's due process rights. In order to cure this violation, Murray should have been allowed to interview witnesses to the unrecorded events.

In an attempt to discover the basis of the indictment against him, the Defendant then sought to interview the Assistant State Attorney present with the Grand Jury and Lead Detective O'Steen. Other than the actual members of the Grand Jury, the only witnesses who could assist this Court in determining if there was any competent evidence presented to the Grand Jury were Assistant State Attorney Bernie DelaRionda and Lead Detective O'Steen. They have vital information as to how the evidence was presented before the Grand Jury. The trial court denied Murray's request to interview O'Steen. (V.4, P.633). The court abused its discretion by denying the Defendant's request to interview the Grand Jury to further the pursuit of justice as allowed under Florida Statute 905.27(c). (V.4, P.634).

In support of his Motion to Dismiss Indictment, Murray relies on this Court's previous rulings cited above. The DNA evidence presented to the Grand Jury in Murray I has been deemed unreliable by this Court. Specifically, this Court ruled "[t]he State completely failed to carry its burden as to the proponent of the DNA evidence. Not only did the State's expert repeatedly avoid answering questions as to the actual procedures used in conducting the PCR DNA tests at

issue here, he also **affirmatively misled the trial court** as to the NRC's acceptance of PCR DNA methodology at the time of the hearing." **Murray vs. State**, 692 So.2d 157 (Fla. 1997) (emphasis added). It was the results of that DNA testing that was presented to the Grand Jury to obtain the indictment in this case. It was those DNA results that were presented in trial to obtain a conviction in Murray's first trial.

After this Court's opinion in Murray I, the State submitted the evidence for new DNA testing. The results of that DNA testing were utilized in securing the conviction in Murray's third trial. Murray's second trial ended in a hung jury and a mistrial was declared. The DNA evidence in the third trial was ruled inadmissible by this Court in Murray II due to the probability of evidence tampering, witness tampering, and faulty DNA testing procedures.

Therefore, the DNA evidence used to indict the Defendant has been excluded or deemed unreliable. All of the evidence has now been destroyed by the government's faulty DNA testing and the defense is not able to have the evidence independently reviewed and tested. The DNA evidence the Grand Jury heard was misleading even if this Court did not deem it to be unreliable. The Grand Jury was misled into believing that the DNA sample recovered at the crime scene matched the Defendant. At the time of the Grand Jury proceedings, no one realized that the State had not even tested the victim's DNA in this case. It was not until the time

period between Murray I and Murray II that the victim's DNA was tested and it was learned that the DNA recovered from the victim's home matched the victim. At the time of the indictment and Murray I, there was only one loci available for DNA testing in United States laboratories. (V.6, P.1004, 1025, 1077-1083). Results of the subsequent testing revealed the DNA evidence that was presented to the Grand Jury and said to match Murray actually matched the victim as well.

Today's DNA testing provides for a match over a large number of separate loci. (V.6, P.1130). The DNA results presented to the Grand Jury only provided for a match at one loci. Id. That one loci is commonly referred to as the DQalpha type. At the DQalpha type, the evidentiary hair was a 1.2, 3. (V.6, P.1158). The DQalpha type for Murray is a 1.2, 3. (V.6, P.1165). The DQalpha type for the victim was also a 1.2, 3, and the State concedes that. The Assistant State Attorney acknowledged the fact that the victim was a 1.2, 3 and was considering entering a stipulation in that regard. (V.6 P.1082-1084). The trial court stated the following:

> **The Court**: But we don't have to stick our heads in the sand. We know enough at least to say the PCR testing is the same as the Defendant's, right?
>
> **Mr. Caliel**: Yes, sir.

Thus, Murray and the victim were a match at that one loci. Therefore, the DNA results were of no probative value and clearly misleading. Had the Grand

Jury been told that the DNA recovered from the home matched the victim, it would have been of no probative value and could not have reasonably led to an indictment. The State has the burden to dismiss or correct an indictment when they learn it is based on false or misleading evidence. **United States vs. Alzate,** 47 F. 3rd 1103 (11th Circuit 1995).

During the previous trials, the Defendant repeatedly requested any and all Grand Jury minutes. The State's response was consistently that the Appellant did not have the right to those minutes. This time the trial court granted Murray's request and ordered the State to turn over any and all Grand Jury minutes. It was only then that the State advised that they did not have any Grand Jury minutes to turn over because the testimony was never recorded in any manner.

Murray thereafter filed a motion to interview the Assistant State Attorney who handled the indictment to determine what evidence was presented to the Grand Jury, that motion was denied. Murray then filed a motion to interview the detective who was present in the Grand Jury room; that was denied. Therefore, because the only known evidence that was available to indict Murray has been deemed inadmissible due to the State's experts misleading the courts and due to the probability of tampering, the Motion to dismiss the indictment should have been granted.

The following discussion took place during the hearing on Defendant's Motion to Dismiss and Motion to Compel Disclosure of Grand Jury Minutes. (V.4, P.629).

Court: Well, I'd suggest we start with your motion to dismiss. I don't think I have a response to it, I could be wrong.

State: You do not have a written response, that's correct.

Court: Alright, I don't have a response to it then. So, I assume everything in there that is factual is true, right?

State: No sir, I don't know if you want to get into the argument now.

Court: Now you want to tell me why you didn't file a response?

State: Because it's insufficient and I guess I could have filed a motion to strike because it's not sworn to, nor is it timely.

(V.4, P.630).

The State then argued the motion to dismiss was improper and that the issues should have been addressed previously. The trial court then pointed out that one of the grounds in the motion is that improper evidence was presented to the Grand Jury. The trial court inquired of the State whether there were any Grand Jury minutes.

Court: Well, what exists in the way of Grand Jury notes of who testified, that sort of thing?

State: There may be something to that effect, yes, sir.

Court: Well, I asked, didn't I ask you, Mr. Caliel, when we were here some time ago?

(V.4,P.632).

The Appellant then requested to take the deposition of the only witness to testify in front of the Grand Jury, Detective O'Steen. That motion was denied. (V4, P.633). The defense then requested the ability to interview or depose the members of the Grand Jury, and that request was denied as well. (V.4, P.634).

The trial court inquired of defense counsel, 'isn't it also true that all the State would need is to establish probable cause by having a snitch testify that the defendant made some admissions?' The defense responded by pointing out to the trial court that there were no snitches at the time of the indictment or arrest. (V.4, P. 635-636). The State then began to try to argue facts to the trial court. The court stopped the State and said, "I don't have anything in the record to support what you're saying." (V.4, P. 640-642). The State then inquired:

State: I don't know if I can, I don't know if it would be simpler if the court wants to, I could file a motion in response, I don't know if that is what the court requests.

Court: I thought I asked for that two weeks ago.

State: I apologize that's my fault.

Id. at 642.

The State failed to file a response to Appellant's motion to dismiss. The trial court erred in not granting the sworn motion to dismiss. Pursuant to Rule 3.190 Fl. R. Crim. Proc., the trial court was required to accept all factual matters as true. If

the State disagreed to the factual matters, they had a duty to file a written traverse or demurrer. The State failed to do so even after a specific request by the trial court. The only evidence presented to the Grand Jury has been deemed inadmissible and misleading. It should be pointed out that in this trial the prosecution attempted to introduce that same DNA evidence that was presented to the Grand Jury and ruled inadmissible by this Court in Murray I. After a Frye hearing, that DNA evidence was again deemed inadmissible by the trial court. (V.2, P.300-307).

In **Commonwealth vs. Mayfield**, 398 Mass. 615; 500 N.E. 2d 774 at 780, n.15 (1986), the Chief Justice stated that, "prosecutors have an ethical duty to request the dismissal of an indictment if they become aware, even after the fact, that false testimony was used to obtain it. However, dismissal of an indictment is not required if the tainted witness statement was harmless due to other substantial untainted evidence. **United States vs. Pino**, 708 F.2d 523 (10th Cir. 1983). There was no other untainted evidence presented to the Grand Jury in Murray's case.

Once the sworn motion to dismiss was filed stating that false and misleading testimony was used to indict Murray, the burden shifted to the prosecution to prove otherwise. The prosecution did nothing even after being requested to by the trial court. The DNA testimony presented to the Grand Jury related only to the DQalpha loci. We now know that the evidentiary hair was a 1.2, 3 at the DQalpha

loci (V.6, P.1158), Murray is a 1.2, 3 at that loci, (V.6, P.1165), and the victim was a 1.2, 3 at the DQalpha loci. The State concedes this point.

It is now clear that the indictment was based on evidence that was excluded by this Court in Murray I and Murray II as having been tampered with or deemed misleading. The trial court erred in denying the Motion to Dismiss the Indictment and the Amended Motion to Dismiss the Indictment. Wherefore, Murray asks this Court to reverse this conviction and remand to the trial court to discharge Murray or, in the alternative, remand for a fifth trial.

DOUBLE JEOPARDY

The trial court erred by denying Murray's motion to dismiss based on double jeopardy. Murray has now been forced to face four trials. The prohibition against double jeopardy is fundamental. **Lippman vs. State**, 633 So. 2d 1061,1064 (Fla. 1994).

As Mr. Justice Black stated in **Green vs. United States**, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, *thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity,* as well as enhancing the possibility that even though innocent he may be found guilty.

(emphasis added.)

It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Appellant recognizes that typically a mistrial as a result of a hung jury or a retrial after reversal on appeal is not an instance wherein double jeopardy is implicated. However, there must be a breaking point, especially when the reasons for the reversals are due to the improper actions of the prosecution and the prosecution's witnesses.

The changes in testimony of the prosecution's witnesses have been addressed herein. In **Carsey vs. United States**, 129 U.S.App. D.C. 205, 208-209, 392 F.2d 810, 813-814 (1967), Judge Leventhal described how subtle changes in the State's testimony, initially favorable to the defendant, may occur during the course of successive prosecutions:

> [T]he Government witnesses came to drop from their testimony impressions favorable to defendant. Thus a key prosecution witness, the last person to see appellant and the deceased together, who began by testifying that they had acted that evening like newlyweds on a honeymoon, without an unfriendly word spoken, ended up by saying for the first time in four trials that the words between them had been 'firm,' and possibly harsh and 'cross.'

> We also note that the police officer who readily acquiesced in the two 'hung jury' trials that appellant was 'hysterical,' later withheld that characterization. This shift, though less dramatic, was by no means inconsequential in view of the significance of appellant's condition at the time he made a statement inconsistent with what he later told another officer.

Implicit in this is the thought that if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own. See **United States vs. Scott**, 437 U.S. 82 at 105, n.4 (1978), 98 S.Ct. at 2201, n.4 (dissenting opinion). It has also been said that "central to the objective of the prohibition against successive trials" is the barrier to "affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." **Burks vs. United States**, 437 U.S. 1, 98 S. Ct., at 214 (1978).

What is sadly true in Murray's case is that after each of this Court's rulings the prosecution's testimony has changed. As discussed herein, Evidence Technician Chase even admitted he changed his testimony about the two critical hairs he retrieved from the victim's body because he learned of the testimony of another witness. As discussed herein, Detective O'Steen and Evidence Technician Powers testified for the first time without the benefit of notes or reports to refresh the recollection that they recall separating evidence prior to it being analyzed thirteen years earlier. As discussed herein, FDLE analyst Wilson was the surprise witness who testified for the first time without the benefit of notes or reports to

refresh his recollection that thirteen years earlier he placed a critical evidentiary item in a plastic bag. Neither of the witnesses just mentioned were called to give this critical testimony in either of Murray's first three trials or the trial of co-defendant Taylor. Murray is further prejudiced because the last witness to see Murray prior to the offense is now deceased and the medical examiner was not healthy enough to testify at trial.

This Court has held that a State's expert witness misled the trial court in Murray I. This Court ruled that a second State expert witness performed sloppy lab work and tampered with a defense expert witness in Murray II. The prosecution should not be given a fifth bite at the apple. Murray should not be forced to run the gauntlet for a fifth time to see what other changes in testimony and surprise witnesses the prosecution will bring to bear on Murray.

The errors described herein were clearly harmful. There can be no contention that the error was harmless. Harmless error occurs when there is no possibility that the error contributed to the conviction. **State vs. Diguilio**, 491 So. 2d 1129 (Fla. 1986); **Murray vs. State**, 692 So. 2d 157 (Fla. 1997). The denial of such was an abuse of discretion. Therefore, this Court should reverse this conviction and remand to the trial court to discharge Murray.

V. THE COURT ERRED BY DENYING THE APPELLANT'S RIGHT TO INTERVIEW WITNESSES.

The Appellant filed a Motion to Compel Disclosure of Grand Jury Minutes (T. 240). The trial court ordered that the Grand Jury minutes/recordings be transcribed for the Defendant in the case at Bar. At that time, the State disclosed for the first time that the minutes/recordings were not transcribed and there was no transcript to be offered to determine if any competent evidence was presented to the jury to obtain the indictment. The failure to record the proceedings was violative of the Defendant's due process rights. In order to cure this violation Murray should have been allowed to interview witnesses to the unrecorded events.

In an attempt to discover the basis of the indictment against him, the Defendant then sought to interview the Assistant State Attorney present with the Grand Jury, and Lead Detective, O'Steen. Other than the actual members of the Grand Jury, the only witnesses who could assist this court in determining if there was any competent evidence presented to the Grand Jury were Assistant State Attorney Bernie DelaRionda and Lead Detective O'Steen. They have vital information as to how the evidence was presented before the Grand Jury. The trial court denied Murray's request to interview O'Steen. (T. 669-670). The court abused its discretion by denying the Defendant's request to interview the Grand Jury as allowed under Florida Statute 905.27. (T. 670).

When the trial court ruled that the defendant had good cause to have the Grand Jury testimony turned over by the prosecution, the burden of production shifted to the State. The State had the burden of giving Murray any and all information provided to the Grand Jury.

Therefore, the trial court's denial of Murray's request to interview the witnesses was error and clearly prejudicial in light of this Court's rulings in Murray I and Murray II. Therefore, this court should reverse this conviction and remand to the trial court to discharge Murray, or in the alternative, remand for fifth trial.

VI. THE EVIDENCE WAS INSUFFICIENT TO CONVICT GERALD MURRAY OF THE OFFENSES CHARGED.

At the end of the State's presentation of this case, Gerald Murray moved for judgment of acquittal as to all counts because the State had failed to prove a prima facie case as to the essential elements of the offenses charged. The trial court denied the Motion. Murray's renewed Motion for Judgment of Acquittal at the end of the presentation of the defense's case was denied by the trial court.

The trial court erred by denying the Motions for judgment of acquittal because the State failed to offer sufficient evidence to establish a prima facie case of first degree murder, burglary with an assault, and sexual battery. Each of the counts implicitly requires that the accused be present to participate in those crimes. The only evidence the State offered in an attempt to establish Murray's presence is

hair evidence that has been destroyed and the incredible testimony of a jailhouse informant. Neither fingerprints, blood or semen samples collected at the crime scene placed Murray at the scene. This evidence is insufficient to establish Murray's presence or participation in the alleged crimes. Even the State's expert could not discount the possibility that the hair from the crime scene could have come from someone other than Murray. He also could not positively identify the hair taken from the crime scene as belonging to Mr. Murray and cannot say how or when the hair got there.

This Court noted in **Long vs. State**, 689 So.2d 1055 (Fla. 1977), that evidence that creates nothing more than a strong suspicion that a defendant committed a crime is not sufficient to support a conviction. In Long, the evidence introduced to convict was "two hairs consistent with that of the victim; that a carpet fiber from the scene of the crime matched the carpet in Long's car; and that Long made vague statements to the effect that he had killed 'others'". Id. This Court stated that was insufficient to support a conviction. In **Horstman vs. State**, 530 So.2d 368 (Fla. 1988), this Court reversed a conviction that was based on the testimony of FBI analyst Michael Malone, approximately three years before the allegations of improper testing and testifying were raised. The Court stated the following:

> The strongest evidence implicating Horstman in Peterson's murder is the hair that was found on her body. Although hair comparison

> analysis may be persuasive, it is not 100% reliable. Unlike fingerprints, certainty is not possible. Hair comparison analysis, for example, cannot determine the age or sex of the person from whom the hair came. The state emphasizes that its expert, Agent Malone, testified that the chances were almost nonexistent that the hairs found on the body originated from anyone other than Horstman. We do not share Mr. Malone's conviction in the infallibility of hair comparison evidence. Thus, we cannot uphold a conviction dependent on such evidence.

Id. at 370.

The only other evidence the State offered to establish Mr. Murray's participation was the testimony of an eight time convicted felon, Anthony Smith, to whom Mr. Murray had allegedly made incriminating statements. Smith was rewarded by having the death penalty waived in his own case. (Tr. 1015). Smith admitted that he would do anything to get out of the death penalty "even if it meant deception". (V.15 P.1040). To put Smith's testimony into context one must know the facts of his crime. He pistol whipped a 77-year-old woman until the gun fell apart in his hand. (V.15 P.1023). He thereafter escaped form the Duval County jail, was captured and escaped from that facility before being captured again. While on the run, he was committing bank robberies and was arrested for possession of a sawed-off shotgun. He admits that he saw the facts of Murray's case on America's Most Wanted but says it wasn't until after he agreed to cooperate against Murray. (V.15 P.1035). He testified that the prosecutor was unethical in the handling of the investigation, and that his attorney, who is now a

Duval County judge, wasn't doing anything to represent him. (V.15 P.1033-34). He even told a federal judge that the federal judge "didn't know what the fuck he was doing". (V.15 P.1019).

He was even able to recite facts about the case that Murray never told him about, because the facts would just "pop into his head" (V.15 P.1046). It is this testimony alone that prohibits the trial court from having to dismiss the charges on a Motion for Judgment of Acquittal. **Long vs. State**, 689 So.2d 1055 (Fla. 1997).

Accordingly, Murray's death sentence should be vacated, his sentence reversed and remanded to the trial court with directions to enter an order of acquittal for these crimes.

VII. THE COURT ERRED DURING JURY SELECTION IN ALLOWING THE STATE TO STRIKE AN AFRICAN-AMERICAN JUROR WITHOUT PROVIDING A LEGITIMATE RACE NEUTRAL REASON.

The trial court erred when it allowed the prosecution to strike an African-American juror without giving an appropriate race neutral reason. Defense counsel argued that the reasons given were not race neutral, and when the defense had exercised all of its peremptory challenges, they requested an additional peremptory, and identified the juror they would indeed strike if they were granted an additional peremptory challenge. The court erred in allowing the prosecution's strike and by denying the defense's request for an additional peremptory.

When the prosecution chose to strike the African-American juror, the following colloquy took place:

> **Mr. DelaRionda**: Your Honor, we strike juror number 26, Mr. Jones.
> **The Court**: Give us a race neutral reason.
>
> **Mr. DelaRionda**: Yes, sir. His feelings on the death penalty. He first stated that he wouldn't give a number when asked by Mr. Block, I think it was.
>
> **Mr. Kuritz**: My notes are opposite. He said yes to both on Mr. Jones.
>
> **The Court**: You got any other reasons?
>
> **Mr. DelaRionda**: No, sir, just his feelings about the death penalty.
>
> **The Court**: I have a note that he agreed.
>
> **Mr. DelaRionda**: I thought he said it depends.
>
> **Mr. Caliel**: Your Honor, I believe he said - - for the record, I believe he said he agreed with the two questions that were posed by Mr. DelaRionda except his initial impression about the death penalty when he was asked if he was for or against it he depends and also refused to give a numerical response to Mr. Block's questions, and I believe his initial reaction on the word depend that would give us the challenge.
>
> **The Court**: Well, at this point I would tentatively allow it because I know Ms. Hobbs is a black female and Mr. Ramsey is a black male and you haven't moved to strike them so I will allow it for now and see what happens because I don't believe there is a racial pattern if that's your recollection. It may well be true. Mr. Kuritz.

(V11. P.333-334)(emphasis added).

Shortly thereafter, the defense had used all their peremptory challenges and requested an additional peremptory strike.

Mr. Block: We ask you to revisit the issue of juror number 26.

The Court: Mr. Jones, especially in light of the fact that Ms. Hobbs who is a black female and Mr. Ramsey who is a black male were not challenged by the State I will find the exercise of Mr. Jones was exercised for a race neutral reason.

Mr. Block: We would ask for an additional strike because we had to use a strike on number 25 Vaccaro who we believe should have been stricken for cause. The Court has already ruled on that. I am not re-arguing it but based upon the fact that he did vacillate and the Court ruled the way that it did on that issue with other jurors we were forced to use our strike with Vaccaro and I believe the law requires us to ask for an additional peremptory and we do so at this time.

The Court: Who are you going to use it on if I give it to you?

Mr. Kuritz: Actually Mr. Watson.

Mr. Block: Watson who got in an argument with me that the Court had to intervene on.

The Court: I don't recall that.

Mr. Block: That's the one who wouldn't answer my question what he meant by anything is possible.

The Court: Oh, no. You didn't get in an argument with him. You just asked the man the same question twice and he gave you the same answer which I thought was an entirely appropriate answer and I thought you were badgering so I put an end to it.

Mr. Block: And, Your Honor, for the record I understand. I respectfully disagree and don't think it was an answer, number one, an appropriate answer and, number, two, when you corrected me I guess or stepped in there was laughter in the courtroom and I have a problem with Mr. Watson.

The Court: I don't recall laughter in the courtroom, but in any event I will deny your request for an additional challenge.

(V.11 P.336-337).

The prosecution stated that their reason for striking Jones was "just his feelings on the death penalty." (V.11 P.333). Jones actually answered the prosecution's questions in the affirmative on the death penalty issues. The defense noted it and the court noted it, and it is evidenced by the transcript of the following discussion.

The questions the prosecutor was asking regarding the death penalty were two-fold. An example of these questions is as follows and immediately preceded the questions to the African-American juror:

> **Mr. DelaRionda**: Thank you. Mr. Clark, how do you feel about that, the first part? Could you sit as a juror and vote? If the State proves the evidence beyond a reasonable doubt that he is guilty could you vote guilty knowing that it could subject him to the death penalty?
>
> **The Prospective Juror**: Yes.
>
> **Mr. DelaRionda**: And in that second part if the aggravators and you hear the mitigators, if the aggravators outweigh the mitigators could you vote to recommend death?
>
> **The Prospective Juror**: Yes. (V.10 P.155).
>
> ……
>
> **Mr. DelaRionda**: Okay. Mr. Jones?
>
> **The Prospective Juror**: Yes to both. (V.10 P.163)
>
> ……

The defense renewed the previously made objections and did not accept the panel.

> **The Court**: Ms. Horne and our second alternate will be Mr. Wallace. Anything further before we bring in the jury?
>
> **Mr. Block**: Nothing.
>
> **Mr. Kuritz**: My client just renews previous objections to the panel that we made along the way and he does not accept the panel based on that.
>
> **The Court**: I understand. Okay. I was going to go ahead and read my opening remarks to the jury this afternoon. Do you want me in there to mention the defendant's right to remain silent?
>
> **Mr. Kuritz**: Yes, Your Honor.

(V.11 P.338).

Because the trial court erred in allowing the prosecution to strike an African-American juror without a valid race neutral reason, and erred by refusing to grant the defense an additional peremptory, this court should reverse Murray's conviction and remand to the trial court to discharge Murray, or in the alternative, remand for a fifth trial.

VIII. THE TRIAL COURT ERRED BY DENYING THE MOTION FOR MISTRIAL BASED ON JUROR MISCONDUCT.

The jury misconduct can be separated into four areas. First, the foreman Starkey. Second, the prayer meeting in the jury room. Third, Juror Ramsey not disclosing that he knew members of law enforcement and talking about the case prior to deliberations. Fourth, an agreement to find guilt only if there was an agreement to recommend life. After the guilt phase and before the penalty phase, Appellant moved for a jury interview. The jury at that time had found Murray

guilty of First Degree Murder. The foreman of the jury, Juror Starkey, was excused by the trial court because he admitted that he discussed the case with Chief of Detectives Mackesy of the Jacksonville Sheriffs Office (V.17 P.1404). Therefore, he was not allowed to serve during the penalty phase. However, Starkey also communicated with a witness in the case and spoke to a bailiff regarding prayer in the jury room.

It is undisputed that jurors should not, prior to the final submission of the cause to them, converse among themselves on any subject connected with the trial or form or express any opinion thereon. Moreover, the jury should not communicate or discuss the subject matter of the case with any third person, including any court official. **State vs. Hunter**, 358 So.2d 50 (Fla. 4th DCA 1978) cert. den. at 364 So.2d 886 (Fla.). The law is clear that communications between an officer of the court and the jury outside the presence of the parties and their counsel are improper and constitute grounds for reversal or a new trial. **Hunter**, supra. Officer Mackesy is a law enforcement officer, and the communication between Juror Starkey and Officer Mackesy is reversible error. Additionally, communication between a bailiff and jurors ordinarily constitutes reversible error regardless of whether the bailiff's answer is legally correct because the court alone is entitled to instruct the jury on the law and must do so in the presence of the entire jury. **Thomas vs. State**, 348 So.2d 634 (Fla. 3rd DCA). In **Thomas**, supra

case after being told by the foreman they were deadlocked 5 to 1, the bailiff instructed the jury that they had to reach a unanimous verdict. That constituted reversible error. In Murray's case, the bailiff instructed juror Starkey that they were allowed to pray. It is clear in this case that the Appellant demonstrated an impropriety extrinsic to the verdict. A defendant has the right to have the jury deliberate free from distractions and outside influences. **Livingston vs. State,** 458 So.2d 235 (Fla. 1984).

In **State vs. Hamilton**, 574 So. 2d 124 (Fla. 1991), this Court discussed whether a jury's recommendation during the penalty phase must be set aside because there were unauthorized publications in the jury room during deliberations. This Court adopted the harmless error test and held that "Defendants are entitled to a new trial, unless it can be said there was no reasonable possibility that the (unauthorized books) affected the verdict. Id. at 129 (quoting **Paz vs. United States**, 462 F.2d 740 (5th Cir. 1972)). The State has the burden of showing that the error was harmless. **State vs. Diguilio**, 491 So.2d 1129 (Fla. 1986).

In this case, there were outside influences that impacted the jury, and there is a reasonable possibility that these outside distractions affected the verdict. The trial court compounded the error by questioning jurors regarding whether the prayer affected their decision-making process. On inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matters which essentially

inheres in the verdict or indictment. See §90.607(2)(b) Fla. Stat. In **Hamilton**, supra, this Court held that the trial court must not inquire into a juror's thought process to determine whether the error is harmless. Rather, the trial court's inquiry "must be limited to objective demonstration of extrinsic factual matter disclosed in the jury room. **Hamilton**, 574 So. 2d at 129 (quoting **United States vs. Howard**, 506 F.2d 865 (5th Cir. 1975)). In this case, there is no doubt from the record that the trial court inquired into the juror's thought process and made its decision based on that inappropriate inquiry. Therefore, it cannot be said beyond a reasonable doubt that the error was harmless. **State vs. Diguilio,** 491 So.2d 1129 (Fla. 1986). Therefore, the conviction must be reversed. **Keen vs. State**, 639 So.2d 597 (Fla.1994).

Juror Starkey, the foreman during the guilt phase, committed several incidents of misconduct throughout the trial. In the middle of the trial, outside of the courtroom, he stopped and talked to one of the witnesses in this trial, James Richard Fisher (V.13 P.617). He testified, after the court inquired, that he talked to the trial witness for 5 to 6 minutes (V.13 P.620). During the time of the conversation, other jurors walked by and observed him. He had his juror button on his coat. The court then inquired of the witness, Mr. Fisher, who stated that all he said was "Hey man, how're you doing?" They were in front of the court building when they were talking, and he was probably halfway through his cigarette (V.13

P.614). Mr. Fisher said they did not talk about the case specifically. (V.13 P.611). The defense moved for a mistrial, which was denied.

Juror Ramsey, halfway through the trial, testified that coming back from lunch he told two other jurors the name O'Steen sounded familiar. (V.13 P.602). He described to the jurors that Detective O'Steen was someone he knew from the neighborhood. (V.13 P.603). At that time, T. C. O'Steen was brought before the juror and the juror testified that T. C. O'Steen was not the same person that he knew. (V.13 P.606). Still, the fact remains that he did not disclose that he knew police officers during jury selection, and he was clearly discussing the case with the other jurors. A review of the jury selection transcripts reveals that Juror Ramsey never mentioned that he knew any members of law enforcement. Defense counsel requested a mistrial or, in the alternative, to strike Juror Ramsey and replace him with an alternate. (V.13 P.776). A mistrial should have been declared regarding this jury misconduct, or in the alternative the court should have replaced Juror Ramsey with an alternate juror.

Juror Starkey got permission from the bailiff to pray during the deliberations. (V.16 P.1254) Juror Starkey also discussed the death penalty prior to the guilt phase in that he told a Jacksonville Sheriff's Officer that he could not sleep at night during the guilt phase because he was struggling with the death penalty. (V.16 P.1244,1265). The court held a limited jury interview.

Unfortunately, the Court sought to determine the thoughts of the jurors during the deliberations as well as their mental process contrary to **Keen vs. State**, 639 So.2nd 597 (Fla. 1994).

Additionally, based upon what the uniformed bailiff overheard, it was clear that the jurors came to an agreement that they would find the Defendant guilty in exchange for a life sentence. Murray recognizes that during the jury interviews, the court questioned each juror and they all testified they did not find the Defendant guilty in exchange for a life sentence. The majority of the jurors testified that they did not discuss a life sentence. However, one juror testified that he had discussions with another juror about the death penalty. (V.17 P.1376). The jurors involved were Joyce and Ramsey. Juror Joyce testified at the jury interview that prior to the vote of guilt one or two of the jurors in the case discussed that they did not feel comfortable about the penalty phase. (V.17 P.1359).

Juror Joyce testified that "one or two of the jurors had discussed or mentioned some apprehension about finding guilty of first degree murder, no mention of premeditation or felony either way, about convicting for first degree murder, and not necessarily feeling comfortable at that time about what the penalty phase would entail." Id. Juror Joyce's explanation of the deliberations during the guilt phase indicates that the other jurors minimized the significance of their verdict and/or penalty recommendation because the court would either concur, "or

for lack of better word, overturned, or overruled our recommendation for punishment." (V.17 P.1360).

During the jury inquiry, the court asked the jury if prayer affected their verdict. In doing so, the court committed reversible error by inquiring into the thought processes of a jury. see **Keen vs. State,** 639 So.2nd 597 (Fla.1994).

Based on the cumulative effect of the juror misconduct and the improper inquiry made by the trial court, Murray was denied his constitutional right to a fair trial. As such, this court should reverse this conviction and remand to the trial court to discharge Murray or, in the alternative, remand for a fifth trial.

IX. THE TRIAL COURT ERRED BY NOT EXPLAINING THE REASONABLE DOUBT JURY INSTRUCTION UPON REQUEST OF THE JURY.

The trial court erred by not further defining "abiding conviction of guilt" when the jury submitted the question in writing to the court. (V.16 P.1334). The jury needed and asked for guidance on the phrase "abiding conviction of guilt" within the reasonable doubt instruction. The court and the defense discussed various options to assist the jury, but the prosecution objected. (V.16 P.1336-1338).

It is not surprising to learn the jury needed assistance with the abiding conviction of guilt language. The language of an abiding conviction of guilt is similar to the language found to be unconstitutional in **Dunn vs. Perrin,** 570 F.2d

21 (1978). An insufficient reasonable doubt instruction requires a reversal. **Sullivan vs. Louisianna**, 508 U.S. 275, 113 S.Ct. 2078 (1993). The jury in Murray's case was clearly seeking guidance, and it was error not to provide such guidance. **Archer vs. State**, 673 So.2d 17 (Fla. 1996). The Standard Jury Instructions do not adequately define the phrase "abiding conviction of guilt" and the trial court did not offer any additional guidance.

Therefore, this Court should reverse this conviction and remand to the trial court to discharge Murray or, in the alternative, remand for a fifth trial.

X. THE TRIAL COURT ERRED BY ALLOWING THE TESTIMONY OF THE FOLLOWING WITNESSES TO BE READ TO THE JURY OVER DEFENSE OBJECTION:

(A) MEDICAL EXAMINER TO BE READ INTO EVIDENCE.
(B) JUANITA WHITE.

(A) MEDICAL EXAMINER:

The State filed a motion to read Dr. Floro's former trial testimony (R. 156). The trial court granted this motion over the defense's objection (R. 159). The Court allowed the testimony of the medical examiner from a previous trial to be read into evidence. Over the Defense's objection, the medical examiner's testimony was read to the jury, and by reading the testimony, it was impossible to determine which injuries he was describing. The Defendant was denied due process because he could not properly cross-examine the doctor on the issues that arose during this trial. Additionally, the court was able to determine that the

testimony was from a previous trial. Even the trial court realized how prejudicial that would be to Murray. (V.5, P.852). Due to the nature of the medical examiner's testimony, it was impossible to preclude the jury from knowing there was a prior trial. The testimony included directions for the medical examiner to point to injuries in the photographs that the person "sitting in" for Dr. Floro could not do.

As to the issue of sexual battery, the Florida Department of Law Enforcement found no presence of semen in direct contradiction to the testimony of the medical examiner. The Defendant's confrontation rights were violated in that counsel was unable to cross-examine the doctor on these critical issues because his testimony was simply read to the jury. **Douglas vs. Alabama**, 380 U.S. 415 (1965).

The Appellant moved for a mistrial connected to the testimony of Dr. Floro being read to the jury and argued that it was clear that the reading was from a prior trial. The motion was denied. The jury knowing that the Defendant had been previously prosecuted for these crimes is clearly prejudicial. The cumulative effect of this error combined with the others addressed herein prejudiced Murray's right to a fair trial.

As pointed out by trial counsel in the motion hearing, "we've learned through the trials that there's been a change of the testimony throughout [the case]

to match the State's theory of the case." (V.5 P.673, L. 8-12). Even the previous trial testimony that was read to the jury demonstrates that Dr. Floro previously testified that the injuries were consistent with one knife being used by one assailant. (V.13 P.591). However, that testimony was changed to match the theory of the prosecution's case, that two assailants were present.

Dr. Floro testified unequivocally in deposition that the wounds to the victim came from one knife. The following testimony was read to the jury:

> Were you able to in your medical opinion [determine] if the same knife was used to make the abdomen and/or – your response: Well, the wounds all looked the same in size so most possibly they were all made by one type of knife. One knife. The next question posed was, Does that go for even the neck that has a large gash in it? Well, that is entirely different from the rest. It's large, you know, you can enlarge a wound by moving your hand or movement of the victim would enlarge the wound.

The testimony went further into the issue of one knife:

> The following question: Now, what you're saying is there may be two scenarios, one, there could have been another knife that was used, a different type of knife? Do you recall your response: No, I didn't say that. **I will stick to one knife.** And the reason why one wound is larger than the rest is probably because the movement of either the assailant or by the victim. But you can't exclude one knife, can you? No, I cannot. There was no testimony about any scissors or anything of that nature, was there? No, sir. When was the first time scissors ever came into question, sir, that you're aware of? I don't remember.

(V.13, P.591-592) (emphasis added).

Just like Wilson who testified about the plastic bag, Dr. Floro couldn't remember the first time anyone ever mentioned scissors to him either. (V.13,

P.591-592). Murray respectfully submits this change in testimony was one more example of the government's witnesses changing their testimony to fit the prosecution's theory of the case. The cumulative effect of the change in testimony of Chase, Wilson, Dizinno and Floro greatly prejudiced Murray's right to a fair trial.

(B) JUANITA WHITE:

The State filed its Motion to read Juanita White's former trial testimony. (R.156). The Defense objected but was overruled. The testimony was not relevant to the crime and was more prejudicial than probative. The sole reason the State presented this evidence to the jury was to prejudice the Defendant. The testimony that was read described Juanita White's dog chasing the Defendant and Taylor, and that she got her gun to protect herself.

The court erred in denying the Motion for Mistrial when White's testimony was read. (V.13 P.646). This violated Murray's cross-examination rights. **Douglas vs. Alabama**, 380 U.S. 415 (1965). Further, the testimony lacked any probative value and was only used by the State to show bad character and to inflame the passions of the jury. The Appellant moved for mistrial regarding the testimony of Juanita White being read to the jury and pointed out that from the testimony it was clear they were reading from a prior trial (V.13 P.660). The Motion was denied (V.13 P.775).

The jury was left with the impression that White was a neighbor of the victim and, therefore placing the Defendant in the immediate vicinity of the crime scene. In fact, they do not live close to each other. The cumulative effect of this error prejudiced the Defendant's right to a fair trial. Therefore, this court should reverse this conviction and remand to the trial court to discharge Murray, or in the alternative, remand for a fifth trial.

CONCLUSION

For all of the foregoing reasons, the convictions and sentences in this case should be reversed. For the Florida death penalty process to have any integrity, this Court should not allow a citizen of this State to be subject to execution based on the evidence in this case. Murray respectfully requests this Court remand with instructions to discharge or, at a minimum remand for a fifth trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, by mail, this 24th day of October, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is typed in Times New Roman font, and it is in size 14 font.

_____

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