IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

APPEAL NUMBER 5D06-3529

JUSTIN MERTIS BARBER
Appellant

v.

STATE OF FLORIDA
Appellee.

A DIRECT APPEAL OF A JUDGMENT AND LIFE SENTENCE FOR FIRST DEGREE MURDER FROM THE CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT ST. JOHNS COUNTY, FLORIDA

AMENDED BRIEF OF APPELLANT (ORIGINAL)

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PRELIMINARY STATEMENT

The original record on appeal consisted of 8 volumes of pleadings which are paginated in sequential order. References to the original record on appeal will be in the format "**R**" followed by the page number or numbers as assigned by the clerk. The original record on appeal was supplemented by the trial transcript and various hearing transcripts. The trial and post trial transcripts are paginated in sequential order. References to the trial and post trial transcripts will be in the format "**TR**" followed by the appropriate page or page numbers as assigned by the court reporter. Supplemental record hearing transcripts will be in the format "[**TR]**" followed by the appropriate page or page numbers as assigned by the clerk.

STATEMENT OF THE ISSUES

I. THE TRIAL COURT ERRED IN DENYING BARBER'S MOTION FOR NEW TRIAL WHEN THE EVIDENCE IN THIS PURELY CIRCUMSTANTIAL EVIDENCE CASE DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

II. THE TRIAL COURT ERRED IN DENYING BARBER'S REQUEST TO INTERVIEW JURORS TO DETERMINE WHETHER THE JURY HAD BEEN TAINTED BY IMPROPER PUBLICITY.

III. THE TRIAL COURT ERRED IN DENYING BARBER'S MOTIONS IN LIMINE AS TO EVIDENCE OF (1) EXTRAMARITAL SEXUAL AFFAIRS, (2) COMPUTER SEARCHES, AND (3) LIFE INSURANCE.

STATEMENT OF CASE

INDICTMENT

Justin Mertis Barber (hereinafter referred to as "Barber" or sometimes "Justin") was indicted for the first-degree murder of his wife, April Barber. [R1]

Barber filed several motions in limine[1] prior to trial, including:

a. a motion to bar admission of extramarital affairs [R487];

b. a motion to bar admission of evidence of life insurance policies [R485]; and

c. a motion to bar admission of evidence relating to computer searches and music downloads. [R541]

The trial court permitted testimony of five extramarital affairs over the previous three years as impeachment evidence only. (The State had also sought to introduce this evidence as "prior bad acts" evidence.) [R480]

Barber's Fifth Motion in Limine dealt with the admission of evidence of an insurance policy on April Barber's life. [R485] The trial court permitted this testimony to establish motive, intent and premeditation. [R1709].

Barber's Sixth Motion in Limine sought to exclude evidence obtained from searches of Barber's home and office computers; the court permitted testimony of the

[1] Two of these motions were filed under seal. [R485; R-487]

results of computer searches and music downloads.

Jury selection began on June 8, 2006. [TR362] The State rested on June 15, 2006. The defense motion for judgment of acquittal based on a reasonable hypothesis of innocence was denied. [TR1184]

The defense presented its case June 19-20, 2006. [TR1192] At the conclusion of the defense case, the defense again moved for a judgment of acquittal based on the state's failure to exclude the reasonable hypothesis. That motion was denied. [TR1353; 1522; 1527]

Closing arguments and jury instructions were given on June 21, 2006. [R 1541] The jury was sequestered on the afternoon of June 21, 2006, although they were permitted to have their cell phones with them. [R1263-64] The jury deliberated four days before returning a verdict of guilty as charged. [TR1937]

The penalty phase was held on Monday, June 26, 2006. The jury returned a recommendation of death by an eight to four vote. [TR2000]

Barber filed a Motion for New Trial, asserting again that the State had failed to exclude every reasonable hypothesis of innocence and that the trial court had erred in denying the defense motions for judgment of acquittal. [R1217-18] The Motion for New Trial also asserted the trial court had erred in permitting the evidence of extramarital affairs, computer searches and life insurance policies. [R1217-18]

MOTION TO INTERVIEW JURORS BASED ON POTENTIAL PREJUDICIAL PUBLICITY

In the motion to interview jurors, Barber reminded the Court that the jury had deliberated for approximately 40 hours before returning its verdict Saturday, June 24, 2006 [R1220]. The case had been the subject of extensive pretrial and trial publicity in print and in the electronic media. The case was covered on a daily basis by representatives of the national news media, CBS, NBC, and ABC as well as being the subject of commentary on CNN. Most importantly Court TV provided live coverage of the trial as well as daily commentary from various lawyers or other alleged legal experts from around the country. Included among the commentators who appeared on Court TV was the original prosecutor in the case, Maureen Christine. [R1220] Counsel was informed that she was presented by Court TV as being

> the original prosecutor who had the inside story on all the information and evidence that the jurors were <u>not</u> being permitted to hear. The effect was to create the impression that there was substantial additional evidence of the Defendant's guilt that for some "legal" reason the jurors were not being permitted to consider . . . The subject of her commentary included various items that were the subject of pretrial Orders in Limine, including those that were not opposed by the State because the evidence was conceded to be irrelevant . . . she discussed the Defendant's purchase of body armor from E-Bay . . . she suggested that this was used in the course of the crime and discarded afterwards . . . it would appear to be the very kind of "trial publicity" that is proscribed by Rule 4-3.6, Rules of Professional Conduct . . . the type of commentary that is at issue here, including specific reference to alleged facts or evidence that are being kept from the jury presents an [*sic*] unique and inherent threat

> to that requirement [that jurors "avoid exposure to any materials outside the courtroom"]. The unusually high degree of public interest in the case, coupled with the nature of the information and the manner and source of the presentation, provides a substantial and sufficient basis for the requested relief [to interview the jurors.

[R1220-1222]

The State responded with a motion to strike the defense motion to interview jurors, complaining that it was not supported by sworn allegations of misconduct on the part of any juror. [R1300] At an initial hearing on the motions, September 5, 2006, the court denied the motion to strike, finding that the Supreme Court had adopted Rule 3.575, Florida Rules of Criminal Procedure January 1, 2005 that removed the requirement that a motion to interview jurors be verified or sworn. [TR1824] The defense had attempted to obtain the appearance at the September 5, 2006 hearing of the former prosecutor whose Court TV commentary was at issue, but she failed to appear and instead simply filed a motion for protective order. [TR1824-26]

The trial court questioned the defense what its argument was for interviewing the jurors. Defense counsel stated:

> If any one of the 14 persons [12 jurors and 2 alternates] were exposed to any information that came in from outside the courtroom, then the verdict would be subject to challenge.

[TR1849]

The court agreed in principal but asked if the defense had "any kind of evidence that that actually occurred?" [TR1849] The defense acknowledged that it did not have any specific evidence that any specific juror had heard a specific fact but under the circumstances of the massive publicity were suspicious that it had happened. [TR1850] The court asked whether the fact that the former prosecutor made the complained of statements on national TV in and of itself would be a basis for challenging the verdict [TR1841] and the defense answered that circumstantially it would. [TR1842] The defense argued:

> I think we are going to be able to show here . . . I don't think there is just one or two . . . it was more or less - - somewhere around 12 different times that Mrs. Christine [the former prosecutor on the case] appeared on national television. This case was the front page news in St. Augustine every day of the trial, two weeks. It was the - - Court TV covered it gavel to gavel. It was on each evening's news cast. St. Augustine is a very small community. And what was presented here was not the usual talking heads kind of stuff where, Oh, we think the defense is winning or we think the prosecution is winning or whatever, what was presented here was specific factual information. She was presented as a person with inside knowledge of the case. And I'll give you a great example, the best example there is. This court prior to trial heard a motion in limine, basically a *Frye* motion, on Dr. Charles Sperry on the issue of whether - - basically whether a loosely held firearm would produce a projectile at a slower rate and therefore would account for what Dr. Sperry deemed to be too short of a distance that these bullets traveled in Justin Barber's body. Well, as the court will recall, that was - - I used the word - - Dr. Sperry was exposed in this courtroom. That was total, indisputable bunk . . . And the court ruled accordingly and kept it out, eliminated it, prohibited the jury from hearing that. Ms. Christine went on camera with that and talked about

this idea about a limp-wristed shooter and even got into a discussion with the commentator about they've had this Dr. Sperry in other cases. I think this Nancy Grace [the commentator] said, Oh, yes, I've used him before, he lectures internationally, how wonderful he is. And then the question, Well, why isn't the jury being able to see that? And there's some comment about, Well, you know, he's got very clever lawyers, got good lawyers, and so they filed this motion in *Frye*, and so on so forth. . . . The impression - - clear impression was - - and it's not just once, but repeatedly the impression was that somehow there had been some legal maneuvering or some kind of loopholing or something that had kept the jury from hearing this relevant evidence. And it wasn't on just one subject, Judge. By my count, we've had nine different pretrial motions in limine, several of which had subparts to them. And we can go through these tapes [the defense had obtained duplicate tapes from the broadcasters of the interviews in question] and show you where she repeatedly made reference to that very subject matter which was kept out of evidence . . . So the point is . . . This is the most sinister possible material to put out on the public airways.

[THE COURT] But if the jury never heard it, what difference does it make, and does it make the verdict subject to challenge?

[MR. WILLIS] If the jury in fact never heard it directly or indirectly, then obviously our motion [to interview the jurors], if granted, would prove that out.

[THE COURT] You have evidence which gives you reason to suspect that the jury did hear it?

[MR. WILLIS] Circumstantially, yes, sir, I do.

[TR1854-57]

The hearing was continued to September 12, 2006. [R1306] The defense complained that Ms. Christine had avoided service of process in the interim.

[TR1865-66] The court elected to proceed without her. [TR1866] The State conceded that the former prosecutor had made the statements complained of on national television. [TR1866]

The defense again argued in more detail that the verdict was *subject* to challenge on the basis of the improper publicity which may have reached the jurors.

> [W]e've got 14 people going home every night, visiting with their spouses and other members of their family. We've got a - - I would think certainly the most prominent case in recent history in St. Augustine, front page news every day, covered on Court TV, covered on the local news media. We've got the jurors coming in every day, they're going home every day being potentially exposed to that, no one directly but indirectly from members of their own family. And most importantly, to my way of thinking, this is not the routine kind of publicity that you're concerned about. This is of a very special nature and type in the sense that she was specifically identified as the original prosecutor in the case, and the person with inside knowledge of the case, and was specifically asked the questions. And the general conversation was: These are matters that the jury is not being permitted to hear.

[TR1868-69]

The court later asked:

> [THE COURT] Well, what difference does all that make if the jury did not know it in the deliberation of the verdict?
>
> [MR. WILLIS] . . . . I think it flies in the face of common sense and reason to think that not a single person of those 14 persons are exposed directly or indirectly to some version of that material presented on the airways.
>
> [THE COURT] You would then have to prove juror misconduct in the

> sense that they violated my admonition about reading, listening to, or watching any news media.
>
> [MR. WILLIS] We would want the opportunity to do that. That's all we are asking for is the opportunity.

[TR1870]

The defense then presented Court TV tapes of the complained of interviews and statements. [TR1874] The tapes presented were of statements made June 14, 2006, June 20, 2006, and June 21, 2006. [TR1874-76] The jury was not sequestered until June 21, 2006 late in the afternoon and even then they were permitted to keep their cell phones and could contact persons outside. [TR1876-77]

The motion for new trial and motion to interview jurors were denied after argument on September 12, 2006. [TR1941-44]

SENTENCING - JUDICIAL DETERMINATION THAT STATE FAILED TO PROVE MURDER OCCURRED AT THE BOARDWALK

The State filed a sentencing memorandum [R1296] that argued that Barber had held April under water until she was unconscious, a near drowning, before shooting her. The asphyxiation was argued as a sentencing aggravator supporting the death penalty. This was consistent with the State's argument from opening statement through closing argument that Justin first held April under water down at the water's edge at the beach until she was unconscious, then dragged her body about three

hundred feet up to the boardwalk where he then shot and killed her. This argument was essential to the State's proof, because this argument, and its supporting evidence, was the only evidence that Justin had shot April. The State's argument was that because Justin told the police he and April were attacked and shot by an assailant at the water's edge, but the evidence "proved" instead, according to the State, that April in fact was shot at the boardwalk, and not at the water's edge, Justin must be the murderer and not the assailant he claims shot them. [TR1545; TR1549; TR1554; TR1555; TR1558; TR1559; TR1560]

Judge Hedstrom. at the sentencing hearing on September 15, 2006, however, disagreed. *Ruling on the evidence to support the State's aggravator, Judge Hedstrom found instead that the State's evidence on this point was consistent with the defense theory that April was shot at the beach, not at the boardwalk* [R1331] *The court characterized other evidence in support of the State's "shot where she lay" or boardwalk shooting theory as "only speculation.*" [R1331] The court found as to the state's "shot-where-she-lay" theory:

> While the medical examiner favors the "shot-were [*sic*]-she-lay" theory, his testimony acknowledges the white foam findings are consistent with the victim being shot at the waters edge first, then falling into the water, then being dragged to the boardwalk and left. Also, there is no evidence that the abrasions were caused by a near-drowning episode, only speculation.

[R1331]

Judge Hedstrom concluded:

> *The Court therefore finds that the State has <u>not proven</u> the HAC aggravator beyond a reasonable doubt.*

[R1331; emphasis supplied]

The trial court then sentenced Barber to life imprisonment. [R1320] This appeal followed in a timely manner. [R1336]

STATEMENT OF FACTS

On August 17, 2002, Appellant Justin Barber and his wife April belatedly celebrated their wedding anniversary at Carraba's Restaurant in Jacksonville Beach. [R104]. Barber had beers and mixed drinks before and during dinner, and another drink at the nearby Ritz Bar after dinner. [R104]

After playing pool at the Ritz bar, the couple drove together to Guana State Park south of Ponte Vedra, where they had previously celebrated special occasions by having sex on a deck overlooking the beach on each of those occasions. [R108-09]

On the night in question, the couple walked south down the dark beach, then returned north, walking to their starting point. [R109-11] During the return northbound walk, both were shot - - April Barber died of her wounds, but Justin

Barber was able to leave the beach and drive to get help. [R81-130]

In a deposition given in a subsequent civil case, Barber testified that he and his wife had been accosted at gunpoint at the water's edge by an assailant who approached them from the north. [R81-130][2] Barber testified the man wore a dark tee-shirt and a baseball hat with a distinctive logo. [R112]

Barber testified that he lost consciousness after being shot and that when he came to, he began searching for April. [R113-14] Barber testified he attempted to carry his wife off the beach and used several methods to carry her to the dune walk-over. [R115-16]

Barber then attempted to get help by flagging down cars on the roadway, but no one stopped. [R117-18] Barber then drove north on State Road A-1-A to seek help, but ultimately passed out after driving into the median. [TR1297-98]

Vacationers Jason and Kimberly Pryor had driven northbound past the beach access shortly before Barber left to get help; the Pryors both testified another vehicle had been parked at the dune walkover near Barber's SUV. [TR1272-74] The Pryors both testified Barber's SUV later came past them on A-1-A at a high rate of speed with its hazard lights flashing. [TR1264-66; TR1272-74] Barber's SUV landed in

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[2] This deposition was read into the record at trial. [R1] A video-taped walk-through with Barber explaining the incident was introduced by the defense. [TR723-35]

a median and he passed out. [TR1264-66]

Paramedic Susan Brown responded to the scene of the crashed SUV; she testified Barber had minimal bleeding. [TR1249] Barber was life-flighted from the median strip to a local trauma center. [TR1254] Barber was treated at the emergency room by Dr. Tepas who observed five wounds and noticed two wounds of significant concern -- the wound three to four centimeters below the nipple, and the one near the neck. [TR1074] Tepas opined that these wounds could have caused significant pain and could be consistent with a loss of consciousness. [TR1079-80]

St. John's County Sheriff's Lieutenant Ben Tanner was the first law enforcement officer to arrive at the beach crime scene, where he found April Barber's body at the dune walk-over. [TR465] Tanner was initially unable to determine what injuries she had suffered. [TR482] April Barber had been shot once in the face, below her left eye. [R114]

Two hours later, FDLE crime scene analyst John Holmquist arrived at the beach to "process" the scene; he observed blood on April's right wrist, inside upper left arm and on her face. [TR501; TR554; TR555] Holmquist also testified the tide had destroyed most of the drag marks in the sand between the surf and the dune walkover, but that there were dozens of footprints in the sand above the tide line. [TR507]

Three and one-half hours after Lt. Tanner had first arrived on the scene, photographs were taken of April Barber which showed her body lying across the boardwalk and blood running down her face. [TR561-62]

Paramedic Brian Erb of Jacksonville Fire/Rescue was the first medical responder on the scene; Erb specifically checked April for bleeding and did not see any bleeding observed by Holmquist. [TR1221-22; TR1225] Jason Pryor, the vacationer/passer-by, had also returned to the scene; because he had prior training as a first responder, he was permitted to check the body prior to the arrival of paramedics. [TR1277] Pryor had noticed no blood on April's face. [TR1277]

FDLE analyst Holmquist also testified none of Justin Barber's blood was found on the dune walkover or on the path to his car. [TR557] Blood found on April's right wrist, left arm, left shoulder and under April's armpit turned out to be Justin Barber's blood. [TR973; TR1225]

FDLE analyst Nicole Lee testified that blood found on Justin Barber's shirt (in at least three locations) and on Justin Barber's pants (on at least two locations) was determined to be female blood. [TR964-69] Additionally, Lee had observed a large area of blood on the back of April's blouse, but never tested it. [TR972]

The medical examiner, Dr. Steiner, testified April's body showed multiple areas of abrasion (showing both pressure and movement) and a gunshot injury to the

left cheek. [TR1004] Steiner opined the abrasions on the left clavicle, the left arm, the left side of the body and behind the left ear were made while April was still alive. [TR1006-07] Steiner further opined that April had suffered a "near-drowning" episode, but stated that the foam on April's cheek was consistent with April having died in saltwater. [TR1014]

Pathologist William Sturner testified for the defense; Sturner opined that the blood line shown of photos of April Barber's face was a "re-bleed," consistent with her having been shot at the water's edge and dragged or carried to the boardwalk. [TR1402-03] Sturner also testified the female blood on Barber's clothing supported Barber's version of the events. [TR1472]

Sturner also opined that all four of Jason Barber's wounds were inflicted by a third party, and that the wounds had been capable of rendering Barber unconscious. [TR1393-99] Sturner also testified the wound to Barber's palm was consistent with a scuffle with an assailant. [TR1395-97] Sturner's opinion was that April was not shot at the dune walkover. [TR1418] Sturner also opined that April's lungs were one-half the weight he would expect to see in a drowning. [TR1412]

A DNA expert, Dale Gilmore, testified for the state. [TR1549-50] Gilmore testified that of the forty-six blood stains on April Barber's pants, thirty-six were female blood. [TR979] Gilmore testified the blood stains were not in good condition

for DNA extraction and typing. [TR980] Gilmore further testified that the remaining ten blood stains on April's pants could have all been male. [TR983] Gilmore also testified that the clothing evidence had been poorly handled. [TR985]

FDLE DNA Analyst Jason Hitt testified he tested April Barber's pants and Justin Barber's shirt. [TR931; 941] According to Hitt, the stain on April's blouse presented difficulty in determining whether more than one person's bodily fluids were there. [TR949]

Jerry Findley, a privately-retained crime scene analyst called by the State opined that April had been shot on the dune walkover, but admitted that the finding of female blood on Justin's pants was inconsistent with this theory. [TR1166] Findley also testified there was no blood on the boardwalk. [TR1167]

Alexander Jason, the defense crime scene expert, testified that for April to have been shot where she lay on the boardwalk, that the shot would have had to come from underground. [TR1468] Jason testified it would have been difficult, if not impossible for Justin to have held April upright as he shot her. [TR1471] Jason testified that the blood flow evidence was consistent with Barber's version of the incident. [TR1463] Jason also testified that the bullet holes in Justin's shirt did not exactly correspond to the bullet wounds on Justin's body - - this, he testified, "could be consistent with a struggle." [TR1445-46; TR1451]

Testimony established April Barber had initially applied for the two million dollar insurance policy on her life with First Colony Life Insurance. [TR1203] The company representative conducted a background investigation and personal interview with April Barber; the policy was issued in July 2001. [TR821; TR1204]

CPA David Siegel testified that Justin Barber had $58,000 credit card debt which had been incurred after the purchase of the life insurance policy. [TR809-21] Siegel testified the credit card debt had been incurred after post-September 11 stock market losses. Siegel testified Barber's annual income had been $105,000 and that April Barber's annual income had been $73,000. Siegel testified he saw no problem with the credit card debt, given the couple's high income and testified Barber had managed the debt with no delinquencies. [TR817-18]

Shannon Kennedy testified that she had begun a casual sexual relationship with Barber after an office-sponsored happy hour. [TR765] The two had occasional sex over a three week time period; Kennedy lived with another man at the time and had no intention of breaking up with the other man. [TR772]

STANDARD OF REVIEW

DE NOVO REVIEW FOR SUFFICIENCY OF THE EVIDENCE CLAIM

The "sufficiency of the evidence" standard determines whether evidence presented is legally adequate to permit a verdict and is used to decide a motion for

directed verdict. "In the criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt." *Tibbs v. State,* 397 So.2d 1120, 1123 (Fla. 1981). Sufficiency of the evidence is generally an issue of law that should be decided pursuant to the *de novo* standard of review. *Jones v. State,* 790 So.2d 1194 (Fla. 1st DCA 2001). The issue of the sufficiency of the evidence should be raised in the context of a motion for a directed verdict as it was in this case. *Santiago v. State,* 874 So.2d 617, 623-625 (Fla. 5th DCA 2004).

REASONABLE HYPOTHESIS OF INNOCENCE WHEN EVIDENCE IS EXCLUSIVELY CIRCUMSTANTIAL

If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. *See Banks v. State,* 732 So.2d 1065 (Fla.1999). However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence. *See Orme v. State,* 677 So.2d 258 (Fla. 1996); *Pagan v. State,* 830 So.2d 792, 803 (Fla. 2002). Circumstantial evidence can be sufficient to sustain a conviction provided that the evidence is (1) consistent with the defendant's guilt and (2) inconsistent with any

reasonable hypothesis of innocence. *Orme v. State,* 677 So.2d 258, 261 & n. 1 (Fla.1996) (quoting *Davis v. State,* 90 So.2d 629, 631 (Fla.1956)). On the other hand, "evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, . . . is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict." *Orme,* 677 So.2d at 261 n. 1 (quoting *Davis v. State,* 90 So.2d 629, 631-32 (Fla.1956)). "The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and *where there is substantial, competent evidence to support the jury verdict*," reversal is not required. *Darling v. State,* 808 So.2d 145, 155 (Fla. 2002) (emphasis supplied) (quoting *State v. Law,* 559 So.2d 187, 188 (Fla. 1989)). The State is not required to "rebut conclusively, every possible variation of events," but only to present evidence that is inconsistent with the defendant's reasonable hypothesis. *Id.* at 156 (quoting *Law,* 559 So.2d at 188-89), cited in *Delgado v. State,* 948 So.2d 681, 689-690 (Fla. 2006).

A motion for judgment of acquittal should be granted in a circumstantial evidence case if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. *State v. Law,* 559 So.2d 187, 188 (Fla. 1989) (citing *Wilson v. State,* 493 So.2d 1019, 1022 (Fla.1986).

Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. *Davis v. State*, 90 So.2d 629 (Fla.1956); *Mayo v. State*, 71 So.2d 899 (Fla.1954); *Head v. State*, 62 So.2d 41 (Fla.1952). In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false. *Mayo v. State*, *supra*; *Holton v. State*, 87 Fla. 65, 99 So. 244 (1924), cited in *McArthur v. State*, 351 So.2d 972 (Fla. 1977).

JUROR INTERVIEWS - THE *ROBINSON* ISSUE

The juror interview issue is controlled by *Robinson v. State,* 438 So.2d 8 (Fla. 5th DCA 1983). The *Robinson* court found prejudicial error when the pretrial publicity was closely related to the case, it occurred near the time of trial, was prominent, its tone was prejudicial to the defense and there was a likelihood the jury may have been exposed to it. With respect to the likelihood the jury had been exposed to the publicity, the deciding factor appears to have been the failure of the trial court to inquire in the face of widespread publicity.

EVIDENTIARY RULINGS

Section 90.104(1)(b), Florida Statutes, provides that "[i]f the court has made a definitive ruling on the record admitting or excluding evidence, either at or before

trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." *See In re Amendments to the Florida Evidence Code-Section 90.104,* 914 So.2d 940, 941 (Fla. 2005); *Rodgers v. State,* 948 So.2d 655, 663 (Fla. 2006).

The standard of review on appeal of an evidentiary ruling is abuse of discretion. *Carpenter v. State,* 785 So.2d 1182, 1201 (Fla.2001).

SUMMARY OF ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING BARBER'S MOTION FOR NEW TRIAL WHEN THE EVIDENCE IN THIS PURELY CIRCUMSTANTIAL EVIDENCE CASE DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

The State failed to overcome Barber's reasonable hypothesis of innocence that he and his wife were shot by an unknown assailant as they walked along the deserted beach late at night at Guana State Park. Not only did the State's evidence not exclude Justin Barber's defense, but the State failed to produce legally sufficient evidence of its own theory of the case.

II. THE TRIAL COURT ERRED IN DENYING BARBER'S REQUEST TO INTERVIEW JURORS TO DETERMINE WHETHER THE JURY HAD BEEN TAINTED BY IMPROPER PUBLICITY.

The law is well settled that once a criminal defendant presents evidence of pretrial or trial publicity in the community in which the trial takes place, that would be prejudicial to the defendant's right to a fair trial, then the trial judge has a duty to interview the jurors to determine if in fact any juror has seen or heard any of the prejudicial publicity. If a juror has been exposed to such prejudicial publicity, the court must determine if the juror can nevertheless follow his or her oath and remain impartial and decide the case solely on the basis of the evidence and arguments presented in court under the judge's instruction on the law.

The controlling standard is found in *Robinson v. State*, 438 So.2d 8, 9 (Fla. 5th DCA 1983). Under *Robinson* the burden on the defendant is only to establish that there has been prejudicial publicity in the community. Once that burden is met the trial court is then required to interview the jurors to determine if they have been tainted by that publicity. The failure of the trial court to conduct jury interviews on these facts is reversible error under *Robinson*.

III. THE TRIAL COURT ERRED IN DENYING BARBER'S MOTIONS IN LIMINE AS TO EVIDENCE OF (1) EXTRAMARITAL SEXUAL AFFAIRS, (2) COMPUTER SEARCHES, AND (3) LIFE INSURANCE.

Barber obtained pretrial rulings on various motions in limine relating to the admission of (1) his extramarital affairs, (2) computer evidence, and (3) life insurance. The trial court correctly held that on the facts presented in this case, the casual sexual trysts and sexual liasons Barber admittedly engaged in were not evidence of motive for murder. The trial court erred, however, in admitting the extramarital affairs on the basis that it showed that Barber had, when first asked if he had a happy marriage, lied when he affirmed that his was a happy marriage. Whether or not extramarital affairs are evidence of an unhappy marriage, the fact that Barber had had such affairs was not probative of any fact in issue - - particularly given that Barber readily admitted the affairs in question upon further questioning - - and only went to make Barber seem a bad person.

The trial court also erred in admitting evidence from Barber's work computer that someone who had used the computer six months prior to the murder had done two Google type searches relating to chest wounds, when it was not shown that Barber had done the searches, other persons had access to the computer in question, the searches were remote in time to the murder, there was no evidence that the computer user had "clicked through" to the search results, and because of the way the FDLE accessed the computer files to find these searches, the State could not put the evidence in context, that is, there was no proof what the computer user had been looking at either immediately before or after the searches. Taken together, given the extreme prejudice of this evidence, these factors went to admissibility and not just to the weight of the evidence. Too much was left to the speculation of the jurors and too many inferences were required to be stacked together for the evidence to be probative of any fact in issue.

Finally, the trial court erred in admitting evidence of the life insurance on April Barber's life, given that there was no evidence showing any nexus whatsoever between the life insurance and the crime, instead, the evidence showed that the insurance had been obtained for legitimate reasons, and there was evidence that Justin Barber thought that the insurance on his wife had lapsed at the time of the crime.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING BARBER'S MOTION FOR NEW TRIAL WHEN THE EVIDENCE IN THIS PURELY CIRCUMSTANTIAL EVIDENCE CASE DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

Although the State proved that April Barber was dead and that Justin Barber was present at the scene, the State failed first to prove that Justin Barber committed the crime, and second, failed to rebut by competent substantial evidence Barber's defense that he and his wife were attacked by an armed robber as they walked late at night on the deserted beach at Guana River State Park.

The State's case was based solely upon circumstantial evidence; that evidence, at best, amounted to nothing more than impermissibly stacked inferences tending to establish motive and suspicion - not the actual crime. In *Davis v. State,* 90 So.2d 629 (Fla.1956), the Florida Supreme Court explained:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt.

Id. at 631-32. See also, *State v. Morris*, 168 So.2d 541 (Fla. 1964). The Florida Supreme Court continues to apply the prohibition against stacking inferences or

assumptions, see *Baugh v. State,* 2007 WL 1215130, *5 (Fla. 2007):

> Where the evidence creates only a strong suspicion of guilt or simply a probability of guilt, the evidence is insufficient to sustain a conviction. *Cox v. State,* 555 So.2d 352, 353 (Fla.1989). Additionally, evidence is insufficient to support a conviction when it requires pyramiding of assumptions or impermissibly stacked inferences. *Cf. Gustine v. State,* 86 Fla. 24, 97 So. 207, 208 (1923) (reversing conviction because "[o]nly by pyramiding assumption upon assumption and intent upon intent can the conclusion necessary for conviction be reached"); *Brown v. State,* 672 So.2d 648, 650 (Fla. 4th DCA 1996) (finding evidence insufficient when it requires pyramiding of assumptions or inferences in order to arrive at the conclusion of guilt).

In *Miller v. State,* 770 So.2d 1144 (Fla.2000), the Supreme Court held that "the circumstantial evidence test guards against basing a conviction on impermissibly stacked inferences." *Id.* at 1149. Suspicions alone cannot satisfy the State's burden of proving guilt beyond a reasonable doubt. See also, *Scott v. State*, 581 So.2d 887 (Fla. 1991); *Barber v. State*, 923 So.2d 475 (Fla. 2006).

The State's theory was that Barber had first only "half-drowned" his wife to the point of unconsciousness at the water's edge, then dragged her body to the boardwalk and shot her there. The State argued this proved Barber lied about being attacked at the water's edge, and hence proved that he had fabricated the defense that a robber had attacked him and April at the water's edge.

However, after the sentencing hearing *the trial judge made a finding of fact* (which the State neither objected to nor appealed and which is law of the case), *that*

the State had failed to prove this point by competent substantial evidence beyond and to the exclusion of every reasonable doubt. Instead, the trial judge found that the State's own evidence was ***not*** inconsistent with the defense theory that April Barber had been shot at the water's edge.

That finding by the trial judge seals the result of this appeal. By concluding that the State had not proved beyond a reasonable doubt by competent substantial evidence that April was shot at the boardwalk (instead of at the water's edge as Justin consistently asserted in his defense) the trial judge abrogated the State's only evidence that Barber had committed the crime. The trial court was required to apply the same standard to determine whether the State had proven the death penalty aggravator as is required to determine whether the State met its sufficiency of the evidence burden and burden of rebutting the defense hypothesis of innocence, hence the ruling on the aggravator amounts to a ruling on sufficiency and rebuttal of the defense theory.

The evidence presented by the State *to prove Barber committed the crime*, as opposed to proof of motive or premeditation (which without proof of the crime, proves nothing), is reduced to one thing -- the State's theory that April was killed at the boardwalk.

The trial court ultimately found that the State had failed to prove by competent,

substantial evidence beyond a reasonable doubt that April in fact was killed at the dune walkover. Instead, the court ruled, the State's own proof was consistent with April having been shot at the water's edge as Barber testified. The result of this finding is that the State failed to meet the first prong of the circumstantial evidence test; that is, the State must first prove by competent substantial evidence that the Defendant committed the crime.

Alternatively, given that the State's entire case was wholly circumstantial, the State had the further burden of proving by competent substantial evidence that the defendant's theory of defense was not true. The trial court's finding likewise seals the result of that analysis.

In *Cox v. State,* 555 So.2d 352 (Fla.1989), the Florida Supreme Court held that "one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden." *Id.* at 353 (quoting *Davis,* 90 So.2d at 631). If the State's competent substantial evidence is not inconsistent with the defendant's hypothesis of innocence, then no jury could return a verdict in favor of the State. *State v. Law,* 559 So.2d 187, 189 (Fla.1989). Barber's case is similar to *Cox,* in that the State's evidence, while perhaps sufficient to create some suspicion, is simply not strong enough to support a conviction. *See also, Jaramillo v. State,* 417 So.2d 257 (Fla.1982).

Florida courts have proceeded with "extreme caution" when reviewing criminal convictions based solely on circumstantial evidence. *Head v. State*, 62 So.2d 41, 42 (Fla.1952); *Harrison v. State*, 104 So.2d 391, 395 (Fla. 1st DCA 1958); and have rigorously applied the circumstantial evidence standard when evaluating the sufficiency of the evidence. In an unbroken line of decisions dating back nearly a century,[3] Florida courts have consistently reversed criminal convictions when:

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[3] *Broadnax v. State*, 57 So.2d 651 (Fla.1952) (defendant's statement to police that he was only working as an employee at a country beer and wine establishment and had no knowledge of "live" lottery tickets in cigar box under counter, not properly negated by state's proof; also state's proof itself insufficient to prove guilty knowledge or possession of the lottery tickets; possession of lottery tickets conviction reversed); *Lyons v. State*, 47 So.2d 541 (Fla.1950) (evidence deemed insufficient to link the defendant to the shooting of a calf; defendant's trial testimony, corroborated by his wife's trial testimony, that he discovered the calf dead after another person had shot the calf and left the scene, not properly negated by state's proof; larceny conviction reversed); *Savage v. State*, 152 Fla. 367, 11 So.2d 778 (1943) (state's evidence deemed insufficient to establish manslaughter negligence against the defendant in an automobile accident in which he was the driver; in addition, the defendant's exonerating version of the accident and his effort to extricate the victim from the automobile thereafter, not properly negated; manslaughter conviction reversed); *Parish v. State*, 98 Fla. 877, 124 So. 444 (1929) (state's evidence deemed insufficient to link defendants to a burglary; defendants' trial testimony and other evidence establishing an alibi not properly negated by state's proof; burglary conviction reversed); *Davis v. State*, 90 Fla. 816, 107 So. 245 (1925) (state's evidence deemed insufficient to establish that defendant fired shot which killed deceased; defendant told police that he fired his gun into the ground and not at deceased; manslaughter conviction reversed); *Simpson v. State*, 81 Fla. 292, 87 So. 920 (1921) (state's evidence deemed insufficient to establish that defendant had a specific criminal intent to commit rape when he broke into a dwellinghouse; defendant testified he was drunk and had no recollection of incident; conviction for breaking and entering a dwellinghouse with intent to commit rape reversed); *Whetston v. State*,

(1) certain deficiencies or gaps in the state's case did not sufficiently link the defendant to the crime charged, did not sufficiently establish a requisite criminal intent or guilty knowledge, or otherwise left intact a viable hypothesis of innocence;

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31 Fla. 240, 12 So. 661 (1893) (state's evidence deemed insufficient to link the defendant to the arson of a cottonhouse; defendant gave exonerating testimony; arson conviction reversed); *Davis v. State*, 436 So.2d 196 (Fla. 4th DCA 1983), pet. for review denied , 444 So.2d 418 (Fla.1984) (state's evidence deemed insufficient to establish that defendant with requisite criminal intent aided and abetted his companions in the commission of a holdup; defendant made statement to police that he had no knowledge that any robbery was about to take place; robbery conviction reversed); *Redding v. State*, 357 So.2d 483 (Fla. 3d DCA), cert. denied , 364 So.2d 892 (Fla.1978) (state's evidence deemed insufficient to link the defendant to the theft of certain property from a room previously leased by the defendant; defendant testified at trial that he moved out of the room in question, that he left the key in the house mailbox, and did not steal any property; grand larceny conviction reversed); *Harris v. State*, 307 So.2d 218 (Fla. 3d DCA 1974), cert. denied , 315 So.2d 195 (Fla.1975) (state's evidence deemed insufficient to establish possession and guilty knowledge of heroin found in car jointly occupied by defendant and a companion; defendant gave exonerating trial testimony as to his lack of knowledge of heroin in the car; possession of heroin conviction reversed); *Forbes v. State*, 210 So.2d 246 (Fla. 3d DCA 1968) (state's evidence deemed insufficient to establish that money orders endorsed and uttered by the defendant were false or forged documents; defendant testified that the money orders were paid to him by the persons whose names appear as the makers; forgery and uttering convictions reversed); *Smith v. State*, 194 So.2d 310 (Fla. 1st DCA 1966) (state's evidence deemed insufficient to link defendant to burglary; defendant told police that the stolen items of property found in his possession were purchased at several auctions; burglary convictions reversed); *Day v. State*, 154 So.2d 340 (Fla. 2d DCA 1963) (state's evidence deemed insufficient to establish culpable negligence and to negate defendant's exonerating version of events leading to fatal automobile accident; manslaughter conviction reversed).

(2) certain affirmative proofs of innocence, frequently the defendant's own trial testimony or statements to the police, which were not sufficiently negated by the state's evidence, or

(3) a combination of both of the above factors.

The underlying justification for the circumstantial evidence standard and its corresponding rigorous enforcement is that:

> [T]he finger of suspicion implicit in circumstantial evidence is a long one and may implicate both the innocent and guilty alike. Persons caught in a web of circumstances may often appear guilty upon first impression, but in fact be entirely innocent as surface appearances are frequently deceiving.

Jones v. State, 466 So.2d 301, 326 (Fla. 3rd DCA 1985).

In order to avoid convicting entirely innocent people based on suspicion, the law demands an especially high standard of proof when convictions are based entirely on circumstantial evidence. "[O]ur responsibility in such circumstances -- human liberty being involved -- is doubly great," *Head v. State*, 62 So.2d 41, 42 (Fla.1952), because "[t]he cloak of liberty and freedom is far too precious a garment to be trampled in the dust of mere inference compounded." *Harrison v. State*, 104 So.2d 391, 395 (Fla. 1st DCA 1958).

This Court should have no difficulty in concluding that the State's circumstantial evidence fails to exclude, as a matter of law, the reasonable hypothesis

of innocence that Barber and his wife were attacked by an armed robber as they walked late at night on the deserted beach.

The version of the evidence that a defendant puts forth must be believed unless the circumstantial evidence shows it to be false. *Rager v. State,* 587 So.2d 1366 (Fla. 2nd DCA1991); *Butts v. State,* 620 So.2d 1071, 1073 (Fla. 2nd DCA 1993). The minimal circumstantial evidence adduced by the State did not disprove Barber's statement or any of his evidence that a third person had assaulted and shot him and his wife. Indeed, the trial judge himself found the State's key evidence of guilt to instead be consistent with Barber's theory of defense. Therefore the State's evidence did not exclude Barber's reasonable hypothesis of innocence and as such the evidence was simply insufficient to avoid a judgment of acquittal. Justin Barber's conviction must not be allowed to stand; this court must vacate the conviction and discharge Barber.

II. THE TRIAL COURT ERRED IN DENYING BARBER'S REQUEST TO INTERVIEW JURORS TO DETERMINE WHETHER THE JURY HAD BEEN TAINTED BY IMPROPER PUBLICITY.

The law is well settled that a trial court's refusal to inquire whether jurors have been exposed to prejudicial publicity requires a new trial. *Robinson v. State*, 438 So.2d 8, 8-9 (Fla. 5th DCA 1983). *Robinson* sets forth the rule approved by the Florida Supreme Court in *Derrick v. State*, 581 So.2d 31, 35 (Fla. 1991):

> Initially, the trial court must determine whether the published material has the potential for prejudice. . . . If it does, then a two-step process is necessary. First, the court should inquire of the jurors as to whether any of them read the material in question. If none of the jurors read the material, then its publication could not have prejudiced the defendant and the trial may proceed. . . . If any of the jurors indicate they have read the material, they must be questioned to determine the effect of the publicity, i.e., whether they can disregard what they read and render an impartial verdict based solely on the evidence at trial. . . . This procedure has been deemed necessary even though the trial court repeatedly admonished the jury, as here, regarding the reading of newspapers during the trial. . . .

The failure to follow this procedure is reversible error:

> [T]the trial court failed to even make a threshold inquiry as to the possibility of prejudice. The court also failed to inquire as to whether any of the jurors had, despite the court's admonition, read the articles. *The court's failure to take any action to determine whether the jurors had been exposed to and prejudiced by the articles requires that appellant be given a new trial.*

Robinson v. State, 438 So.2d 8, 9 (Fla. 5th DCA 1983) (citations omitted, emphasis supplied; footnote omitted).

The defense made a more than sufficient showing of the publication of materials which were prejudicial. The tapes submitted to the court were of television presentations on June 14, 2006, June 20, 2006, and on June 21, 2006. [R12-61-63] The jury was not sequestered until June 21, 2006, in the late afternoon; even then they were permitted to keep their cell phones and could contact persons outside. [R12-63-64] Once the defense made that showing, the trial court was required under *Robinson*

to conduct an inquiry of the jurors to determine whether any of them had heard or heard of the material in question, and then if so, whether they could disregard what they had heard and still render an impartial verdict.

Instead, the trial court mistakenly required the defense to first show that a specific juror had in fact heard specific prejudicial trial publicity before conducting any inquiry of the jurors, and denied the request.

Robinson and *Derrick* ***mandate*** inquiry of the jurors once a showing had been made of prejudicial publicity. The prima facie showing that must be made is only a showing of media publicity that is prejudicial to the defense. Once that showing is made, as it was in Barber's case, inquiry of the jury is required to then determine whether the jurors have actually heard or seen the publicity in question. The trial court's ruling, which turned the *Robinson* procedure upside down, is directly contrary to the procedure mandated by *Robinson* and *Derrick*.

DUE PROCESS VIOLATION

The original prosecutor in the case who advised the grand jury which returned the indictment against Barber repeatedly appeared on national television creating prejudicial publicity against Barber.

Rule 4-3.6 of the Rules of Professional Conduct provides:

Trial Publicity

> **(a) Prejudicial Extrajudicial Statements Prohibited.** A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

In *Florida Freedom Newspapers, Inc. v. McCrary,* 497 So.2d 652 (Fla. 1 DCA 1986), *affirmed,* 520 So.2d 32 (Fla.1988), the Florida Supreme Court said:

> We note, first that, even in the absence of a court order, prosecutors and defense counsel as officers of the court are severely restricted from making extrajudicial statements which might prejudice a fair trial. Moreover, prosecutors and defense counsel have a duty of reasonable care to prevent investigating employees, or other persons assisting in or associated with the case, from making extrajudicial statements prejudicial to a fair trial. *Rule 4-3.6 . Rules Regulating The Florida Bar.*

The prosecutor's action was intolerable because she was the attorney who personally advised the Grand Jury which returned the indictment. [R1]

The Sixth Amendment guarantees "trial, by an impartial jury . . ." in federal

criminal prosecutions. Because "trial by jury in criminal cases is fundamental to the American scheme of justice," the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ''indifferent'' jurors. . . . ''A fair trial in a fair tribunal is a basic requirement of due process.'' *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). "[The] verdict must be based upon the evidence developed at the trial." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).

In *Irvin v. Dowd* the defendant was convicted of murder following intensive and hostile news coverage. On review the Court vacated the conviction and death sentence and remanded to allow a new trial. "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ." 366 U.S., at 728, 81 S.Ct., at 1645. Similarly, in *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), the Court reversed the conviction of a defendant whose staged, highly emotional confession had been filmed with the cooperation of local police and later broadcast on television for three days while he was awaiting trial, saying "(a)ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow

formality." Id., at 726, 83 S.Ct., at 1419. And in *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), the Court held that the defendant had not been afforded due process where the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself "inherently prevented a sober search for the truth." Id., at 551, 85 S.Ct., at 1637. See also *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

In *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), the Court focused on the impact of pretrial publicity and a trial court's duty to protect the defendant's constitutional right to a fair trial. The Court ordered a new trial for the petitioner. Beyond doubt, the press had shown no responsible concern for the constitutional guarantee of a fair trial; the community from which the jury was drawn had been inundated by publicity hostile to the defendant. The trial judge "did not fulfill his duty to protect (the defendant) from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." *Id.*, at 363, 86 S.Ct., at 1522. The Court noted that "unfair and prejudicial news comment on pending trials has become increasingly prevalent," *id.*, at 362, 86 S.Ct., at 1522, and issued a strong warning about frustration of fair trials.

Because the *Sheppard* court failed to use even minimal efforts to insulate the trial and the jurors from the "deluge of publicity," Id., at 357, 86 S.Ct., at 1519, the

Court vacated the judgment of conviction and a new trial followed, in which the accused was acquitted.

These cases demonstrate that pretrial and trial publicity easily lead to an unfair trial. The capacity of the jury to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. The Supreme Court has held that the trial judge has a major responsibility to insure that such publicity does not result in an unfair trial by a jury that has been prejudiced by extrajudicial media information about the case. What measures the judge takes to mitigate the effects of pretrial or trial publicity may well determine whether the defendant receives a trial consistent with the requirements of due process.

The former prosecutor's actions in creating prejudicial trial publicity created an atmosphere that made it inevitable that Barber was denied a fair and impartial jury. The trial judge had a responsibility to insure that the jury had not been irremediably tainted by her misconduct; the failure to do so requires that the verdict, judgment and sentence be vacated on Due Process grounds as well as for the failure to comply with the *Robinson* requirement.

III. THE TRIAL COURT ERRED IN DENYING BARBER'S MOTIONS IN LIMINE AS TO EVIDENCE OF (1) EXTRAMARITAL SEXUAL AFFAIRS, (2) COMPUTER SEARCHES, AND (3) LIFE INSURANCE.

The most prejudicial evidence in the trial was that of Barber's extramarital affairs. The State justified the admission of extramarital sexual affairs solely on the basis that evidence of the affair contradicted Defendant's statement to investigators that he had a happy marriage.

Of course, the result does not logically follow; evidence that Barber had engaged in extra-marital sex is not evidence that his statement to Detective Cole that he had a "happy marriage" was false. Overwhelming social science data going back over decades has established that there is no correlation between extra-marital sex and an unhappy marriage. *See e.g. The Relationship of Extramarital Sex, Length of Marriage, and Sex Differences on Marital Satisfaction and Romanticism: Athanasiou's Data Reanalyzed*, Shirley P. Glass, Thomas L. Wright, *Journal of Marriage and the Family*, Vol. 39, No. 4 (Nov., 1977), pp. 691-703.

Yet, the trial judge ruled that the evidence was admissible for that reason. [TR1779]

This is circular reasoning. Barber did not testify; the *State* introduced his statement that he had a happy marriage, not Barber. The State should not be permitted to bootstrap prejudicial evidence of extramarital sexual affairs onto an

exculpatory statement that it introduced in the first place. Both the State and trial court conceded that the extramarital affairs were not evidence of motive. Therefore, this extra marital affair evidence was not relevant, Florida Statutes, § 90.401, and to the extent it had any relevance its relevance was outweighed by its improper prejudicial effect. Florida Statutes, § 90.403.

COMPUTER SEARCHES AND MUSIC DOWNLOADS

COMPUTER SEARCHES

The state introduced evidence developed by FDLE computer analyst Chris Hendry that someone had searched the web on a computer in Barber's Rayonier office as follows:

(a) on February 14, 2002, for "medical trauma, gunshot, chest;"

(b) a week later, "medical trauma, gunshot, chest;" and

(c) on July 19, 2002, "Florida Divorce."

[TR1571-72] These searches all occurred on a work computer accessible by other persons. [TR841] No similar searches were found on Barber's personal home computer. Mitch Walters, Rayonier's IT Manager, testified that other persons had access to Barber's office computer. [TR841; 867-868] Walters testified that Barber cooperated with the request for his computer and simply brought it when asked. [TR838]

Evidence established there were 1,954 Google, MSN and Yahoo searches on the computer [TR906-907]; no evidence established that the person doing the search then clicked through on any search result of the pertinent terms. [TR911] FDLE analyst Hendry was unable to place results into any context; that is, he could not say what was being done on the computer immediately prior or immediately after the searches they put into evidence. [TR912]

These queries, conducted on a non-exclusive computer six months prior to April Barber's death had no legal or logical relevance to the issues in this case. The probative value, if any, of such evidence was substantially outweighed by the danger of prejudice, confusion of issues, or misleading the jury. The evidence should not have been allowed. *See*, Florida Statutes, § 90.403. The admission of these computer searches was highly improper because it placed misleading inferences in front of the jury and encourage them to engage in improper speculation and improper stacking of inferences. **[**

MUSIC DOWNLOADS

The testimony established that Barber's computer had been used to download substantial quantities of recorded music. Leaving aside the question of whether he, in fact, downloaded the songs at issue, questioning by both the prosecutor and members of the grand jury focused on specific song titles (or lyrics) selected from

those downloaded. For example, primary focus was on a song by the band Guns N' Roses that was downloaded the afternoon before April Barber's death, which contained lyrics "I used to love her, but I had to kill her."

Other titles included "Stairway to Heaven," "Knocking on Heaven's Door," "I'm Moving On," "You Could Be Mine But You're Way Out Of Line," and "Fire Woman." Even if there was some way to reliably attribute downloading of this music to Justin Barber, it would take an incredible series of inferential leaps - - i.e., stacking of inferences - - to establish any relevance or materiality to the issues at trial. Again, at a minimum, Florida Statutes, § 90.403 prohibits the introduction of this material. It was far too prejudicial for any possible probative value.

LIFE INSURANCE

Barber moved pretrial for an order prohibiting any evidence related to his being a beneficiary on the two-million dollar life insurance policy owned by April Barber. The State sought to introduce this evidence to establish a financial motive.

In order for evidence to be admitted under Florida law, it must not only be relevant but the probative value of this evidence must not be substantially outweighed by the danger of unfair prejudice. Evidence that Barber was a beneficiary on his wife's life insurance policies was irrelevant, highly inflammatory and unduly prejudicial. In *Brooks v. State*, 918 So.2d 181 (Fla. 2005), the Florida Supreme

Court provided guidance in determining the admissibility of evidence related to a life insurance policy in a murder case. Although the Court permitted the introduction of the life insurance in *Brooks*, it was admitted as part of a conspiracy between Brooks, Davis and Gilliam to commit murder.

The *Brooks* Court also found that evidence of the insurance money was admissible as evidence of Brooks' motive and intent based on the reasoning that the source of the money (the life insurance) to pay Brooks, was inextricably intertwined with Brooks' own motive to participate in the conspiracy. In sum, the *Brooks* Court found that absent the life insurance policy, co-conspirator Davis, who was of extremely limited financial means, could not have fulfilled his commitment to pay Brooks. Thus, the evidence was admissible to show Brooks' own motive and intent to participate in the murder because otherwise, co-conspirator Davis would not have been able to pay *Brooks* his promised fee for his participation.

In Barber's case the life insurance in question was matching two million dollar term life acquired in July 2001; April Barber listed Justin as the primary beneficiary of her policy and Justin listed April Barber as the primary beneficiary of his policy. Her policy was fixed for 20 years with an annual premium of $1,030.[4] The amount

[4] The facts recited in this argument, to the extent not contained in the Statement of Facts, were proffered to the court in support of Barber's Motion in Limine. [R485]

of the policy was based upon industry standards relating to gross income. The Barbers were able to purchase slightly less than 15 times their gross annual income at an extremely attractive premium because of their young age and good health.

There were compelling reasons to acquire the life insurance policies. April Barber's mother died at a very young age of cancer; her father was incarcerated and not expected to be released in the foreseeable future. April Barber had two young siblings to whom both she and Justin were very close. Justin Barber and his wife had served as surrogate parents to her younger siblings, and provided a residence for them. In addition to overall economic and estate planning, the purpose for the life insurance was to ensure there was sufficient money available to provide for both of April Barber's younger siblings through their childhood, young adulthood, and college until they could be meaningfully self-sufficient.

Unlike *Brooks*, the facts in this case do not establish the necessary nexus for admissibility of this evidence. The most obvious factual difference is that *Brooks* involved a conspiracy between three individuals to commit murder, and the life insurance was to be used to pay for the commission of the murder.

Additionally, there was evidence that Justin Barber had intended for the policy on April to lapse and that he did not think it was still in effect at the time of her death. Testimony further established that April Barber had actually paid the quarterly

premium on her own policy on June 24, 2002. After April's death, Barber made no inquiry or took any action related to the First Colony Life Insurance policy; only after Barber was contacted by a First Colony representative did he become aware that the First Colony policy was still in effect.

Barber's belief that the First Colony insurance policy had lapsed is critical in addressing the nexus question. *Brooks* held that where a defendant is a beneficiary of a life insurance policy, it is only logical to require evidence establishing that the defendant knew of the policy in order for it to be admitted as evidence of motive. Barber lacked knowledge of the continued coverage of his wife's life insurance policy after he discontinued paying the premium; this lack of knowledge precludes admission of the insurance evidence.

In addition to Barber's lack of knowledge of the continued coverage, there are other facts which distinguish *Brooks* and support Barber's position that a sufficient nexus did not exist to allow admission of the insurance evidence. The State could not show that any of Barber's actions leading up to or at the time that his wife was murdered supported an inference that Barber had a motive to murder his wife for monetary gain.

Barber had undergraduate and masters degrees from the University of Oklahoma, and worked with a Fortune 500 company in the fast-track executive

program. As a result of his position within the company, Barber advanced rapidly and at the age of thirty-two was already making close to $100,000.00 a year. Barber's salary was only destined to continue to increase. Barber's financial position is clearly opposite that of the co-conspirators in *Brooks* who were financially destitute. April Barber could have easily been self-sufficient based on her level of education. A routine divorce could have been readily obtained and at a minimal expense had Barber desired to end the marriage. In short, based upon Barber's earning ability, a financial motive cannot reasonably be argued to support admissibility of the life insurance policy.

Barber's actions were also inconsistent with insurance playing any role in his conduct. According to Barber, he and his wife were approached by an unknown assailant on the beach wielding a firearm and demanding money, who shot them both. After losing consciousness, he awoke to find his wife face down in the ocean. Despite having been shot four times, Barber was able to transport his wife up the beach to a walkover. At that point, lacking the strength to carry his wife over the walkover, Barber went to his car parked on Highway A1A to search for help, and attempted to flag down at least three vehicles. Because all the cars drove around him without stopping, Barber was forced to drive to look for help. Despite his serious medical injuries, Barber drove with his hazard lights flashing at speeds over 70 mph

in search of help.

In Barber's case, unlike *Brooks*, there is no direct evidence that Barber murdered his wife, and only speculation that if he had murdered his wife that he did so out of a desire to profit from her life insurance.

All of Barber's actions in attempting to get help for his wife are inconsistent with the intent to commit murder. In Barber's case, the State used the life insurance policy for the exact purpose which was specifically disapproved of in *Brooks*, i.e., to fill the evidentiary vacuum for his motive to murder, which was otherwise completely lacking. The First Colony Life Insurance policy was not admissible because Barber had no knowledge it was still in effect at the time of the murder. Without some overt nexus to the crime, the State should not have been permitted to rely purely on speculation that Barber decided to murder his wife to collect her life insurance. There was nothing unusual or sinister about a married couple obtaining life insurance. It was improper to permit the State to argue that merely because Justin Barber was a listed beneficiary on his wife's insurance policy that he had motive to kill her, absent direct testimony or evidence of a plan to commit murder and absent a nexus between the insurance and that plan. Evidence of the life insurance policy had minimal probative value, yet its prejudicial impact was immeasurable. Allowing the jury to speculate about motive without any evidence was reversible error.

CONCLUSION

Appellant JUSTIN MERTIS BARBER requests this Honorable Court reverse and vacate his conviction and sentence and remand the case to the circuit court with instructions that retrial is barred under Double Jeopardy principles. The State failed to present factually and legally sufficient evidence of guilt beyond a reasonable doubt or to the exclusion of every reasonable doubt. *Ballard v. State*, 923 So.2d 476, 485 (Fla. 2006) (conviction reversed on the basis of legally insufficient evidence, only evidence was circumstantial, with instructions to grant judgment of acquittal on remand); *McArthur v. Nourse*, 369 So.2d 578 (Fla. 1979) (reversal in circumstantial evidence case for failure to establish proof to the exclusion of every reasonable hypothesis of innocence is based on legal sufficiency of the evidence, hence retrial is barred under Double Jeopardy); *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Alternatively, Barber requests that the judgment and conviction be vacated based on (1) the failure of the court to permit interviews of the jurors to determine if they had been tainted by improper publicity about the case and (2) the lower court's error in admitting the complained of evidence identified in the motions in limine, in which event retrial would be permitted subject to this Court's rulings on the evidentiary matters.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, attention Mary Griffo Jolley, Esq., 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, by United States Mail, first class postage prepaid, this 14th day of September, 2007.

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William Mallory Kent