IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2071

THOMAS M. OVERTON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTEENTH JUDICIAL CIRCUIT,
IN AND FOR MONROE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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COUNSELS FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Overton's motion for post-conviction DNA testing pursuant to Fla. R. Crim. P. 3.853. The following symbols will be used to designate references to the record in this appeal:

"DNA-R" -- record on instant 3.853 appeal to this Court

"T" -- transcript of original trial proceedings

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ARGUMENT IN REPLY

THE TRIAL COURT ERRED IN NOT ORDERING DNA TESTING OF BIOLOGICAL MATERIALS LIKELY TO EXONERATE MR. OVERTON OR MITIGATE HIS SENTENCE

The sole physical evidence linking Thomas Overton to the crime was evidence showing that semen found on bedding taken from the crime scene genetically matched Mr. Overton's blood. Overton v. State, 801 So. 2d 877 (Fla. 2001). The importance of this evidence is highlighted by the State in its response to Mr. Overton's first motion for DNA testing stating, "This case was essentially a DNA case". (DNA-R. 15). Mr. Overton is in agreement with this statement. Yet, Mr. Overton has steadfastly maintained his innocence and has carefully laid out the extraordinary mishandling and improper storage of the bedding sample that was, years later, found to contain his DNA. (Appellant's Initial Brief, p. 6-9).

The underlying crimes occurred in August, 1991. During the mid 1980's, advances in technology for DNA typing were no longer restricted to biology and medicine, but had also entered forensic science. However, as DNA typing entered the courtrooms, questions appeared about its reliability and methodological standards and about the interpretation of population statistics. DNA Technology in Forensic Science / Committee on DNA Technology in Forensic Science, Board on Biology, Commission on Life Sciences, Nat'l Research Council, Nat'l Academy Press, Wash. D.C. 1992, P. vii.

The scientific and legal communities called upon the National Research Council of the National Academy of Sciences to take the lead in examining the issues generated by the forensic use of DNA. As a response, the National Research Council initiated a study and issued its first report in 1992. Id.

The first report resolved a number of questions, but nevertheless, it generated some controversy. The National Research Counsel was then asked to do a follow-up study, and issued its second report in 1996. The Evaluation of Forensic DNA Evidence / Committee on DNA Forensic Science: An Update, / Commission on DNA Forensic Science: An Update, Nat'l Research Council, Nat'l Academy Press, Wash. D.C., 1996, p. v-vi.

The first report touched upon the use of DNA evidence in court proceedings and specified some requirements to admissibility:

> To produce biological evidence that is admissible in court in criminal cases, forensic investigators must be well trained in the collection and handling of biological samples for DNA analysis. They should take care to minimize the risk of contamination and ensure that possible sources of DNA are well preserved and properly identified. As in any forensic work, **they must attend to the essentials of preserving specimens, labeling, and the chain of custody** and to any constitutional or statutory requirements that regulate the collection and handling of samples. . DNA Technology in Forensic Science / Committee on DNA Technology in Forensic Science, Board on Biology, Commission on Life Sciences, Nat'l Research Council, Nat'l Academy Press, Wash. D.C. 1992, p. 131 (Emphasis added).

The second report focused on situations where the DNA *profile* of a suspect

apparently matches that of the biological material taken from the crime scene or from the victim. The Evaluation of Forensic DNA Evidence, supra, p.2. The central question that the report addresses is: What information can a forensic scientist, population geneticist, or statistician provide to assist a judge or jury in drawing inferences from the finding of a match? Id. This report was even more specific about the absolute necessity of following strict guidelines for chain of custody when handling DNA evidence when it stated:

> **Even the strongest evidence will be worthless – or worse, might possibly lead to a false conviction** – if the evidence sample did not originate in connection with the crime. Given the great individuating potential of DNA evidence and the relative ease with which it can be mishandled or manipulated by the careless or the unscrupulous, **the integrity of the chain of custody is of paramount importance.** This means **meticulous care, attention to detail, and thorough documentation of every step of the process**, from collecting the evidence material to the final laboratory report. The Evaluation of Forensic DNA Evidence / Committee on DNA Forensic Science: An Update, / Commission on DNA Forensic Science: An Update, Nat'l Research Council, Nat'l Academy Press, Wash. D.C., 1996, p. 25 (Emphasis added).

Undoubtedly, the evidence of Mr. Overton's semen on bedding found at the crime scene was the underlying basis for the court ruling that the requested DNA testing (of hairs in the tape binding on Mrs. MacIvor) would not give rise to a reasonable probability of an acquittal or a lesser sentence.1 (DNA-R. 58-64). However, this is not a valid

1 The clear implication is that since Mr. Overton's semen was already found on bedding taken from the crime scene, any further testing of a hair found in the tape binding of the female victim would not give rise to a reasonable probability of acquittal

consideration.

The unrefuted facts surrounding the gathering, storage and documentation of the bedding samples show that there was a complete lack of "meticulous care, attention to detail, and thorough documentation of every step of the process", (The Evaluation of Forensic DNA Evidence, Supra), and that no one was "attend(ing) to the essentials of preserving specimens, labeling, and the chain of custody". DNA Technology in Forensic Science, Supra.

The State has not disputed that the serologist took the clippings of bedding to his home, air dried them on a clothesline without placing paper underneath to preserve possible trace evidence, and placed them in his personal refrigerator (T. 3481, 3393-4, 3505, 3535). It is not disputed that several days later, the serologist took the bedding to the police property room (T. 3395) then checked it out the same day and took it to his lab in Key West to test a portion for "his own purposes" (T. 3395-6, 3427, 3432) and several weeks later made more cuttings from the bedding and placed then in *unsealed* envelopes. (T. 3406-7, 3419-21, 3520, 3818). It is also not disputed that for the next 18 months the serologist kept the unsealed envelopes in the unlocked refrigerator at the Key West lab, then later in a refrigerator in his Marathon lab (T. 3416, 3420, 3523-5). It is without dispute that a sealed package containing some of the bedding was sent to a psychic and

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or a lesser sentence.

returned on 1/13/93 (T. 3514), but not put back into property when returned. (T. 3514). Mr. Overton maintains that the DNA profile, admittedly the strongest evidence considered by the jury, is worthless as evidence to place him at the scene of the crime due to the complete lack of an established chain of custody. As such, it cannot be a basis for the court's conclusion that potential genetic evidence from the hairs in the tape bindings would not give rise to a reasonable probability of an acquittal or a lesser sentence. Arguably, more attention to detail is required when the evidence specifically concerns DNA - as attested by the very existence of Rule 3.853, Florida Rules of Criminal Procedure, DNA evidence is qualitatively different in kind than other forms of evidence, including blood-grouping evidence. Ortiz v. State, 844 So. 2d 70 (Fla. 4th DCA 2004).

If the trial court had properly excluded the DNA testing of the bedding because of the inability to link those DNA results to Mr. Overton due to no established chain of custody, Mr. Overton submits that the State would be seeking to test the hairs found between the layers of tape binding the female victim. There was no break in the chain of custody for the tape bindings. If those hairs are found to be Mr. Overton's, it would prove conclusively that he was at the scene of the crime when it occurred. Conversely, if the hairs found between the bindings are not Mr. Overton's, at a minimum it would prove additional perpetrators were present and thereby mitigate his sentence.

In its answer brief, the State argues that Mr. Overton has failed to provide a factual

statement that would explain how the hair strands attached to the tape would either exonerate him or mitigate his sentence, as required by Florida Rule of Criminal Procedure 3.853 (b) (3) & (4). However, the State fails to acknowledge the facts relevant to the hairs found in the tape bindings, and ignores the logical inference that if the hairs are not Mr. Overton's, their existence on the tape is proof of at least one other perpetrator who was integral in subduing Mrs. MacIvor.

In the direct appeal opinion, this Court stated that Mrs. MacIvor's ankles were tied together with a belt, several **layers** of masking tape and clothesline rope. Overton v. State, 801 So. 2d at 822 (Fla. 2001) (Emphasis added). That opinion further stated that when noticing that a dresser drawer containing belts and neckties had been pulled open, officers believed that the items used to bind and strangle Mrs. MacIvor came from inside the home. The opinion also reiterates the fact that an informant testified at trial that Overton allegedly said he had chased Mrs. MacIvor back into her bedroom and temporarily restrained her using articles he found inside the bedroom to bind her. Overton v. State, Supra, 886 (Fla. 2001). Therefore, the belief is that Mr. Overton overpowered Mrs. MacIvor, grabbed masking tape and other items from inside the MacIvor home, and bound her. The bindings with the masking tape were wound around the ankles in several layers.

Later, several dark hairs were pulled and separated from the tape and sent to FDLE for processing but not subject to DNA testing. (DNA-R. 78). FDLE's comparison

of Mr. Overton's head and pubic hair did not produce a match. (T. 3852-3, 3856-7). The court below found (and the State now argues) that Mr. Overton has not proven that the hairs found in the tape became attached to the tape during the crime, finding:

> First of all, there is no way to determine where the tape came from, that is, was it in the MacIvor's residence before the break-in or was it brought to the crime scene by the perpetrator? Secondly, the fact of the matter is that tape is a sticky substance which can easily pick-up a few strands of hairs in a variety of ways and from a variety of sources. For example, the pieces of hair in question could have been on the tape prior to the commission of the crimes, or the pieces of hair could have been left in the MacIvor residence weeks, months, or even years before the crimes by a legitimate guest and then picked up by the tape at the time of the crimes. (DNA-R. 85).

However, it was previously established that the tape (and other items used to bind Mrs. MacIvor) had been obtained from inside the MacIvor home, and that the tape was wrapped repeatedly around the ankles of Mrs. MacIvor. No doubt tape is a sticky substance that can pick up hairs in a variety of ways. However, when a roll of tape is used to bind a victim and wrapped in layers around the victim, and when later the tape is removed there are hairs stuck between the layers of tape, logic dictates that the most likely source of the hairs came from the body or clothing of the perpetrator. This is especially so when you consider that unbound masking tape would not have a sticky substance on the outside of the tape, and that only upon unwrapping the tape to use as a binding does it expose the sticky aspect of the tape. When the tape was repeatedly bound

around the victim's ankles, it necessarily means that fresh tape was being wrapped in layers, allowing for the hairs to become attached during the process of binding.

The contrary finding of the lower court, if consistently applied in like cases, would preclude DNA testing of hairs or other genetic material that is found between bindings of tape. Certainly, this wasn't contemplated by the rule.2

The State relies on Galloway v. State, 802 So. 2d 1173 (Fla. 1st DCA 2002) to show the appellate court upheld the denial of a request for DNA testing because the results couldn't refute evidence that the defendant was present and was also participating with co-defendants in the crimes. (Answer Brief, p. 15). However, Galloway, supra, concerns the appellant and two co-defendants who participated in a robbery and sexual battery. The reasoning was that the lack of appellant's DNA would not demonstrate that he wasn't present at the scene and participating in the commission of the crimes. Id., at 1175. In comparison, in the case at hand, the State has not alleged or proven any co-perpetrators. Under the circumstances, if the hairs between the taped bindings are found to not be Mr. Overton's, it would demonstrate that at least one other person actively participated the crimes – thereby mitigating Mr. Overton's death sentence.

The State also relies on a Florida Supreme Court decision for the proposition that DNA testing of a hair found on the victim's nightgown was properly denied since it was not possible to discern how, when or where the hair had been transferred to the victim.

King v. State, 808 So. 2d 1237, 1247-1248 (Fla. 2002). However, the facts are substantially different from the facts in the case at hand. In King, the victim was found on her back in the porch door threshold area, presumably having crawled from her bedroom where a fire was started. Her nightgown was up over her breast area. When the officer found her, he dragged her out of the burning house where she was eventually covered with a sheet, examined at the scene by the medical examiner and identified by two neighbors. Id., at 1247. The court found that the hair fragment, too small to determine if it was Negroid or Caucasian, could have been transferred from anyone's hair that was on the floor as she crawled from her bedroom, from anyone's hair that was on the porch area, or from the ground outside the house where she was dragged away from the fire, from the perpetrator, from one of the men who dragged her, from the medical examiner or those who identified her – to others. Id. In the instant case, Mrs. MacIvor was found immovable and bound, with the hairs stuck between the tape bindings. It is most likely that one or more of the perpetrator's left this hair in the process of binding.

The State cites to a Second District Court of Appeals case where the court held that DNA testing of the contents of a rape kit in a sexual battery case could provide exculpatory evidence, arguing that Mr. Overton cannot demonstrate the same. Huffman v. State, 837 So. 2d 1147, 1148-1149 (Fla. 2nd DCA, 2003). Mr. Overton submits that if the hairs found between the bindings of the female victim were to be tested and found

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2 Florida Rule of Criminal Procedure, 3.853 (b) (3) & (4).

to not be Mr. Overton's hairs, that under the posture of this case this would not exonerate him for the crime(s). That is due to the fact that the court allowed evidence to be presented to the jury that Mr. Overton's semen was found on the victim's bedding – even though the state could not prove the semen sample originated in connection with the crime (i.e., nonexistent chain of custody). That being the case, the jury was left with the inference that he deposited his semen on the bedding at the scene of the crime. Therefore, even if DNA testing of the hair(s) conclusively proves they do not belong to Mr. Overton, this cannot exonerate him since other DNA evidence was present. However, considering that the hairs are located between layers of tape bindings on the female victim's ankles, and the likelihood that the hairs would have been deposited there by one or more perpetrators, this DNA testing would give rise to a reasonable probability of a lesser sentence. That is a sufficient basis for granting the relief requested.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing Thomas Overton respectfully requests that this court immediately grant him DNA testing of hairs found between MacIvor's bindings, and allow an independent laboratory to perform such tests.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by Federal Express, to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler, Ninth Floor, West Palm Beach, FL 33401 on this 8th day of August, 2005.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Times New Roman 14 point font.

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