IN THE SUPREME COURT OF FLORIDA

TROY J. MERCK
APPELLANT

VS

STATE OF FLORIDA
APPELLEE

CASE No. 91,581

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

A PRO SE SUPPLEMENTAL BRIEF TO
THE INITIAL BRIEF OF APPELLANT

TROY MERCK #118167
Department of Corrections I.D. No.
Union Correctional Institution
PO Box 221 A1-P-2210-S
Raiford Fla 32083

INDEX OF CITATIONS

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This Pro se motion is being filed by the defendant Even though he has only a 7th grade Education and no legal training.

This Defendant is unsure if this is the proper time to raise these or if they should be brought in a 3.850 motion Later. However hoping to protect these issues from Any sort of procedural barment lates, the defendant brings them now but does not waive the Right to Re-file them At the proper time if this is not it.

For the perpuss of this breif (O.T.) stands for original trial transcripts And (R.S.T.) stands For re-sentencing trial transcripts

ISSUE (I) Denieal of Assistance of Counsel.

Under Artical 6 of the United states Constitution the defendant has A Right to Assistance of Counsel. The Defendant was denied this Right when he was refues Assistance in filing A motion for A New trial based on Newly discovered Evidence of Perjury, Violation of Due Process by lose of Exculpitory Evidence by police and a Brady claim violation.

Although the defendant did file a motion for New Trial based on newly discovered Evidence of perjury and was Allowed to Argue it befor the Court, the defendant did so with the aid of A Pinellas County sheriffs Deputy, which is the same office Det. Nestor Works for, (The person the motion is Aledgeing lied)

Due to this Denieal of Assistance by Counsel the defendant was unable to file a motion for Violation of Due Process by lose of Exculpitory Evidence or a Denieal of Brady material motion

This is A violation of Defendants Right to Assistance of Counsel Under Artical 6 of the U.S. Constitution

Defendant respectfully Ask that the court Allow him to go Back And Re-file his Motion for New trial for Perjury with the Assistance of Counsel And File for A New trial based on Violation of Due Process by lose of Exculpitory Evidence and Denieal of Brady material with assistance of counsel. so that theses issues can be delt with in the proper manner

Issue (II) Knowing use of PerJury by The Prosecution
The Court Errored in Failing to Grant Defendants Pro Se Motion For A New Trial Based on Newly Discoverd Evidence of Pes Jury Pursuant TO Rules of Criminal Procedures # 3.600

The motion was based on testimony given by Det. Thomas Nestor at the trial held on this matter (August 31st - sep. 7th 1993)

At that time After being Called As A Rebuttal witness, Det. Nestor Was Questioned As to Weather or Not he had made A connection between A pair of Khaki Colord pants And A light blue oxford style shirt with the sleeves Rolled up And the Crime scene or suspects by the state's Attorney And defense Counsel Zinober (OT 1053-1059)

Det. Nestor made it Clear he had made No Connection ~~between~~ [1#] between these Clothes And the Crime scene or the suspects

In a new penalty Phase trial held July 14th-18th 1997 Det. Nestor gave testimony under Proffered Redirect Examination (RS T.655 Lines 14-25). When Asked if the statements he had Just made under Direct ment, That he reconized At the time he Examined the khaki pants & light blue shirt, that they fit the discription of the clothes worn by the killer in this case. According

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1# Det. Nestor Also said one of the reasons he made no Connection between those Clothes and the Crime or suspects was because he saw no Blood on them. However Det. Nestor did save other articals of Clothing from the same car that Nither had blood on them or were discribed by Any of the witnesses as being worn by any of the suspects in this case.

This fact should cast farther Suspicion upon Det. Nestors statements and Actions regarding these clothes.

to the discription provided to him by the witness Katherine Sullivan.
To this he answered, yes! [T. 655]
This means he did infact make a Connection between those clothes and the Crime scene and/or the suspects. This Constitutes Per Jury by way of Contridictory statements on a material Fact.

This is material not only be caused these clothes to be lost forever to the Defense for use At trial but also because Det. Nestor was use to rebut Some of the Defense Claims.

The Defense showed A video Tape, taken by the sheriffs office, of the Search of the Red mercurey Bobcat in this case. The video showed the clothes in Question being take from the car By Det. Nestor.
The Defense Attempted to show that because these clothes fit exactly the discription of the ones worn by the killer and since the state Already had The clothes the defendant had on At the time of the crime which are not the same clothes on the video the The defendant could not be the killer.
These clothes were to be what solidifyed the other Evidence, given by the states witnesses, that tended to show Neil Thomas was the killer not Troy Merck
However the state brought Det. Nestor back As A rebuttle witness to say he Checked those clothes and they had nothing to do with this case. That Effectively put Det. Nestor, and therefore, the Prosecutions, word, Regarding the value and Connection between these clothes And the suspects, against the word of the Defense.
We now no this Rebuttle testimony wasn't exactly truthful. Therefore A New trial should be held. Giglio v. U.S., 405 U.S. 150 (1972) Griffith v. U.S., 535 F.2d 320 (1976) Since the Defendant Established the Five Prerequisites of;

1# The Evidence was discovered after trial
2# The Failure to learn of the new Evidence at the time of the trial was not due to the Defendants lack of diligence
3# the Evidence is material to the issues involved
4# the Evidence is not merely Cumulative or impeaching
5# That a new trial could Possably Produce A New trial

The court should have granted his motion for A New trial based on Newly discovered Evidence of PerJury. And not to do so was ERROR

2#

This was not the only Evidence that tended to show Neil Thomas was the killer and not Troy merck. Four other witnesses for the state made comments that tended to show this Fact.

KATHERINE SULLIVAN

MS. sullivan gave A statement At the scene of the crime in which she said the person that killed mr. Newton is the person who tried to provoke him to fight by calling him A pussy and that that person had on khaki colored pants And A light colored shirt with the sleeves Rolled up.

In her trial testimony she said the person that leand against her Car and was Asked to move by her Boyfriend Glenn Sharpenstein, was not the Killer

This tends to show Troy merck was Not the killer in that Neil Thamas Admitted to Being the person who tryed to provoke mr. Newton into A fight by calling him A pussy not Troy merck and That it was in fact Troy Merck not him self that was Ask to move off the car by mr. sharpenstein.

We Also know Troy merck was Not Wearing the khaki Colored pants and light colored shirt with the sleeves Rolled up.

NEIL THOMAS

Mr. Thomas admitted it was he who tryed to provoke the victim into a fight and not Troy merck. He also admitted it was Troy merck not himself who was asked to get off ms. sullivans car by her boyfriend

RICHARD HOLTON

mr. Holton stated that the person who killed mr. Newton, pounded the Roof of the Red Bobcat and demanded the keys.

This tends to show that Troy merck was not the killer because Neil Thomas Right hand Palm Print was found on the Roof of the Red Bobcat in the area mr. Holton indicated the killer hab slapped

HENRY BROMMELSICK

mr. Brommelsick, when asked by Defense Counsel zinober who the killer would be based on the states theory of what happend in this Crime and his Finger print Evidence, said the killer would have to be neil Thomas

ISSUE (III) THE VERDICT IS CONTRARY TO THE LAW OR WEIGHT OF THE EVIDENCE

The Court errored in failing to grant a new Trial based on issue 6# of defendants Pro se motion for a New Trial based on Newly discoveld Evidence of per Jury Pursuant to Florida Rules of Criminal procedures 3.600.#

The defendants motion was based on a claim that Det. Thomas Nestor had Committed per Jury ~~by~~ while Testifying as a Rebuttal witness.

The states two key identification witnesses, Katherine Sullivan and Neil Thomas, gave testimonies that tended to contradict each other and Add Credence to the defenses Claim of mistaken identification.

Det. Nestors Accertion, while on the stand as a Rebuttal witness, that the khaki pants and light colored oxford style shirt he found in the defendants Car, had nothing to do with this case. Not only pitted his word & Credibility as a Detective Against that of the defenses, in ahead to head match, but also tended to take away some of the Contrariness of the testimonies of Katherine Sullivan and Neil Thomas

We now know the testimony given by Det. Nestor, while on the stand as a Rebuttal witness, in regards to these Clothes isn't exactly true.

This has the Effect of greatly increasing the strenth and credibility of the defenses Claims. While at the same time weakening the strenth & Credibility States Arguements.

In light of this the Verdict is now Contrary to the Weight of the Evidence therefore a new trial should be held in the interest of Justice and in Fairness to the Defendant

STATE v. HART 632 So. 2nd 134 (Fla. App. 4th Dist. 1994)
MOSS v. STATE 689 So. 2nd 1260 (Fla. App. 3rd Dist. 1997)

ISSUE(IV) PROSECUTORIAL MISCONDUCT VIA IMPROPER COMMENTS

The Court Errored in Failing to grant the defendants motion for A mistrial After the prosecutor Brought it to the Attention of the Jury that the Defendant Does Not believe in God.

In the resentencing trial held July 14-18 1997. ONE of the prosecutors for the state, while Cross-Examining the defense witness Kathleen Heide About the defendant, Asked in part, Isn't it true he doesn't (RST. P 1113 L.17-18) Believe in God?

Defense Counsel Immediately Called for A side bar Whereapon he asked the Court to grant A mistrial.

The Court Agreed there's no reason for the prosecutor to bring this up and no place for it in the Court. However inplace of declairing A mistrial the Court Chose to give Curative Instructions

The defendant Now urgese this court to grant A New penalty Phase trial on this issue.

The issue of Religious belief or lack of is A Highly Emotional subject And the prosecutors Comment on the defendants lack of belief in God was totally irrelevant to Any of the issues in this case. The only Appearent reason for bringing it up was to inflame the Jury.

This is potentually, An Extremly ~~prejudi~~ preJudicial piece of irrelevant information that was given to the Jury, Information the prosecutor Almost Assuredly had to know wasn't Admissable under the circumstances, And Even though Curative instructions were given to the Jury and they were told to disregard the last Question, this is not Enough to cure the possable preJudice to the defendant because no Amout of Curitave instructions in the World can Erase this Highly preJudicial, totally irrelevant information from the minds of the Jurors!

There's An Even greater Chance this information was prejudicial to the defendant, befor this Jury, since this Jury was picked solely for the reason of rendering An Advisory recommendation of life in prison or Death.

In effect the Jury is Asked to decide if They feel the defendant should be Allowed to live A life in prison or should he be put to death. Therefor unlike Any other type of trial, this totally irrelevant information is not only Highly prejudicial but possibly fatally prejudicial to the defendant.

The possibility of prejudice to the defendant is Extremly high in this instance. Therefor A new penalty phase trial should be granted to insure the defendant A fair trial.

ISSUE (VI) UNCONTITUTIONALLY EXCLUDING POTENTIAL JURORS BECAUSE OF THEIR STRONG CONSCIENTIOUS And/OR RELIGIOUS CONVICTIONS.

The Court Erored in Failing to Grant the Defendants obJections to prospective Jurors being struck for Cause because of their strong Conscientious and/or religious convictions against the Death Penalty that would keep them from Ever voting For the Death Penalty. This denied the Defendant his Constitutional right under the 6th Amendment to An impartial Jury reperserting A Complete Cross-section of the Community.

In A penalty phase trial held July 14th–18th 1997 for the Defendant Troy Merck An obJection was made by the defense Counsel to Allowing roughly Ten(10) prospective Jurors to be struck for Cause simply because they held Conscientious and/or Religious Convictions against the Death Penalty that are so strong they would never vote for the death Penalty.

This obJection was overruled and these prospective Jurors struck for Cause. This deprived the defendant of his 6th Amendment right to A trial by An impartial Jury Drawn from A complete Cross section of the Community.

It is unconstitutional for Any court in the state of Florida to Pose Any Question to A prospective Juror, that implies in Anyway, they may have to make A Choice between their Convictions against the Death penalty And Any state Law and/or instruction by A Judge that Says they must [redacted] Vote for the Death Penalty.

There is no state Law or set of Judges instructions that say A Juror has to vote for Death or that the Death penalty is the only Punishment for the Crime. Therefor that Choice will

ISSUE ~~II~~ ~~Contued~~ Continued

not have to be made by Any Juror because there is No Law or set of instructions that can be given that says Any Juror would have to vote for the Death penalty in Any Case, for Any reason.

· As far as this Defendant is Awear. The Death Penalty is an optional form of punishment which the Jury is Free to select or reject as it sees Fit.

In this state, the Jury decisions in the penalty phase portion of Cases where the Death penalty is An option, Are reached by A maJority vote. Not A unanimous one. Therefore the presence of on Any given Jury of one or Even Five Jurors would not disrupt the decision making process in that one Juror with these convictions Could not Cause A hung Jury.

The presence of Any More then Five Jurors with these views would have to reflect the Conscious of the Community. which is Exactly what the Jury is supposed to do

If the idea is that A Jury should be impartial drawn from A Cross-Section of the Community? Then That Certainly should Not mean a Selection of only those with A predisposition to impose the severest Sentence or those with A predisposition to impose the least Sentence that's possible. At the same time Neither can it mean A systematic exclusion of All prospective Jurors that hold Either of these to views. For A Fair Cross-section of the Community would have to be made up with the inclusion of the sections of the Community that hold both of these two views plus All the views in between the two-

Therefore there is no constitutional basis to systematicly Exclude A Complete section of the community by striking for cause All prospective Jurors who Are so oppossed to Capital punishment that they would Never inflict it on A defendant.

To do so is to Exclude from Jury service An identifiable Class of Citizens in the Community.

It stands to reason that if the presence of A fair cross-section of the Community on venires, panels or pools from which Juries Are drawn is essenital to the fulfillment of the sixth Amendments guarantee of An impartial Jury. Then the wholesale Exclusion of Entire Sections of the Community fails to provide A fair possibility for obtaining A complete repersentation of the Cross-section of the Community

Thus the Current practice in the State of Florida of Excluding All prospective Jurors based on their inability to vote for the Death Penalty, when there is No law that says they have to vote for Death and No conflict with the system of A majority Vote is unconstitutional and has deprived the Defendant of his rights under the 6th Amendment.

For this reason A New trial As to the penalty should be held.

Certificate of Service

I certify that A copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa Fl 33607 And Steven L. Bolotin, Public Defender, PO Box 9000 - Drawer PD, Bartow, Fla 33831

118167

Troy J. Meeks

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NOTARY CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF UNION)

The foregoing Supplemental Brief was acknowledged before me this 24 day of May 1999 by Inmate Troy J. Merck who produced his prison I.D. card number DC-118167 as identification.

Respectfully Submitted,
Troy J. Merck 118167
Union Correctional Institution
P.O. Box 221
Raiford, Florida 32083

SUBSCRIBED AND ATTESTED TO before me this 24 day of May, 1999.

Richard U. Tucker Sr.
NOTARY PUBLIC
My commission expires:

Richard U. Tucker, Sr.
MY COMMISSION # CC603761 EXPIRES
February 9, 2001
BONDED THRU TROY FAIN INSURANCE, INC.

DEBBIE CAUSSEAUX, ACTING CLERK
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6/13/99 filed 5/26/99

TROY MERCK
vs.
STATE OF FLORIDA

CASE NO. 91,581

I have this date received the below-listed pleadings or documents:

Pro Se Supplemental Brief to the Initial Brief of Appellant (original)

Appellee's answer brief shall be served on or before September 15, 1999. Per this Court's Administrative Order In Re: Mandatory Submission of Briefs on Computer Diskette dated February 5, 1999, counsel are directed to include a copy of all briefs on a DOS formatted 3-1/2 inch diskette in Word Perfect 5.1 (or higher) format. **PLEASE LABEL ENVELOPE TO AVOID ERASURE.**

All briefs must comply with this Court's Administrative Order dated July 13, 1998, entitled "In Re: Briefs Filed in the Supreme Court of Florida" and include a statement certifying the size and style of type used.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Debbie Causseaux

Acting Clerk
Supreme Court

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

DC/tsc

cc: Mr. Steven Bolotin
Ms. Candance Sabella