

No.

IN THE

SUPREME COURT OF THE UNITED STATES

LUKE EDWARD FLEMING,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

**On Petition for Writ of Certiorari
to the Florida Second District Court of Appeal**

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether the Petitioner's convictions for murder and sexual battery violate the Due Process Clause of the United States Constitution because the evidence failed to show that the Petitioner committed the acts in question.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

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b. Statutes

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c. Other Authority

U.S. Const. amend. V	1, 7
U.S. Const. amend. XIV	1, 7

The Petitioner, LUKE EDWARD FLEMING, requests the Court to issue a writ of certiorari to review the opinion/judgment of the Florida Second District Court of Appeal entered in this case on March 10, 2021. (A-3).¹

D. CITATION TO ORDER BELOW

Fleming v. State, 313 So. 3d 605 (Fla. 2d DCA 2021).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida Second District Court of Appeal.²

F. CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of United States Constitution requires the prosecution to prove guilt beyond a reasonable doubt. *See* U.S. Const. amends. V and XIV; *In re Winship*, 397 U.S. 358, 361 (1970).

¹ References to the appendix to this petition will be made by the designation “A” followed by the appropriate page number. References to the trial transcripts will be made by the designation “TR” followed by the appropriate page number.

² Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

In 2018, the Petitioner was charged in Florida state court with first-degree murder and sexual battery. The alleged victim of the offenses was Deborah Dalzell, who had been found dead nineteen years earlier in March of 1999. The indictment alleged that the Petitioner sexually battered Ms. Dalzell and then killed her by asphyxiation. The case proceeded to a jury trial in February of 2020. During the trial, the state trial court denied the Petitioner's motion for a judgment of acquittal, and at the conclusion of the trial, the jury found the Petitioner guilty as charged. The trial court subsequently sentenced the Petitioner to life imprisonment. (A-4). The Florida Second District Court of Appeal subsequently *per curiam* affirmed the Petitioner's convictions without discussion. (A-3).

2. Statement of the facts.

The statement of facts, as set forth in the brief filed by the Petitioner's appellate counsel in the state appellate court below, are as follows:

The prosecution called 12 witnesses in its case-in-chief against the defendant. These witnesses consisted of civilians, Sarasota County Sheriff's Office Deputies, and various experts. The defendant testified on his own behalf and did not call any other defense witnesses.

The facts at trial showed the matter to be a "cold case" that had been filed after a breakthrough with DNA evidence and a genetic database search showing the defendant to be the source of semen found on and in Dalzell's body. (TR. 187-195). The prosecution's case consisted entirely of circumstantial evidence. The defense presented at trial was that the defendant had engaged in consensual sex with Dalzell after meeting her at a bar on the night of her murder but had not himself been involved in the murder in any way. (TR. 502-03). The defense tried to show the defendant and Dalzell had sex in the defendant's car after

meeting in a bar and the defendant never went to Dalzell's house where her murder occurred. (TR. 502-03).

Margaret Thistle, a longtime Sarasota resident, talked to her younger sister Deborah Dalzell every day. (TR. 197-199). Deborah, a corporate attorney and tax expert, had moved down from Massachusetts in 1997 and purchased a house in a new subdivision development in 1998. (TR. 199). In March, 1999, the subdivision was still undergoing construction, and Deborah had not finished work on her new home. (TR. 200). She still had not put shades into her windows. (TR. 213). Thistle remembered seeing empty lots near Deborah's house and construction workers often in the area. (TR. 212-14). Deborah was unmarried and lived by herself. (TR. 197-206).

Thistle had visited with Deborah at the new home on March 27, 1999, and the two sisters had coffee in the lanai together. (TR. 208). Thistle observed no ripped or torn screens while at the house that day. (TR. 209). She talked to Deborah over the phone the next day (Sunday) and made plans to pick up her tax return from Deborah's mailbox the next morning. (TR. 209-10). When Thistle went by the house Monday morning, she did not find the tax return in the mailbox. (TR. 211). Instead, she found the door locked and got no answer when she knocked; she tried to call Deborah at work but her call went to voicemail. (TR. 211-12).

Joel Seiner worked together with Deborah at KMC Telecom in 1999. (TR. 219-22). He sometimes socialized with Deborah but did not see her over the weekend before her murder. (TR. 222). That Monday, Seiner did not see Deborah at work and found this very unusual because [she] usually showed up early. (TR. 223-24). As the morning went on without Deborah at work, Seiner became concerned and went to her house to see if something was amiss. (TR. 224). He arrived at the house at 10:00 a.m. and found Deborah's car still in the garage. When Seiner went to the back of the house, he saw a screen had been ripped and torn and, when he peeked through the opening, noticed the French door to the lanai ajar. (TR. 227-28). He also saw a lamp laying on the floor inside and the bedroom in disarray. (TR. 228-30). He called the police and cooperated with their investigation from that point on. (TR. 230).

Sarasota Sheriff's Office Deputy Debra Kaspar remembered responding to a "welfare check" at Dalzell's residence on March 29, 1999. (TR. 236-39). She found a fresh cut in the screen containing the back entrance to the house and saw the French door entrance open. (TR. 243-45). In conducting an area canvas, Kaspar discovered that a neighbor dog-walking the night before had seen lights on in the house and heard voices inside. (TR. 252-55). Eventually, Kaspar went into the house with another Deputy. (TR. 247). She found the bedsheets in the bedroom in

disarray and saw Dalzell's body bent over at the waist with her upper body in the bathtub. (TR. 248-50). She found nothing else in the house out of the ordinary and called a CSI Unit to the scene. (TR. 250-51). From that point on, Detectives took over the investigation. (TR. 251). During his investigation, Lead Detective Kevin Pingel found no connection between the defendant and Dalzell. (TR. 305-06). Pingel took buccal DNA swabs from over forty (40) people over the years of his involvement in the investigation. (TR. 304-05).

Bobi Shaw led the police crime scene investigation. (TR. 261-65). Shaw photographed and documented the scene and remembered finding Dalzell's nude body in an overflowing bathtub with the water faucet still on. (R. 242, TR. 266). Shaw found Dalzell's head, arms and upper torso submerged in the water and pieces of duct tape floating around her. (TR. 266-67). The body had white cloth around its neck and a translucent substance around the anal area and inner thighs, which remained anchored on the floor outside the bathtub. (TR. 267-68).

Shaw confirmed the presence of the Medical Examiner on the scene and watched as the Medical Examiner swabbed the body's anus and genital area for physical evidence. (TR. 268-69). After the swabbing, the police removed the upper body from the bathtub and continued to process the crime scene. (TR. 268-70). Shaw remembered finding three windows in the master bedroom half-open and screens in the pool area cut open. (TR. 270-73). She also found bloodstains on the bed linen and further signs of struggle in the bedroom area with a roll of duct tape next to the bed and a white sock found in the bedding. (TR. 270-74). Shaw attended the autopsy and impounded a large amount of evidence, including a T-Shirt found on Dalzell's neck, a sock found in her mouth, and the Medical Examiner's sexual assault kit swabs. (TR. 279-82).

Shaw stayed at the crime scene for a large amount of time, spending a total of five (5) days processing it. (TR. 284-96). This including extensive fingerprint processing with special attention given to the window, a possible point of entry for the killer. (TR. 284-90). Shaw also found footprint evidence outside the house and cigarette butts inside and outside. (TR. 291-97).

Dr. Wilson Broussard, Deputy Chief Sarasota County Medical Examiner in 1999, conducted the autopsy of Deborah Dalzell. (TR. 474-82). He had been at the crime scene at 3:30 p.m. on March 29, 1999. When he conducted the formal autopsy the next morning, Dr. Broussard found signs of asphyxiation on the body and concluded the time of death to have been at least 8 to 10 hours before the police arrival at Dalzell's house in the morning. (TR. 483-84). Dr. Broussard testified that the T-Shirt found around Dalzell's neck and the sock found jammed into her mouth had been used by her killer or killers to cut off the flow of blood to

her head and brain. (TR. 483-86). He also noted how the broken capillaries in Dalzell's eye sockets were signs of ligature. (TR. 487-88). He found signs of struggle and pressure to the neck area on Dalzell's body, along with further struggle evidence on the left hand (injury) and legs (bruising). (TR. 487-93).

Dr. Broussard took sexual assault swabs from the body at the scene due to signs of trauma (tears) to the anal and vaginal areas. (TR. 494-95). He noticed a "gelatinous semen-like substance that looked to be leaking in a gravity-dependent fashion from her genital area." (TR. 493-94). He admitted the tears were consistent with consensual sex, as well as non-consensual sex. (TR. 497). Dr. Broussard concluded that Dalzell died as the result of a homicide and the specific manner of death had been mechanical asphyxia due to a combination of ligature and a sock rag in the mouth. (TR. 496).

Detective Benjamin Lubrano took over the "cold case" investigation in July, 2018. (TR. 313-15). By then, the investigation essentially revolved around trying to find DNA matches with the sexual assault swabs collected by Dr. Broussard. (TR. 313-17). Lubrano obtained an arrest warrant for the defendant after discovering a close match between the crime scene DNA and DNA voluntarily collected from the defendant's biological son. (TR. 315-17). After arresting the defendant, Lubrano collected buccal DNA swabs from him. (TR. 317-19). Lubrano also established that the defendant lived less than a mile away from Dalzell's house at the time of her murder. (TR. 320-22). Lubrano conceded that the defendant's standard fingerprints did not match any of the latent fingerprints collected from the crime scene in 1999 and DNA testing established other contributors to the DNA found on the T-shirt wrapped around [Dalzell]'s neck at the time of her death. (TR. 323-32).

Kris Cano, Mary Pacheco, and Alicia Cadenas of the Florida Department of Law Enforcement Crime Lab conducted the DNA examinations and comparisons in the case. Pacheco tested a crime scene sample labeled "semen on inside thigh", finding it to be a single source profile and a complete match with the defendant's buccal swab DNA profile. (TR. 390-418). Cadenas confirmed the match between crime scene semen DNA and the defendant's DNA profile. (TR. 424-42). In testing the white T-shirt, Cadenas found a mixture of at least three (3) people contributing to the DNA sample found on it with the defendant being a possible contributor to the mixture. (TR. 447-50). When she tested cervical vaginal swabs take from Dalzell, Cadenas found a complete match with the defendant's DNA. (TR. 450-53).

The defendant testified on his own behalf. (TR. 504-21). The defendant was 20 years-old in March, 1999, and living at his parents' house in Sarasota. (TR. 504-06). At the time, he used to go to local bars

by himself, and, on the night of Sunday, March 28, 1999, he went out on one of these bar-hopping trips. (TR. 505-07). While out, he met Deborah Dalzell in one of his regular bars (he could not remember which one) and convinced her to have consensual sex in his car. (TR. 505-07). The defendant never saw Dalzell again after she drove away from the bar parking in a 1988 Chevy that night. (TR. 508). The defendant did not use a condom during his sexual encounter with Dalzell. (TR. 508). The defendant denied breaking into Dalzell's house and killing her and, indeed, ever going to Dalzell's house. (TR. 508). The defendant remembered no bruising on Dalzell during their sexual encounter. (TR. 517).

Direct Appeal Initial Brief at pgs. 5-11.

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The question presented in this case is:

Whether the Petitioner's convictions for murder and sexual battery violate the Due Process Clause of the United States Constitution because the evidence failed to show that the Petitioner committed the acts in question.

The Due Process Clause of the Constitution requires the State to prove guilt beyond a reasonable doubt. *See* U.S. Const. amends. V & XIV; *In re Winship*, 397 U.S. 358, 361 (1970). For the reasons set forth below, the Petitioner requests the Court to grant review in this case and address the question presented.

The evidence in this case clearly showed that the murder occurred in Deborah Dalzell's house. The prosecution based its case against the Petitioner exclusively on circumstantial evidence, and this circumstantial evidence consisted of two main prongs: (1) DNA evidence demonstrating that the Petitioner had engaged in sexual intercourse with Ms. Dalzell and (2) evidence of the Petitioner's proximity to Ms. Dalzell's house, giving him the opportunity to apparently break into the house and escape undetected. This evidence failed to show that the Petitioner – as opposed to some other person – committed the crimes alleged. The Petitioner testified to having consensual sex with Ms. Dalzell earlier at a different location and *well before* the time of her murder. Notably, the DNA evidence and other trial evidence failed to place the Petitioner at the murder scene at the time of the murder.

The prosecution failed to present any other evidence whatsoever to tie the

Petitioner to Ms. Dalzell or her house. No witnesses or evidence established any sort of connection, meeting, or prior acquaintance between the Petitioner and Ms. Dalzell. The Petitioner did reside within a one mile radius surrounding Ms. Dalzell's house – but, presumably, so did hundreds of other people in Sarasota County, Florida.

The police crime scene experts conducted a five-day investigation at Ms. Dalzell's house and collected extensive physical evidence, including footprint evidence and fingerprint evidence. The Petitioner's fingers and feet did not match the collected evidence, meaning that someone else had left the evidence at the crime scene. The only evidence to place the Petitioner at Ms. Dalzell's house was found in the DNA recovered from the sexual assault swabs – meaning the evidence came from inside Ms. Dalzell's body. The evidence did not establish where Ms. Dalzell's body had been in the hours before her death – meaning the DNA could have been left, as the Petitioner testified, during a sexual encounter occurring outside the house and not during her murder. There was no conflict in the evidence concerning this reasonable possibility, as the Petitioner testified to a consensual sexual encounter with Ms. Dalzell outside the confines of her house and before her murder, and the prosecution failed to produce any evidence to rebut or even dispute the Petitioner's testimony.

Dr. Broussard laid out a timeline of the murder, based on his expert analysis. Dr. Broussard testified that, based on his autopsy and crime scene investigation, Ms. Dalzell was murdered eight to ten hours before the police arrived. The police arrived at about 10:00 a.m. on the morning of March 29, 1999 – meaning the murder happened between midnight and 2:00 a.m. Dr. Broussard himself collected the sexual assault

swabs at 3:30 p.m. on the afternoon of March 29, 1999. He testified to seeing possible semen on Ms. Dalzell's thighs resulting from gravitational forces, which he collected as evidence. Based on Dr. Broussard's own testimony, he collected this swab at least twelve hours after Ms. Dalzell's murder had occurred.

Ms. Dalzell definitely had some sort of sex with the Petitioner and definitely died due to murder in her own house. The fact that Dr. Broussard recovered evidence of the sexual act on her thigh twelve hours after the murder does not establish – in any way – what time Ms. Dalzell had sex with the Petitioner and whether that sex was non-consensual. The prosecution's evidence, even taken in a light most favorable to the prosecution, fails to establish that the sex and the murder occurred simultaneously or even in close temporal proximity to each other. The evidence also fails to rule out the reasonable possibility that another person forcibly raped Ms. Dalzell and killed her in her home while wearing a condom, thus not leaving any DNA inside her body.

Given these facts, the trial court should have granted the Petitioner's motion for a judgment of acquittal. Thus, it is a violation of the Petitioner's constitutional due process rights to sustain his convictions.

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to consider this important question.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

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