In The
SUPREME COURT OF FLORIDA

CASE NO. SC04-19

ERIC SIMMONS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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

I. JURISDICTION

This is an appeal of a final judgment of the Circuit Court of the Fifth Judicial Circuit in and for Lake County, Florida, imposing the death penalty. Therefore, this Court has jurisdiction pursuant to Article V, Section 3(b)(1) of the Florida Constitution.

II. SUMMARY OF THE CASE

The Appellant was indicted on December 28, 2001(Vol. I, p. 5)[1]. The Appellant was charged with two (2) counts: Count I, sexual battery - force likely to cause injury; and Count II, murder in the first degree. That indictment was amended on January 13, 2003 (Vol. I, p. 644). The Appellant was charged with three (3) counts: Count I, kidnapping; Count II, sexual battery - force likely to cause injury; and Count III, murder in the first degree.

A trial was held on September 8, 9, 10, 11, 12, 15, 16, 17, 18 and 19, 2003. The Defendant was found guilty of all counts. Vol. VII, pp. 1202-04. The jury returned an advisory sentence for imposition of the death penalty. Vol. VII, p. 1211. The lower court sentenced the Appellant to death on December 11, 2003. Vol. IX, pp. 1413-32; 1445-48.

Numerous pre-trial and post-trial motions were filed, almost all of which were denied, which will be discussed *infra*.

III. STATEMENT OF THE FACTS

Deputy John Conley of the Lake County Sheriff's Office ("LCSO") found the body of an unknown victim on December 3, 2001, at about 11:30am, in a wooded area

[1]For ease of reference, the record in this proceeding will be designated by volume number and page, *i.e.*, Vol. __, p, __, or if to the transcript of the proceedings as Tr. ____.

being patrolled for dumping. Tr. 1924-1927. There were many tire tracks caused by many people going in and out of the area. Tr. 1933. He was unsure when the last time was he had checked the area, but there had been at least one day in between his visits. Tr. 1936.

Crime Scene Technician ("CST") Cushing of the LCSO arrived at the scene at approximately 12:30pm. Tr. 1940. He was assisted by CST Shirley. Tr. 1944. They photographed the scene and casted tire tracks. The tire tracks cast were those with the greatest detail, not those closest to the body. Tr. 1945. A 10-foot square grid was established around the body and the ground dug up and sifted for bullets or weapons. Tr. 1947. Various beer cans, cigarette butts, and miscellaneous items were taken into evidence. Tr. 1948-49. A diagram of the area was prepared by the CSTs. Tr. 1956.

There were tire tracks which went over some of the tire tracks which had been cast. Tr. 1967. The tracks that were casted were those which were of at least 6-feet in length. Tr. 1968. No measurements were taken to determine if any of the tracks casted or photographed could have come from the same vehicle. Tr. 1968-69.

The diagram made of the scene depicts part of a pathway and two of the trees in a wooded area, with no measurements and no indication of where the body was located. Tr. 1969-70. The grid was dug at approximately 4:20pm on the day the body was found, with the body at the center and was dug 12-inches deep, and was done

because it always is by the LCSO, despite the fact that there was no indication that the victim had been shot. All evidence, including tire tracks in the area of the body were destroyed by the digging. Tr. 1974-79. CST Cushing indicated that a vehicle made a three-point turn somewhere near the body but could only point to arching tire tracks on the roadway. Tr. 1981-90. CST Cushing could not testify as to what tracks were made by the same vehicle, what the wheel base of any vehicle was, or anything else except for the existence of the tire tracks. Tr. 1988.

Sheala McBee of the LCSO testified that there were no fingerprints of value found on any of the evidence collected from the area where the body was found. Tr. 1993-94.

CST Bedgood of the LCSO collected larvae from the exterior of the victim's body at the medical examiner's office on December 4, 2001, in addition to other items including the victim's clothing. Tr. 2027-28. This was the first time CST Bedgood had collected larvae and had no training in so doing. Tr. 2033. He put them in the refrigerator until approximately 24 hours later. Tr. 2038. Since working this case, the CSTs were sent for training in collecting insects which taught him to do things differently than he did in this case. Tr. 2040; 3974; 3986. He does not know what time he collected the insects. Tr. 2046.

Lawrence Treadaway, coordinator for the Florida Automated Weather Network ("FAWN"), was called by the State to testify about temperatures across all of Florida between December 1, 2001, and December 4, 2001. Tr. 2051-69. He was not informed of the location where the victim's body was found. Tr. 2070.

Jerry Hogsette, a private consultant, was called by the State. His background is in the area of the life cycle of flies. He has no background in forensic entomology by training and has limited experience in working with others in the 1970s and 80s. Tr. 2083-95. He was qualified by the lower court as an expert in the life cycle of flies. Tr. 2095. Dr. Hogsette concluded that the eggs had to be laid by 10:00am December 2, 2001, to reach the state they were in when he examined them. Tr. 2111; 2117. He opined on the rate of deterioration of the body but had no experience with human subjects. Tr. 2138-39; 2149.

Dr. Sam Gulino is a forensic pathologist who was the medical examiner in the instant case. He went to the scene where the body was found and observed a white female lying in a clearing in a wooded area, with tire tracks and debris around the body. There was blood in the area around her head. She had no shoes and no blood on the soles of her feet. She had apparent blunt force trauma to her right head and face, a cut on her neck, and a stab wound in the lower abdomen. Her hands had cuts and hairs were entangled in her fingers. Tr. 2157-58. The abdominal wound was under the uncut

pants. The body was still exhibiting rigor mortis. Tr. 2158. The period of rigor mortis varies greatly, depending upon the degree of activity before death. Tr. 2160. The body was removed at approximately 3:30pm in a body bag and was taken to the medical examiner's office at which time an approximately one-hour long preliminary review of the body was done before placing it in the cooler until the autopsy was performed which was on December 4, 2001. Tr. 2160-64.

The victim was 69 inches tall and weighed 190 pounds. Tr. 2165. The wounds consisted of ten lacerations of varying sizes and shapes to the scalp, smaller lacerations on her fact, a small, superficial stab wound on the lower lip, extensive bruising to the scalp from blunt impacts, and a large five-and-one-half by three-inch area of comminuted fractures, *i.e.*, fractures which leave the skull broken into small pieces. Tr. 2165-66. It was these fractures and the resultant brain damage which caused the death.

There was also a fracture to the base of the skull which went through the base, causing bruising to brain tissue. This is the result of high energy impact. Tr. 2167. There was a stab wound below the right ear and a small cut on the right side of the neck. There was a long cut across the front and right front of the neck. The neck wounds were caused either after death or after the blow to the head. She had various

post mortem scrapes on her right side. The stab wound in her abdomen was over five inches in depth. Tr. 2167-71.

The victim suffered bruising and lacerations to her anus caused by an unknown object. Tr. 2172. The injuries were not consistent with anal intercourse. Tr. 2173. There was also extensive bruising on her extremities. Tr. 2174. Dr. Gulino described numerous defensive wounds on her arms and hands, including numerous cuts and abrasions, a cut on the palm of both hands and a patterned injury on her right index finger, which appeared to be made by a threaded object. Tr. 2175-77.

The head wound would have caused the victim to be unconscious in a very short time, but the actual time to death could have been minutes thereafter. Tr. 2184. The anal wounds were primarily bruising. Tr. 2185.

Dr. Gulino put her time of death at between 24 to 48 hours from the time the body was observed at the scene. Tr. 2187. The bruising that was "fresh" occurred within 24 hours of her death and a body which is already dead does not bruise. Tr. 2192-93. The bruising was not consistent with being bound, although on the one upper arm there was bruising indicating someone's hand holding the arm. Tr. 2194.

The only injury to her right leg was bruising and a few small scrapes at the knee. The left knee was bruised and there were scrapes on the left shin. Tr. 2199. Rigor mortis to the extent that limbs would not move, such as the case of the victim at the

scene would occur within six to eight hours, and would remain for up to 36 to 38 hours. Tr. 2200.

Dr. Gulino testified that it was his professional opinion that the site where the body was found was not the place where the killing took place, due to the lack of sufficient blood and because the area around the body was not disrupted. Tr. 2226. The purpose of going to the scene where the body is found is to assist law enforcement. There was no indication that the victim had been shot. Tr. 2227.

Dr. Gulino testified that he would have expected more blood at the scene where the body was found, given the nature of the wounds. Tr. 3903. The absence of the amount of blood which would be expected, combined with the lack of disruption of the ground and the lack of any blood around the body indicated to him that the victim was not murdered where the body was found. Tr. 3913. If the wounds had been inflicted inside the car, a substantial amount of blood would have been found there. Tr. 3917.

Jerry Wetzel, director of electric media at the University Athletic Association for the University of Florida, testified that the Florida/Tennessee football game began on December 1, 2001, at 4:46pm and ended at 7:56pm. Tr. 2238.

CST Jim Binkley of the LCSO went to the laundromat where the victim worked where her purse was found. Tr. 2261. No evidence of any blood or any violence was found there. Tr. 2262-63. The purse was taken into evidence. Tr. 2264.

Sgt. Linda Green of the LCSO placed the items from the victim's purse into evidence which contained a gift list for individuals including the Appellant and his mother, father, and sister. Tr. 2273-77. The room where the purse was found had been locked and the owner of the laundromat had opened the room. Tr. 2279.

CST Ron Shirley of the LCSO testified that he cast three of the five tire tracks indicated to him by CST Cushing. Tr. 2282. Any of the tire tracks could have been cast but he chose three that he believed to be of the best quality. Tr. 2286.

On December 7, 2001, the Ford Taurus belonging to the Appellant was brought to the LCSO and a search warrant was executed. CST Shirley and former CST Caudill examined the vehicle. Tr. 2289. Despite the Appellant's inability to test spots on the door jam of the passenger side of the vehicle, CST Shirley testified that presumptive tests indicated the presence of blood on the passenger door. Tr. 2299. On December 9 and 10, 2001, examination of the car continued. CST Shirley swabbed small spots which appeared to CST Cushing to be blood. Tr. 2306-07. Luminol was sprayed to test for the presence of blood. A positive reaction was received from the carpet fibers

themselves, from the seat cushion and from the back floorboard. Tr. 2313-14. The spots were very small. Tr. 2357.[2]

The passenger seat cushion was taken into evidence and CST Shirley twice took samples of the foam to send for testing. Tr. 2382. The bulk of the stain on the cushion was on the left-hand side of the cushion as one would be seated in the vehicle. Tr. 2384. Mitochondrial DNA testing was done on the seat cushion.[3]

Terrell Kingery was a senior crime analyst at the Florida Department of Law Enforcement ("FDLE") at the time of the investigation into the crime at issue in this case. Tr. 2387. He received three of the tires from the Appellant's vehicle and the casts made of tire tracks by LCSO personnel. When he inquired about the fourth tire, he was told that it was determined by the LCSO that eliminated the possibility that the fourth tire had left any of the impressions at the scene. Tr. 2476. He determined that the right front tire of the vehicle could not have left any of the tire tracks identified by

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[2]Shawn Johnson from the serology section of the FDLE was the State's DNA expert who testified concerning testing done on these items. Tr. 2699-2736. Edward Blake of Forensic Sciences in California was the defense expert on these matters. Tr. 4085-4134. Stuart James, an expert in blood spatter analysis, also testified for the defense. Tr. 3361-3467. This testimony will be discussed in argument *infra*.

[3]Brian Sloan of the Cellmark Laboratory in Dallas, Texas, testified concerning mitochondrial DNA ("mtDNA") matters as the State's expert on this issue. Tr. 2539-95. His testimony was first proferred. Tr. 2517-2533. The Appellant's expert, Dr. Terry Melton of Mytotyping, Inc., in State College, Pennsylvania, testified on this issue. Tr. 4047-85. These portions of the trial will be discussed *infra* in the argument portion of this brief.

the LCSO. Tr. 2445. The left rear and right rear tires could not be eliminated as leaving the tire impressions he was sent. Tr. 2495-81. Millions of tires would fall into that category. Tr. 2509. Mr. Kingery explained the proper method of collecting tire impressions and what was required to be done at the scene. Tr. 2471-75. The age of a tire impression cannot be determined. Tr. 2510.

It was stipulated by the parties that the victim was Deborah Tressler. Tr. 2750-51.

It was stipulated by the parties that the Appellant's vehicle was towed for transmission work on December 4, 2001, and was picked up the afternoon of December 7, 2001. Tr. 2751.

It was stipulated by the parties that the Appellant arrived at his parents' home at approximately 5:30am the morning of December 2, 2001, went to work with his father in Orlando, and returned to his parents' home where he remained until approximately 9:00-9:30pm that day. Tr. 2751.

It was stipulated by the parties that the hairs found in the victim's hands had characteristics consistent with the hairs being hers, although that is not conclusive. The hairs were not from the Appellant. Tr. 2752-53.

Steve Ellis, a friend of the Appellant's and a fireman, testified that Mr. Simmons called him on December 1, 2001, to see about celebrating Mr. Ellis' birthday together

which was on December 2, 2001. Mr. Simmons told Mr. Ellis that he wanted him to meet a woman named Debbie whom he had met at a laundromat. Tr. 2759-61. He spoke with Mr. Simmons again on December 3, 2001, when Mr. Simmons called to see if he had heard why the LCSO helicopters were up which was common since the fire department had had a police scanner. The scanner had been removed and he did not know. Tr. 2763. On December 6, Mr. Ellis again spoke with Mr. Simmons. A deputy had told Mr. Ellis that the body that was found was that of a woman who worked in a laudromat. Mr. Simmons had called because Debbie had been missing and was wondering what Mr. Ellis had heard. Mr. Simmons became very sad at the thought it might be his friend. Tr. 2767-76.

Jose Rodriguez testified that he lived near the laundromat prior to his being incarcerated and had come to know the victim. Tr. 2779. He had seen the Appellant at the laudromat a couple of times. Tr. 2780. He knew the Appellant had a white four-door car with a flag in the right rear window. Tr. 2783-84. He said that he saw Mr. Simmons in the laundromat with Debbie Tressler when he went to the pay phone at 10:30 to 11:00pm on December 1, 2001, and that they were still there when he got off the phone. He does not recall how long he was on the phone. Tr. 2785-91. When he contacted the police to tell them about seeing Mr. Simmons, he was incarcerated and looking for help in being released. Tr. 2794. Mr. Rodriguez had two prior convictions

for battery, one being aggravated battery when he hit a man in the head with a large stick. Tr. 2842-45. A group of pictures was shown to Mr. Rodriguez which did not contain the Appellant's photograph. He picked one which looked like him but he drew in longer hair and a scruffy beard to make it look like the man he had seen with Ms. Tressler, neither one of which Mr. Simmons had. Tr. 2797; 2849. He finally identified Mr. Simmons when Detective Willis of the LCSO took Mr. Simmons' drivers license photograph to the jail. Only a single photograph was shown to Mr. Rodriguez. Tr. 2857-61.

Andrew Montz, 21 years of age at the time of the trial, was a resident of Sorrento. On December 1, 2001, he and his expectant wife went to the Circle K at the intersection of Rtes. 437 and 44 in Lake County. He was checking the tire pressure while his wife went inside. He saw a white, four-door car moving slowly on Rt. 437. When it got to the intersection, a woman opened the passenger door and screamed for help. The driver pulled the woman back in the car and sped off. He could not see the woman's face but she had "light brown to blackish" hair and was wearing white. He could not see the driver. The car never stopped. The car had black and silver trim down the side of the car. Tr. 2879-83. A year later, he reviewed a videotape of a vehicle at the LCSO which he said was the same vehicle because it was white, four-door car, had a flag, and had dents on the passenger door. Tr. 2885. When

questioned as a defense witness, Mr. Montz was shown a photograph of the Appellant's vehicle. He indicated that the vehicle in the photograph did not have the same trim nor the dents. Tr. 3586. The door was opened when the car was at the white stop line and was open for approximately three to five seconds. Tr. 2887-88. The door was halfway open and her feet were planted on the floorboard. Tr. 2889-90. He remembers that the passenger door was quite dented and the car was quite dirty. Tr. 2890. At the time of the incident, Mr. Montz identified the car as a Chevy Corsica. Tr. 2892-94. At the time he stated that the car had spoked wheels. At the time of the incident, he did not mention the flag, although he testified that he mentioned it after the tape was off. Tr. 2895.

Mr. Montz did not call Crime Line on the night of the incident. He called in response to a newspaper article several days later requesting information concerning the body which was found. Tr. 2896-97. He was informed when he went to view the videotape a year later that he was looking at the car of the then defendant, Eric Simmons. Tr. 2898. The Assistant State Attorney on the case, Bill Gross, had been Mr. Montz' boy scout leader. Tr. 2899. The rims on the car in the videotape did not look like the same ones he had seen the night of December 1. Tr. 2900-02.

Sherry Renfro, who was on probation for dealing in stolen property, testified that she was at the Circle K the night of December 1, 2001, taking a friend to use the pay

phone there. Tr. 3251-53. She saw a car slow to stop at the red light at Rtes. 44 and 437. As it did so, the passenger door opened and a woman started screaming for help. She started walking toward the car to see if she could help. She said that she got close enough to see her full face and the door was completely opened. Tr. 3256. She could not see the driver, and could not tell if the driver was a man or a woman. Tr. 3257. As the car pulled away, the woman was pulled back in. She had a hold of the door handle and the door slammed shut. Tr. 3258. The woman was wearing a white T-shirt. Tr. 3258. Ms. Renfro walked back to her van, told her friend that she would be right back and got in her van and went after the car. She did not get close to the car and did not catch it. Tr. 3256-61. At the time, both Ms. Renfro and her friend, Shane Lotito, thought that the car was a Chevy Corsica. Tr. 3261.

Ms. Renfro said that she recognized the picture of Ms. Renfro right away. Tr. 3263. She also claims that she recognized the Appellant's vehicle when she was taken to the Sheriff's office sally port to view it several days later. She claims to remember the flag in the back window and the bumper sticker in the rear window. Tr. 3266.

She remembers that she thought the woman had short brown hair and was medium sized. Tr. 3271. The woman was trying to climb out of the car and had one foot on the ground. Tr. 3272. When the car started, the woman's foot swung back under the car. Tr. 3272. She says she looked at the woman for a minute to a minute

and a half. Tr. 3274. She believes that the driver had dark hair. Tr. 3275. The picture of the woman she was shown had different hair than the woman she observed. The hair was a different color and longer. Tr. 3276. She remembers car being dirty. Tr. 3277. The bumper sticker she says she saw is in the rear window behind the driver's side of the car. Tr. 3280. She did not see the license tag. Tr. 3280.

Ms. Renfro was never asked to do a composite drawing of the woman she saw, was never asked to look at different cars, or anything of the sort. She was shown one picture of the victim to identify and taken to the LCSO to identify the Appellant's vehicle. Tr. 3293. Ms. Renfro was told to be available for further testimony. Tr. 3297. However, when called by the defense to testify, she did not return. Tr. 3566-69.

Detective Willis of the LCSO testified that in 2001 he was in the area around the Circle K a great deal for his line of work. They referred to the area as the "football field" as it was lit up like one. Tr. 3308-12. The spotlight located at the Circle K illuminated vehicles so that when he was conducting surveillance there he could see through the cars to see who the driver and the passenger are. Tr. 3314.

Michael Schroder, an employee of the LCSO for vehicle maintenance, testified that the Appellant's vehicle had not been in an accident. Tr. 2933. However, he could only tell if the car had been in a major accident that resulted in structural damage. Tr. 2937.

Detective Perdue of the LCSO was the lead detective on the homicide case. He testified that it is about a five-minute drive from the laudromat to the intersection of Rtes. 44 and 437. Tr. 2951. On December 7, 2001, the name Eric Simmons came up as the boyfriend of the victim. His name was run through Auto Trac to determine his address and vehicle type. Tr. 2954-55. Mr. Simmons' parents' address came up and Detective Perdue and Detective Adams checked there for the vehicle where it was found at approximately 3:30pm on that date. The two detectives, accompanied by approximately 15 additional deputies, went on the property immediately. According to Detective Perdue, Mr. Simmons was cooperative and voluntarily went to LCSO headquarters for an interview. He was not under arrest. Tr. 2960-61. Detective Perdue left transportation of Mr. Simmons to road patrol and made arrangements for a wrecker to tow the vehicle to the processing bay at the LCSO. Tr. 2962.

During the interview of Mr. Simmons, Detectives Perdue and Adams had a tape recorder that they did not turn on because the "look on Eric's face" indicated to them that he did not want it on. Tr. 2964. The interview was hardwired for videotaping. During a proffer, the Detective indicated that the lieutenant and the detective in charge of the videotaping left the room and neither he nor Detective Adams noticed that no one was monitoring the equipment and did not know that the videotape ran out of tape. Tr. 2661-2680. Approximately half of the interview was not taped by audio or videotape.

Tr. 2971. He did not learn this until the next day. Tr. 2970. Mr. Simmons signed a *Miranda* waiver. Tr. 2968.

Mr. Simmons told them about his relationship with the victim. Tr. 2979-81. He repeatedly denied harming Ms. Tressler. Tr. 2983. Mr. Simmons told the detectives that he had taken Ms. Tressler to work with him and his father for his father's landscaping business on December 1, 2001, where they were moving trash and the like. They went back to his apartment to clean up and watch the football game. The reception on his television was bad and he dropped Ms. Tressler off at the laundromat before the game was over. Tr. 2985-87. He went back home as he had to be up early to meet his father. She was supposed to go with him, but he went to pick her up and she was not at her trailer or the laundromat, so he went on to work. Tr. 2987-88. He denied having driven by the Circle K that night. Tr. 2988. After about four hours of interview, Detective Perdue went down to check on the car and was there when a presumptive test was found to be positive for blood on one of the small spots. He went back upstairs and told Mr. Simmons, who, according to Detective Perdue, said "Well, I guess if you found blood in my car, I must have did it." Tr. 2991-92. The videotaped interview was published to the jury. Tr. 3027-90.

Despite the fact that half of the interview was not taped, Detective Perdue contends that the only thing that was said during the second, untaped portion of the

interview which was not said in the first half was the comment saying "I must have did it". Tr. 3106. That comment was at the very end of the interview. Tr. 3113. Detective Perdue testified that during the untaped portion of the interview, he and Mr. Simmons discussed Ms. Tressler and discussed things about Mr. Simmons himself and his family. Tr. 3112.

Detective Perdue indicated that Mr. Simmons lied during the interview based upon the statement of others. Tr. 3125. However, it was later determined that some of what law enforcement believed to be untrue was based upon misunderstandings of another witness. Tr. 3124.

Detective Perdue testified that his "investigative report" outlined everything that was done by law enforcement in its investigation of the case. Tr. 3144. The various steps of the interview were outlined by Detective Perdue. Tr. 3144-75.

From the time the body was found on December 4 through December 7, 2001, law enforcement put up road blocks and handed out fliers to find the person who they believed to be the victim's boyfriend. The fliers contained composite drawings of that person. Tr. 3142-58. The detectives were to meet with a FBI profiler on December 7, but did not. Tr. 3158.

The LCSO was moving a command post around to areas where they believed they would find the Appellant. When they received the address of Mr. Simmons'

parents, the command post was moved out to that area. It was on December 7 that what Detective Perdue termed "the thundering herd" descended on Mr. Simmons' property. Tr. 3159. At the time, they wanted to speak with Eric Simmons because they had reason to believe he was the last person to see Ms. Tressler alive. He was not under arrest at that time because they had no physical evidence and there was not enough upon which to base an arrest. Tr. 3163.

After the arrest of Mr. Simmons, the LCSO search the Seminole Woods area which is next to where the body was found to see if they could locate a murder scene. They were also looking for what they believed to be missing clothing items, such as the victim's shoes, and, they believed that she had changed clothes since last seen at Rtes. 44 and 437. Nothing was found. Tr. 3167.

Detective Perdue had no basis for concluding that the victim was murdered by someone she knew. Tr. 3174. Detective Perdue took the statement "if you found blood in my car I must have did it" to be a confession of guilt. He asked no follow up questions. Tr. 3178. The arrest was made based upon that "confession", blood found in the car, contradictions in the time frames and witness testimony. Tr. 3234. No evidence was obtained after the arrest. Tr. 3238-50.

Detective Adams of the LCSO basically corroborated the testimony of Detective Perdue. Tr. 3318-36. However, Detective Adams stated that the audio tape was not

used because it was superfluous given the fact that it was being videotaped. It had nothing to do with Mr. Simmons' wishes. Tr. 3328. He also testified that he had never known the taping equipment to fail before. Tr. 3332.

The detectives believed that Mr. Simmons had invoked his rights when he said that he had had it after Detective Perdue made the comment about finding blood in the car. They did not think he had invoked his rights when he made similar statements earlier in the interview. Tr. 3336-52.

Stuart James was qualified as a defense expert in bloodstain pattern analysis and related fields. Tr. 3361-70. He explained various presumptive tests used for testing for blood and said that it is generally accepted that presumptive tests cannot be relied upon. It is impossible to tell by looking at a spot or a stain whether the substance is blood. Tr. 3370-78. He explained the science of bloodstain pattern analysis. Tr. 3378-88. Mr. James testified that the spatter on the door jamb of the Appellant's vehicle was not consistent with a beating, stabbing, or gunshot occurring in the vicinity. Tr. 3393.

Mr. James reviewed the autopsy report and photographs taken in the case. It was his opinion that the injuries sustained by the victim could not have been inflicted in that vehicle given the lack of blood found. Tr. 3397. The fact that some of the specks tested were found not to be blood and the mixture of canine DNA with one of

the tested spots makes it very difficult to conclude that the spatter had anything to do with the death involved in this case. Tr. 3400. It was consistent with having a cut or scrape on a hand and flicking the hand. Tr. 3400.

Mr. James testified there was evidence that the body had been moved. Tr. 3433. Throughout his testimony Mr. James repeatedly indicated that the injuries inflicted upon the victim did not occur within the vehicle as the lack of blood staining in the vehicle did not support that inference. Tr. 3433 - 3460.

Mr. Gross questioned Mr. James regarding blood splatter on the vehicle door post and Mr. James indicated that he had not seen any evidence of presumptive tests that would support that the stains were in fact human blood. Tr. 3444. Later in his questioning of Mr. James, Mr. Gross again refers to the splatter on the vehicle door post as blood splatter. Tr. 3451.

Dr. Haskell is called to the stand and qualified as an expert in the field of forensic entomology. Tr. 3495. Dr. Haskell described in great detail methods and procedures employed in the proper collection of information, and physical evidence from victims at the scene. Tr. 3496 - 3515.

Dr. Haskell stated that when he reviewed the samples of insects recovered from the victim he identified two different species plus the greenbottle fly group. Tr. 3517. Dr. Haskell indicated that given the samples as presented and the conclusions that

could be drawn from said evidence it was impossible for him to determine time of death. Tr. 3520. Mr. Gross questioned Dr. Haskell regarding the information that he had compared to that used by Dr. Hogsette to determine time of death. Dr. Haskell indicated that there was a major flaw in the entomological report of Dr. Hogsette in that Dr. Hogsette did not document all information the he utilized. Tr. 3538. Dr. Haskell describes the errors in Dr. Hogsettes' report and lack of training in forensic science as indicated in his C.V.. Tr. 3546 - 3552.

Jerry Linton stated that Detective Linda Green suggested that the date that he met with Eric Simmons and Debbie Tressler was December 1. Jerry Linton did not associate that date to the date that Debbie Tresslers' body was found. He testified that he had in fact met with Eric Simmons and Debbie Tressler one week prior to the weekend that her body was discovered. Tr. 3596.

Dr. Frank testified that he reported an incident to the law enforcement regarding his observing a white vehicle being driven by an older white male with gray hair into the field where victim was found. Tr. 3637. The vehicle observed by Dr. Frank did not have an FSU license tag. Tr. 3640. Dr. Frank stated that a newspaper article regarding the finding of the victim's body prompted him to notify law enforcement. TR. 3644. Law enforcement investigators never asked Dr. Frank to supply information for a composite sketch of the subject that he saw. Tr. 3637.

Detective Perdue was questioned by Ms. Orr regarding the probable cause that existed when he contacted Eric Simmons at his father's home. Detective Perdue stated that he did not have probable cause to arrest Eric Simmons until the blood was found in his car. Tr. 3786.

Detective Perdue determined that it was better to show Ms. Renfro a photograph of the victim as opposed to having her do a composite. The same was true for the vehicle. Tr. 3826. He stated that the reason he did not do the composite was because he did not believe the case was important enough to do so. Tr. 3828.

There were shoes found in the victim's trailer, but they were not taken into evidence. Neither was the beer bottle which was the same brand as that found by the body. Tr. 3837.

Mark Brewer, legal advisor to the LCSO, testified that he saw red stains on a sheet in the back seat of Mr. Simmons' vehicle. Tr. 3883. When asked to look at the actual sheet, and seeing no stains, he stated that perhaps it was shadows. Tr. 3885.

CST Cushing testified that he photographed a red stain on the carpet at the victim's trailer but did not have it tested because he believed it was nail polish. He agreed that the beer bottle at the trailer was similar to that found by the body but decided not to take it into evidence. Tr. 3924. Shoe prints were casted by the victim's

trailer. However, no shoes were taken into evidence that were found at the trailer so no comparisons were made. Tr. 3931.

CST Shirley was shown the picture of the Appellant's car which Andrew Montz had identified as being like it had looked the night of the incident he observed. CST Shirley testified that what looked like dirt was fingerprint powder that he had put there and the tires on the car were ones he put on the car as the actual tires were in evidence. Tr. 3962-63.

Prior to applying luminol to the interior of the Appellant's vehicle, CST Shirley testified that the seats and the carpeting in the vehicle were dirty. Tr. 3971.

Shawn Johnson, the FDLE serology analyst, testified that he obtained the DNA profile of the victim from saliva, not from the blood. Tr. 4025. He was never requested to send the victim's DNA profile to Cellmark. Tr. 4026. He was unable to obtain any DNA from the seat cushion. Tr. 4027.

IV. SUMMARY OF ARGUMENT

There are many issues raised on appeal. Most important among them are that the verdict is not supported by evidence, motions to suppress were improperly denied, law enforcement failed to investigate the case to provide any evidence of any value, and the State bolstered this lack of evidence by mischaracterizing, if not inventing, evidence. Simply put, this is a case in which it was determined that the Appellant was going to be

arrested and convicted, and the State set out to do whatever was necessary to achieve that goal. The evidence does not support the result, and the lower court erred on numerous occasions permitting this travesty of justice to be perpetuated.

V. ARGUMENT

A. The Verdict Is Not Supported By the Evidence

When distilled to its essence, the facts of this case are very simple. Law enforcement spent days trying to identify anyone who knew this essentially homeless victim. They found Eric Simmons who law enforcement classified as the victim's "boyfriend". In fact, he was a kind person who helped her get some money by having her work with his father, had her over to his parent's house, despite their apprehension, for Thanksgiving, and permitted her to use his shower since she had none. She lived in a trailer with no electricity and no running water except for a hose and an electric cord provided by a car lot next to the trailer.

Instead of looking at the true relationship between the two, law enforcement instead determined that, since he was the last one who they were able to establish saw Debbie Tressler alive, he must have killed her. However, what did law enforcement do to find the killer? Nothing. Their "investigation" consisted of locating Eric Simmons and finding circumstantial evidence to support their conclusion that he was the killer.

Luckily for law enforcement, a call had come in concerning the incident at Rtes. 437 and 44, which, despite the fact that that intersection was on the way to nothing to do with either the victim, Eric Simmons, or the place the body was found, it did involve a four-door white car. The fact that both witnesses identified the car as being a Chevrolet Corsica, not a Ford Taurus, both witnesses identified the "victim" as wearing white when Debbie Tressler had on black pants and a gray sweatshirt, and neither witness saw the driver of the car, did not deter law enforcement. They showed Eric Simmons' car to the witnesses and said "could this be the car" and, of course, they said "yes".

Fortuitously, Debbie Tressler had been helping the Simmons' move large limbs before she was murdered, so that there were small specks of her blood in the car. Eric Simmons also had a large puppy which may have scratched or bitten her. The blood specks in the vehicle are wholly inconsistent with the bludgeoning suffered by Debbie Tressler. The so-called blood which could only be seen after cutting open the seat cushion of the car and was so old that no nuclear DNA could be obtained from the cushion by the FDLE,[4] could only have been put there from the injuries sustained by Ms. Tressler if she had been transported with her head on the bottom of the seat

[4]Edward Blake was able to obtain nuclear DNA from the cushion. While being unable to obtain a full profile, he could identify two male contributors.

cushion with her back against the back of the seat. Her head injuries were to the right side of her head, and the bulk of the stain was on the left side of the cushion.

The tire tracks by the body were not even studied by the State. Instead, they took casts of tire tracks which it was believed were of the best quality, not of the most value. Two of the tires on Eric Simmons' car could have left those tracks, but it is unexplained how he drove in on two tires.

Debbie Tressler was a large woman, being 5'9" and weighing nearly 200 pounds. For one person to have moved this body as dead weight, let alone maneuver the dead weight in and out of a car, did not concern the State. It was also of no import that there were several weapons used in this terrible assault on this woman. There was the blunt instrument which crushed her skull, a knife with a long blade, and T-shaped object, and some object that had threading like a pipe.

At the time of the arrest, the detectives knew that Eric Simmons knew Debbie Tressler. They knew that Eric and Debbie had watched a football game on December 1. They knew that Debbie Tressler was dead on December 3. Where she was killed, when she was killed, and with what she was killed was unknown. At the time of the trial and to this day, those remain the only known facts and the unknowns remain just that.

In order to obtain a conviction in this case, law enforcement engaged in misstatement after misstatement, if not outright perjury, to obtain warrants to search for

something which would turn Eric Simmons from the person lending a person down on their luck a helping hand to a cold-blooded murderer. Since taking apart his apartment resulted in nothing, it became necessary to turn small specks of blood and an old stain in the vehicle into the scene of an awful murder.

To do this, the State misused mitochondrial DNA testing and contorted the findings beyond any learned person's imagination but with great conviction. The result was that a death-qualified jury, not wanting to be responsible for letting a murderer go free, and believing that the State and their emissaries did their jobs properly and that evidence was properly presented, convicted an innocent man.

This Court cannot permit this travesty of justice to be perpetuated. The conviction must be reversed.[5]

[5]The sexual battery and first-degree murder charges are interrelated, in that there is no way to draw the distinction between time, place and perpetrator of the crimes. The inability to do so corroborates the Appellant's position and underscores the lack of proof of the crimes, with the exception that they did, in fact, occur. However, the kidnapping charge, which was added as an afterthought which will be discussed more fully *infra* is wholly without proof. No evidence was presented by the State and that charge cannot stand.

B. The Trial Court Lacked Jurisdiction to Hear the Case

The Appellant presented argument in both pre- and post-trial motions, that the Court lacked jurisdiction to hear the case. The lower court found that it had jurisdiction. The lower court erred in making these determinations at each step of the proceeding.

The Appellant raised this issue in a pre-trial motion to dismiss (Vol. III, pp. 549-50) and in the post-trial motion for arrest of judgment (Vol. VIII, pp. 1338-44). The arguments in those motions are incorporated herein by reference.

Article I, Section 16 of the Constitution of the State of Florida requires that a person be tried in the county *where the crime is committed*. If the county is not known the indictment can charge the venue in two or more counties and it is then the choice of the accused as to the venue which shall hear the case. This Constitutional provision is codified in Section 910.03 of the Florida Statutes. This was not done in this case.

The State admitted that it had no knowledge of where the murder or the sexual battery occurred. Statement of Particulars,[6] Vol III, p. 537; Vol. XI, pp. 349-50. Instead of amending the indictment to add counties in which the acts occurred, the

[6]The references to the count numbers in the Statement of Particulars are to those in the initial indictment. They refer to the sexual battery and first-degree murder charges.

State, after the Appellant had filed his motion to dismiss and the hearing was held thereon,

amended the indictment to include a new charge of kidnapping. The State, and the lower court, believed that this cured the problem that the lower court lacked jurisdiction. In Crittendon v. State, 338 So.2d 1088 (Fla. 1st DCA 1976), the appellate court approved State v. Domer, 1 Ohio App.2d 155, 159-60, 204 N.E.2d 69, 74 (1965), and held that mere preparation is not sufficient to become an act requisite to the commission of premeditated, first-degree murder. Driving around, looking for a place to commit the murder, or even going to a predetermined murder site is insufficient. Therefore, driving through a county on the way to a murder does not give the county driven through jurisdiction to hear the case.

The elements of kidnapping and the elements of first-degree murder as set forth by this Court are wholly separate and distinct. The element of one is not required for the other. Therefore, even if kidnapping had been proven, which it most certainly was not, the kidnapping charge could not give the trial court jurisdiction to hear the sexual battery or murder charges.

The trial court erred in denying the Appellant's pre- and post-trial motions. The lower court lacked jurisdiction to hear the case. The lower court's decision must be vacated.

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

The Appellant was arrested at the conclusion of his interview at the LCSO headquarters, according to the State. However, the facts belie this contention and raise several issues which the lower court improperly decided.

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

The Appellant filed a motion to suppress the statements of Mr. Simmons on the basis that there was no probable cause for his detention and that his accompanying the detectives to the LCSO was anything but voluntary. Vol. IV, pp. 568-617. Four days of hearings were held on this motion and related motions to suppress.[7] Tr. 230-346; Tr. 439-600; Tr. 625-659; Tr. 692-790. The motion was denied by Order of the lower court dated April 15, 2003. Vol. VI, pp. 907-21.

The instant case is very similar to that in Hayes v. Florida, 470 U.S. 811 (1985), in which it was found that, under the circumstances presented in that case, which included a threat of being arrested, the agreement to go to the police station was not voluntary. In its order denying the motion to suppress, the lower court distinguishes Hayes by claiming that the Appellant never expressed any reluctance to go with the

[7]The hearings were conducted on this motion, the Motion to Suppress Evidence from the Search of the Defendant's Residence (Vol. III, pp. 551-54), and the Motion to Suppress Evidence from the Search of Defendant's Vehicle (Vol. III, pp. 562-67; Vol. IV, pp. 619-24).

officers. The circumstances of having virtually the entire LCSO surrounding the Appellant, with the helicopter overhead, would lead any reasonable person to conclude that it was not a good time to dispute the matter. To claim this was voluntary is ludicrous at best.

The lower court judge then made the determination that it made no difference anyway since he was of the opinion that probable cause existed for the arrest. While that may be the judge's belief, it is not one that was shared by law enforcement at the scene. The judge's opinion is of no moment in this instance. The basis for the judge's opinion on this matter is on equally flawed "evidence". He cites to the argument of the Assistant State Attorney who mischaracterized the statements of Ms. Renfro and was inaccurate in the statement that the Appellant was recently convicted of a violent crime against another female.

This is but one more example of the promulgation of misinformation leading to faulty conclusions which infected this case throughout.

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

A motion to suppress the evidence obtained from the search warrant obtained for the Appellant's vehicle was filed by Appellant. Vol. III, pp. 562-67; Vol. IV, pp. 619-24. The arguments made therein are incorporated herein by reference. Four days of

hearings were held on this motion as well as on two other motions to suppress filed by the Appellant.[8] Tr. 230-346; Tr. 439-600; Tr. 625-659; Tr. 692-790. The motion was denied by Order of the lower court dated April 15, 2003. Vol. VI, pp. 899-906.

The order denying this motion, the trial judge went to incredible lengths to justify the denial and or give credence to the actions of law enforcement. However, in so doing, the evidence presented in the hearings was ignored and the lower court simply altered it to support the denial.

The affidavit supporting the search warrant was signed by "Detective Mark Brewer", who is the legal advisor to the LCSO. In his affidavit, he states that he had been a law enforcement officer since 1979. The motion to suppress questioned the veracity of this statement since Mr. Brewer is an attorney. The lower court found that the information was accurate since he was, in fact, a sworn officer at the time he signed the affidavit. While true, that ignores the testimony of Mr. Brewer at the hearing when he stated under oath that he was a police officer in Sarasota for two years starting in

[8]The hearings were conducted on this motion, the Motion to Suppress Evidence from the Search of the Defendant's Residence (Vol. III, pp. 551-54), and the Motion to Suppress Defendant's Statements (Vol. IV, pp. 568-617). Nothing of evidentiary value was obtained from the Appellant's home so no evidence was admitted during trial. While it is the Appellant's position that the denial of that motion to suppress was error, it is harmless since it did not effect the trial in the instant case. However, the arguments made concerning the lack of probable cause is relevant to the arguments on the other two motions and the evidence admitted at trial. Therefore, arguments made on that motion are incorporated herein by reference.

1979. His certification lapsed in the 1980s and was reinstated something over two years prior to the date of the hearing which was on January 10, 2003. That makes the statement true except for a nearly 20-year gap.

Mr. Brewer went on to state that he had conducted or been involved in numerous homicide investigations. Based upon that experience, he stated that he looked into Mr. Simmons' vehicle and saw "numerous" "visible" stains on a sheet in the back of the vehicle which were "consistent with dried blood." The lower court judge admits that he looked at the sheet and saw no stains of any variety, but merely states that "there is no evidence to contradict that Detective Brewer observed what appeared to him to be blood stains on the sheet". This statement is incredulous. The evidence is the sheet itself. It was not stained with anything, let alone blood. To lend credence to the trial judge's ruling would be to imply that Mr. Brewer is simply delusional. Certainly, this statement was put in the affidavit in order for the magistrate to believe that there was evidence seen in the vehicle which warranted the search.

Another issue arose at the hearings concerning whether or not Mr. Brewer had, in fact, observed anything in the vehicle. The search warrant was signed by the Honorable Judge Briggs who was filling in the afternoon of December 7 as duty judge for Judge Johnson who actually had the duty judge job for the weekend. Judge Briggs did not recall the exact time he signed the warrant, but did know that he would recall if

he had been there very long after normal business hours.[9] Mr. Brewer testified that it was, in fact, during business hours. Tr. 630. The prosecutor who was there stated, as an officer of the court, that he recalled it clearly and it was at 6:00pm or 7:00pm. Tr. 642. Mr. Brewer later testified that it was between 6:00pm and 9:00pm. Tr. 701. The one undisputed issue is that the car was towed to the sallie port at the LCSO. The tow truck driver, Michael Schroeder, was apparently the only one who kept time records. The LCSO records show that Mr. Schroeder got the call at 6:00pm at home. He had to go get the tow truck and get out to Mr. Simmons' parents' home. He got lost, so anticipates that he got to the Simmons' residence approximately 7:00pm. It takes approximately 20 minutes to load a car on the wrecker. It took about 20-25 minutes to drive to the LCSO. He then unloaded the vehicle. He clocked out at 9:00pm. That would indicate that he left the LCSO after unloading at about 8:15pm. Tr. 757-62. Detective Lewis of the LCSO was in charge of staying with the vehicle until the tow truck arrived. His report indicates that the wrecker left the Simmons' residence at 7:12pm. He followed the wrecker to the LCSO and arrived there at 7:48pm. Tr. 766-67.

[9]Judge Briggs was deposed and the deposition is referenced in the trial court's order. It does not appear to have become a part of the record, although the transcript was provided to the lower court. The Appellant is requesting permission to supplement the record with that transcript.

These times make it apparent that Mr. Brewer did not see the car before signing the affidavit. In fact, the affidavit states that the vehicle was located at 33020 County Road 44, which is the Simmons' residence. Mr. Brewer testified that that was the only statement in the affidavit which was false. Tr. 705-07.

The affidavit also misstated the information received from Sherry Renfro. The statement in the affidavit that a person "matching the description of the victim" was seen in a car "resembling a Chevrolet Corsica type car" is simply inaccurate. While the trial judge concedes that the description is not the same, he justifies the difference because the testimony at the hearings was that Ms. Renfro identified the picture of the victim as the woman in the car, and explained that the Ms. Renfro later said she was not certain of the make of the car. While that is all well and good, that does not make the statements in the affidavit true and accurate.

The affidavit also states that the victim appeared to have disappeared on the night of December 1, 2001. Law enforcement was not in possession of any evidence which would substantiate that contention. In fact, they were aware that she was seen on December 1, 2001.

As an initial matter, the mere falsification of the affiant's qualifications raises great question concerning the veracity of the affidavit. As the Court stated in Franks v. Delaware, 438 U.S. 154 (1978), the magistrate must be able to rely upon the truthfulness

of the affiant. While an affidavit may contain statements that are hearsay or belief, it must be the honest belief of the affiant that the statements are true. If the affiant is less than candid with his own background, the entire affidavit must be called into question. This certainly is reckless disregard for the truth if not intentional misstatements.

It was physically impossible for Mr. Brewer to have viewed anything in the vehicle since it was not there. He testified that he did not go to the Simmons' residence. What evidence he claims to have seen, *i.e.*, the bloody sheet, did not exist. The fact that Mr. Brewer's testimony changed from hearing to hearing demonstrates disregard for the truth.

Pursuant to Franks, the false material in the affidavit must be removed and a determination must then be made whether, with only the remaining information, probable cause existed for the issuance of the warrant. See, also, Thorp v. State, 777 So.2d 385 (Fla. 2000); Pagan v. State, 830 So.2d 792 (Fla. 2002). If the false material is removed, there remains the statement that three (3) people identified the Mr. Simmons as the victim's "boyfriend", that Mr. Simmons' father lives on County Road 44 where the car was located, and that the car is registered in Mr. Simmons' name. This is not probable cause for the issuance of a search warrant.

The lower court offers its decision in the alternative. Either there was probable cause for the warrant or a warrant was not required. The lower court's ruling implies

that it is either determining that the *Carroll*[10] doctrine applies, or that it could have been a search incident to arrest. In the Order denying the Motion to Suppress the Defendant's Statements (Vol. VI, pp. 907-21), the lower court found that, despite the fact that the record is replete with statements that the Appellant was not under arrest because law enforcement did not believe they had probable cause to do so until the blood was found in the vehicle and Mr. Simmons "confessed", the trial judge substituted his judgment for that of law enforcement, holding that probable cause for arrest existed at the time the Appellant was first contacted. There is no basis given for this conclusion, and Appellant can think of none.

However, since the lower court also cites to Chambers v. Maroney, 399 U.S. 42 (1970), in support of its contention that the lack of blood stains of the sheet was of no moment, it is possible that the lower court believes that the *Carroll* doctrine is applicable in the instant case. Carroll requires probable cause to exist for a search but permits a warrantless search when the vehicle is likely to flee the locality thereby creating exigent circumstances. There were no exigent circumstances here. The car was parked, the "thundering herd" was all around it, and, after a deputy had the assignment of waiting with the vehicle. Carroll and its progeny[11] make clear that the requirement for a search

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[10]Carroll v. United States, 267 U.S. 132 (1925).

[11]See, e.g., Chambers, supra; Chimel v. California, 295 U.S. 752 (1969).

warrant is eliminated only in the most exigent circumstances, such as an automobile stop on a highway.

As demonstrated above, probable cause did not exist for the issuance of the search warrant and the evidence obtained pursuant to that warrant should have been suppressed. There are no alternatives to the obtaining of a warrant which are applicable in the instant case. The lower court erred in denying the motion to suppress. The error is far from harmless, as the evidence which was obtained from the vehicle is the so-called blood spatter on the vehicle and the seat cushion with the much ballyhooed stain. While the tire impressions were of little moment in the trial, the State relied heavily[12] upon the other evidence obtained from the vehicle in its case. This error warrants the reversal of the lower court's ruling and remand for a new trial with instructions.

3. The Arrest and Ultimate Conviction of the Appellant Was the Result of Police Misconduct

The investigation by the Lake County Sheriff's Office in this homicide case constituted nothing more than a manhunt. Whether it was by Detective Perdue and/or Detective Adams and/or their superiors, the decision was made that the untimely or horrific death of Deborah Tressler, the hapless victim in this case, was who the LCSO

[12]The State's reliance on this evidence was not only substantial but was improper as discussed *infra*.

determined to be her “boyfriend”. The identity of that person was unknown for several days and the investigation which took place during the period after the body was found was an investigation to determine the identity of the boyfriend. By the detectives own testimony, that was their only focus. It was not how or where or when or why Deborah Tressler was murdered. It was who was her boyfriend.

The LCSO expended vast amounts of manpower and no doubt money in this effort. Fliers were printed up with composite sketches and computer-generated likenesses of the persons described to the detectives as the person they sought. Roadblocks were set up to hand out these leaflets and to question individuals of any knowledge they may have of his whereabouts.

Finally a breakthrough came and they obtained the name – Eric Simmons. The fact that he did not look like the composite drawings they had were of no moment. He was going to be their man and they then set out to prove it.

The overzealousness of the LCSO and the excitement with which they viewed the prospect of nabbing Eric Simmons is evidenced by the “thundering herd” which descended upon the Simmons’ residence once the car was located – complete with helicopter support, and everyone from the second in command in the LCSO through road patrol being present. Command posts were set up. They were ready for the big arrest.

The problem was that they had nothing to connect him to the murder. That did not matter. It had to be there. So the warrants were obtained for Eric Simmons vehicle and his home. Since probable cause was difficult, "evidence" of his connection to the crime was, to be polite, embellished. The blue sheet in the back seat of the car for his puppy became blood stained and a woman not matching the description of the victim became the victim, and in the Appellant's vehicle, screaming for help. The fact that the description of the car was not the Appellant's did not matter. It was close enough.

In interviewing Mr. Simmons, they were sure they had him lying about the events of December 1. They had spoken to witnesses that proved that. As it turned out, the witnesses they spoke with were mistaken, not Mr. Simmons, but he still had to be lying. The couple specks of blood in the car was the clincher. Now they had their probable cause and the arrest was complete.

The search of the house was going to be the icing on the cake. They learned he had just cleaned, so that was a good sign. They took everything into evidence from his apartment, including a wall, flooring, carpeting, plumbing, blinds, and even a mop. Once again, no evidence of anything untoward occurring in the residence was found.

Law enforcement had the opportunity to speak to a profiler from the FBI to determine the nature of the person who might have committed this terrible murder. However, that opportunity was foregone when Eric Simmons was located. There was

no reason to believe that the murder was committed by someone she knew, but that made it easier and made for a quick solution to the crime.

This lack of investigation was made far easier by the fact that Deborah was, for all intents and purposes, homeless. No one knew her well. No one cared all that much what happened to her. Even her mother had not seen her in 15 years. Everyone was just happy to see the case resolved – rightly or wrongly. What is ironic, is that the only person who did care what happened to her is the person law enforcement decided was the murderer.

The victim had called the LCSO on a couple of occasions complaining of being harassed at the laundromat by the Rodriguez twins. However, the detectives decided to use Jose Rodriguez and his mother to identify their murderer. They even went so far as to take Jose out of jail to drive him around to find Eric.

Their choice of murderers lacked any common sense, much less evidence. Mr. Simmons parents live on a huge piece of State land which is wholly uninhabited. If Eric was going to dump a body, would it not make more sense for him to dump it where it would never be found as opposed to a place where there was a substantial amount of traffic? And if he dumped the body there, why would he change only two of the tires on his car to cover the fact that he had been there? How did he mange to clean the seat so thoroughly as to complete wash away what the State would have one believe to be

a huge blood stain on the seat cover while leaving dust and dirt on the cushion and not washing away the specks?

One would have hoped that this case would have gotten to the Office of the State Attorney and met with the response that an investigation into the murder, not the suspected murderer, was required. Instead, the Office of the State Attorney picked up where law enforcement left off.

This is a case of the tail wagging the dog. Law enforcement decided who they were going after, and they then sought whatever meager evidence they could accumulate to prove their predetermined outcome. This would be an extremely poor investigation if this were a petit theft case. It is unforgivable for a first-degree murder case.

D. Mitochondrial DNA Was Improperly Submitted and Argued

1. Brian Sloan's Testimony Should Not Have Been Permitted

The State's "expert" on mitochondrial DNA was Brian Sloan. The Appellant did not challenge the veracity of the science of mtDNA under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Rather, the challenge was to the State's expert's report and whether the use of mtDNA was proper in this case.

In Magaletti v. State, 847 So.2d 523 (Fla. 2nd DCA 2003), rev. denied, 858 So.2d 331 (Fla. 2003), the court applied this Court's nuclear DNA analysis to mtDNA. It is required that there be two (2) levels of analysis. First, the qualitative analysis to

determine if the DNA results in a match of some kind. Second, the quantitative analysis to determine the frequency with which such a match might occur by chance. Murrary v. State, 692 So.2d 157 (Fla. 1995); Brim v. State, 695 So.2d 268 (Fla. 1997). Mr. Sloan was unable to testify on the second, qualitative analysis required. In fact, his boss, Richard Staub, was called by the State to provide that analysis. Tr. 1799-1850. He did not testify at trial, but only at a hearing before the court. After that testimony, the Assistant State Attorney informed the court that the lab, Orchid Cellmark, had contacted him to inform him that they were changing their analysis in light of the disagreement with the statistical analysis of the defense expert, Dr. Terry Melton, a highly-regarded expert in the field of mtDNA. Dr. Melton testified that Cellmark had improperly determined it was a unique type of mtDNA. However, that was due to the fact that not all of the data sites had been checked. Tr. 4057-58. Dr. Staub decided that the defense expert was correct and had rerun the data. Tr. 2326. This changed again when the Assistant State Attorney once again spoke with Brian Sloan. Brian Sloan decided that both Dr. Staub and Dr. Melton were incorrect, and he was going with the original calculations. Tr. 2459. Given the fact that it was Brian Sloan who was not qualified to do the statistics, it was far more than curious that he was the one making this determination.

The mere fact that the Cellmark qualitative analysis changed three times in three days raises grave doubt as to their qualifications as experts in the field. This doubt was raised further during his testimony. Tr. 2539-94. Mr. Sloan testified that the stain on the cushion in his opinion was blood and that the mtDNA tested came from that stain. Tr. 2564. Mr. Sloan did not do even a presumptive test for blood on the cushion section he was sent to test. Dr. Melton testified that it is impossible to determine the source of mtDNA in a seriously degraded stain. Tr. 4068. He is not an expert on stains, and his insistence that the stain was blood and that the mtDNA came from that stain may well have been given far too much weight by the jury.[13] Brian Sloan should not have been qualified as an expert in the first instance. His testimony on matters on which he clearly was not an expert only served to exacerbate the problem.

2. The Evidence Concerning mtDNA Was Improperly Argued by the State

The problems with the State's expert were compounded by argument of the Assistant State Attorney. He argued vociferously that the degradation of the DNA in the seat cushion was caused by cleaning fluids. There was no basis for this argument,

[13]See, Daniel A. Krauss & Bruce D. Sales, The Effects of Clinical and Scientific Expert Testimony on Decision Making in Capital Sentencing, 7 Psych. Pub. Pol. And L. 267 (2001) (an empirical investigation concluding that when a jury perceives that an expert is confident in his evaluation, they tend to place great weight on this expert's testimony).

scientific or otherwise. The seat cushion was the crux of the State's case. It was wholly improper to present argument that was unsubstantiated by the evidence.

The only thing that the mtDNA evidence showed was that Deborah Tressler had most likely been in the car and left something behind, be it skin cells, perspiration, fecal matter or any of a number of other bodily substances. The fact that she had been in the car was never disputed.

The State, however, argued the evidence to convince the jury that the whole stain was the blood of the victim which the Appellant had tried to clean up. Argument which is contrary to the evidence is improper.

In this case, this was not harmless meanderings of the attorney. As previously stated, this was the crux of the State's case, and was the only evidence which could even conceivably link the Appellant to the crime. It could only do so if the Assistant State Attorney's argument were true. It was not. The evidence does not support a finding of guilt.

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

The testimony of John Brigham was proffered by the defense. Tr. 3647-3703. The Court would not permit Dr. Brigham to testify at trial. It is within the trial court's discretion to admit this type of expert testimony or not. See, e.g., McMullen v. State,

714 So.2d 368 (Fla. 1998); Johnson v. State, 438 So. 2d 774 (Fla. 1983). However, that discretion is not unfettered. Chesnoff v. State, 840 So.2d 423 (Fla. 5th DCA 2003). Section 90.702 of the Florida Statutes provides that expert testimony is admissible if the testimony would assist the trial of fact in understanding the evidence or in determining a fact in issue.

In the instant case, the "eye witness" testimony of Andrew Montz and Sherry Renfro was key to the State's case. It was their testimony which placed the Appellant's car, although not the Appellant, with the victim when she was allegedly calling for help. It was on the basis of this testimony alone that the kidnapping charge rested, and it was on that testimony alone that the trial court determined that there was jurisdiction to hear this case.

The fact that both witnesses changed their testimony drastically from the time of the incident on December 1, 2001, to the time of trial is of great import in this case. The following factors are matters which would have been explored with the expert and may have helped the jury to understand why well-meaning individuals may alter their views of what they saw: (1) Both witnesses had independently said that the car was a dirty Chevy Corsica and was later a clean Ford Taurus; (2) Sherry Renfro remembered seeing a bumper sticker which was in a position that she could not possibly have seen it that night; (3) Sherry Renfro saw a far older woman with short brown hair wearing a white

T-shirt, but definitely identified the picture of a younger woman with long, black hair; (4) Sherry Renfro saw a driver with dark hair but later determined that she could not tell as the Appellant is very naturally blond; and (5) Andrew Montz saw spoked wheels, but the fact that the wheels on the car he saw looked different did not keep him from saying it was the same car.

The import of the validity of these witnesses' testimony is apparent. Given the import of the testimony and the fact that this is a death penalty case, every effort should have been made by the trial court to ensure that the jury had every bit of information available to it to make its decision in this case. The witness was already in the courtroom. It was not a matter of fiscal responsibility which caused this decision to be reached by the lower court.

There was no corroborating evidence that the incident at the intersection at Rtes. 44 and 437 on the night of December 1 had anything to do with the Appellant or the victim in this case. The changes of their views of what they saw was certainly the result of poor police work, as will be discussed *infra*. But it would have assisted the jury in understanding the psychological factors that cause erroneous identifications when overly suggestive techniques are employed by law enforcement.

The importance of the identifications and the lack of any other evidence makes the trial court's decision to exclude the testimony of Dr. Brigham an abuse of discretion.

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

The record reflects that Dr. Jerry Hogsette, the State's witness to establish a time of death, had no background in forensic entomology. While the Court qualified him as an expert in the life cycle of flies, as opposed to an expert in forensic entomology, does not rectify the problem.

Dr. Hogsette's testimony was to place the time of death in the very narrow window of time in which the Appellant could have even possibly committed the crime, *i.e.*, between midnight and 5:00am on December 2, 2001. The Appellant is not in a position to comment on his qualifications in other areas of entomology. However, having never worked in forensic entomology, he was wholly unfamiliar with the matters concerning a murder victim which must be taken into account in the collection and analysis of insect evidence. In addition, Dr. Hogsette was questioned about the decomposition of the body, an area in which he had absolutely no training or experience.

It is appalling that a professional of any sort would take it upon himself to make a first foray into a field to be in testimony in a trial in which a man's life is at stake. It is even more appalling that the State would choose such an individual to testify and that the trial court would permit it.

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

The Appellant filed a pre-trial Motion to Suppress and/or Preclude In-Court Identifications.[14] Vol. V, pp. 884-893. This motion was also denied by the lower court.

The record reflects that every identification that was made in this case came as the result of law enforcement showing a single photograph, or a single automobile, to a witness and asking them to identify it. The most egregious of these was the identifications of the victim by Sherry Renfro and the identification of the Appellant's automobile by Sherry Renfro and Andrew Montz. The results of these improper methods are demonstrated time and again throughout the trial and this brief.

Courts consistently employ the factors set forth in Neil v. Biggers, 409 U.S. 188 (1972), to determine if an identification is proper. There, the Court stated:

> [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontations, and the length of time between the crime and the confrontation.

409 U.S. at 199-200. While this case specifically relates to the identification of the defendant, the same criteria has been held by this Court to be applicable in instances

[14]A memorandum of law was also filed. The arguments made in the motion and the accompanying memorandum are incorporated herein by reference.

of identification of physical evidence as well. See, e.g., Pittman v. State, 646 So.2d 167 (Fla. 1994); Dennis v. State, 817 So.2d 741 (Fla. 2002).

There can be no question that the method employed by law enforcement in the instant case for identifications was highly suggestive. However, in order to determine whether an identification is admissible or must be precluded at trial, the totality of the circumstances must be reviewed to see if the method employed is "unnecessarily suggestive and conducive to irreparable mistaken identification." Kirby v. Illinois, 406 U.S. 682, 691 (1972), *citing* Stovall v. Denno, 388 U.S. 293 (1967), and Foster v. California, 394 U.S. 440 (1969).

Sherry Renfro's identification of the victim was unnecessarily suggestive in that there were many more reliable ways in which to have an identification of the woman she saw by the Circle K. Since it was clear from her description of the woman that it did not match what was already known of the victim, specifically as it relates to her age and hair style, it would have been far better to have put her with a sketch artist or to have a computer-generated composite done to see what she actually remembered of this person. A photo line-up could have been done, but it would have been far inferior to having her recreate the person.

A grouping of automobiles or their photographs would also have been a better way to proceed with the identification of the vehicle seen. In the case of Andrew

Montz' identification, he was shown only one vehicle and was shown that vehicle over a year after he had initially seen it. The possibilities for misidentifications were extremely high.

The State and law enforcement made much of the certainty with which these individuals identified the person or vehicle. However, that certainty was only present until asked if specific things were remembered. For example, as demonstrated above, Ms. Renfro said the woman looked the same except for her hair color and length and the woman's age. Since she was only shown a head shot, that was quite substantial. Her description of her size differed from the victim's actual size, however, as well. Mr. Montz said vehicle he was shown looked the same as he had seen the previous year except for the dents, the dirt, the wheels, and the trim. Ms. Renfro's identification included certainty about seeing a bumper sticker which she could not possibly have seen from her perspective at the time of the incident.

These identifications were extraordinarily improper, particularly in view of the fact that there was no need for haste. Show-ups may be employed where necessary but there was nothing in the circumstances of these identifications which precluded law enforcement from using proper methods.

Apparently, the LCSO does this with some degree of regularity, as the deputy testified that he was instructed to take the drivers' license photograph only to the jail

to show Jose Rodriguez for his identification. Mr. Rodriguez was not going anywhere, and a photo lineup certainly could have been prepared.

By employing such suggestive and improper means of identification of key evidence in this case, the Appellant's due process rights under the Fifth and Fourteenth Amendment to the Constitution were violated.

The identifications of the Appellant's vehicle also violated the Appellant's Sixth Amendment right to counsel. A defendant has a right to counsel at every critical stage of the prosecution of the case. Powell v. Alabama, 287 U.S. 45 (1932). This includes the right to counsel at identification procedures. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

The *Wade-Gilbert* Rule creates a *per se* exclusionary rule for identifications made in a procedure in which the defendant was not afforded the right to counsel. The identifications of the vehicle were made after the Appellant was under arrest. It was these identifications which became the crux of the State's case for kidnapping and felony murder. Had the Appellant been afforded the right to counsel, these procedures would not have been employed and the original statements of the witnesses would have precluded the State improperly relying on these tainted identifications.

The identifications violated the Appellant's Fifth, Sixth and Fourteenth Amendment rights under the Constitution, and the identifications should have been precluded from being heard at the trial.

H. The Prosecutor's Misconduct Rose to a Level to Prevent a Fair Trial

Throughout this proceeding, from the motions hearings through the trial, the Assistant State Attorney's cavalier attitude toward the truth and the forthright presentation of his case was evident. The hearings on the motions to suppress are prime examples of this.

Each new hearing provided a new story from the witness stand by the same officers who had testified earlier. Time after time, the Assistant State Attorney would come up with another thing that just came to his attention which had been incorrect in the previous testimony. Even his own statements as an officer of the court informing the court of matters relating to the signing of a search warrant at which he was present were found to be erroneous by documented time sheets. Whenever one of these "oops'" arose, it would somehow be turned to be defense counsel's lack of knowledge of the discovery.

It is certainly proper for an attorney to argue their perspective of evidence presented. However, it is not proper to argue clearly erroneous or unsubstantiated

conclusions with great conviction. This was particularly apparent in the State's arguments concerning the mtDNA as discussed more fully above.

It is supposed to be the goal of the Office of the State Attorney to seek the truth and to prosecute those who deserve prosecution. Simply obtaining convictions by whatever means is available is not supposed to be the goal.

I. The Death Penalty Was Improperly Imposed

1. Florida's Death Penalty Statute Is Unconstitutional

Section 775.082 of the Florida Statutes provides that the imposition of the death penalty is premised upon the findings of the court. Section 921.141 provides for a penalty phase in which the jury provides an advisory opinion to the court which is not binding upon the court. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court held the Arizona death penalty statute to be unconstitutional because it is the jury, not the judge, who should impose a death penalty. In Walton v. Arizona, 497 U.S. 639, 648 (1990), the Supreme Court stated "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."

The Appellant filed a memorandum of law on this issue below. Vol. III, pp. 514-23. The arguments made therein and the precedent relied upon are incorporated herein by reference.

Since the statute upon which the Defendant's sentence was imposed is unconstitutional, the death penalty could not properly be imposed. By imposing the death penalty in this case, the Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States were violated. Therefore, the sentence of death must be reversed.

2. The Aggravators Were Improperly Imposed

Three (3) aggravators were found applicable in this case: (1) conviction of a prior violent felony; (2) the murder was committed during the commission of sexual battery, kidnapping, or both; and (3) the crime was especially heinous, atrocious and cruel.

The prior conviction involved a drunk driving incident in which the officer involved *thought* that the Appellant was swerving toward him. Certainly, to rise to the level of becoming an aggravating factor there must be some intent required and some proof beyond one individual's belief. This aggravator was improperly imposed.

To find that the murder occurred during the commission of another crime, whether it be kidnapping and/or sexual battery, is contrary to the evidence presented. There was absolutely no evidence presented on when or where the sexual battery occurred. The only evidence on this charge was the physical evidence that the crime occurred. It is a leap of faith to determine that it occurred contemporaneously with

the murder. Similarly, there was no evidence presented that Ms. Tressler was kidnapped. Even assuming that it was Ms. Tressler who was seen in the car at Rtes. 44 and 437, she would have had to have gone home to change clothes before the murder. This makes it impossible for the kidnapping to have continued through the time of the murder.

The finding of the HAC aggravator also requires assumptions to be made upon matters not in evidence. While it is clear that the victim was badly beaten, it is wholly possible that the first blow rendered her unconscious. If that were the case, she would not have suffered and the aggravator would be inapplicable. Since there is nothing known of how, when or where the murder occurred, it is impossible to determine if any aggravators relating strictly to the murder are applicable.

Since the aggravators are not supported by the evidence, they should not have been imposed. The death penalty should not have been given.

VI. CONCLUSION

The Appellant has provided many grounds which warrant a reversal of the trial court's conviction. However, Appellant would ask that the Court not lose sight of the greater picture when reviewing the various areas raised in this appeal. The most important matter is that the Appellant is innocent and the State's case lacked any proof to the contrary. Absent the seat cushion and the improper arguments made concerning

that, an item which should not have been in evidence at all, the case is purely circumstantial. In a circumstantial case, the evidence must provide an unbroken chain of circumstances which lead conclusively to the guilt of the accused to the exclusion of any possibility of innocence. See, e.g., Frank v. State, 163 So. 223 (Fla. 1935); Mayo v. State, 71 So.2d 899 (Fla. 1954). Here, one has to search to find a single link.

The Appellant respectfully requests that this Court see through the morass of unsubstantiated theories presented by the State and look to the evidence, or lack thereof, and reverse the conviction of the lower court.

VII. CERTIFICATION OF FONT COMPLIANCE

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

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

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by U.S. Mail, postage prepaid, to the Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607, this 6th day of August, 2004.

_____
JANICE C. ORR