

IN THE SUPREME COURT OF FLORIDA

GERALD D. MURRAY,

Appellant,

v.

CASE NO. 95,470

STATE OF FLORIDA,

Appellee.

_____ /

APPELLANT'S REPLY BRIEF

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Appellant, Gerald D. Murray, will be referred to herein by name, as "Defendant" or as "Appellant." Appellee, State of Florida, will be referred to herein as the "State" or Appellee." References to the Record on Appeal will be designated by the symbol "R", reference to the transcripts will be by the symbol "T" and reference to relevant volume and page set forth in brackets. Example, (Vol. I, 1).

SUMMARY OF ARGUMENT

ISSUE I

Appellee asserts that the testimony regarding the "apparent tampering" is not actually a tampering issue at all. The State's first assertion is that because there is additional evidence, not a change or alteration in the evidence, it is not a true tampering claim. The State's second argument is that this is merely a dispute over the word "several". The State's first argument that it is not a true tampering claim is in direct contradiction to well established Florida case law. Second, there was not a misunderstanding as to the word "several". The term "several" was defined by the State's own expert as being between two and five, and is in direct contradiction to the State's argument in this appeal. Therefore, the evidence should have been excluded.

ISSUE II

Appellee argues that this is not a proper tampering claim either. The State asserts that this is merely a minor break in the chain of custody that is not sufficient to suppress the evidence. This is not a chain of custody issue, each of the State's witnesses in the chain of custody testified. However, no witness could explain away the discrepancies pointed out by Defense counsel at trial. Therefore, the evidence should have been excluded.

ISSUE III

Appellee asserts that the trial court did not abuse its discretion by excluding this critical impeachment testimony regarding the telephone call from the State's expert to the Defense expert. The State suggests that this is merely irrelevant, hearsay testimony with no sufficient impeachment value. The testimony clearly established that the State's DNA expert had an interest in protecting the results of the testing beyond that which the jury was entitled to hear. It is uncontradicted that the State's DNA expert placed a phone call to the Defense expert in an attempt to alter the Defense expert's testimony. The significance of that testimony was to establish that the State's expert had a motive beyond that of simply providing truthful testimony. The State's expert had a personal interest so great that he actually attempted to alter the testimony of another witness. The State's expert witness made several inconsistent statements during the course of the trial and changed his testimony regarding critical issues from the time of testing to the time of the trial. That testimony was critical to impeach the credibility of that witness.

ISSUE IV

Appellee asserts that the DNA results should have been admissible because the protocols and procedures that were followed satisfied the Frye test. Further, the State asserts that there was substantial compliance with the protocols, and that the errors that

were made were merely scrivener's errors that did not effect the reliability of the tests. The State in its Answer Brief does not address all of the numerous number of errors, missing documents, missing photographs, changes in testimony, violation of protocols, and violation of procedures. Violations that caused the trial court to state that they indeed called into question the reliability of the results. The court even pointed out that the lab analyst who actually did the testing testified that the results should be deemed unreliable and inconclusive.

ISSUE V

The State of Florida argues that the collateral crime evidence was admissible to establish consciousness of guilt on the part of the Appellant in this case. Appellant submits that too much time had passed to establish consciousness of guilt as to the crimes charged in this case. Appellant was incarcerated on a separate felony charge, and it was error to introduce that collateral crime evidence. The court's ruling effectively shifted the burden to the Appellant to testify about his incarceration on a separate felony charge. The State fails to establish the relevancy of the fake identification card and a fake social security card. Those facts were clearly irrelevant to the case and offered no evidentiary value.

ISSUE VI

The State argues that there is no prosecutorial duty to preserve a sample for additional testing by the defense. However, in this case, the trial court actually ordered the testing be done in a manner that would preserve a sample for defense testing. After doing the initial test, and using just one-half of the sample, the State's expert called the prosecutor and asked what to do with the remaining sample. Therefore, the remaining sample could have been set aside for defense testing. The response should have been to take whatever steps necessary to preserve it for independent defense testing. However, the prosecutor told him to continue testing and to use the remaining sample. That was in direct contradiction to the trial court's order. Therefore, the DNA testing should have been excluded.

ISSUE VIII

The State in its Answer Brief asserts that the Appellant has no constitutional right to discovery, and that Appellant was not entitled to discover the names of the attorneys involved in the DNA testing on the same gel loading worksheets as that of the Appellant. Appellant pointed out the numerous inconsistencies, missing documentation and altered documentation in this case. Counsel was seeking to discover if indeed those items existed in the other files, or to affirmatively establish that there was an alteration of the evidence that would lead to its exclusion. The State suggests that there might be a confidentiality issue. That

argument ignores the fact that defense counsel was actually provided the names of the other individuals tested with Appellant, and the results of their tests. Defense counsel was simply seeking the documentation to support the calls made by the State's DNA expert. The request was reasonable and there was a good faith basis for the request. It was reversible error to deny the request.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY ADMITTING

HAIR EVIDENCE RELATED TO SLIDE Q42.

The State of Florida in its Answer Brief concedes this issue is properly preserved for appeal.

The basis for excluding this hair evidence related to slide Q42 is the "apparent tampering" of the only two hairs seized at the crime scene, which somehow became "as few as five and as many as twenty-one" by the time it was introduced at trial. The State in its Answer Brief appears to either misunderstand or misconstrue the testimony in this case, and fails to even address the trial court's statements requiring "something proof positive", or that the Defendant provide "demonstrative evidence" of tampering, before shifting the burden to the state to "establish a proper chain of custody". Cridland v. State, 693 So.2d 720, 721 (Fla. 3rd DCA 1997). It is error to require the Defendant to explain away the discrepancy. Dodd v. State, 537 So.2d 626 (Fla. 3rd DCA 1989). Florida law holds the Court's requirement that the Defendant shoulder such a burden is reversible error. The burden is on the proponent of the evidence.

The State's argument on this issue appears to be two-fold. First, the State argues that this is not a "true tampering claim", because there is additional evidence, not that the evidence seized was in a different form when introduced at trial. Second, it argues this is merely a dispute over the meaning of the word "several".

As to the first argument, according to the State, "a true tampering claim involves a change or alteration in the evidence, not that there is additional or missing evidence." (Answer Brief page 13). This argument ignores the full authority of the cases dealing with tampering in the State of Florida. In Dodd v. State, the Third District Court of Appeal reversed the trial court, because at trial, the seizing officer testified that when he seized the evidence and its container, the cocaine weighed 317.5 grams. However, at trial the registered combined weight was 249.5 grams, clearly this is a missing evidence case in direct contradiction to the State's argument.

There are no Florida cases supporting the State's argument on this issue. The State therefore seeks to support its argument by citing cases from Connecticut and Mississippi. In the first case cited, State v. Nieves, 438 A.2d 1183 (Conn. 1982), police seized several items from the defendant's home and noted on their evidence log that six syringes were seized. However, when the toxicological chemist opened the envelope, she counted only five syringes, and noted this discrepancy on the laboratory report. The Court in its ruling admitting the evidence, noted that this could be something as simple as a counting error. However, the critical distinction between Murray, and Nieves, is actually pointed out by the State in its Answer Brief. The critical distinction at page 18 of its Answer Brief is that the Court also noted an unbroken chain of custody was established.

Nieves is easily distinguished from the facts in this case. In Murray's case there was not an unbroken chain of custody. To the contrary, two critical witnesses in this case were not even called to testify. First, the person who actually opened the box containing the unknown evidentiary hairs, and the known hairs of the Defendant was not called to testify. Second, the critical witness who then took those hairs and mounted them on the slides for examination was not called to testify.

The Trial Court, the Jury, and this Appellate Court have no way of knowing whether the person who actually opened the box containing the known and unknown hairs intentionally or inadvertently combined the hairs. Additionally, the Trial Court, the Jury, and this Appellate Court have no way of knowing whether the person who actually mounted the slides intentionally or inadvertently combined the unknown and known hairs prior to the analysis. Further, the addition of evidence after known samples have been taken from a suspect should cause a great concern for the likelihood of tampering.

The next case the State seeks to rely upon is Haley v. State, 737 So. 2d 371 (Miss. App. 1998). In that case, in pertinent part, the evidence logs indicated that of the twenty-two dollars that were seized, there were only two one dollar bills instead of three, and one quarter instead of ten quarters seized from Defendant's pockets. Again, the critical distinction in that case is pointed out by the State in its Answer Brief. There, the detective

testified that the items remained in his constant care, custody and control and that he committed two typographical errors in preparing the evidence logs. Appellant's case is easily distinguished because in Murray's case, as stated earlier, there was not an unbroken chain of custody.

The State in its Answer Brief contradicts even itself. On page 13 of its Answer Brief, the State argues that Appellant's claim is not a true tampering claim, because a "true tampering claim" deals with a change or alteration, "not if there is additional or missing evidence" (Answer Brief page 13)(emphasis supplied). However, on page 20 of its Answer Brief, the State points out that the Nieves case they seek to rely upon involves missing evidence.

The State suggests that a "true tampering" claim is only when the original item has been exchanged with another, or is contaminated, or altered. If it was not made clear in the Initial Brief, the Defendant in this appeal adamantly argues that the known hairs of the Defendant were intentionally or inadvertently exchanged with, or added to, the unknown hairs taken from the crime scene. It is unknown exactly what happened, because the Trial Court committed reversible error by failing to shift the burden to the State to explain the discrepancies.

The State further suggests that "if there are additional hairs, this does not undermine the conclusion that at least some of those hairs are Appellant's." (Answer Brief page 20). This argument is invalid based on the testimony presented by the State

at trial. Not all of the hairs that were tested rendered a valid result, and therefore, there is absolutely no way of knowing which two hairs were taken as evidence from the crime scene, and which additional hairs were the known hairs of Gerald Murray. The prejudice to Murray is obvious and inescapable.

The State also seeks to rely upon United States v. Olson, 846 F.2d 1103, 1116 (7th Cir. 1988), noting that the nature of the evidence in that case, bullets and bullet fragments, makes alteration unlikely. That case is easily distinguished and inapplicable to this case because, as stated earlier, there are additional hairs, not hairs that have been altered.

The State's second argument in support of the Trial Court's ruling is that this is merely a dispute over the meaning of the word "several". This argument fails based on the testimony of the State's own expert witness. He defined the term "several" for the Trial Court and this Appellate Court. Mr. Dizinno testified unequivocally that, "several to me means in my notes two to ten. We don't count hairs so anywhere --- there could be as few as five and as many as twenty-one . . ." (V.32 1070)(emphasis supplied). This testimony is compared to the testimony of the State's Evidence Technician Chase, who testified that he collected only two single hairs from the body of the victim. (V.30 718,722). One hair was found on the victim's leg, and one hair was found on her chest. (V.30 718).

The State further concedes the exact issue that makes the

probability of tampering even stronger. The Defendant's known hairs were in the same box as the two unknown hairs found at the crime scene, thereby increasing the likelihood of tampering. *The defense need not prove malice or bad faith on behalf of law enforcement.* Defendant need only show that the evidence seized is not in the same condition as the evidence offered at trial. It is at that point that the burden shifts to State to establish a proper chain of custody, and to sufficiently explain away any and all discrepancies. That was not done in this case, and the State failed to meet that burden. That error requires reversal.

Harmless Error

The State argues that if indeed the admission of the hair evidence related to slide Q42 was error, it was harmless error. It is inconceivable to suggest that hair evidence said to match that of the Defendant, found on the body of the victim, could in anyway be construed as harmless error. The remainder of the argument made by the State on this issue relates to the circumstantial evidence presented at trial, and the testimony of the multi-convicted felon, Smith, which was effectively impeached at trial.

ISSUE II

THE TRIAL COURT ERRED BY ADMITTING HAIR EVIDENCE RELATING TO SLIDE Q20.

The State of Florida in its Answer Brief contends this issue is not properly preserved for appeal. Defendant respectfully draws

this Appellate Court's attention to (V. 32, 1001 - 1032 and 1082 - 1088), wherein the Trial Court noted that the Defense continued to object to the admission of this evidence, and granted the defense a standing objection on this very issue.

The State then proceeds to argue that this is a mere break in the chain of custody, not tampering, and that a minor break in the chain of custody is not sufficient to suppress the evidence. Florida Law holds otherwise.

The testimony on this critical issue was that a bottle of lotion and a garment were seized from the bathroom sink of the victim's home by Officer Laforte. Officer Laforte testified that he placed both items in a paper bag for continuity because they were found together. Officer Laforte went on to testify that he placed the items in paper, not plastic, "because plastic promotes the growth of mold, mildew and destroys evidence." (V. 29, 584, L2-3). Therefore, it is undisputed that both the garment and lotion bottle were placed in the same paper bag. The evidence presented by the State at trial was that when Katherine Warniment, of the Florida Department of Law Enforcement (FDLE), testified, she stated that when she opened the bag that should have contained both items, she did not receive a bottle of lotion. (V. 31, 920, L9-16). She went on to testify that the item she received was in a double-bag assembly of two additional layers of plastic bag, and that there was no lotion bottle in the bag.

The State's argument that there was a mere break in the chain

of custody was never argued by the Defendant at trial, nor on appeal, and the State's argument to the contrary is without merit. Katherine Warniment testified that when she received the bag, she inspected it thoroughly, because her job was that of "trace evidence recovery", and she testified at trial that:

It was just the one seal. In trace evidence recovery, it's important to check the items to make certain that they have not been exposed to prior to that procedure, and I did receive that sealed, the seal appears to be intact. I did not see any indications of prior examination, so it appeared to be in good condition to perform that particular examination.

(Vol. 31 P. 921, L20, P. 922 L2) (emphasis added).

Based on the State's testimony alone, it is clear that there was not a break in the chain of custody. Officer Laforte sealed the two items together. Dianne Hanson of the FDLE, testified that the same day she received the bag, she forwarded it to Ms. Warniment. (Vol.31, P.968). Moreover, she did not open the bag, but instead merely marked the bag. (Vol.31, P.972). Katherine Warniment of FDLE was the person who opened the items. When she opened the items she made clear to the Trial Court that the lotion bottle was not present.

The State points out that the Assistant State Attorney argued that the testimony established that the lotion bottle was sent to the fingerprint section. (Answer Brief page 23). However, there is absolutely no evidence in the record to support such an argument. The testimony of Katherine Warniment unequivocally

established that the bag and its seal were intact, and she specifically looks for this. In trace evidence recovery, it is critical that the item has not been exposed to any unknown circumstances prior to testing.

The State concedes that "Appellant might have the basis for a claim if the evidence concerned the lotion bottle". (Answer Brief page 25). It should be noted that this testing was not done until after the known hairs of the Defendant were seized in this case. The significance of trace evidence recovery can not be over-emphasized. Any exposure without documentation must cause great concern, especially when the known hair, blood, and saliva samples of Murray were in the possession of that lab. The DNA testing was not done until after the known hairs of the Defendant were seized and packaged with the unknown evidence samples in this case.

The law is clear that when there is "apparent tampering", the burden immediately, and automatically, shifts to the State to establish a proper chain of custody, and to explain away any and all discrepancies. The Trial Court fundamentally erred by not shifting the burden to the State to do so.

If this Court concludes that there was the "probability of tampering", and that the State failed to present a complete chain of custody and thereafter fully explain away any and all discrepancies, this Court need not address Issue IV dealing with the DNA evidence in this case.

Harmless Error

The State argues that as to this issue, if the Court indeed erred by allowing the testimony regarding hair evidence from the slide Q20, that error was harmless. That argument fails because the critical DNA evidence in this case came from within that bag. That bag clearly had been opened, an item removed, and who knows what was deposited therein prior to examination in the laboratory of the FDLE?

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO EXCLUDE EVIDENCE OF A PHONE CALL DURING THE TRIAL BETWEEN STATE EXPERT WITNESS AND THE DEFENSE EXPERT WITNESS DEALING WITH THE DNA TESTING IN THIS CASE.

The State of Florida in its Answer Brief concedes this issue is properly preserved for appeal.

The Trial Court erred by limiting defense counsel's ability to cross-examine the crucial State witness, Mr. Deguglielmo, who was testifying in support of the DNA testing in this case. It is well-settled that "when a witness takes the stand, he *ipso facto* places his credibility at issue" Mendez v. State, 412 So.2d 965, 966 (Fla. 2nd DCA 1982), and that "a party may elicit facts tending to show bias, motive, prejudice, or interest of a witness, a right that is particularly important in criminal cases because 'the jury must know of any improper motives of a prosecuting witness in

determining the witnesses credibility.'" Hair v. State, 428 So.2d 760-763 (Fla. 2nd DCA)(citation omitted).

It is also well-settled that the right to cross-examine a critical state witness on the issue of bias or prejudice is very broad, and great latitude should be given. Interest, motive and animus are never collateral matters on cross-examination and are always proper. Ehrhardt, Florida Evidence Section 608.5, 2000, p.457.

In this case, the telephone call from the State's DNA expert to the defense DNA expert was clearly an attempt to influence the testimony of Mr. Warren, the Defense expert who actually conducted the DNA testing. Mr. Deguglielmo, the State's expert, was a former supervisor of Mr. Warren, the Defense expert. It is not the Appellant's argument that the cross-examination should have been allowed to show that there was a change in the testimony of the defense expert. It was, and is, the Appellant's argument that the jury should have been allowed to hear that the State's DNA expert had an interest in protecting the results of the testing beyond that which the jury perceived, and therefore, he attempted to influence that testimony.

While clearly the State expert's attempt to alter, or influence, the testimony of the Defense expert failed, the jury should have been allowed to hear that the State's expert witness had an interest and motive in this case beyond merely providing truthful testimony. It is well established that the denial of the

full right of cross-examination is harmful and fatal error. Coxwell v. State, 361 So.2d 148 (Fla. 1978).

The State's expert made several inconsistent statements throughout the trial, and evidence of that phone call was crucial for the jury to learn why there were inconsistencies from the time of testing, to the time of Trial. The necessity for the jury to hear that testimony was not to show a change in the testimony. It was extremely important to the credibility, interest, and motive of the State's key witness.

No Florida case law exists to support the State's argument, and the case cited by the State in its Answer Brief is easily distinguished. The State relies on Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1179 (3d Cir. 1993), which deals with a trial attorney's attempts to influence the testimony of witnesses. First, a trial attorney is not a critical witness offering expert testimony in the form of opinion against a Defendant. Second, in that case, the Court did allow testimony about the contents of the conversation between the trial attorney and the witnesses. Third, the Trial Judge in that case actually instructed the jury that "it could draw an adverse inference against Lightning Lube based on this testimony". Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1179 (3d Cir. 1993). Conversely, the Trial Court in this case precluded defense counsel from even mentioning the phone call ever took place. That was reversible error.

It is not Appellant's argument that the cross-examination

should have been allowed simply to show that there was an attempt to change the testimony of the defense expert that failed. It was, and is, the Appellant's argument that the jury should have been allowed to hear that the State's DNA expert had an interest in protecting the results of the testing beyond that which the jury perceived. The jury should have been allowed to hear that the State's expert witness had an interest and motive in this case so great that he actually attempted to influence the defense expert's testimony. Witness tampering is a felony in the State of Florida.

ISSUE IV

THE TRIAL COURT ERRED BY ALLOWING THE INTRODUCTION OF DNA TESTIMONY PURSUANT TO THE FRYE STANDARD?

The State of Florida in its Answer Brief concedes this issue is properly preserved for appeal.

However, the State of Florida suggests that the Frye test is inapplicable in this case because deviations from test protocols and lab errors are not a violation of Frye unless they are so significant as to render the test results completely unreliable. Appellant has shown this Court that the insufficient protocols and lab errors were so flagrant and numerous that it clearly renders those results unreliable and inadmissible, especially in light of the fact that the lab analyst who actually did the testing in this case was called by the defense, and he unequivocally testified that these test results should be deemed unreliable and inconclusive.

On this issue the State relies on the Arizona case of State v. Tankersley, 956 P. 2d 486, 490, 492 (Ariz. 1998), wherein the trial court ruled that Tankersley's argument was really one of "dirty test tubes", not the reliability of the methodology, and that while the Defendant was free to explain the problem to the jury, the evidence was admissible and met the Frye standard.

Appellant's case is easily distinguished from the case cited from Arizona. Appellant's argument in its Initial Brief was broken into six distinct areas, each of which had its own individual errors and omissions within each subgroup requiring reversal; First, the lack of an independent review by a second qualified analyst to protect against bias; Second, the lack of a substrate shaft control used to protect against contamination; Third, the absence of critical documentation necessary to provide an independent review to ensure the absence of contamination; Fourth, the manipulation of the digitized printouts of the evidence by the State's expert; Fifth, the violations of the instructions that came with the DNA testing kit by the manufacturer, Perkin Elmer; Sixth, Microdiagnostics, the unaccredited lab that actually did the testing in this case, even violated their own protocols.

The State in its Answer Brief fails to address numerous issues pointed out by Appellant in this case. For example, the Trial Court's own statements that it had concern regarding the "sloppiness that does call into question the reliability, especially when the technician himself, the one who performed the

test, disagrees with the supervisor as to the reading of the same test, reliability of tests?" (R.4455). It cannot be said enough that the lab analyst who actually did the testing was called by the Defense, and he testified that the results of his own testing should be deemed unreliable and inconclusive. The State also fails to address the Court's question to the Assistant State Attorney, asking him "[w]here do you seek to find your independent review?" (R4455). The State in its Answer Brief fails to acknowledge, or even address the fact that the State's second expert witness, Dr. Martin Tracey, testified that the general standard in the scientific community is that there should be a consensus before issuing a report. Dr. Tracey stated that in "most laboratories, if there is an inconclusive call, is because the original analyst and reviewer disagree." (Vol. 35, P.1474, L2-13).

The State in its Answer Brief also fails to address the testimony of Martin Tracey, wherein he was posed a hypothetical question specifically involving the facts of this case brought out during the Frye hearing. Dr. Tracy was asked if: [1] there was no consensus among the analysts; [2] there are differences in interpretations among the two analysts; [3] there was no independent review of the work done; [4] there were several steps missing; [5] reports being issued that are inconsistent with what the worksheets actually show, would that give you reason for serious concern? "If all those situations were true, surely." (Vol.35,P.1475,L13-23)(emphasis added).

The NRC II discusses potential analyst bias and indicates that:

Possibly exculpatory evidence might be ignored or rejected. Contradictory test results or evidence of sample mixture may be discounted. Such bias is relatively easy to detect if test results are reviewed critically. Both TWGDAM and ASCLD-LAB accreditation guidelines stipulate that the case files be reviewed internally by a qualified second analyst before a report is released. That not only reveals bias but also reveals mistakes in recording and oversights. Independent review by an defense expert provides even stronger protection against the possibility that bias will lead to a false match. This is most effective if the defense expert is thoroughly familiar with the standard procedures of the testing laboratories so that exceptions from standard can be noted.

It has been argued that when the analyst of the test result involves subjective judgment, expectations or other biases can influence an analyst's interpretation (Nisbett and Ross DOR, 1980). For example, it has been suggested that analysts examining DNTR autoradiographs sometimes interpret pink bands as real or artificial so as to produce a match with the subject's profile.

NRC II. at 85. (emphasis supplied).

This is not a case of dirty test tubes, this is a case where "there were examples of sample mixup or mishandling in the analysis stream. Wrong lanes were loaded on the electrophoresis gels twice. Wrong samples were recorded on the same sample sheets, where the transfer of a solution to the wrong tube occurred." (R4178, L20-25). Documents that must exist were missing, population databases were not provided, quality control critical reagents, case files,

and notes were not complete. Photographs were missing. Printouts were missing. Data analysis and reporting was not complete. Equipment calibration and maintenance logs were not provided. Proficiency testing results on individual personnel were not complete or provided. Quality assurance and audit records were not provided to the defense. (R.4193,13-13). Critical controls were not provided, because they were never photographed for polymarker and DQA1, nor was there a digitized image as the State suggest. As to the two significant hairs in this case, B-3 and B-4, those photographs were necessary because, as the Defense expert testified, "if there are extra dots or bands in the negative controls or even the positive, I know there's a contamination problem so I can't judge, first of all, whether there's any contamination problem. Second, I have to know whether the test was conducted properly is to have a positive control, a DNA of known type and make sure that it types correctly. So, without those controlling I can't tell whether the test was conducted properly or improperly." (R.4202, L25; R.4203 L1-11).

The State in its Answer Brief fails to address issues such as the State expert's own notarized report that lists a result as being inconclusive on Q-42, hair 1, at the CFS1PO loci, yet at trial he testified that there was a valid result. One thing the two analysts actually agreed upon at the time of testing, was that the lab analyst who actually did the test also reported that particular loci as being inconclusive. However, at trial, the

State's expert changed his testimony to match the facts of this case. The defense expert did not change his testimony. Further, the lab analyst who did the work never reviewed the notes of the second analyst prior to the issuance of the report which is necessary to complete an independent review.

Other examples of inconsistencies in the interpretations include:

1. Q-20, hair B-3, the LDLR polymarker was reported by one analyst as an A, and other analyst as a A fainter B.
2. Q-20, hair B-4, at HBGG one analyst reported an A, and the other analyst reported an A fainter B.
3. D7S8 one analyst reported a B, and the other reports a B fainter A.
4. Q-20 for hair B-3 at TPOX, only an 8 was reported. However, to truly be a mixture of Gerald Murray and the victim, that loci would necessitate a [8, 10], because Vest is a 10 and Gerald Murray is an 8.

These changes in interpretation from the time of testing to the time of trial is extremely prejudicial, coupled with the fact that the digitized images had been manipulated. Additionally, Mr. Deguglielmo, the director of the lab, testified that he knew this case was going to be highly publicized, and therefore, he paid special attention to it. The digitized images in this case can be adjusted to show fainter or darker bands. This may be the cause for the change in interpretations of the fainter calls that were not seen by the lab analyst, nor the lab supervisor during testing, that were ultimately testified to at trial by the State's expert.

This is the exact analyst bias that the NRC II, and this Court, has warned against, and was further evidenced by the phone call the State's expert made to the Defense expert attempting to influence his testimony. If indeed the testing had been deemed inconclusive, the Director of that unaccredited lab would not have had the opportunity to testify in court. His work would have been done, and there would have been no DNA testimony in this trial.

The additional calls cited above were necessary to create the theory that there was a mixture of Murray and Vest. Without those calls the theory evaporates, and the testing actually exculpates Murray! Therefore, it was necessary for the State's expert to alter those calls from that of the original lab analyst, and that of his own notarized report.

Mr. Deguglielmo chose to call these fainter alleles when it fit his theory. However, when he observed fainter secondary bands that violated his theory, he chose not to call them.

To illustrate an individual review was not performed, Dr. Baum testified:

Documents that must exist are missing, I haven't seen population database, I haven't seen quality control critical reagents, case files and notes are not complete. Photographs are missing. Printouts are missing. Data analysis and reporting is not complete. Equipment calibration and maintenance logs have not been provided, so are not complete for the review. Proficiency testing results on individual personnel have not been complete or provided. I haven't seen quality assurance and audit records.

(R4193).

Dr. Baum testified that these missing documents prevent an independent review of the testing procedures and:

. . . that's not good enough in the community, in the forensic community, if you see some data, you have to make a document of it so that somebody else can come and see what you've seen. You can't just put it in the reports, and there's not - - he hasn't provided all the documentation of his looking - - at certain aspects of the tests, especially some of the controls has not been provided.

(R4193-R4194)(emphasis supplied).

This is not a case of dirty test tubes, this is a case where an actual gel tray containing case samples broke, and it was not even documented. Appellant hopes that this court will seize upon the testimony of Joseph Warren, the lab analyst who actually did the testing in this case. Mr. Warren testified that ". . .[w]hen one has to resort to very strenuous arguments to make . . . the data fit the case, that tells me that perhaps something is wrong with the data." (Vol.23, P.228, L18-21). He further stated as to the faintly amping alleles, they ". . . were too faint and too ambiguous to be interpreted decisively. There was too large a window for ambiguity in these tests," and these results should have been reported as inconclusive. (R. 4071, L10-18).

Appellant recognizes that PCR testing is widely accepted in the scientific community, but as Mr. Warren testified, "it is designed to present straightforward empirical data to be viewed by

a court to help determine guilt or innocence of a Defendant." However, as Mr. Warren stated, "in this case I think that there are enough ambiguities with the oddness of the mixtures that in the - - that we have at that point moved from empirical science into the realm of speculations, that we are saying, in effect . . . that the victim's DNA found on the hair shaft is probably from the victim." (R.4115, L7-25)(emphasis supplied). PCR testing was not designed for probably, it was designed to give exact numbers to determine the likelihood that this DNA came from this person, not that it probably came from this person, or that it might have come from this person.

The State in its Answer Brief fails to address the lack of the substrate shaft control. As this Court stated in Hayes v. State, 660 So. 2d 257 (Fla. 1995), DNA technology is constantly changing, and is subject to a *de novo* review. This Court is to look at the standards in the scientific community at the time of its admission at trial, not at the time of the analysis, to determine whether the novel scientific evidence was generally accepted in the relevant scientific communities. Lindsey v. People, 892 P.2d 281 (Colo. 1995). It is important to note that at the time of the testing in this case, the laboratory that actually did the testing, Microdiagnostics, was not fully accredited for forensic applications in PCR testing. (R3356, L2-10). Further, Microdiagnostics' protocol failed to include the critical substrate shaft control. That control is necessary to detect contamination,

and was the standard in the community at the time of the testing, at the time of trial, and continues to be the standard in the field today. Failure to apply this critical control renders the results inconclusive and unreliable.

Harmless Error

The State argues that if indeed the admission of the hair evidence related to slide Q42 was error, it was harmless error. That is inconceivable. To suggest that DNA evidence found on the body of the victim was said to match that of the Defendant could in anyway be construed as being harmless error is beyond comprehension.

The rest of the argument made by the State relates to the circumstantial evidence presented at trial, and the extremely impeached testimony of the multi-convicted felon, who testified that Appellant made statements to him implicating him in the offense.

ISSUE V

THE TRIAL COURT ERRED BY WHEN IT ADMITTED COLLATERAL CRIME EVIDENCE.

The State of Florida in its Answer Brief concedes this issue is properly preserved for appeal.

Appellee argues that this evidence is admissible to establish consciousness of guilt on the part of Appellant in this case. As

stated in the Initial Brief, Murray's state of mind over two years after the alleged offense is irrelevant to the essential elements of murder, burglary, or sexual battery. This is especially true, when considering the fact that Appellant was incarcerated on another charge at the time of his flight, a charge which he was adamantly contesting. Murray became aware months before his indictment that there was hair evidence that allegedly linked him to the homicide.

During the trial of the co-defendant Taylor, Murray learned that his hair allegedly matched that found at the crime scene. If Appellant had a guilty conscience, he would have fled at that time, but he did not do so. Further, the State's argument does not address the other bad acts introduced by the State that were objected to by the defense counsel. Those being the fake identification card, and fake social security card Murray was using. That testimony was introduced purely to establish bad character and the propensity for committing bad acts. What else does the admission of that evidence establish? It does not go to any material fact at issue and does not establish consciousness of guilt to the charges. It was purely to establish bad character.

The Trial Court, as well as the State, suggested that counsel could have explained to the Jury defense counsel's theory. That theory being that Murray was not fleeing to avoid prosecution for the homicide, he was fleeing to avoid prosecution for the violation of probation on a separate felony charge. That would place the

defendant in the position of telling the Jury that he was in jail on a separate felony charge. To properly rebut the State's testimony would shift the burden to the Defendant, and require him to testify regarding other pending criminal charges.

The State further suggests that the admission of the collateral crime evidence was necessary to explain the context of Murray's confession to his co-escapee. Clearly, the State could have presented the testimony of that inmate without the necessity of implicating either man in an escape. The admission of that evidence was reversible error.

ISSUE VI

THE TRIAL COURT ERRED BY DENYING THE MOTION TO EXCLUDE DNA EVIDENCE BECAUSE THE HAIR HAD BEEN CONSUMED BY PRIOR TESTING.

The State of Florida in its Answer Brief argues this issue is not properly preserved for appeal. Appellant respectfully disagrees. Appellant was given a standing objection as to this issue. The State argues that Defendant's only claim is that of a due process violation, and cites the case of Houser v. State, 474 So.2d 1193 (Fla. 1985). While the State is correct that there is no duty upon the State to preserve evidence for further testing in a typical setting. There is a duty to preserve evidence when a trial court specifically orders the State to do so. Considering the facts of this case, it is extremely important to note that the

Government exercised bad faith, in direct contradiction to the Trial Court's Order, that the testing be done in a manner that would allow for independent testing by the Defense. The testimony regarding this issue further highlights the importance of the trial court restricting Defense counsel from thoroughly cross-examining the State's DNA expert, Mr. Deguglielmo.

As stressed in Defendant's Initial Brief, the State's DNA expert contradicted himself in his attempt to explain his actions, and the actions of the State Attorney on this issue. The State's expert testified that it is not possible to have the DNA to turn over to the Defense. The State's expert utilized semantics to avoid truthfully answering the question. The issue is not the Defense request for Mr. Deguglielmo to extract the DNA from the remaining sample to then turn over to the Defense. The issue was the Court's Order that the remaining sample, not the DNA, be turned over to the Defense, so that the Defense could have its own expert extract the DNA from the hair root for independent DNA testing and analysis.

The argument that the lab had to use the entire sample to properly perform the DNA test misconstrues the testimony of the State's expert in this case. As pointed out in the Initial Brief the State's expert actually testified that ". . . we used 50 percent of the sample to do an amplification for CTT. That set of STR's, that amplified DNA can be run a number of times, that amplified DNA can be run a number of times. There will be enough

DNA there to load at least five, maybe ten different gels, depending on the amount of DNA that we load on the gel." (Vol.33,P.1327). The State's expert appears to be misleading the Trial Court about the amount of DNA available, and whether any can be turned over for independent testing.

Counsel cites the line of cases that support the argument that there is no due process violation if, the State's unavoidable consumption of the entire sample in testing was necessary. However, the testimony in this case is that there was no unavoidable consumption of the entire sample. To the contrary, the State's expert called the Assistant State Attorney to advise him that the lab had obtained results from one half of the evidence sample, and specifically inquired what the Assistant State Attorney wanted the lab to do with the remainder. Pursuant to the Trial Court's Order, the response should have been to take whatever steps necessary to preserve it for independent defense testing, not to continue testing the remainder. Therefore, the DNA testimony should have been excluded.

ISSUE VIII

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO COMPEL NAMES OF ATTORNEYS INVOLVED IN DNA CASES ANALYZED ON GEL LOADING WORKSHEET.

The State of Florida in its Answer Brief concedes this issue is properly preserved for appeal.

The Trial Court abused its discretion by denying Appellant's

discovery request pertaining to other testing that was done simultaneous with that of the Appellant. The State's expert argued that the testing was separate, and that other DNA tests have absolutely no bearing whatsoever on the test results in this case. While the test results of other testing done at the same time may arguably be irrelevant, the purpose of the discovery request was to obtain the supporting documents that were allegedly missing from Appellant's case file, as well as to view the photographs contained in the other files that were manipulated in Murray's case.

The State's expert misled the trial court in his testimony that the testing was not done at the same time. As was pointed out by defense counsel during the discovery request, results of testing in other cases were actually provided to the defense, with the names of the others tested. The results had already been given to the defense. Counsel for the Appellant was merely seeking the documentation necessary to support the calls that were already provided. Due to the manner in which the testing was done, the results and worksheets that were turned over to the defense contained actual calls from the other testing. Accordingly, the results of Murray's testing would be included on the results and worksheets of the other individuals. Counsel pointed out the numerous inconsistencies, missing documentation, and potentially altered documentation in this case and was seeking to discover if indeed those items either existed in other files, or to affirmatively establish that there was an alteration of the

evidence that would lead to its exclusion.

The purpose of the discovery request was to view the files, to perhaps contact the attorney's for the persons who had their DNA tested with Murray, and to learn what was turned over in discovery to them to determine whether or not there had been an alteration of the evidence. It is uncontradicted that there was a mistake made in the gel loading process, and the State's expert admitted that it would have affected the integrity of the other testing. However, he did not advise anyone of that error. If there was nothing to hide perhaps the State would not have objected so vehemently.

The State in its Answer Brief suggests that these items were not in the possession of the State, and that their disclosure would somehow unnecessarily annoy or embarrass the party who had the documents. Mr. Deguglielmo made several trips to the State of Florida for the purpose of providing testimony in this case. Each time he brought Murray's case file with him. It is inconceivable to imagine that carrying one or two additional files could have caused any unnecessary annoyance or embarrassment. The State further suggests that there may somehow be a confidentiality argument. That argument, if indeed valid, could have been made by the laboratory if indeed the Trial Court would have ordered the disclosure. That argument also overlooks the fact that names and results had already been given to the defense. Counsel was merely seeking the supporting documentation.

If indeed confidentiality would have been an issue, defense

counsel even suggested to the Trial Court that the names be blacked out, or the Trial Court make an *in camera* inspection of the documents. The discovery rules allow for disclosure of evidence that may lead to admissible evidence. If indeed those items would have been produced, and the claims substantiated, it is quite likely the Trial Court would have excluded all DNA testimony.

Because of the great number of clerical errors, missing steps, missing documents and missing photographs, trial counsel was seeking to discover if the missing items were turned over to the other agencies that had submitted the samples that were tested with Murray's. As well as to determine if the calls that were made, and delivered to those agencies, matched those testified to by Mr. Deguglielmo. Counsel's suggestion that an *in camera* hearing be held to determine the relevancy of such information, was denied. (R.3412). Counsel's request was reasonable and there was a good faith basis for the request. Failure to order its disclosure was reversible error.

CONCLUSION

For all of the foregoing reasons, the convictions and sentences in this case should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Charmaine M. Millsaps, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by mail, this _____ day of January, 2001.

ATTORNEY

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New Font size 12.