IN THE SUPREME COURT OF FLORIDA

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

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GERALD D. MURRAY
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

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

# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT
## FRAUD ON THE COURT AND PROSECUTORIAL MISCONDUCT

The State argues throughout its answer brief ["AB"][1] that appellate counsel "repeatedly and groundlessly [assaults] the integrity of the prosecution below" [AB 13, 16, 17, 19, 24], and that such error is unpreserved for review [AB 24]. As deception and guile are by nature surreptitious, this Court should not expect the trial record itself to be replete with evidence of the State's wrongdoing. Still, to the extent that misconduct was manifest in the state's presentation of its case at this fourth trial, the record reflects as much, as will be re-addressed *infra*.

This Court has held that "orders, judgments or decrees which are the product of fraud, collusion, deceit, mistake, etc. . . may be . . . acted upon *at any time*. This is an inherent power of courts of record, and one essential to insure the true administration of justice and the orderly function of the judicial process." State v. Burton, 314 So. 2d 136 (Fla. 1975)(italics in original). Moreover, the central concern is "not with the correction of errors in the trial of cases, or a trial court changing its mind, but with the power of a court to protect itself and the true administration of justice from fraud practiced upon it." Id. Finally, "a final order procured by fraudulent testimony *against a defendant in a criminal case* is deserving of *no protection,* and due process requires that he be given every opportunity to expose the fraud and obtain relief from it." State v. Glover, 564 So. 2d 191 (Fla. 5TH DCA 1990)(following Burton).

[1] Appellant adopts Appellee's notation system.

Appellant filed a second motion for this Court to relinquish its jurisdiction to the trial court for an evidentiary hearing regarding the fraud Appellant alleges occurred throughout the proceedings below, apparently for over a decade. Based on the State's response, this Court denied that motion, deeming Appellant's posture more appropriately addressed post-conviction. See Current Case Docket, 11 January 2007, 27 March 2007.

Florida Rule of Appellate Procedure 9.040 provides:

> (a) *Complete Determination.* --In all proceedings, a court shall have such jurisdiction as may be necessary for a complete determination of the cause.
>
> * * *
>
> (c) *Remedy.* --If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek proper remedy.
>
> (d) *Amendment.* --At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties.

Justice inherently requires that any court, especially the highest tribunal of a state, concern itself with the substance of the matters before it, regardless of the form or procedural vehicle by which relief is sought. The foregoing authority makes plain this notion.

To substantiate the application of Florida Rule of Appellate Procedure 9.040(d) regarding whether either party's substantial rights will be effected, the State here can claim no substantial right, which could elevate

the State's position to one superior to Appellant's. For a death sentence to have any integrity, it cannot be grounded upon fraud.[2]

## SUMMARY OF THE ARGUMENT

All issues germane to Appellant's argument regarding ISSUE I are eligible for review; the instant record shows that prosecutorial misconduct was rampant at all of Murray's trials. Because the facts have changed, Murray II is not the law of the case, and therefore the trial court's

[2] In each of Murray's four trials, the State's most critical witness was a co-escapee of Appellant's to whom Appellant allegedly confessed his participation in the crime underlying the four trials, one Anthony Smith. Prior to the last three of Appellant's trials, Smith was coerced into testifying against Murray upon the State's empty threats of revoking Smith's convictions and sentences and seeking the death penalty against Smith; he was already serving a sentence of life.

After Murray II, Smith was aware of the import of his testimony to the State's case, and while in prison he also got wise that the State's prior threats indeed were empty. For these reasons, he refused to testify again against Murray in 2003. The State resorted to a deal with Smith for his testimony, which the State denied in its court-ordered-Answer to Smith's motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850.

As part of his 3.850 proceeding, Smith attempted to subpoena Appellant and his Counsel. Neither Appellant nor his lawyer was ever apprised by any appropriate party of Smith's 3.850 proceedings. These proceedings began after Appellant's fourth trial and conviction when a disillusioned Smith sought to hold the State to its end of their bargain for Smith's fourth testimony against Murray. As such, these events are not a part of the basic trial record on appeal. Regardless, these allegations are real, and they are absolutely material to justice for Murray. Appellant has previously provided this Court with the materials from Smith's proceedings which substantiate these claims.

In light of the activity regarding Smith since Murray's fourth trial and during the pendency of this third appeal, the misconduct of the prosecution below deserves deeper scrutiny by this Court. Appellant now replies directly to the assertions in the State's Answer Brief. The implications of the full ambit of the prosecutorial misconduct are inextricably intertwined with the matters which luckily, in the interest of justice, were brought to light on the trial record on appeal.

admission of evidence slide Q-42 was unreasonable. Evidence technician Chase collected exactly two hairs from the victim's body, and he changed his testimony across trials due to prosecutorial misconduct to accord with the State's evolving theory of the case.

Applying governing law to the discrepancies in numbers of hairs illustrates how Murray has shown a probability of tampering with Q-42, which the State has failed to overcome. As two hairs are the only physical evidence allegedly linking Murray to the scene of the crime, the manifest error was harmful and related directly to the verdict.

Similarly, regarding ISSUE II, all issues are eligible for review. Admission of evidence slide Q-20 was unreasonable due to the prosecution's failure to account fully for discrepancies regarding the chain of custody. The State intentionally concealed the accountability of an extra plastic bag among the evidence, and its explanation came after the trial court erroneously concluded that the chain had been established, admitting the evidence. Even despite the late explanation of the extra bag, the State never explained the disappearance of at least one other bag. The alleged second hair of the defendant was on Q-20, and the two hairs are the only physical evidence linking Murray physically to the crime. The error therefore was harmful.

Regarding ISSUE III, the trial court's limitation of the extent of defense counsel's cross-examination of a key state witness regarding a central issue at trial was clearly erroneous and prejudicial. Murray's known hairs were in the FBI lab at the time that the entire lab was under

investigation. The court unreasonably relied upon the misleading testimony of FBI agent Dizinno, deciding an issue of credibility which should have been left for the jury through cross-examination.

For ISSUE VII, regarding jury selection based upon the plain record, the State failed to provide a race-neutral reason for striking an African-American prospective juror. Appellee's distinctions regarding the cases cited in its answer brief only help illustrate the error. The relative races of the subjects are not dispositive, and the assertions of the prosecution below to strike Mr. Jones were unfounded.

## ISSUE I: ADMISSION OF SLIDE Q-42 INTO EVIDENCE

### A: Preservation

The State has conceded the preservation of this issue as a matter of evidentiary admissibility [AB 15-6]. The State claims that the issue has not been preserved for Constitutional purposes, or for claiming prosecutorial misconduct.

In DeFreitas v. State, 701 So. 2d 593 (Fla. 4TH DCA 1997), a new trial was granted where the cumulative effect of prosecutorial improprieties denied appellant his constitutional right to a fair trial. Invoking "fundamental error, which can be considered on appeal even without a proper objection or preservation in the lower court [Id. at 596], the court held that "when the prosecutorial argument taken as a whole is 'of such a character that neither rebuke nor retraction may entirely destroy their sinister influence . . . a new trial should be granted, regardless of the lack of objection or exception.'" Id. *citing* Ryan v. State, 457 So. 2d 1084

(Fla. 4TH DCA 1984) (internal citation omitted), *Review denied by*: State v. Ryan, 462 So. 2d 1108, (Fla. 1985). Further,

> "prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether 'the error committed was so prejudicial as to vitiate the entire trial.' [internal citation omitted] The appropriate test for whether the error is prejudicial is the 'harmless error' rule."

Boatwright v. State, 452 So. 2d 666 (Fla. 4TH DCA 1984).

Finally, this Court has held that "due process requires that fundamental fairness be observed in each case for each defendant. Our system of justice depends on this basic precept. In this case, the prosecutor's "over zealousness in prosecuting the State's cause worked against justice, rather than for it." Gore v. State, 719 So. 2d 1197 (Fla. 1998)(citing Ryan, 457 So. 2d at 1091).

Murray implores this Court to examine the conduct of the prosecution below as a whole.[3] Coercing a witness[4] into testimony against a defendant is fraudulent and constitutes plain error[5] that offends due process and vitiates the entire trial. As its key witness, the State cannot argue that false testimony from Anthony Smith incriminating the Defendant was or could have been harmless beyond a reasonable doubt. See Knowles v. State, 848 So. 2d

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[3] There was no objection on the record at this fourth trial to prosecutorial misconduct. It was only upon review of the transcripts of all four trials and this Court's rulings in Murray I (692 So.2d 157 (Fla. 1997) and Murray II that the misconduct of the prosecution became so apparent.

[4] Regarding Anthony Smith, *supra* in footnote 2.

[5] The error is plain when finally brought to light. Objection below is impossible when the State obstructs justice.

1055 (Fla. 2003) (If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful). As prosecutorial misconduct necessarily involves Constitutional implications [IB 33-5, cases cited there; DeFreitas, Ryan, Gore, *supra*], since Appellant shows the impropriety by the prosecution below, both aspects of this issue are ripe for review. DeFreitas, *supra*. Furthermore, Appellant will demonstrate the aspects of the proceedings below actually in the record which manifest prosecutorial misconduct. In viewing the prosecution's conduct as a whole, this Court should give new consideration to the changes in testimony of witnesses Chase [IB 20-3], Wilson [IB 45-7], Floro [IB 97-8], and Dizinno [IB 23-7], discussed *infra*.

**B: Murray II controls**

Appellant agrees with Appellee's presentation of the controlling standard of Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1266 (Fla. 2006) [AB 17]. It is with the State's application of this law to the facts in the record that Murray disagrees, as well as the claim that arguments regarding changes in testimony "were not presented to the trial court [and that] the record remains undeveloped and those claims are unpreserved" [AB 18].

Appellee's bulleted summarization of the facts, just as the prosecution's case below, does nothing to explain the "gross discrepancies" [AB 31] present in both the testimony of Chase and Dizinno. This point is better served *infra*, when discussing Appellee's interpretation of the record as to whether the testimony of either witness changed materially.

**C: The trial court's ruling was unreasonable**

Murray agrees with the governing law on this sub-issue as well [AB 19-20], but disagrees with the State's outcome. The rulings of any court cannot be reasonable when founded upon evidence swathed in deceit. Moreover, the unreasonableness of the trial court's admission of Q-42 in light of the conflicting testimony of Chase and Dizinno is apparent based on the record.

**D: The specific should clarify the general, and there *were only 2 hairs***

Appellee characterizes the inconsistencies in the testimony of witness Chase regarding the number of hairs retrieved from the victim as immaterial [AB 21]. Considering that these two hairs are the only physical evidence allegedly linking Murray to the scene of the crime, any inconsistency is sadly extremely material[6].

The State supplemented the record with Chase's deposition from the separate trial of Murray's alleged co-conspirator in 1991. There, the State shows that Chase "has been using [the word] "samples" from the onset of litigation of this murder" [AB 21]. Appellee alleges further that the witness *never* has been sure as to the number of hairs [AB 21-2], emphasizing "**Some,**" "**hairs from the leg and the chest**," "**I think**," and "**would be**" from different excerpts of Chase's testimony over many trials.

Appellee argues that Chase characterized the evidence he seized from the chest and leg of the victim as "samples" since the onset of litigation

[6] The two hairs cannot be said to be Murray's to the exclusion of all others. It is only that Murray cannot be excluded as a possible donor based on a microscopic comparison.

in 1991. However, Appellee fails to acknowledge that Chase was never even asked during that deposition[7] from the Taylor case, *precisely how many* hairs he collected. He stated in 1991 merely that the two distinct samples came from two areas of the victim [AB 21]. Two hair samples, as he testified in Taylor's 1991 trial, and without clarification *at that time* as to *precisely how many* hairs he collected, is perfectly consistent with Chase testifying in 1994 at Murray's first trial that he collected *two* [SR1 7].

> A Yes, sir, **I think** it was one from the left leg and one from the chest? [sic, as to the "?"]
> Q So it **would be** a total of two?
> A Yes.

[AB 22, emphasis therein].

The State woefully equivocates this last excerpt. According to Appellee, a simple follow-up question asked by then-defense-counsel, Roberto Arias, somehow casts a cloud of doubt on the quality of the recollection of the witness. Use by Arias of the incorrect mood of the verb "to be" by asking "So it **would be** a total of two," instead of more clearly and properly asking "So it **[was/had been/is]** a total of two" is unconvincing that at Murray's first trial in 1994, Chase was anything but certain that he had collected two hairs.[8] The follow-up clarified the number.

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[7] Chase's testimony referenced by Appellee was from a deposition taken by Taylor's attorney. Murray had not been indicted, and thus he was not represented. Taylor's counsel apparently did not believe it to be a critical issue in light of the overwhelming evidence of Taylor's guilt. As a result, a detailed inquiry regarding the precise number of hairs did not take place until Murray's first trial.

[8] That Chase used tweezers to collect the hairs [IB 17; SR1 4-8] corroborates that he collected only two. A clump of hair would not require such.

Appellee continues to explain Chase's inconsistencies by citing this time to the record of the 1998 trial, when the *prosecution first attempted* to cast doubt on whether there were exactly two hairs [AB 22-3, citing SR1 44-5]. Because Appellant has just clarified that the State's reference to Chase's 1991 testimony regarding "hair samples" does not cast doubt on *precisely how many* hairs Chase collected, the State's juxtaposition of this 1998 excerpt is equally ineffective to show that Chase "was **never** certain how many hairs he put in the envelope" [AB 24, double-emphasis therein].

In fact, due to the Attorney General supplementing this record on appeal with the Chase's 1991 deposition – "the onset of litigation of this murder" – it is now crystal clear that it was the *prosecution* who obfuscated any and all testimony ever given by Chase regarding this crime. Supporting this notion is the absence of objection at Murray's 1994 trial regarding Chase's recovery of two hairs [SR1 7], as well as the different explanation in 1994 as to the difference in numbers of hairs examined by Dizinno.[9]

The most important testimony of all was Chase's testimony from this fourth trial [AB 23-4]. Evidence Technician Chase again testified he collected two hairs from the body of the victim [V 799]. The following

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[9] 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." [IB 18; SR1 588]

questions and answers were given in this trial, confirming Chase's testimony in 1994 at Murray's first 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[10] 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**.

[IB 21-2; Emphasis added].

All of the prior confusion attributable to Chase regarding how many hairs he collected has been the result of prosecutorial obfuscation. Defense counsel's cross-examination of Chase at this fourth trial serves to clarify that indeed he was certain in 1994 of his having collected only two hairs. Revisiting whether Murray II controls, Appellant has shown that indeed there *has* been a "change in the facts on which the mandate was based"

[10] During the first of Murray's four trials.

with regard to testimony of Chase. Engle, *supra*. For that reason Murray II does *not* control as to the admissibility of slide Q-42.

Revisiting the issue whether the trial judge was unreasonable in admitting Q-42, Appellant's second explanation as to the blatant inconsistencies regarding Chase's testimony conclusively shows that admission of this evidence was unreasonable. This point will be more apparent after Appellant's addressing the testimony of Dizinno, *infra*.

The prosecution has been the party responsible for the inconsistencies in the testimony of Chase. This is material to the overall nature of the prosecutorial misconduct that has plagued these proceedings for over a decade. Indeed, it formed the grounds for this Court's determination in Murray II that no probability of tampering had been established, which Murray has now shown should not be the law of this case respecting this issue.

**E: Any inference regarding misconduct by the prosecution below is not unreasonable, and the law cited by Appellee for this sub-issue applies only to its own hypothetical set of facts**.

Appellant takes issue with the following bulleted statements of Appellee, as they are meant collectively to excuse the State's misbehavior.

- Defense counsel was provided the full opportunity to cross-examine Chase regarding his memory and prior testimony (See V 798-801, 803-804; XII 523-5, 527-8) [AB 24]

First, these separate citations to the record by the State are to instances where identical testimony was first taken in a deposition to perpetuate testimony, and then recited to the jury at trial. Second, defense counsel effectively cross-examined Chase, *clarifying* years of prosecutorial

obfuscation regarding his prior testimonies, as shown in earlier rebuttal to prior sub-issues herein.[11] The State would have inquired if they did not already know why Chase changed his testimony.

- There is no indication that the other testimony was in any way misrepresented to Chase [AB 25].

This meritless assertion completely leads one astray from the point: Whether other testimony was accurately represented to Chase is not the problem; that other testimony was represented to him *at all* is the crux of the issue.

- Whatever specifically happened would have been in the nature of refreshed recollection[12] and not an attempted introduction into evidence of prior recollection recorded, Compare §90.803(5), Fla. Stat. [AB 25]

The very wording of this statement shows that the Appellee does not even know what happened, and therefore is completely without merit.

- There was no prosecution attempt to place in front of the jury the content of a prior writing or another witness's testimony under the guise of refreshing recollection [AB 25]

Again, this citation is irrelevant and without merit. One should not expect that the prosecutor would be so bold as to perform such an action in open court and on the record.

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[11] Appellee's claim that "defense counsel was able to lead Chase into agreeing that when 'he began this case and this investigation several years ago,' he 'thought' that there were two hairs" [AB 23-4] is inaccurate and therefore irrelevant. Chase had already conceded earlier in the same testimony [V 799] that there were two. Defense counsel did not "lead Chase into agreeing" with anything but what Chase had already said. Quite to the contrary, the prosecution – perpetually the party to obfuscate Chase's testimony [*supra*] – on re-direct examination "was able to lead Chase into agreeing" that he could not remember how many hairs were present [V801-2].

[12] Footnote in Answer Brief omitted.

Even without a perfect record, most disturbing and central to this issue is that the record *does* show Chase was exposed to and influenced by prior testimony of anyone *at all*, and as a result, his testimony "changed":

> 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**.

[AB 21; V 799]

Here, a State's witness openly admits on the record that he changed his testimony after learning that other testimony was potentially inconsistent with his. This change in testimony was related to the most important issue in the entire trial. This was not a change on a collateral issue. Whether the State itself corrupted this witness[13] may be material to a claim of direct prosecutorial misconduct[14], but it is irrelevant to the miscarriage of justice which the perpetual disparity in testimony of this witness has caused[15] and continues to cause for Murray. Due process has plainly been

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[13] In light of the proceedings below overall, across multiple trials, it is reasonable to infer that the prosecution instituted the changes in the testimony of Chase. Since the reversal on appeal of Murray's first trial, and continuously since then, the State has had motive to alter its case in chief to obtain an irreversible conviction.

[14] Appellant maintains that the proceedings below, on and off the record, are replete with prosecutorial misconduct.

[15] Accord: Murray II's finding of no tampering, corrected now in light of Appellant finally clarifying on this appeal that Chase actually retrieved only two hairs, bolstered even by testimony from Taylor's trial supplemented by the State herein.

insulted, and the integrity of Murray's death sentence is tainted.

Moreover, the prosecution did engage in express misconduct on this record. Murray has shown that any discrepancy in Chase's testimony was due to obfuscation by the State beginning with Murray's 1998 trial. Yet, the prosecution has been on notice since 1994[16] that Chase conclusively retrieved only two hairs. The testimony in the 1991 deposition in the Taylor case was clarified by Chase and fully addressed in 1994 that he retrieved two hairs. In light of the prosecution's repeated offer into evidence of known false testimony,[17] the State has violated Giglio. See Guzman v. State, 868 So. 2d 498 (Fla. 2003)[18](enunciating Giglio's application in Florida). To suggest the State can continue to change testimony, but the defense can cross-examine on that change is preposterous. It is improper and should not be allowed.

The resulting prejudice is apparent. This Court upheld the admission in 1999 of Q-42 in Murray II.[19] As a direct result of that decision, Q-42 again was admitted in this fourth trial. It purportedly contains hairs that are microscopically consistent with Murray, which is the only physical

[16] Contra: [AB 27] that defense was on notice since at least 1998 regarding evidence technicians and Dizinno.

[17] In 1998, 1999, and 2003.

[18] Appellant cites Guzman for its legal principle, not its factual similarity.

[19] Appellant does not challenge this Court's previous ruling then or now, but this clarification of the perpetual wrong-doing by the state is what allowed this court's decision in Murray II. For this reason, "a final order procured by fraudulent testimony *against a defendant in a criminal case* is deserving of *no protection,* and due process requires that he be given every opportunity to expose the fraud and obtain relief from it." Glover, *supra*.

evidence that exists possibly to put Murray at the scene of the crime. The hairs cannot even be said actually to be Murray's.

In Archer v. State, 934 So. 2d 1187 (Fla. 2006), regarding a Brady violation for suppression of evidence, this Court "held that the State is not considered to have suppressed evidence if such evidence was already known to the defense," (*citing* Maharaj, 778 So. 2d at 954). By analogy this Court might conclude that because the defense also was on the same notice as the State since 1994, the defense should not complain of the prosecution having put on false testimony. Such a conclusion would be incorrect. Defense counsel at each subsequent trial elicited what has looked until this time as a mere inconsistency. Moreover, that the defendant would be able to show through cross-examination and impeachment that particular evidence of the State is false does not obviate the prosecutor's duty to refrain from presenting known false testimony in the first place.

**F: Even if Dizinno did not change his testimony, there still has never existed a solid chain of custody**.

The State expresses confusion as to "what prosecution theory" to which Dizinno changed his testimony [AB 26][20]. Regarding Q-42, the State's specific theory is that chain of custody has been established, despite the conflicting and altered testimonies of Chase and Dizinno.[21]

[20] The theory as it relates to the hairs is that the numbers must match. If Chase says two hairs and Dizinno says 5–21 hairs, there is a problem. Thus, Chase must change his testimony to allow "wiggle room" to allow the introduction of this evidence. Thus, we now have "hair samples".

[21] Again, any reliance on Murray II Appellant has shown to be erroneous.

Appellant clearly stated in his initial brief that at Murray's first trial, the State's explanation for the discrepancy in number of hairs was not that Chase was wrong or that he was not sure of his testimony. 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."

[IB 18; SR1 588]

This brief presentation attempted to show a lack of tampering. It did not discuss hairs or hair "samples", or any disparity between Chase and Dizinno.

Lack of surprise due to prior notice to Defendant based on Dizinno's recurring testimony[AB 26-7] does not cure the error below, which Appellee's silence implicitly acknowledges was preserved for review [IB 26-7]. First, Appellant agrees that the quantity of hairs to which Dizinno has ever testified [AB 26] has consistently remained several, and in any event more than two; it is the disparity between quantities recalled by Dizinno *vis a vis* those recalled by Chase that is the problem. Second, even if "it was customary at the time for the analyst or an FBI technician who works for the analyst to open the submitted evidence and mount it" [AB 28], the respective analysts and technicians regarding Q-42 have snapped the chain. Their names and observations must be ascertainable; here they are not. Appellant discusses this second point first.

The State claims incorrectly that chain of custody was established with reference to testimony by Dizinno in 1998 or 1999 [AB 26-7], and his lengthy explanation given for the first time inconveniently *13 years later* respecting the "standard procedure for a technician under his supervision" [AB 27]. It is immaterial whether Dizinno has testified precisely who was his technician at the time [AB 29].[22] What matters here is *this person still has not testified – **EVER***.[23]

Without this testimony, the State still has been unable to explain the unmistakable discrepancy between the number of hairs as testified by Chase and Dizinno. The State has failed to carry its burden, in the face of probable tampering, of establishing a sufficient chain of custody, or providing other evidence that tampering did not occur. Murray II, 838 So. 2d at 1082 (cases cited therein). The prosecution below offered absolutely no other evidence to explain this blatant inconsistency. Aside from the shattered chain of custody regarding Q-42, the gross discrepancy between the numbers of hairs asserted by Chase and Dizinno is even more unsettling.

**G: The State's attempt to frustrate Appellant's legal argument only solidifies its applicability**.

Peek v. State, 395 So. 2d 492 (Fla. 1980) is the applicable case, and

[22] Murray maintains that it is still disturbing, nonetheless, that Dizinno only now has clarified this, and Appellant offers that it casts even greater doubt on Dizinno's credibility.

[23] Further compounding the error, indeed obliterating the chain link-by-link, is the certainty that Dizinno did not put his own initials on anything which would establish that the evidence was always under proper supervision [IB 25-6; AB 27].

Appellant has shown that Q-42 should be inadmissible due to probable tampering. That Chase retrieved exactly two hairs as samples in this case [*supra*], and that Dizinno acknowledged there were *at least* five [IB 23-4; XIV 916][24], is a material disparity which still remains unexplained. The only plausible explanation from this record[25] is an inference of tampering.

The State looks to Helton v. State, 424 So. 2d 137 (Fla. 1ST DCA 1982), hoping to find support to excuse the prosecution's incomplete establishment of a chain of custody, in which the court based its holding on defense counsel's failure to '"pursue any cross examination on' it 'or otherwise explore' it" [AB 30]. Here, defense counsel thoroughly pursued and explored, and ultimately uncovered and brought to light, the gaping differences between recollections of witnesses Chase and Dizinno.

Appellee's distinctions of other cases are incorrect or immaterial when considered against Dodd v. State, 537 So. 2d 626 (Fla. 3RD DCA 1988) and Cridland v. State, 693 So. 2d 720 (Fla. 3RD DCA 1997). Appellee's treatment of Dodd supposes that "[h]ere, there were no 'gross discrepancies'" [AB 31]. Appellant submits that indeed there is a gross discrepancy. The number two is less than one-half the number five, or conversely, the number five is

[24] It is important to note here that the context of Dizinno's testimony at XIV 907-9 regarding Q-42 concerns only those hairs that were retrieved by Chase from the leg and chest of the victim. Dizinno had just testified [XIV 905] that there were 46 total questioned items. Appellant wishes to avoid any possible confusion that the total number of 46 questioned items could somehow be linked to having come from Chase's hair "samples" from the leg and chest of the victim. In sum, of 46 total questioned items, exactly 2 came from the chest and leg of the victim.

[25] The State still has not called the evidence technician, whoever s/he may have been, to account for the forged initials.

more than twice the number two.[26] Using Cridland, in which "there was 'conflicting evidence as to the quantity of the cocaine seized,'" the State claims, "[h]ere, there is no conflict" [AB 31]. Even if this Court would disagree with Appellant regarding Dodd that two versus five[27] is a "gross discrepancy," the Court must admit that such *at least* is a conflict. Two versus five is huge when we are discussing hairs and microscopic evidence in a death case with no other physical evidence.

**H: Indeed, Appellant has shown a probability of tampering**.

Only an inference of tampering can explain on this record the disparities in the numbers of hairs.

**I: All the error has been quite harmful**.

The State's rendition of the circumstantial evidence in its bulleted conclusion is competitively alluring. Appellant does not dispute the admissibility of any of this evidence, but takes issue with two of these conclusory statements.

- Murray, **in essence**, admitted that the crime-scene hair was his when he responded to the Detective's statement that the hair matched Murray's by stating that the police should have gotten the results back last year (See XV 957). [AB 33, bold emphasis added]

Even in context on this record, this statement of Murray to a detective has no essence whatsoever. The State fails to explain the inferential leap to call it an admission by Murray that the hair was his. The detective

[26] Five is the more conservative number propounded by the State's own witness: Dizinno acknowledged there could have been as many twenty-one!

[27] Or, *twenty-one*!

himself testified to Murray's basis of knowledge for the hair's presence, as well as Murray's account of how the hair might have arrived there [XV 957-60].[28]

- Evidence indicated that one assailant was sloppy and another assailant was somewhat thorough in cleaning up: No usable latent fingerprints, and there even were no victim's prints on many household items where they would be expected (citations omitted) [AB 33].

Having just admitted the issue is "whether Murray was a co-perpetrator" [AB 33], the State is quick to conclude that there must have been one in the first place. The lack of fingerprints does nothing to show that Murray was even there. Indeed, it obviously supports the notion that he was not.

**Conclusion**

Murray contends that all issues germane to slide Q-42 were preserved below. Appellant implores this Court to consider all of the proceedings below in their fullest context. The rampant prosecutorial misconduct is fundamental error that needs no objection for preservation, and it inherently carries constitutional implications.[29]

The persistent offering into evidence of Chase's false testimony is disappointing. The court erred to admit Q-42 into evidence in light of the gross discrepancies between the testimony of Chase and Dizinno. Multiplying

[28] Nor are Murray's out-of-court statements, admitted through the Detective, that authorities "didn't find his come" a basis to conclude that Murray "came" somewhere and cleaned it up.

[29] Prosecutorial misconduct across three trials is still misconduct, which abhors justice. Even if the proper court could not reprimand a particular agent of the State, this Court can relieve Murray from the compound effect of this perpetual fraud.

the error are the facts that the prosecution has changed its theory of the case regarding this evidence, and that Dizinno's initials were forged.[30] The prejudice is apparent, as discussed *supra*. Murray submits that the tampering issue is itself reason for reversal, but argues that in light of the persistent misconduct of the prosecution, this case deserves acquittal.[31]

## ISSUE II: ADMISSION OF SLIDE Q-20 INTO EVIDENCE

### A: Preservation

The State concedes the preservation of whether the trial court was reasonable regarding Q-20 as a matter of evidentiary admissibility [AB 36]. The State claims Murray failed to preserve as a matter of due process the prosecutorial misconduct manifest as "deception, 'dirty pool,' and the like" [AB 36]. In precisely the same way as issue I regarding Q-42, prosecutorial misconduct is apparent on the record. Inference is hardly required.

Appellee affords great weight to the hearing 30 April 2003 – which was merely a status hearing – to shine a light on the prosecution, purposefully ignoring the obvious: that Wilson never was announced as part of the chain of custody [AB 47-8, 54]. In heralding the extent to which "Murray was on notice that the State intended to present multiple witnesses to introduce Q-20 in this trial," Appellee almost immediately recounts the witnesses that

[30] Appellee implies that Dizinno's initials only were forged on the box [AB 29], but the record reflects that initials on the actual mounted-slides upon which the hairs were examined also were forged [IB 48].

[31] One can hardly imagine how the prosecution could convict Murray a fifth time in light of the apparent inadmissibility of Q-42 based on Chase's testimony. Even if the state would call the evidence technicians, such would not overcome the disparity in numbers of hairs.

actually testified at the hearing specifically regarding the admissibility of Q-20 [AB 47]. The name "Wilson" did not appear. Now aware of the new problem regarding the plastic bag, the prosecution failed to apprise the defense of the prospective testimony of Wilson to account for it.[32]

To the extent that defense counsel having been "caught quite aghast" [AB 36] relates to prosecutorial misconduct, Appellee's assertion that such was "no substitute for a timely and specific objection, timely motion to strike, or timely motion for mistrial" [AB 36] is an argument for form over substance, and is therefore without merit. Indeed, that such utterance by defense counsel occurred out of the presence of the jury is plain indication that the court was aware of the problem. Counsel could hardly have been more clear at the hearing a mere eight days earlier of the continuing problem with the chain of custody for Q-20.

The discussion sidebar clearly shows that the court was addressing the surprise nature of Wilson's sudden account for the extra plastic bag. [XIII 738-50]. That defense counsel actually had deposed Wilson "in 1999" [AB 37, 55] is irrelevant to Murray's lack of opportunity to show at this trial that Wilson's testimony was a sham – the issue was only apparent as of 12 May 2003. Appellee characterizes defense counsel's attention to "Wilson and the plastic-bagged lotion bottle" as a "red herring" [AB 54]. The plastic bag at issue was not a "red herring" when this court reversed in part due to it specifically in Murray II.

[32] Not only did the State stand by completely silent at the May 12th hearing [IB 42-3; IV 778-91], but its 11TH Supplemental Discovery Exhibit [II 284] is also without any such reference.

Even if the ***bottle*** was of limited import, everyone at trial knew of the importance of the accountability of that plastic bag. Contrary to assertion by Appellee, it is ***every*** "fault of the State that the defense had not prior to this trial asked Wilson a direct and simple question about the plastic bag[33]" [AB 55]. Despite its constituting plain error[34], defense counsel in fact preserved for review the violation of Murray's Constitutional right to Due Process due to prosecutorial misconduct.

**B: Murray indeed has shown probable tampering, and admitting Q-20 was unreasonable**.

Alluding to Murray II, Appellee argues that "the chain of custody was filled-in with additional testimony; there was actually no such discrepancy. Therefore, here Murray has failed to show that the trial court's ruling was unreasonable. . ." [AB 39]. Actually, there were discrepancies. They were distinct from those in Murray II, and they remain unexplained.

Powers, O'Steen, Warniment, and Hanson testified at the May 12 hearing [AB 47]. Powers did not use plastic [IV 721]. He confirmed that the nightie and lotion each individually were put in paper bags, then into a larger paper bag together, then opened at FDLE and put into other paper[35] bags [IV 730]. He could not account for the absence of one of the bags [IV

[33] The State cannot show that the plastic bag ever was an issue, nor that it ever had been a part of any of the three previous trials in any way. As far as this record shows, it materialized both physically and in testimony at this trial.

[34] Alone, and in light of the prosecution below viewed as a whole.

[35] Powers testified that he had witnessed the transfer at FDLE [IV 714] and confirmed that no plastic was used at that time [IV 726].

731]. O'Steen could not say there was a plastic bag [IV 746-7]. Warniment [IV 757] and Hanson [IV 771] both testified there was no plastic bag.

The trial court ultimately encapsulated the purpose of the hearing as being "to determine there was two things in one bag, and now there's two things in two bags. I'm just trying to reach the threshold issue of whether we'll even hear about this at trial" [IV 775]. The court was well aware of the application of Murray II: "I'm just ruling this discrepancy that was mentioned in the Supreme Court's opinion, the State has explained it to me to my satisfaction, that I will permit them at the time of trial to put on testimony concerning the admissibility of it" [IV 777].

All the State's witnesses could put the chain together again, but only regarding the discrepancy from Murray II directly noted here by the trial court. As defense counsel argued:

> "not one witness can attest to having ever seen or touched a plastic bag, yet we have one here today. We also have a missing bag, Your Honor. Since when we asked, you have larger bags and two items were in smaller bags, those items were then taken and put in other bags . . . we have perhaps five bags of which we do not have present here so we have missing bags, we have additional bag."

[IV 778] Thus, there were two new discrepancies. The trial court clearly was aware of the import of the plastic bag as a discrepancy, evident from the following exchange immediately before excusing Powers:

> THE COURT: All right. Let me ask you something, Mr. Powers. Look at exhibit C for me, that's the one with the lotion, put that bag back in there, first. Okay. Look at the contents of that bag.
>
> THE WITNESS: Yes.

THE COURT: Now do you know how the lotion got in the baggie?

THE WITNESS: No, sir, I don't.

THE COURT: You mentioned there was – it was placed in a bag before it was put in exhibit A, the big bag?

THE WITNESS: Right.

THE COURT: Do you know?

THE WITNESS: It would be this bag here.

THE COURT: Do you know if that plastic bag is the bag or not?

THE WITNESS: No, sir, I don't recall.

THE COURT: All right. Could it be the bag?

THE WITNESS: Yes, could be.

THE COURT: Okay. All right. Any other questions –

[IV 732] The court's speculation here as to whether the plastic bag could be that into which the lotion had been placed initially is contrary to the evidence based on the testimony of Powers earlier in the same hearing. Powers confirmed that neither he nor anyone at FDLE while he was there delivering the evidence used plastic [*supra*, IV 714, 721, 726].

Appellee notes that during this fourth trial the "court elaborated, contrasted the fuller 2003 facts with the limited record in the 1999 trial of Murray II, which 'left something up in the air,' and ruled that the 'discrepancy doesn't exist' and that 'there has been no tampering in this case.' (XII 486-87)" [AB 40]. This ruling was manifestly unreasonable. ***Wilson had not yet even testified as to the plastic bag or the missing bag***. At the time of the court's ruling, the 2003 facts were not full enough.

Later at trial appeared Wilson, who accounted for the plastic bag [XIII 700-35]. There was 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, 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. He did not testify that he had any contact with the lotion bottle or the plastic bag in any of the first three trials [IB 46].

Appellant submits further that Wilson's testimony regarding the plastic bag *after* the trial court's ruling on Q-20 could not have rendered the court's error harmless. First, based on the pandemic misconduct of the prosecution below, there is a reasonable likelihood that this testimony was contrived [IB 46-7; *passim supra*]. Second, as just explained in the immediately preceding paragraph and bolstering the invention by Wilson of this account, the explanation is incredible and incapable of verification. Finally, Wilson only accounted for one of the discrepancies: there is no explanation for the missing bags. Q-20 clearly should have been excluded.

**Conclusion**

Murray has shown how unreasonable the admission of Q-20 was in light of the fact that the court had not even heard Wilson's fabricated explanation of the plastic bag at the time of the court's ruling, despite the court's

knowledge of the plastic bag as a discrepancy. Because the eventual testimony also did not resolve the *missing* bags, the error was not rendered harmless. As with Issue I regarding Q-42, Murray submits that the tampering issue is itself reason for reversal, but argues that in light of the persistent misconduct of the prosecution, this case deserves acquittal.

**ISSUE III: RULINGS REGARDING DIZINNO'S TESTIMONY**

The trial court limited the cross-examination of a key[36] state witness [IB 57-68; AB 55-9, 62-5]. This limitation was itself prejudicial [IB 65, cases cited there]. Ironically, the grounds for the trial court's limitation was the representation made by the witness himself, and adopted by the State, that the subject matter of the purported cross-examination had nothing to do with Dizinno.

Appellee argues that Dizinno did not mislead the trial court into limiting cross-examination,[37] claiming the "defense assumed, without

[36] As discussed earlier, Q-20 and Q-42, with regard to both of which Dizinno testified, are the only physical evidence allegedly linking Murray to the crime.

[37] Regarding Dizinno's misleading the court, Appellant notes another particularly disturbing inconsistency in his historical testimony. Dizinno testified in at least three of the four trials that he had examined *pubic hair* ***of the victim*** [SR5 570, 634, 667]. Yet, for the first time ever, it was revealed in this trial through FBI analyst Warniment that *no pubic hair of the victim ever was removed from the victim*. Her pubic region was shaved [V 835-7].

Murray acknowledges the lack of objection on this specific ground below: As with the surreptitious and perpetual prosecutorial misconduct, this disturbing fact regarding the pubic hair of the victim was only discoverable upon examination of the records of multiple trials and after the fact.

establishing, that the 'FBI lab' was one monolithic organization" [AB 63]. Counsel made no such claim. To the contrary, Dizinno himself testified in 1999 that there was an "investigation into the FBI laboratory . . . It involved the entire laboratory" [SR5 698]. Moreover, Dizinno's claim at the time, "that investigation had nothing to do with me or this case" [SR5 698; accord: XIV 893] was inherently circuitous, elaborated *infra*.

Even in this trial, Dizinno offered a distinction without a meaningful difference when he denied that the "purported investigation[38]" involved the micro and fiber unit because it involved Mr. Malone as an individual [XIV 882]. Just like his 1999 testimony, he immediately expounds an internally inconsistent reasoning, acknowledging that "Mr. Malone was an examiner in the hair and fiber unit" [XIV 882]. Somehow, because its impetus was "complaints of one individual and in another unit," the investigation had nothing to do with hair and fiber; yet Dizinno confirms in the same sentence that the "investigation *spread to other units* and Mike Malone became part of that investigation" [XIV 883, italics added]. The chain is not even inferential, it is deductive: There was an investigation; several units of the FBI lab were targets; Mike Malone was a target; Mike Malone was in the hair and fiber unit; *therefore* the investigation had to do with the hair and fiber unit. Since Murray's known hairs were in that unit at that time when this evidence was opened and slides mounted, there absolutely was a ground

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Murray notes it here to corroborate the lack of credibility of FBI agent Dizinno, and to provide context for this Court's evaluation of the substance of his other inconsistent testimony across trials.

[38] [AB 64] – the investigation was real.

for impeachment.[39] Any exclusion by the court into this subject matter was unreasonable and clearly erroneous.

Guising in a cloak of relevance its argument for exclusion[40], the prosecution transformed the issue of the credibility of the FBI into a matter which the jury would never hear. Instead, the trial court erroneously decided a matter of credibility for the jury. This error was not harmless. Tampering issues aside[41], that the defense was prohibited from questioning the reliability of the analysis of critical evidence was unfair. This evidence directly related to the conviction, which warrants reversal.

**ISSUE VII: RACE-NEUTRALITY IN STRIKING POTENTIAL JUROR**

Appellant notes that the trial court itself established the threshold requirement of Melbourne v. State, 679 So. 2d 759 (Fla. 1996) [AB 77]. The court itself felt compelled to inquire as to the prosecution's motive [XI 333]. Based on the excerpts of the record propounded by Appellee, discussed

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[39] Moreover, like the proceedings regarding Anthony Smith, Appellant has apprised this Court in materials accompanying his second *Motion to Relinquish Jurisdiction* [docketed 01/11/07] showing that not only was the hair and fiber unit under investigation, but that on at least one occasion

Dizinno himself verified results of Malone which were used to convict a defendant of Murder, which evidence was later shown to be conclusively unreliable. Although not part of this record, the Court can verify the substance of Appellant's claims herein that Murray's defense counsel should have been permitted to cross-examine Dizinno regarding the investigations.

[40] See *State's Fifth Motion in Limine*, [II 294]

[41] This matter concerning the credibility of the FBI would only further corroborate the Appellant's claim of tampering. Doubtless, this was part of the prosecution's motive to preclude such cross-examination. This would not have been anything to confuse the jury, but indeed would have added relevant perspective.

*infra*, the court's assessment of the credibility of the allegedly race-neutral reason was clearly erroneous.

The State cites Reed v. State, 560 So. 2d 203 (Fla. 1990), noting the factual racial similarity of that defendant and Murray, as well as portions of the composition of their respective panels [AB 77]. The State fails to note, however, that the Court in Reed expressly held that while relevant, the relative race of the defendant and the ill-stricken jurors is not dispositive. Reed, 560 So. 2d at 205. Moreover, the subsequent procedural history of Reed is immaterial for this Court to consider Murray's claim.

Further, in Murray's fourth trial, the prosecutor's explanation was not "entirely accurate" [AB 78], and the judge's response was hardly an "accreditation" [AB 79]. Appellee wrote:

> {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. de la Rionda [the other prosecutor] 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 [defense counsel's] questions, and I believe his initial reaction on ***the word depend*** that would give us the challenge.

(XI 333-34) {Appellee argument} Accordingly when Mr. Jones was initially asked for his opinion on the death penalty, he equivocated:

> PROSECUTOR: All right. How do you feel about the death penalty?
>
> THE PROSPECTIVE JUROR: Well, the way I feel about it *whether he or she is guilty or not guilty* ***I don't have anything against it*** *whether he or she is guilty or not guilty*. I don't- you know, that's the way I feel about it right here. He or she guilty or not guilty I don't know.

(X 137) Then, later, Mr. Jones would not give a number (XI 280-81, 283):

> DEFENSE COUNSEL: . . . Let's talk about the death penalty. …[W]hat I want you to do is rate from one to five with zero being I support it but I am not that strong on it and five being … I strongly advocate the death penalty … where would you put yourself?
>
> ***
>
> [DEFENSE COUNSEL]: Jones?
>
> THE PROSPECTIVE JUROR: ***I agree*** but I don't have a number.

[AB 78; emphases and {bracketed clarification} added]

The prosecutor misquoted Mr. Jones. His initial impression was perfectly consistent with his answers to the prosecution's two essential questions[42]; he is for the death penalty. The prosecution based its argument to strike Mr. Jones on his use of "the word depend." Appellee's own excerpt shows that Mr. Jones used no such word. Further, Mr. Jones did not equivocate. Perhaps lacking grammatical perfection, he stated, "I don't have anything against it." Finally, his failure to "give a number" was immaterial in light of his further confirmation in that very sentence that he agrees with the death penalty [AB 78].

In light of the prosecution's inaccurate recollection of the record in support of its purportedly race-neutral peremptory strike of Mr. Jones, any "accreditation" by the judge was clearly erroneous. The judge had his own notes, consistent with defense counsel's, that Mr. Jones was for the death

[42] "yes to both" at [XI 333] refers to the two halves of the compound question asked of all jurors by the prosecution regarding the death penalty: whether the juror could convict, knowing the death penalty could be possible; and whether the juror could recommend death if aggravators warranted as much. [IB 88]

penalty [XI 333; IB 86]. Instead of verifying with the court reporter or simply trusting himself, he believed the prosecution's misstatement.

## CONCLUSION[43]

Murray has shown that his conviction warrants reversal. On and off the record, the prosecution, for over a decade and across several trials, engaged in misconduct regarding the preparation and presentation of its case. Presenting false testimony, the State has been able to show a jury evidence that is fatally tainted: Q-42 and Q-20 have been erroneously admitted in the past, and are now conclusively inadmissible. In light of all of the proceedings below, it is not unreasonable to attribute changes and other inconsistencies in the testimony of Chase and Dizinno to prosecutorial meddling. This misbehavior has been surreptitious and subtle, and therefore hard to discover. Regardless, it constitutes plain error of a magnitude to warrant the reversal of Murray's conviction. This inherent violation of Due process strips this death sentence of any integrity.

Compounding the misdeeds of the prosecution below was the error by the trial court limiting cross-examination of a key state witness on a central issue. The hairs on slides Q-42 and Q-20 are the only physical evidence allegedly linking Murray to the scene of the crime. Murray's known hairs were in the FBI lab and under analysis at the very same time as an investigation into the lab as a whole. This key information regarding the

[43] Murray's failure to address other argument from the State's answer brief should not be construed as his concession of those issues or abandonment of the argument in his own initial brief, upon which he rests with regard to any other claims therein.

credibility of the FBI was withheld from the jury by the trial court and therefore warrants reversal as it was clearly erroneous.

Even before the trial, and irrespective of the admissibility of any evidence, the record reveals error of constitutional magnitude. The prosecution failed to provide a race-neutral reason to strike potential juror Mr. Jones. The record shows that any beliefs of the prosecution regarding the beliefs of the prospective juror were clearly erroneous, as was the court's ruling thereon.

Considering that all physical evidence available against Murray is undeniably tainted and inadmissible as a matter of course, not only should this Court vacate his sentence and reverse his conviction, but also remand with instructions for the trial court to enter judgment of acquittal.

**CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished to the following by U.S. Mail on May 30, 2008: Stephen R. White, Esq., Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399 and the Appellant, Gerald Murray, DC #291140, Union Correctional Institution, 7819 N. W. 228th Street, Raiford, Florida 32026-1160.

**CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted,

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