19-7578

No. 20-_____

ORIGINAL

In The
SUPREME COURT OF THE UNITED STATES

RAY EDWARD BARRY,
Petitioner,

v.

WILLIS CHAPMAN, Warden
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Ray Edward Barry, #411456
Petitioner, *in pro per*[*]
Macomb Correctional Facility
34625 26 Mile Road
Lenox Township, MI 48048

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[*] This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

QUESTIONS PRESENTED

Did The District Court Abused Its Discretion In Binding Over To Circuit Court And The Circuit Court Erred In Refusing To Quash The Information?

Did The Trial Court Abused Its Discretion In Denying The Motion To Quash The Information And Dismiss The Charges With Prejudice When It Was Discovered That Clearly Exculpatory Evidence Had Been Lost Do To Negligence Of The Police In Mailing It To An Independent Laboratory For DNA Testing. The Trial Court Erroneously Ruled That The Evidence Was Not Clearly Exculpatory And Due Process Requires That The Conviction Be Vacated And The Charges Be Dismissed. U.S. Const. Am XIV. Additionally, The Trial Court Reversibly Erred In Failing To Give An Adverse Inference Instruction To The Jury?

Did The Trial Court Abused Its Discretion In Failing To Admit Evidence Under MRE 404(B) That The Putative Third Party Assailant Had Choked His Daughter With A Wooden Stick Such That She Suffered Blunt Force Trauma When The Forensic Evidence Showed That The Deceased Suffered Blunt Force Trauma, As Well As Stab Wounds, And A Tree Branch Was Found Over His Body?

Was Petitioner Denied A Fair Trial And Due Process Of Law, And Did The Trial Court Abused Its Discretion In Failing To Order A Mistrial, When The Prosecution Failed To Disclosed To The Defense Certain Critical Evidence – *Additional Hairs* – Although The Prosecution Knew That The Evidential Value Of The Hairs Taken From The Crime Scene Were Critical. This Amounts To A Brady Violation And Prosecutor Misconduct And The Remedy Is Vacating The Conviction And Dismissal Of The Charges. Finally, Trial Counsel Was Ineffective In Failing Earlier To See That Additional Hairs Remained Which Could Have Been Tested, And To Request Testing Of These Hairs?

Must Petitioner's Conviction Be Vacated And The Charges Dismissed Due To Insufficiency Of The Evidence. U.S. Const. Am Xiv?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ray Edward Barry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The final order of the United States Court of Appeals, 6th Circuit, denying a certificate of appealability (December 11, 2019), appears at APPENDIX A to the petition and is unpublished. The final opinion and order of the United States District Court - E.D. Mich., denying the petition for writ of habeas corpus appears as APPENDIX B to the petition and is reported at Ray Edward Barry v Randall Haas, 2019 U.S. Dist. LEXIS 115244, Dk. No. 2:16-cv-13490, (E.D. Mich., July 11, 2019).The final order from the Michigan Supreme Court is published at People v Barry, 499 Mich. 870, 875 N.W.2d. 213, 2016 Mich. LEXIS 379 (Mar. 08, 2016). The final opinion of the Michigan Court of Appeals is unpublished (Mich. Ct. App., Dk. No. 321330, August 11, 2015). (See Appendix, filed under separate cover).

JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its final order on December 11, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grant Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The Sixth Amendment of the United States Constitution states in relevant part: "In all criminal prosecutions, the accused shall...have the assistance of counsel for his defense." "The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *People v Williams*, 470 Mich 634, 641; 638 NW2d 597 (2004) (citing *Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963)).

28 U.S.C. 1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party to any civil case, before or after rendition of judgment or decree.

28 U.S.C. 1915(a)(1): Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person

is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

PROCEDURAL HISTORY

Petitioner had been charged in one-count of Information with open murder. He was convicted after a nine-day jury trial of first degree murder, MCLA 750.316. This is a cold case arising from the death of Christopher Green by stabbing and beating in December 2002.

FACTS

Christopher Green was last seen alive on December 9, 2002 at approximately 10:30 am as he prepared to go to his friend Benny Washington's house to take some venison for Benny's dogs. (Tr 2, 31-32, 41). The Greens and the Washington's lived on 60th Street in Bangor less than a mile from each other. (Tr 2, 33). Christopher was 19 at the time of his death. (Tr 2, 42).

Later that day, Christopher was found dead in a ditch along 60th Street, between the Green house and the Cousins' house. (Tr 2, 90-97, 120, 123-124; Tr 4, 199). A log had been rolled on top of him. (Tr 3, 19; Tr 5, 98-99, 190). Green's body was lying also between the Cousins' house, and the Berry's house, which were about ¼ mile apart, but closer to the Barry's house. (Tr 2, 70).

Emergency responders were called at mid to late afternoon, and were flagged to the body by two men. (Tr 4, 201, 209, 214-215, 256). Howard Butler first discovered Green in the ditch. He went to Ray Barry's house[1] to use Barry's phone to call 911. (Tr 2, 124-127, 219-221). Lloyd Cousins[2] had just driven into Howard Butler's driveway to work on his car when Butler arrived and said someone was dead in the ditch; (Tr 3, 10-12, 51, 59). He and Butler decided to call the police. (Tr 3, 12, 17). Lloyd stayed at Howard's house for 5-8 hours as the crime scene was processed. (Tr 3, 43-44). Lloyd's and Howard's shoes were taken. (Tr 2, 141; Tr3, 50).

Green was already cold, stiff and dead when he was found at 3:30 pm. (Tr 4, 204, 239 243). The ground nearby – both on the roadway and down near the ditch – was "scuffed" by footwear, there was some blood splattered on the ground, and some clothing lay nearby. (Tr 4, 240,

1. Ray Berry lived with his father, Roy Berry, down the street, also on 60th Street, about "a long walk" away. (Tr 3, 73-740. Actually, it was Roy Berry who owned the Cousins' home. (Tr 3, 77).
2. Floyd Cousins' nephew. (Tr III, 38, 42).

298; Tr 5, 95, 187). It looked like there had been a struggle alongside the road, hats were nearby, and there was a set of broken eyeglasses to the south. (Tr 5, 75, 94, 153, 197). The police believed Green had died in that immediate area of struggle, i.e. he had not been "dumped" or "dragged" from a more distant place of death. (Tr 5, 189, 196-198). There was significant blood around the mouth and nose area of the body, and blood was also found towards the road. (Tr 5, 155, 158). A knife blade (without a handle) containing blood (but no fingerprints) was found at the scene. (Tr 5, 88-89, 100, 106-107).

Footprints in the snow led away from the crime scene, running north paralleling 60th Street, and coming back onto the hard snow-packed road, where no footprints could be discerned. (Tr 4, 270-278, 292-295). No "suspect" footwear matching the footprint castings was ever found (Tr 5, 212) but four of the tread castings were similar to tread castings in a footwear database – they were similar to 3 models of very common "New Balance" or "Ascot Z" shoe treads. (Tr 5, 215-216, 223-224).

As the crime scene was processed, hair and fibers were taken from Green's hand. (Tr 5, 182-184; Tr 7, 39-ff). The samples contained in Green's left hand appeared to be Caucasian head hairs. (Tr 7, 41-42, 45). Glenn Moore, forensic specialist, opined that these hairs – held in Greene's hand – could have been transferred during a struggle with an assailant. (Tr 7, 47-48). These were lab items, "L-29" and "L-30".[3] (Tr 5, 182-185). No DNA testing was ever done on these two items (Tr 5, 245) because, as it turned out and was evident during motion hearings, the samples had been lost in the mail while being sent to Speckin Labs for mitochondrial DNA testing. (Tr 7, 236-241). No DNA match was ever made to Defendant on any of the items taken to the lab. (Tr 5, 238-243).

The medical examiner found stabbing wounds to Green's right hand and forehead, four stab wounds to the torso (chest and back), cuts on his thumb and first two fingers, bruises, scrapes and lacerations on the face. (Tr 7, 74, 80-81, 84-87). The cuts on the hands were "defensive wounds." (Tr 7, 90). The right chest stab wound penetrated to a depth of 3-1/2 inches. (Tr 7, 87-88). Cause of death was blunt force head injuries and sharp injuries to the body. (Tr 7, 97-98).

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[3] Detective Pierson explained that the "L" sequence is for laboratory numbers. Tr 5, 174.

After the initial investigation, the case went "cold" for some time. (Tr 6, 77-78). During the "cold" period, Detective Oppenheim visited Defendant at the Forensic Center (Tr 6, 84) where he told Oppenheim he had been home on December 9 and (witness and neighbor) Howard Butler had come from next door to call 911 (Tr 6, 88-90). Defendant told Detective Oppenheim he left the house, went to the ditch, saw Green, and knelt down to say a prayer. (Tr 6, 90).

Defendant made various statements after Green's death that the prosecution construed as admissions or confessions. For example, some time after the killing, Defendant called Antonio Harris and said, "Do you want to know something?" (Tr 6, 10). He told Harris he "got blood on his shoes," that "Sue took his shoes" and "he said he beat him up." (Tr 6, 10, 15). Harris thought he was "jiving" because Defendant always tried to "be a part of the conversation" and so always interjected himself into a situation. (Tr 6, 18-19, 25, 36-39-46). For example, Defendant would make himself out to be a combat warrior in Afghanistan, when it was obvious he had never been to Afghanistan! Jeanine Black said that the day after the murder, Defendant "just wasn't his self...pacing backwards and forth and like something was bothering him." (Tr 6, 108-109). He didn't have his New Balance shoes on (that she had bought for him), and a month later, he told her he had burned them because they had blood on them. (Tr 6, 110-114, 118). He also said that "somebody was looking through the window, he didn't know who it was, and then he grabbed a knife and went outside" and "that he stabbed him." (Tr 6, 114-115, 119).

John Reed testified that one time, Defendant was looking for a man named "Boddy" who lived on 60th St. because Boddy was saying that "I raped Green and killed him – raped him before I killed him." (Tr 6, 35-36, 39, 54).

Claude Taylor, Defendant's half brother, obtained a deal for immunity from prosecution for B & Es in Van Buren County in exchange for his testimony in this case. (Tr 7, 137-143, 154, 170-171). According to Claude, Defendant came to the apartment that he and Jeanine shared. Defendant seemed nervous but said he did not know anything about the murder. (Tr 7, 177-180). And, he did not have his new shoes on.

In March 2003, Claude was in the jail. When he was in jail, he had approached the police for "assurance" that he would not be prosecuted for some open investigations if he cooperated in the Chris Green investigation. (Tr 7, 173, 204). When he was in fact given a deal, he related that in the preceding months, Defendant had told him that "they had got into it...I guess Christopher was looking through the window or something...and then they got into it and that he had killed him." (Tr 7, 175, 186-187, 195-197).

The Cousins family figured large in this trial. They also lived on 60th Street, and the Barry family lived less than 1/4 mile from them. (Tr 2, 63, 171-172; Tr 3, 73). The Cousins family consisted of mom Glenda, dad Floyd, sisters Lisa and Bobby, and son Chad. (Tr 2, 51; Tr 3, 69, 83). When Chad arrived home from school that day at around 4:00 p.m., he saw yellow crime scene tape, police vehicles, and coroner's vehicles down the street from his home. (Tr 2, 61, 86). Ray Barry came over to the Cousins' home that afternoon, fidgeting with his hat and nervous. (Tr 2, 65-67, 85). According to Chad, it seemed like Ray Barry "fancied" his sister, Lisa. (Tr 2, 68, 74). Lisa said that Ray Barry had made a sexual comment to her one time that summer, which she did not like. (Tr 2, 189-191, 210). This was the first and only time Ray Barry said anything inappropriate to her. (Tr 2, 210-211).

Towards the end of the trial, Lisa was recalled to testify that near the time Christopher Green was killed, she saw her father burning a pair of newer tennis shoes in the fire box. (Tr 8, 223-229). This was an extraordinary event, since Floyd Cousins was very particular about what kind of materials went into the wood stove and the tennis shoes were nicer than anything that her family members would have.

Lisa and Christopher had become boyfriend and girlfriend in the spring of 2002 (Tr 2, 43; Tr 3, 71-72) and by the time of his death he visited the Cousins home nearly every day (Tr 2, 53, 55, 173-175; Tr 3, 86). Christopher did not have a good relationship with Lisa's father, Floyd Cousins (Tr 2, 44). Testimony showed that on multiple occasions, Floyd actually "ran him off" because "Chris grabbed [Lisa] in an inappropriate way" (Tr 2, 56-57, 75-78, 179-180, 204; Tr 4, 91-94, 99-101, 150-152). Lisa testified that Floyd Cousins "disapproved of having any guy

that...showed any intentions towards [her] at all." (Tr 2, 175). Lisa had tried to run away from home at least one time and moved out when she was 17. (Tr 2, 78-79, 193). Lisa testified that her father had sexually abused her and her relationship with him essentially terminated after she left home. (Tr 2, 182-184, 200-202). It was the defense theory that Floyd Cousins had the motive and opportunity to commit the crime, and focused on Cousins as the third-party perpetrator. (Tr 1, 12, 29).

On the day Chris' body was found, Roy Barry, Ray's father, came to pick him up at Floyd Cousins' house with his girlfriend, Sue Heffington, and then took him to Claude Taylor's [4] house. (Tr 3, 78, 80; Tr 4, 63-64, 67-70). While they were still in the driveway at Floyd's house, the police arrived, asked them where they had been and where they were going. Defendant had to be asked twice, and said that he had not been in the area until after the crime scene had been blocked off. (Tr 5, 123-124). Sue recalled that the three of them had a discussion about where Ray's new shoes and his coat were. (Tr 4, 71-72, 76). Ray told them he and Howard had seen a body "over there." (Tr 4, 72, 80-81).

Ashley Cousins, former girlfriend to Hollis Barry[5] and a distant relation to Floyd Cousins, overheard a conversation between Ray Barry and Claude Taylor on the day Chris Green was found about someone dying. (Tr 3, 100-101, 110-111, 112-113). Ray Barry had been at Claude Taylor's apartment twice that day. The first time, late morning or early afternoon, he was nicely dressed with nice shoes; he stayed only a few minutes (Tr 3, 101-103, 109-110). A few hours later, Barry reappeared, looking bothered and upset, disheveled and dirty; "his shoes were like filthy." (Tr 3, 106). He pulled Claude aside and that is when the conversation occurred that Ashley had overheard. (Tr 3, 107).

Various neighbors on 60th Street testified to events in the days before the killing. Jamie McDonald and Howard Butler lived with Charles Butler (Howard's brother) for 3-5 days

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[4] Claude Taylor is Defendant's half-brother.

[5] Defendant Ray Barry's cousin. (Tr 3, 95-96).

before the murder. (Tr 4, 44). They were painting the bathroom red the night before the killing. (Tr 4, 49-50, 52-53; Tr 7, 146). Soon after the killing an 8-inch kitchen knife was taken from Butler's home. (Tr 7, 149). No items of evidentiary value – including burned shoes – were taken from Defendant's house (Tr 7, 151-152) or in anyway connected Defendant to the crime (Tr 7, 247).

The day before the killing, neighbor Ricardo Martinez was fixing his water pump. (Tr 4, 117-ff). While he was down in the pump hole before 1:00 p.m., he saw a young black man and a young white man walking down the road "squaring off" or "facing off" and a young white woman walking away from them. (Tr 4, 123-125). They were yelling (Tr 4, 126) but Martinez did not see any physical fighting or contact. He identified the black man that he saw that day as Defendant. (Tr 4, 130, 145). Martinez said when he left for work the next day – perhaps around 10:30 a.m. – he believed he saw a "scarecrow" with a hat lying nearby and shoes in the ditch. (Tr 4, 141-142, 157, 162-164; Tr 5, 133). He had seen an older man chase a younger man off the Cousins property in a beat-up old pick up truck as many as five or six times. (Tr 2, 150-156).

The prosecution rested on Day 7 of trial. (Tr 7, 258, 261). The defense moved for a directed verdict (Tr 7, 263) which was denied (Tr 7, 265-266).

On Day 8 of trial, the defense presented two witnesses: Randall Simmons and Dr. William Brooks. Dr. Brooks had earlier been qualified after a *Daubert* hearing held on November 5, 2013. (Nov. 5, 2013 Tr 12-ff). The trial court ruled that Dr. Brooks would be allowed to testify to Defendant's psychological characteristics and the symptoms associated with his thought disorder (which was a psychotic disorder). (Nov. 5, 2013 a.m. Tr, 66-ff).

Simmons testified that he lived on 60th Street and got to know Chris Green. (Tr 8, 6). Chris confided in him that he had a budding romance with Lisa Cousins, and Simmons would see them meet in the middle of the road on their bicycles. "[H]e would run up and down the street with her and they was in front of my house a lot..." (Tr 8, 7). The morning of his death, Chris had visited Simmons, who gave him some venison, "and – by noon –...somebody called me and said they found Chris dead..." (Tr 8, 9). In the weeks before his death, Chris had also confided that he had been repeatedly threatened with death / physical harm by Lisa's father (Tr 8, 9-12) and that her

"boyfriend" had threatened to beat him up (Tr 8, 14). He also said he felt uncomfortable around her "boyfriend" but it was not clear who the "boyfriend" was, but Simmons believed it was the "black male" who lived on the road. (Tr 8, 12-13)..

Dr. Brooks, a licensed psychologist, had performed a psychological evaluation on Ray Barry over a period of 10 hours. (Tr 8, 21). He diagnosed Defendant as having a psychotic disorder not otherwise specified, border-line intellectual functioning (Tr 8, 22) with delusions of grandeur (Tr 8, 27). A psychotic individual will manifest delusional thinking, severe mood instability, impaired capacity to engage their environment, a need to be the center of attention, and grandiosity. As to Defendant, Dr. Brooks stated,

> "In my interactions and in my evaluation with Mr. Barry,...within the confines of my mental status examination I saw a plethora of those type of examples. He tried to please me. He tried to be the center of focus and the center of attention. That is what I would anticipate and that's what I would expect with an individual that has a psychotic disorder that is characterized by grandiosity types of dilutions. [sic - "delusions"].

(Tr 8, 24).

Grandiosity would tend to manifest itself more as the individual becomes more comfortable, as Defendant did in his many hours with Dr. Brooks. (Tr 8, 25). Delusions of grandeur would manifest as "wanting to be a part of the action, be a part of the center of the focus, be somebody important to the person that you want to impress.."(Tr 8, 28-29).

After Dr. Brooks' testimony, the defense rested and the case proceeded to final argument and instruction. Defendant was convicted, and this appeal followed. Further facts will be stated as necessary in the Argument section.

Proceedings

Various motion hearings were held. The relevant motions, dates and results will be briefly noted. If relevant, issues pertaining to the motions will be discussed in the Argument.

1. **Preliminary Exam.** The prelim took place over parts of 3 days. Defendant was bound over.

2. **May 8, 2013.**

   a. **Motion for Appointment of a Psychologist.** Over defense objection, the trial court deferred ruling on the motion to appoint a psychologist until after a competency hearing had been held, and instead ordered Defendant referred to the Forensic Center for a competency evaluation. Tr 3-15.

   b. **Motion for DNA testing, Motion to Quash the Information.** These two motions were deferred until after the competency evaluation. Tr 9, lines 3-9.

3. **July 2, 2013 - Competency Hearing and Arraignment.** Defendant was found to be competent and pleaded not guilty. (Tr, 7).

4. **July 29, 2013.** The motions which were deferred on May 8 were taken up. The Motion to Quash the Information was denied. (Tr 4-7). The motion for appointment of a psychologist (actually, a motion for expert witness fees) was granted. (Tr 7-9). The Motion for DNA testing was again deferred. (Tr, 9).

5. **August 15, 2013 Status Conference.** The Motion for DNA testing was finally heard, and the motion was granted. The request was for ***mitochondrial*** DNA testing – thus the extraordinary cost of $4,000. (Tr 3). This motion is significant, because the hairs to be tested – those found in Chris Green's hand after he was killed – were ***lost and the mailman signed the green "return receipt" card.***

6. **September 23, 2013 Status Conference.** Brief scheduling matters were discussed.

7. **November 5, 2013. Morning Session:** Motion to Permit Expert Testimony. The defense sought to allow Dr. Brooks testify to Defendant's psychological profile. (Tr, 5). The trial court allowed Dr. Brooks to testify to Defendant's profile, limited to his diagnosis of Defendant's thought disorder and accompanying symptoms, but not including whether Defendant's statements were true or untrue, reliable or unreliable. (Tr 66-68). **Afternoon session:** Motion to permit evidence of third party culpability, i.e. Floyd Cousins. This motion was ultimately granted.

8. **November 20, 2013.** Motion to allow third party culpability. Motion granted.

9. **December 23, 2013.** Miscellaneous motions, not pertinent to this appeal.

10. **January 16, 2014.** Various motions, some of which are pertinent to this appeal.

REASONS FOR GRANTING THE PETITION

I.

THE DISTRICT COURT ABUSED ITS DISCRETION IN BINDING OVER TO CIRCUIT COURT AND THE CIRCUIT COURT ERRED IN REFUSING TO QUASH THE INFORMATION.

Issue Preservation and Standard of Review

The issue was preserved by the filing of a Motion to Quash the Information. See, Record Motion, April 22, 2013. This Court reviews for an abuse of discretion a district court's decision to bind over a defendant, and reviews *de novo* the circuit court's decision on a motion to quash. *People v Hamblin*, 224 Mich App 87, 91, 568 NW 2d 339 (1997); *People v Hudson*, 241 Mich App 268, 615 NW 2d 784 (2000). In *Hudson*, this Court described its reviewing function as follows, and adopts a de novo, rather than a traditional "abuse of discretion" standard:

> "A circuit court's decision with respect to a motion to quash a bindover order is not entitled to deference because this Court applies the same standard of review to this issue as the circuit court. This Court therefore essentially sits in the same position as the circuit court when determining whether the district court abused its discretion..... In other words, this Court reviews the circuit court's decision regarding the motion to quash a bindover only to the extent that it is consistent with the district court's exercise of discretion. The circuit court may only affirm a proper exercise of discretion and reverse an abuse of that discretion. Thus, in simple terms, we review the district court's original exercise of discretion." (Citations omitted).

Argument

A preliminary examination was conducted in this matter at which time several Prosecution witnesses (Antonio Harris and Claude Taylor) testified that the Defendant either suffers from a mental disability or mental impairment. *Trans. of Prelim. Exam.* Vol 2, P36, L11-23; P74). Indeed, one of the witnesses (Harris) testified that what Defendant says is not to be taken seriously. He testified as follows (See, *Trans. of Prelim. Exam.* Vol 2, P26-27):

Q Okay. And after – after the conversation with – that you just testified to as to Mr. Barry, I take it you became extremely concerned that your mother would be living so close to somebody who you believed

A Yeah.

Q – did something so terrible?

A Yeah, I didn't believe him. You know, I just – 'cuz he's like he always want to be a part of something so I kind of figured like, okay, he just want to be a part of something. Like if something happened in Afghanistan for him to have a conversation, he'll say he was there so, you know, I just – I look at it like that. He just – he liked to have conversations. He liked to have something to talk about, to be a part of something.

Q Okay. So what you're telling me is that Mr. Barry's not a very credible person because he has a way of putting himself in situations that he really doesn't belong in?

A Right.

Both of the Prosecution witnesses testified that the Defendant is "gullible" and easily "manipulated." See, *Trans. of Prelim. Exam.* Vol 2, P36, L1-5; P74, L7-14. Both Harris and Taylor testified that Defendant made statements which implicated him in the incident. The first witness (Harris) knew not to take him seriously (see above), while the second (Taylor) saw it as an opportunity to escape criminal charges of his own on several different occasions at the expense of his mentally impaired half-brother, the Defendant. *Trans. of Prelim. Exam.* Vol 2, P94-96.

Taylor tried to make it appear that the reason that he spoke to police about his brother's alleged involvement in Green's death was because he was so "shocked" but in truth he did not speak with the police until he found himself in jail and was trying to get himself out of trouble. *Trans. of Prelim. Exam.* Vol 2, P84-85. Taylor admitted that he had an agreement with the Prosecution that if he cooperated in causing Defendant's arrest ***and*** conviction, he would escape criminal charges. *Trans. of Prelim. Exam.* Vol 2, P94, L16. Indeed, notwithstanding this agreement, he was convicted of a new felony in a neighboring county and avoided incarceration there by once again agreeing to cooperate with law enforcement in this case. *Trans. of Prelim. Exam.* Vol 2, P95-96.

No physical evidence or eye witness testimony was introduced linking Defendant to Green's killing. The bindover was based primarily on the unreliable statements allegedly made by

Defendant which his half-brother, Claude Taylor, manipulated him into repeating while police were monitoring the exchange. Taylor has multiple felony convictions which are relevant to his credibility, including convictions for home invasion and embezzlement. *Trans. of Prelim. Exam.* Vol 2, P95.

Notwithstanding Harris' testimony that Defendant was unreliable and despite Claude Taylor exploiting his easily manipulated and gullible brother (the Defendant), the district court refused to consider Harris and Taylor's credibility. We submit that the district court magistrate erred in refusing to consider witness credibility at all. At the end of the hearing, the court held, in part, as follows:

> First, based upon the testimony of Dr. Hunter, I can find that the cause of death was the multiple stab wounds as Dr. Hunter testified in this matter.
>
> The question then becomes where do we go from there and this is a probable cause hearing. This is not a proof beyond a reasonable doubt. The Court has always taken the position that credibility is one for the trier of fact and not for this Court. That's what I've always held in the last ten-plus years and what I'm going to do today. *Trans. of Prelim. Exam.* Vol 3, P125.

This is an erroneous view of the law governing preliminary examinations.

A magistrate has a duty to bind over to circuit court upon a finding of probable cause to believe that a felony has been committed and that the accused committed it. MCL 766.13. In *People v Justice (After Remand)*, 454 Mich 334, 344, 562 NW 2d 652 (1997), the Michigan Supreme Court remarked that "probable cause" is a less exacting standard than beyond a reasonable doubt. "A magistrate may become satisfied about probable cause on much less than he would need to be convinced of guilt. Since he does not sit to pass on guilt or innocence, he could legitimately find probable cause while personally entertaining some reservations. By the same token, a showing of probable cause may stop considerably short of proof beyond a reasonable doubt, and evidence that leaves some doubt may yet demonstrate probable cause."

However, contrary to the magistrate's view, a magistrate's duty does extend to judging the weight and competency of the evidence presented and the credibility of the witnesses. *People v Paille*, 383 Mich 621, 178 NW2d 465 (1970). "In determining whether the crime of conspiracy had been committed, the magistrate had not only the right but, also, the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses." *Paille*, at 627.

The magistrate " 'must have * * * good reason to believe [Defendant] guilty of the crime charged'. The magistrate has 'the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses' and may consider evidence in defense." *People v King*, 412 Mich 145, 153-154; 312 NW 2d 629 (1981). (citations omitted). The inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. The magistrate is required to make his determination "after an examination of the whole matter." *Id*, 154.

We submit that the magistrate should have considered the "whole" record, including the credibility of the witnesses and reliability of the evidence presented and that he abused his discretion in failing to do so. On *de novo* review, this Court should find that the district court abused its discretion and that the circuit court should have quashed the bindover.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO QUASH THE INFORMATION AND DISMISS THE CHARGES WITH PREJUDICE WHEN IT WAS DISCOVERED THAT CLEARLY EXCULPATORY EVIDENCE HAD BEEN LOST DUE TO NEGLIGENCE OF THE POLICE IN MAILING IT TO AN INDEPENDENT LABORATORY FOR DNA TESTING. THE TRIAL COURT ERRONEOUSLY RULED THAT THE EVIDENCE WAS NOT CLEARLY EXCULPATORY AND DUE PROCESS REQUIRES THAT THE CONVICTION BE VACATED THAT THE CHARGES BE DISMISSED. US CONST AM XIV. ADDITIONALLY, THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO GIVE AN ADVERSE INFERENCE INSTRUCTION TO THE JURY.

Issue Preservation and Standard of Review

The issue was preserved by the filing of pretrial motions: 1) the defense Motion to Quash the Information and Dismiss the Complaint With Prejudice and 2) the prosecution Motion to Suppress Lost Hair Evidence. See Record, Sep 23, 2013. A hearing on the motions was held on November 5, 2013 (afternoon session), beginning at page 21 of the transcript.

This Court reviews for an abuse of discretion a trial court's decision on a motion to quash an information. *People v Waterstone*, 296 Mich App 121, 131, 818 NW 2d 432, 437 (2012); *People v Fletcher*, 260 Mich App 531, 551–552, 679 NW 2d 127 (2004). Constitutional errors are reviewed de novo. *People v Echavarria*, 233 Mich App 356, 358; 592 NW2d 737 (1999); *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

Argument

At least one apparently Caucasian head hair – perhaps several – had been found in the bloody hands of Christopher Green when his body was discovered, apparently in defensive wounds. (See, Motion to Compel DNA Testings of Hair Samples, filed April 22, 2013; See also November 5, 2013 p.m. Tr, 22-24). These hairs had been preserved by the crime scene technicians, and from there had been taken into custody by the State Police. When charges were brought, defense counsel requested that the hairs be tested by an independent forensic lab, Speckin

Laboratories. An August 15, 2013 Order had required Speckin Forensic Laboratories to conduct mitochondrial DNA tests on the hairs. The Order provided, "Speckin shall work with the Michigan State Police to ensure that the chain of custody is properly preserved."

However, instead of ***driving the hairs to Speckin Labs*** the State Police sent the hairs by ordinary certified first class mail, and the green 'return receipt requested' lab was signed – not by the actual recipient but – by ***the mailman, and left in an exterior mailbox***! (Tr, 38-39). Perhaps unsurprisingly, the hairs could not be found. The defense contended that they had been stolen from the mail by someone unknown, an "intervening criminal act." (Id., 30).

In its Motion to Quash the Information, the defense contended that it had been irreparably deprived of the opportunity to show – by forensic testing of mitochondrial DNA of the hair – that the hair belonged to someone ***other than*** Chris Green, i.e. that they belonged to the killer, who was white. (Tr 24-26). The defense agreed that, if the hairs belonged to Chris Green himself, they would not be exculpatory, but loss of the hairs destroyed the possibility of showing that the hairs belonged to someone else, the actual perpetrator. The defense then contended that the only remedy for loss of such critical evidence was dismissal of the charges. (Id., 27). Alternatively, the defense contended that an "adverse inference" instruction should be given to the jury. The prosecution's response was by counter-motion, so to speak. The prosecution's Motion to Suppress requested that any testimony pertaining to whether the hairs were tested or not be excluded.

The trial court denied the defense motion, and partially denied the prosecution motion. See Order, November 20, 2013. The court ruled there had been no showing of 1) materially exculpatory value and 2) no showing of bad faith by the police or prosecution. (Tr, 45-ff). The court ruled that there could be no argument that the police / prosecution ***intentionally*** lost the evidence, but that evidence concerning the hairs and what happened to them could be admitted. (Id..)

The court further ruled that because the loss of the evidence was unintentional, and that the defense could argue only that the evidence was being tested at the defense's request, and that

it had been lost, but could not argue that it had been lost intentionally. The court also refused to give an "adverse inference" instruction. The court asked the parties to prepare a Stipulation comporting with the court's ruling, but defense counsel initially refused, on the mistaken belief that the court was asking for counsel's ***consent to and agreement with*** the court's ruling. When the court made clear that the defense objections were preserved, counsel agreed to assist in preparing a stipulation that simply conformed to the court's ruling. (Tr, 50-ff).

a. General principles concerning loss of evidence.

Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. The United States Supreme Court has interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v Trombetta*, 467 US 479; 104 S Ct 2528; 81 L Ed 2d 413, 419 (1984). To safeguard that right, the Court has developed constitutionally guaranteed access to evidence. *United States v Valenzuela-Bernal*, 458 US 858; 102 S Ct 3440; 73 L Ed 2d 1193 (1982).

When a Defendant is denied access to "exculpatory" evidence; that is, evidence with "exculpatory value," a conviction must be set aside as a "Due Process" violation. *US Const, Amendments V, XIV and Const 1963, art 1, § 17.* Evidence is exculpatory "if it is favorable to the accused" and "if it would raise a reasonable doubt about defendant's guilt." See, *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005); *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). Again, both of these tests have been met in the present case.

In *California v Trombetta*, supra, the Court addressed the extent to which the Due Process Clause imposes on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory evidence and preserving evidence in the government's possession. In finding that law enforcement agencies were not required to preserve breath samples in order to introduce breath-analysis tests at trial, the Court found that the officers "were acting in good faith and in accord with their normal practice." 81 L Ed 2d at 422. The Court stated the following:

> "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality,... evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 81 L Ed 2d 422.

In *Arizona v Youngblood,* 102 L Ed 2d 288 fn 2b, the Supreme Court again discussed the loss or destruction by the government of evidence potentially favorable to the defendant. The Court indicated its unwillingness to read the "fundamental fairness" requirement of the Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. 102 L Ed 2d 289. The Court held "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 102 L Ed 2d at 289. The Court believed that this requirement would limit the extent of the police department's obligation to preserve evidence to reasonable bounds. 102 L Ed 2d 289. In reaching its conclusion, the Court referred to the requirements set forth in *Trombetta*, supra, and indicated that:

> "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." 102 L Ed 2d 288 fn 2b.

b. The trial court erred in ruling that the hair was not clearly exculpatory.

As noted earlier, the police sent the Caucasian hairs to Speckin Labs for mitochondrial DNA testing but the hairs were lost. The trial court found the hair not to be exculpatory. This is a clearly erroneous ruling.

Defendant directs the Court's attention to the specific language of the *Trombetta* case: "exculpatory value," "apparent before the evidence was destroyed" and "unable to obtain comparable evidence." All of these standards or tests are met in the present case.

There is little doubt that the evidence lost in this case had exculpatory value. The hair fibers were found in the very place one would expect to find them if there had been a struggle. That there was a struggle cannot be doubted. Rather than being hair from a man of African-American descent, the hair located was "characteristic" of that coming from a "Caucasian." This evidence is favorable to the Defendant even without being tested. With testing, it would have created far more than a reasonable doubt. It would have helped explain why the statements of a man who suffered brain trauma as a child, who suffers from mental illness, psychotic disorder, delusions and has a reputation for being an unreliable reporter or historian, should not be believed. Regardless of what Defendant said or may have said about this incident, there is good reason to believe his statements are not reliable. The physical evidence taken from the decedent's defensive wounds demonstrates this.

The hair fibers taken from the decedent had "evidentiary value" from the start. It is the reason the crime scene investigator collected them for later testing. When they were subjected to visual examination, the forensic scientist concluded that they came from a Caucasian. At that point, the hair fibers had more than "evidentiary value;" they took on "exculpatory value" for every person of African-American descent. The exculpatory value of these hairs was apparent from the start. The trial court is clearly wrong.

c. The trial court erred in ruling that there had been no showing of misconduct by the police / prosecution in dealing with the hairs and that the evidence had not been suppressed.

The package was sent by certified mail, return receipt requested. Unfortunately the mailman himself signed the green return receipt card himself, and simply put the package in the mailbox, where it was vulnerable to loss or theft. (Nov 5, 2013 Tr, 21-ff, 36-38). Defense counsel objected that in a case of this importance, it was inconceivable that the State Police should have placed the hairs in the mail, instead of personal delivery, and that the MSP had been reckless. (Id.,

25). Without conclusive testing of the hairs, the defense was prevented from arguing to the jury that the hair was ***not*** that of Chris Green, but rather, of his killer. (Id., 24). Because this critical evidence had been lost forever to the defense, counsel requested that a remedy be granted, the sanction of dismissal. Alternatively, counsel requested an instruction that the evidence "would have been favorable to the defense had it been tested." (Id., 27).

We do not know conclusively that there was or was not ***intentional*** misconduct in connection with loss of the hairs, in the sense that someone maliciously threw them in the trash. However, "misconduct" and "suppression of evidence" do not require that sovereign's agents (police and prosecutors) deliberately and with evil mindedness attempt to sabotage a defense by hiding evidence or destroying it. See, for example, *People v Chenault*, 495 Mich. 142, 149-150, 845 N.W.2d 731 (2014), citing *Strickler v Greene*, 527 US 263, 281–282, 119 S Ct 1936, 144 L Ed 2d 286 (1999):

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully ***or inadvertently***; and prejudice must have ensued. (Emphasis added).[6]

Clearly, this critical evidence was handled at the very least recklessly and its loss at least inadvertent. The loss of evidence is in all circumstances a "suppression" of evidence implicating Due Process. *People v Amison*, 70 Mich App, 70, 76-83 (1976), citing *Brady v Maryland*, 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215 (1963). Such a loss is deemed a 'suppression' regardless of intent. Thus, the focus must be on the harm caused by the loss of the evidence. *Amison, Brady.*

The trial court questioned defense counsel extensively whether the hairs were known

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[6] The government is held responsible for evidence within its control, even evidence unknown to the prosecution, *Kyles v Whitley*, 514 US 419, 437, 115 S Ct 1555, 131 L Ed 2d 490 (1995), without regard to the prosecution's good or bad faith, *United States v Agurs*, 427 US 97, 110, 96 S Ct 2392, 49 L Ed 2d 342 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").

to be exculpatory (they were not yet tested, so they were not *known* to be Caucasian, and after all, as the trial court and prosecution pointed out, they may have been Chris Green's own hairs). But in a case involving an African American defendant charged with a brutal beating / stabbing of a white defendant in close combat, the exculpatory nature of apparently Caucasian hairs in the victim's hands is apparent. Why did the trial court not perceive this?

The exculpatory nature of the hair evidence was immediately apparent to defense counsel – once Ray Barry was charged 12 years later – and the prosecution had to be pulled and dragged into having the hairs tested. That they were subsequently "lost" is not surprising in light of the obvious reluctance to have them tested and examined back in 2002. Now, Defendant has been completely and forever denied the possibility of showing that the actual killer of Chris Green was a Caucasian. This evidence was irreplaceable, and was known to be of critical importance – if it was shown to be not Chris Green's hair, it would exculpate Defendant. The loss of irreplaceable and clearly exculpatory evidence amounts to gross negligence or reckless misconduct, at the very least.

One of the most curious questions is why the hairs were never minimally tested at the outset. The hairs were seen to be Caucasian on gross visual inspection. Amazingly, lab tech Glenn Moore conceded that the hairs taken from Chris Green's hand were not even compared with his own head hair. (Tr 7, 50, 60-61). It appears that Moore never even asked for known head hairs to make the comparison! (Tr 7, 60-61). One does not have to be an out-and-out conspiracy theorist to speculate that the police did not want to find out whose hairs ended up in Chris Green's hand. Or, was it simple bumbling incompetence? In any event, critical and irreplaceable evidence has been suppressed. The trial court's ruling is clearly erroneous.

d. The loss of the hairs violates due process and the remedy is dismissal of the charges.

Depending upon the circumstances, the loss of evidence may require either outright dismissal of the charges or a new trial. The issue was discussed at length in *People v Amison*, supra. Generally, the loss of evidence which occurs before a defense request for it does not automatically

mandate a new trial unless there is intentional suppression or bad faith. *People v Johnson,* 197 Mich App 362, 365 (1992); *People v Lane,* 127 Mich App 663, 669-70 (1983); *People v Till,* 115 Mich App 788, 799 (1982); *People v McCartney,* 60 Mich App 620, 627 (1975); *People v Eddington,* 53 Mich App 200 (1974).

Intentional destruction of evidence of known significance to the defense will require outright dismissal of the charges. *People v. Albert,* 89 Mich. App. 350, 354, 280 N.W.2d 523, 525 (1979). But, merely careless destruction of evidence by police not amounting to gross negligence or intentional suppression does not require reversal, *Amison, supra,* at 79. The distinction seems to be whether the status quo ante – the possibility of a fair trial – can be restored to the defendant. Contrast, *People V Hamilton,* 359 Mich 410 (1960)(new trial) with *People v Morris,* 77 Mich App 561, 563-64; 258 NW2d 559, 560-61 (1977)(there, a pattern of inexcusable neglect or deliberate deception involving crucial evidence - dismissal).

When evidence has "exculpatory value," the Defendant need not prove anything beyond the fact that it was lost. *Moldowan v City of Warren,* 578 F3d 351, 385 (CA 6, 2009) (the loss of such evidence "directly threatens the fundamental fairness of a criminal trial). Even though the State Police were ordered by the Court to "ensure the chain of custody," they failed to do so. It does not matter if the evidence was lost carelessly or in bad faith. *United States v Jobson,* 102 F3d 214, 218 (CA 6, 1996). It does not even matter if the evidence was lost because of gross negligence. *Monzo v Edwards,* 281 F 3d 568, 580 (6th Cir. 2002).

In this case, the mere fact that the police were in control of exculpatory evidence and were ordered to "ensure the chain of custody." But the evidence is now lost and cannot be replaced. This should entitles Defendant to a remedy. The question becomes: What remedy is most appropriate under the circumstances? We believe that the court should enter a dismissal with prejudice. The "exculpatory value" of the evidence was "apparent before [it] was destroyed." *California v Trombetta, supra.* The loss of the evidence deprived Defendant of his ability to show that it is not mere "conjecture" to say that a third-party, and not the Defendant, is the true perpetrator. *Holmes v.*

South Carolina, 547 US 319, 327; 126 S. Ct. 1727; 164 L. Ed. 2d 503 (2006).

The loss or destruction of clearly exculpatory evidence "undermine[s] confidence in the outcome of the trial." *Smith v Cain*, 132 S Ct 627, 630; 565 US __; 181 L Ed 2d 571 (2012) (citing, *Kyles v Whitley*, 514 US 419, 434, 115 S Ct 1555, 131 L Ed 2d 490 (1995) (internal quotation marks omitted).

We submit that Defendant's Due Process rights were violated by the loss of this evidence, and that only dismissal of the charges can remedy the damage to Defendant's rights. The loss of the only evidence in a capital case which would have convincingly substantiated Defendant's claims of a third party killer has irreparably prejudiced him. These hairs had an exculpatory value that was immediately apparent. Crime lab technician Moore conceded that the hairs could have been transferred between assailant and Green during a struggle – this much should be obvious. (Tr 7, 47-48, 248-249). They should have been tested.

e. The trial court should have given an adverse inference instruction to the jury.

Defendant asked that the court instruct the jury as follows:

> You have heard testimony that hair fibers were removed from defensive wounds on decedent's hands. Hair fibers are a common form of trace evidence collected in cases where there has been a struggle between two people – hair from one being transferred to the other. A forensic scientist at the Michigan State Crime lab has expressed the opinion that the hair collected in this case came from the head of a [white] Caucasian person. Because the evidence was lost through no fault of Defendant, you may infer that the hair evidence, once analyzed, would have been favorable to the Defendant and unfavorable to the Prosecution.

The trial court refused to so instruct the jury, and we contend that its refusal to do so is reversible error.

Michigan courts have long recognized that when material evidence in control of a party is not produced at trial, the opposing party is entitled to an adverse inference instruction. *Barringer v Arnold*, 358 Mich 594, 601, 604-605, 101 NW2d 365 (1960) (holding that a party's

failure to produce noncumulative evidence within his control raises the presumption that, if produced, the evidence would operate against him); see also *People v Pearson*, 404 Mich 698, 721-722, 273 NW2d 856 (1979) (holding that the prosecutor's failure to exercise due diligence in attempting to locate a res gestae witness entitled the defendant to an instruction that the jury may infer that the missing witness' testimony would have been unfavorable to the prosecutor's case); *People v Davis*, 199 Mich App 502, 514-515, 503 NW2d 457 (1993) (holding that because the defendant did not demonstrate bad faith by the prosecutor the defendant was not entitled to an instruction that where the prosecutor fails to make reasonable efforts to preserve material evidence, the jury may infer that the evidence would have been favorable to the defendant); *People v Hardaway*, 67 Mich App 82, 240 NW2d 276 (1976) (upholding the trial court's reading of an adverse inference instruction when the police erased a tape recording of a police radio broadcast). Michigan's Standard Jury Instructions include a model adverse inference instruction applicable to situations in which a party fails to produce evidence or a witness. SJI2d 6.01.

Because Ray Barry was improperly deprived of this exculpatory evidence and did not receive the benefit of a favorable jury instruction, he was deprived of his due process rights to a fair trial. This Court should reverse Defendant's convictions and remand for dismissal of the charges because loss of the evidence means that it is impossible for Defendant to present his defense adequately and receive a fair trial.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ADMIT EVIDENCE UNDER MRE 404(B) THAT THE PUTATIVE THIRD PARTY ASSAILANT HAD CHOKED HIS DAUGHTER WITH A WOODEN STICK SUCH THAT SHE SUFFERED BLUNT FORCE TRAUMA WHEN THE FORENSIC EVIDENCE SHOWED THAT THE DECEASED SUFFERED BLUNT FORCE TRAUMA, AS WELL AS STAB WOUNDS, AND A TREE BRANCH WAS FOUND OVER HIS BODY.

Issue Preservation and Standard of Review

The issue was preserved by the filing of a pre-trial motion in limine. Issues pertaining to the admission of evidence by the trial court are reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 582 NW2d 785 (1998).

Argument

The defense had filed a Motion to Introduce Evidence of Third Party Culpability, specifically as to Floyd Cousins being the perpetrator of the killing. This motion was granted by the trial court at a November 20, 2013 Motion Hearing. See Transcript of 11-20-2013 hearing, November 25, 2013 Order.

The defense then sought to introduce evidence pursuant to MRE 404(b) to show that Cousins had committed a similar act in once assaulting a victim. (January 16, 2014 Tr, 10-23). Specifically, the defense sought to admit evidence that Floyd Cousins assaulted another person with a small branch of a tree. To that end, Beth Blomquist testified that years ago, she had been visiting her friend Bobbi Cousins at the Cousins' home. Floyd Cousins picked up a tree branch / stick, 5 inches in diameter, with the bark removed, and began choking Bobbi with it as Bobbi was shoved against the kitchen table. Cousins had gotten angry at Bobbi for some reason. The assault was significant enough that Beth had to try to forcibly remove Cousins from hitting / choking Bobbi.

The trial court refused to allow the evidence under the theory that "there is insufficient evidence to show a signature crime." (Tr, 23-24). The court did allow evidence that Lisa Cousins had been sexually abused by her father Floyd under MRE 404(b) and evidence that

Floyd Cousins had threatened to kill Christopher Green. (Tr, 66-67). We believe that the trial court should also have admitted the tree branch evidence and that it abused its discretion in refusing to do so.

There is no doubt that MRE 404(b) is not restricted to admission of evidence in ***criminal*** trials, nor is it restricted to admission of evidence against a ***criminal defendant.***[7] Rather, the rule applies to evidence in both civil and criminal trials, and both to defendants and witnesses alike. MRE 404(b)(1) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Thus, there is no reason based on the text of the rule itself that would preclude evidence that another individual used a log / tree to beat another person in the extended social circle of the Greens / Barrys / Cousins.

The tree branch beating evidence was both relevant and probative of the identity of Chris Green's killer. *People v Vandervliet,* 444 Mich 52, 73-75; 508 NW2d 114 (1993)[8]. As noted previously, Chris not only suffered blunt force trauma as a cause of death, but he was found with a log or small tree rolled on top of him. The likelihood of someone being beaten by a log / tree /

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[7] "We do not believe that the Michigan Supreme Court intended to limit the applicability of MRE 404(b) to criminal cases merely by including the phrase "whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the crime charged". *Scott v Hurd-Corrigan Moving & Storage Co,* 103 Mich App 322, 341, 302 NW2d 867, 875 (1981)

[8] "[T]he evidence must be relevant under Rule 402 [MRE 402], as enforced through Rule 104(b) [MRE 104(b)], to an issue or fact of consequence at trial."

branch is unusual enough [9], but for this to have occurred twice in the same social circle– Beth Blomquist and Chris Green – is of sufficient uniqueness that the trial court should have admitted it. Granted, it is not a "signature crime" as the trial court reasoned, but that is not the test of similarity. How often are people beaten / covered with a log / tree / branch? Infrequently enough that it is probative of the issue of who put the log on Chris Green that Floyd Cousins had committed a similar act years earlier. The doctrine of chances implies this. Imwinkelried explains that the prosecutor must "make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person." *Crawford*, supra at 395. A high degree of similarity is not required. *People v Mardlin*, 487 Mich 609, 790 NW 2d 607 (2010).

In this case the evidence was logically relevant and probative to the issue of the identity of Chris Green's killer. *Vandervliet.* It was significantly similar to the circumstances of Chris Green's death, but there is no requirement that the evidence established a "signature crime," as the trial court ruled. We submit that the trial court abused its discretion in refusing to admit this evidence.

IV.

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING GRUESOME PHOTOS OF THE DECEASED VICTIM.

Issue Preservation and Standard of review

A trial court's decision whether or not to admit evidence is reviewed for abuse of discretion. *People v Katt*, 468 Mich 272, 278 (2003). The issue was preserved by contemporaneous objection at trial. (Tr 7, 55-ff). .

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[9] See, *Crawford*, supra at 392-393: To establish the probative value of the evidence, the prosecutor invokes the"doctrine of chances," also known as the "doctrine of objective. This theory, which is attributed to Professor Wigmore, is widely accepted, although its application varies with the issue for which it is offered.

Argument

On Day 7 of Trial, the court and the parties spent considerable time in reviewing 6-7 photos that would used during the testimony of the medical examiner, Dr. Brian Hunter. (Tr 7, 53-ff). Two of the photos – one of the hand and one of the scalp / head – show "through and through" incising wounds. The photos are fairly devoid of blood, and demonstrate the incising nature of the wounds. Undersigned counsel has the photos on a CD rom, and they are available for review by the panel.

We concede that the photos of the hands, through and through scalp photo, and photos of the torso showing a bloodless stabbing wound, are relevant and not unduly inflammatory. However, one photo shows Chris Greene's bloody and battered body lying on the body bag, his face covered with blood, and his hands bagged. Another photo, taken at the autopsy, shows Green's beaten head and face, underlined by a ruler. Defendant submits that he trial judge abused her discretion by admitting the photograph of the deceased victim's bloody body and the "head shot," because whatever minimal relevance they possessed was far outweighed by their prejudicial effect. *See* MRE 403.

The decision to admit or exclude photographs is within the discretion of the trial court. *People v Mills*, 450 Mich 61, 76, 537 NW 2d 909 (1995). "'Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions.'" *People v Mills,* supra. Thus, gruesome photos of a murder victim are inadmissible where the defense contests not the brutality of a killing or the killer's state of mind, but only the defendant's participation in the killing. *People v Wallach,* 110 Mich App 37, 66 (1981), *vacated and remanded on other grounds,* 417 Mich 937 (1983). Such photographs lack probative value while having a "tendency to inflame the jurors and distract their attention from truly probative evidence." *Id.*

The two photos here, as did those in *Wallach*, lacked probative value. The injuries shown in the photos were horrific and bloody. But the testimony of the medical examiner, Dr. Hunter, easily sufficed to describe to the jury the extent of the injuries on Chris Green's body. (Tr 7, 74, describing the dried blood and bruises, contusions on Green's face). It was simply not

necessary to show the photos of his bruised, bloody and beaten face lying on the body bag, nor of his beaten head. It is inconceivable that these photos would not have aroused the hot anger of the jury. However, it was the court's responsibility to ensure that Defendant receive a fair trial unencumbered by the passion and prejudice of the jury. The medical testimony supplied all that was needed for the jury to assess the prosecution argument that the nature of the injuries suggested blunt force trauma. The graphic depiction of the injuries made no difference to that argument, but even if it did could have been established easily and without prejudice by an autopsy-protocol diagram.

On the other hand, the photographs had the same prejudicial effect noted in *Wallach*: the "tendency to inflame the jurors and distract their attention from truly probative evidence." *Id.* And while that tendency may not have been enough to sway the outcome in *Wallach*, where the other evidence of guilt was "overwhelming," 110 Mich App at 75, here it was enough to sway the outcome. As argued in No. VI of this brief, the evidence that Defendant was the perpetrator of Chris Green's injuries here was fairly weak—so weak that gruesome photographs were likely to rouse feelings of compassion and sympathy enough to tip the verdict. And what could evoke more sympathy or arouse more passion than the photo of a small-ish young man (the Pink Panther, as Chris was described by one witness), allegedly beaten by the Incredible Hulk – Defendant. The trial court should have excluded photos that could lead the jury to abdicate its truth-finding function and convict on passion alone. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995).

In *People v Howard*, 226 Mich App 528, 550-51; 575 NW2d 16, 28-29 (1997) the trial court had ruled that the issue of the defendant's state of mind, was the key issue in this case. One of the autopsy photographs of the victim depicted alleged powder burns on her neck. Thus, an autopsy photo of the victim's neck and hands were instructive in depicting the nature and extent of her injury and was probative of the issue of intent. Moreover, the photograph depicted only the relevant area of the victim's body, her neck area, and did not show any facial features, thereby diminishing any extraneous prejudicial effects. The other photograph in question depicted a missing fingernail on the victim's right hand, which was probative of whether she was experiencing fear and terror at the time she was shot, a fact that was of consequence to the action in light of the defense defendant acted in self-defense or because of provocation by the victim. And, in *People v Price*,

2009 WL 691774 (2009), this Court upheld photos of the victim's stab wounds, but there was no indication whether the entire body of the victim was shown to the jury.

Here, by contrast, the photos display Chris Green's full body, his full face, and display multiple areas of bruising and bleeding. Defendant submits that the judge abused her discretion by admitting these two photos. The remedy is retrial.

V.

DEFENDANT WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW, AND THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ORDER A MISTRIAL, WHEN THE PROSECUTION FAILED TO DISCLOSE TO THE DEFENSE CERTAIN EVIDENCE – *ADDITIONAL* HAIRS – ALTHOUGH THE PROSECUTION KNEW THAT THE EVIDENTIAL VALUE OF HAIRS TAKEN FROM THE CRIME SCENE WERE CRITICAL. THIS AMOUNTS TO A BRADY VIOLATION AND PROSECUTOR MISCONDUCT, AND THE REMEDY IS VACATING THE CONVICTION AND DISMISSAL OF THE CHARGES. US CONST. AM XIV. FINALLY, TRIAL COUNSEL WAS INEFFECTIVE IN FAILING EARLIER TO SEE THAT ADDITIONAL HAIRS REMAINED WHICH COULD HAVE BEEN TESTED, AND TO REQUEST TESTING OF THESE HAIRS.

Issue Preservation and Standard of Review

The issue was preserved by contemporaneous objection during trial, and a mid-trial written motion for sanction, including dismissal of the charges and a mistrial. (Tr 4, 166-ff; Tr 7, 2-5, "Motion for Sanction re Evidence Sample #21). The decision to grant or deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508 (1999).

Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. This Court reviews a trial court's findings of fact for clear error and questions of constitutional law de novo. Id.

Argument

Recall the fiasco concerning the loss of items L-29 and L-30 – the Caucasian hairs found in Chris Green's hands that were sent for mitochondrial DNA testing to Speckin Labs, but were lost or stolen from the mail box. These hairs had been retrieved by the crime scene technicians from the victim's left hand. (Tr 7, 39). Other apparently Caucasian hairs, ranging in color from gray to brown, had been found at the scene and catalogued as items L-11, 12, 29, 30 and 6. (Tr 7, 40-42, 45).

Clearly, for months, the prosecution ***knew*** that the defense sought to have relevant hairs contained in items L-29 and L-30 tested. Notwithstanding this knowledge, the prosecution claimed to have "recently found" certain other hair evidence – L-21 – which it at the very last moment disclosed to the defense. (Tr 7, 2-3). The report concerning this exhibit was marked "H" (Tr 7, 5) or "Evidence Sample #21."

The defense filed a Motion for Sanction re Evidence Sample #21, claiming (1) the prosecution had violated a request for discovery as to all physical evidence (See Register of Actions, Defense Motion, September 27, 2013); (2) a *Brady* violation; and (3) requesting a mistrial (See January 28, 2014 Motion, ¶12). It contended that the prosecution had violated failed to comply with the defense's discovery request by failing to disclose these ***additional*** hairs taken from Chris Green's hand (aside from samples L-29 and L-30).

The defense first argued this on Day 4 of trial. What trial counsel argued is this: the preceding Friday, January 24, 2014, the prosecutor had called defense counsel and said that he could come to the prosecutor's office to review additional evidence. (Tr 4, 168). Attorney DuBay was told that a list would be prepared, and when he received it on Monday morning (January 27), he discovered that proposed sample L-21 consisted of additional hairs. (Tr 4, 169). Although the prosecutor contended that this evidence had been disclosed "all along" "from day one" to the defense, counsel rejoined that because of the significance of the hairs taken from Chris Green's hand, the loss of L-29 and L-30 should have motivated the prosecutor to say "hey, we've got some more

[hairs]". (Tr 4, 184). This evidence had apparently been listed as "evidence not tested," and among the items inventoried was "Sample Number 21, hair / fiber from the left hand of the decedent." (Tr 4, 169-170). This evidence had not been tested. (Tr 4, 185).

We will concede for the sake of argument that the prosecution had listed L-21 at the outset of the case. Nonetheless, we contend that the prosecution committed misconduct, and effectively suppressed evidence that it knew was critical, by not sua sponte flagging the issue.

The trial court found no violation of MCR 6.201, no *Brady* violation, and denied the defense request for immediate testing of the hair. (Tr 4, 187-192). We concede that there was no discovery violation because it appears that Item L-21 was disclosed early on in the mass of paperwork that accompanies most every capital case, and especially a cold case. We submit that the trial court was wrong as to the *Brady* issue and the mistrial request, and additionally, that trial counsel was ineffective in not earlier seeing the L-21 evidence.

a. No *Brady* violation and no prosecutor misconduct. As noted in our earlier argument, under *Brady v Maryland*, 373 US 83 (1963), the government has a constitutional obligation to furnish a criminal defendant with any exculpatory evidence related to the defendant's guilt or possible punishment. In order to comply with the requirements of Due Process, "the individual prosecutor ***has a duty to learn of any favorable evidence*** known to the others acting on the government's behalf in this case, including the police." *Strickler v Greene*, 527 US 263, 281, 119 S.Ct. 1936, 144 L Ed 2d 286 (1999) (quoting *Kyles v. Whitley*, 514 US 419, 437, 115 SCt 1555, 131 L.Ed.2d 490 (1995)) (internal quotation marks omitted, emphasis added).

The trial court ruled that the absence of the hair evidence was neither inculpatory nor exculpatory because the individuals involved, as well as the witnesses, "would have all had innocent reasons to come in contact with each other" such that a transfer of hairs would have been facilitated. (Tr 4, 188). This ruling is, simply disingenuous. The exculpatory nature of ***any*** hair evidence which is ***not*** African American is evident in a case involving an African American suspect and a white victim. And, as we argued earlier, the prosecutor is not merely an advocate – he is the representative

of the sovereign, and his duty is to ensure that justice is done, to present all of the relevant evidence, and to ensure insofar as possible that the innocent are not convicted. This means evidence that the defense counsel may have overlooked, but which is clearly relevant to the identity of the killer.

> "We set out in *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the three components or essential elements of a *Brady* prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." 527 U.S., at 281-282, 119 S.Ct. 1936.

Banks v Dretke, 540 US 668, 691, 124 S Ct 1256, 1272, 157 L Ed 2d 1166 (2004). *Banks* said that a rule declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process." 540 US at 696.

The prosecution as representative of the sovereign has non-delegable duties to ensure that justice is done. *Berger v United States*, 295 US 78, 88-89; 55 S Ct 629; 79 L Ed 1314 (1935). A corollary of this precept is that the sovereign and its servants have a duty to show the entire transaction, all the facts bearing on guilt ***or innocence.*** See, *People v Swetland*, 77 Mich 53, 57; 43 NW 779, 780 (1889): "It is the duty of the prosecuting attorney to furnish all the evidence within his power bearing upon the issue of guilt or innocence, in relation to the main issue, or to give some good excuse for not doing so."

> "The only legitimate object of the prosecution is, 'to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence.' The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.' (Emphasis supplied.).
>
> "The fact that the prosecution merely failed to obtain the evidence

> rather than actively suppressed evidence already in hand is of no consequence here."

People v Jordan, 23 Mich App 375, 387-88; 178 NW2d 659, 665 (1970).

Surely these principles must mean at the very least that when a black man is on trial for the killing of a white man, and there are what appear to be Caucasian hairs in the grip of the dead man's fist, that these hairs should be tested and brought up sua sponte ***by the prosecution*** to the defense if, in the huge morass of papers and documents, the defense may inadvertently have overlooked them. This is not a "rocket science" kind of proposition. The exculpatory value of these hairs is obvious and should have been pursued by the prosecution and police.

The trial court said that the information had been available to the defense (Tr 4, 187) – an assertion that trial counsel apparently did not contest (Tr 4, 184) – and found no *Brady* violation. The court said that the defense "acknowledged" that there was no way to show that the hair was favorable to the defense, but this is not true. Trial counsel "acknowledged" that he may have been negligent in not fully scouring all of the documents which revealed Sample L-21 as untested, but counsel always claimed that if the hair was a Caucasian hair it would be patently exculpatory, but if it were an animal hair, it would not be relevant. (Tr 4, 190).

b. No mistrial.

For many of the same reasons argued in Argument II, the prosecution and police actions in failing to test this additional hair / hairs requires a sanction. It is simply unbelievable that in a capital case where the deceased murder victim has hairs in his hand from a close combat struggle, that the evidentiary value of these hairs is not immediately perceived. These hairs were taken into evidence but not tested? Once again, this is either a deliberate decision not to test them, or it is bumbling incompetence.

A trial court should grant a mistrial where there has been an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v. Ortiz–Kehoe*, supra at 514. Such situations may occur in various ways. For example, deliberate

prosecutor misconduct in questioning a witness will result in a mistrial, plus a double jeopardy bar on retrial. *People v Dawson*, 431 Mich 234, 427 NW2d 886 (1988). Prosecutor misconduct during closing argument will warrant a mistrial. *People v Tyson,* 423 Mich 357, 377 NW 2d 738 (1985). Improper police reference to a "confession" may warrant a mistrial, *People v Gaval,* 202 Mich App 51, 507 NW2d 786 (1993), as will serious juror misconduct, *People v Messenger*, 221 Mich App 171, 561 NW2d 463 (1997).

Regardless whether there was misconduct in not disclosing, or "flagging" to the defense the remaining hairs in sample L-21 so that a timely request for testing could be made, or whether there was simple incompetence in not testing them, Defendant Ray Barry's right to a fair trial was severely impaired. A mistrial should have been granted.

c. Ineffective assistance of trial counsel.

The general principles of ineffective assistance of counsel are well known. In order to establish ineffectiveness of trial counsel, a defendant must show that "counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. US Const. Am. VI; *Strickland v Washington*, 466 US 668, 694, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 521 NW2d 797 (1994). First, a defendant must show that counsel's performance is "deficient", involving "errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland* at 687. This requires that counsel's conduct "fell below an objective standard of reasonableness and that counsel's identified acts and omissions were outside the wide range of professionally competent assistance." Id. at 690. Second, a defendant must show that those deficiencies were prejudicial. And that there is a reasonable probability that but for the unprofessional errors, the result of the proceeding would have been different. Id. at 692-at 694.

If, as the prosecutor claimed at trial, and defense counsel appeared to concede, the existence of these hairs in Sample L-21 were disclosed to the defense from "day one," a hearing is needed to ascertain why defense counsel did not see it earlier, and request that these hairs be tested.

If he simply did not read the matters that had been disclosed by the prosecution, it is deficient performance.

As to prejudice, if, as defense counsel claimed, they were animal hairs, they have no relevance. But, if these hairs were shown to be Caucasian head hairs not belonging to Chris Green, the prejudice to Defendant is clear – it would mean that Chris Green's killer was a Caucasian. This is *Strickland* prejudice. Because the record is clear, and there is no possible trial strategy to justify trial counsel's failure to review documents that had been provided during discovery, review is possible without an evidentiary hearing. *People v Cicotte,* 133 Mich App 630 (1984); *People v Johnson,* 124 Mich App 80; (1983). If this court feels an additional record needs to be made, defendant moves for a remand under the authority of *People v Ginther,* 390 Mich 436 (1973).

VI.

DEFENDANT'S CONVICTION MUST BE REVERSED DUE TO INSUFFICIENCY OF THE EVIDENCE. US CONST AM XIV.

Issue Preservation and Standard of Review

This Court reviews de novo claims of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The Court views the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found the elements of the charged offenses beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). No particular preservation requirement exists for a challenge to the sufficiency of the evidence, *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987).

Argument

The Due Process Clauses of the state and federal Constitutions prohibit a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. US Const Ams V, XIV; Mich Const 1963, art 1, §17; *In re Winship,* 397 US 358, 361-362 (1970). The reasonable doubt requirement protects citizens from "dubious and

unjust convictions, which result in improper forfeitures of life, liberty and property." *Winship*, supra, 362. A conviction must be reversed if the evidence introduced is insufficient to satisfy a rational juror that each element of the offense has been proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 99 S Ct 2781, 61 L Ed 2d 560 (1979). When the sufficiency of the evidence is challenged, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

The deficiencies in this case are glaringly obvious. No physical evidence whatever connected Ray Barry to the crime – not fingerprints, not footprints, not hairs, not DNA, not a weapon, nothing. (Tr 5, 195; Tr 7, 247). No evidence found in his house, although it was searched within "days" of the killing. (Tr 7, 151-152).

The only evidence against him was his statements, and these were / are the product of a psychotic and delusional man, as is utterly apparent from the trial and motion transcripts. Anyone can brag at having committed a crime, particularly when one's social circle consists of thugs and criminals like Claude Taylor. Dr. Brooks corroborated that an individual suffering from Defendant's illnesses would be likely to inflate his importance within that circle by fabricating events showing him to be bigger and more important. This was also corroborated by Antonio Harris who said that Defendant would be likely to pass himself off as a combat tanker in Afghanistan in order to get admiration, and even Claude Taylor, who described him as someone easily led and gullible (Tr 7, 201). Claude Taylor came forward only months later, and only after he offered to make a deal on his outstanding B & Es. (Tr 7, 154-155). Even so, no charges were filed for 10 years. (Tr 7, 251-252). Howard Butler and Lloyd Cousins had been completely untruthful about their whereabouts. (Tr 7 162-163). Notwithstanding thug braggadocio, it is the State's nondelegable duty to produce evidence beyond a reasonable doubt that indeed it was the braggart who committed the crime.

The weakness of the case was highlighted at the time the defense motion for a directed verdict was made (Tr 7, 263). The prosecution replied that Defendant was "in close proximity" to the murder scene and "had a connection to the victim" via love interest in Lisa Cousins

(Tr 7, 264). The trial court denied the motion, saying the evidence supported two "potential versions," one being the "love triangle" theory, and the other being the window peeping theory. (Tr 7, 266). The window peeping theory was thoroughly debunked by Detective Spring, who testified that he had looked for footwear impressions up and down 60th street and to / from a residence, but there were none. (Tr 5, 136-137).

We submit that the state did not produce evidence beyond a reasonable doubt. Petitioner's conviction must be reversed.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Defendant-Petitioner submits that he has presented the Court with compelling reasons for consideration and ask that this Court grant the petition for a writ of certiorari, further Petitioner ask that the Court reverse his convictions and remand this matter to the state court with appropriate instructions.

Respectfully submitted,

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