IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

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SEPTEMBER TERM, 2007

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NO. 2117

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EDWARD ORLANDO TAYLOR, II,
Appellant

v.

STATE OF MARYLAND,
Appellee

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APPEAL FROM THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
(THE HONORABLE JUDGE LARNZELL MARTIN, JR. PRESIDING
WITH A JURY)

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# APPELLANT'S BRIEF

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## STATEMENT OF THE CASE

On June 13, 2006, an indictment was filed in the Circuit Court for Prince George's County charging Appellant, Edward Orlando Taylor II ("Taylor") and Robert Leon James ("James"), with first degree rape, first degree assault, robbery with dangerous weapon and other offenses. A motion to suppress, and other motions, were heard and denied on May 21, 2007. Although a joint trial of the defendants began on May 21, 2007, Appellant's motion to sever was granted after jury selection and his separate trial commenced with a new venire pool on June 4, 2007.

The case was tried before a jury, the Honorable Larnzell Martin, Jr. presiding, from June 4 to June 6, 2007, when the court recorded verdicts of guilty on Rape in the First Degree, Assault in the First Degree, Robbery with a Dangerous Weapon, Kidnapping, Armed Carjacking, Theft of Property Having a Value Less than $500, Unauthorized Use of a Motor Vehicle, Sexual Offense in the First Degree, Attempted Sexual Offense in the First Degree, and Sexual Offense in the Third Degree.

On September 7, 2007, Appellant's motion for a new trial was denied, and he was sentenced to a term of life in prison for first degree rape. The court further sentenced him to 25 years for first degree assault, 20 years for robbery with dangerous weapon, 30 years for kidnapping, 30 years for

armed carjacking, 18 months for theft, 2 years and 6 months for unauthorized use, and 10 years for third degree sexual offense, all to run concurrent with each other but consecutive to the first life term. He also received two concurrent life sentences for first degree sexual offense and attempted first degree sexual offense. Appellant timely noted his appeal on September 12, 2007.

## QUESTIONS PRESENTED

1. Was the evidence presented legally sufficient to sustain appellant's conviction on any counts when the only evidence connecting him to the charged crimes was DNA recovered from the complainant of which he could not be excluded as a minor contributor?

2. Did the trial court violate Maryland Rule 4-326(d), and deny Taylor his right to be present at all critical stages of his trial and his right to a fair trial when, during jury deliberations, the court received notes from the jury containing substantive evidentiary questions but failed to inform appellant or make these notes part of the trial record?

## STATEMENT OF FACTS

Near midnight on February 8, 2006, Heather Jasper parked her automobile in the parking lot adjacent to her apartment complex on Elder Oaks Boulevard, in Bowie, Maryland. (T1 at 139). An individual wearing a mask and carrying a gun approached her car. (T1 at 140). Forced into the backseat of her car, Ms. Jasper was joined by a second individual. (T1 at 141). Her assailants then blindfolded her in her vehicle, forced her to withdraw money from an Automatic Teller Machine, and took her to another unknown location where she was repeatedly sexually assaulted. (T1 at 140-55). This incident lasted several hours, until the two individuals returned Ms. Jasper to the apartment complex in the early morning of February 9, 2006. (T1 at 161).

Ms. Jasper called the police when she returned to her apartment. (T1 at 164). Once the police responded, she was escorted to Prince George's Hospital for a sexual assault examination. (T1 at 166-67; T2 at 65). This examination included the taking of various swabs from different sections of her body. (T2 at 71).

Eventually, Appellant was arrested in connection with this incident. After a grand jury indictment was filed, trial on the charges commenced in front of a jury on June 4, 2007. At trial, the State's case-in-chief consisted

of the testimony of eight witnesses. Despite the number of witnesses, the only witness able to draw any connection between Appellant and the incident on February 8 and 9, 2006, was Julie Kempton, a DNA analyst for the Maryland State police. Ms. Jasper was unable to identify her assailants. None of the other fact witnesses for the State were able to identify Appellant or connect him to the events of February 8 or 9, 2006.

Ms. Jasper testified at trial and provided details of the incident. Her description of the events was at times quite detailed, and conveyed the trauma of the attack she suffered. (T1 at 140-55). She described being blindfolded, (T1 at 141), driven around in her own car with her head pushed down, (T1 at 143), and ordered to withdraw money from an ATM using her bank card, (T1 at 147-48). She further described being ordered to remove her clothing, (T1 at 152), made to perform oral sex (T1 at 154-55), and being penetrated vaginally and anally by one or both assailants (T1 at 158). She could not distinguish whether these acts were committed by one assailant or another, or both. (T1 at 154).

However, Ms. Jasper was not able to identify either of the individuals responsible for this attack. (T1 at 158). In fact, the only physical description Ms. Jasper provided pertained to one of the perpetrators, as follows:

> I just remember him – even though it was the wintertime, I just remember him looking like he was heavy set. He was masked from the nose down, with one of those kind of dollar store bandanas that anybody can get, and he had a hat over his head. (T1 at 141).

Thereafter, she was blindfolded, and could not describe the second individual involved in the incident. (T1 at 141-42). She testified both individuals were male because of the dialogue she was able to hear. (T1 at 142). On direct examination by the State, she explained that even at the times the blindfold was removed, she did not look at either individual because she was ordered not to. (T1 at 144, 160). Indeed, when asked if she would ever be able to identify either assailant, she unequivocally responded no. (T1 at 158).

Ms. Jasper testified that she was able to observe that one of her assailants wore a jacket during the incident, a jacket she described to be a "grayish, maybe bluish" color. (T1 at 169). Detective Thomas Lancaster, one of the detectives assigned to investigate the case, testified that Ms. Jasper had given a description of the jacket as a "silver jacket with writing on the sleeve." (T2 at 42). Detective Lancaster subsequently recovered a blue and gray Tommy Hilfiger jacket from Appellant's house pursuant to a search warrant. (T2 at 41-42). However, when confronted with this jacket during direct examination, Ms. Jasper was not able to recognize or identify the jacket as the one worn by her assailant. (T1 at 169). Nonetheless, over

defense counsel's objection, this jacket was entered into evidence. (T2 at 75-6).

Three witnesses, Derek Graves, Danielle Johnson, and Nancy Jasper, were called by the State to testify to Ms. Jasper's prompt reporting of the sexual attack. On February 9, 2006, Ms. Jasper contacted two friends, Mr. Graves and Ms. Johnson by telephone between two and three o'clock in the morning. (T1 at 193; T2 at 12-13). She communicated to both that she had just been raped. (T1 at 193; T2 at 13). After these calls, she called her mother, Nancy Jasper, in Phoenix, Arizona. (T2 at 15). She further told her mother that she had been raped. (T2 at 16).

An additional witness, Jeffrey Simmons, testified that in February, 2006, he also lived in Ms. Jasper's apartment complex on Elder Oaks Boulevard. (T2 at 17-18). Mr. Simmons was in the parking lot of the complex on the night February 8, 2006. (T2 at 18). At around midnight, as Mr. Simmons approached the front of his building, he observed a male and a female "either coming from somewhere or going to somewhere." (T2 at 18). He believed that the man made a threatening comment to him, although he could not remember the precise substance of the statement. (T2 at 18). He never identified either the man or the woman he saw in the parking lot that night, and made no in-court identification of Appellant. (T2 at 17-27).

Detective Thomas Lancaster, the sexual assault unit detective assigned to the Jasper incident, testified for the State regarding his efforts to investigate the February 8-9 incident. Detective Lancaster indicated that, during the course of his investigation, he was unable to retrieve video surveillance from any of several different surveillance cameras located in and around the area of the incident. (T2 at 30-31, 33). He was able to obtain photographs taken from traffic cameras in the area, but these photographs failed to contain any images related to this case. (T2 at 54). He further indicated that no physical evidence, in the form of fingerprints or DNA evidence, was recovered from Ms. Jasper's vehicle, despite processing by a police evidence technician. (T2 at 38-40). Detective Lancaster also testified that he showed Ms. Jasper a photograph of Appellant (T2 at 59). Despite viewing this photograph, Ms. Jasper did not identify Appellant as one of the perpetrators of the crime.

Detective Lancaster obtained a DNA sample from Appellant on May 15, 2006. At Appellant's trial, the State called two witnesses to testify as to the DNA evidence recovered from Ms. Jasper during the sexual assault examination.

Doctor Claudia Ranniger was qualified as an expert in the field of emergency medicine. (T2 at 64). She conducted the physical and narrative

components of the sexual assault examination of Heather Jasper on February 9, 2006. (T2 at 65). As a result of the physical examination, Dr. Ranniger concluded that there were injuries consistent with a sexual assault of the type Ms. Jasper had described. (T2 at 69). Dr. Ranniger further testified that she took swabs from Ms. Jasper in an effort to collect specimens for DNA analysis. (T2 at 71). Specifically, she took swabs from Ms. Jasper's breast and chest area, where Ms. Jasper had indicated to Dr. Ranniger that she had been licked during the incident. (T2 at 68, 72).

Julie Kempton was qualified as an expert in the field of serology and DNA. (T1 at 115). Ms. Kempton was a Maryland State Police DNA analyst at the time of the trial and was responsible for the DNA testing and analysis of the items recovered from Ms. Jasper's sexual assault examination kit. (T1 at 111, 117).

Ms. Kempton analyzed the vaginal, oral, and anal swabs taken from Ms. Jasper on February 9, and did not detect semen or any other primary body fluids in any of those samples. (T1 at 117). However, saliva was indicated on swabs taken from Ms. Jasper's chest, labeled bite mark/licking swabs. (T1 at 118). Ms. Kempton also testified that she analyzed oral swabs taken from Ms. Jasper, Appellant, and separately-tried co-defendant James (T1 at 120).

Ms. Kempton's analysis of the bite mark/licking swab indicated DNA present from more than one person. (T1 at 122). The DNA present on the swab was compared to the known profiles of both Appellant and separately-tried co-defendant James. (T1 at 123). This comparison revealed James to be the "primary contributor of the DNA." (T1 at 123). Kempton further explained that Taylor's profile did not similarly match, and, as a result, Appellant "could not be excluded as the minor contributor." (T1 at 123). Her conclusion was:

> that James was the primary contributor of the DNA found on the bite mark/licking swab, and that Edward Taylor could not be excluded as the minor contributor, but over 99.99% of people in the population would be expected to be excluded from that mixture. (T1 at 126).

Upon redirect examination, Ms. Kempton explained the scientific basis of this conclusion, explaining:

> [w]hen we have a mixture like this, I cannot say definitively that Edward Taylor's DNA is in the mixture because of the type of mixture that it is, because there are types from more than one person, because they share some types, and also because he's not the major contributor in this mixture. (T1 at 134).

Ms. Kempton testified that she analyzed several other items from Ms. Jasper's sexual assault examination kit for the presence of blood, semen or other physical specimens for comparison. (T1 at 129-33) From these items, there were no further DNA matches or comparisons. (T1 at 129-33).

At Appellant's trial, the State presented no identification evidence. The only in-court identification was that of Detective Lancaster indicating that Appellant was the same individual he had arrested. (T2 at 37).

In addition, the State did not offer any admissions or inculpatory statements made by Appellant. Indeed, the only evidence introduced at trial connecting Appellant to the Jasper incident was Julie Kempton 's conclusion that Appellant "could not be excluded as a minor contributor" of DNA to the swab taken from Ms. Jasper's breast area. (T1 at 123).

Appellant did not testify at his trial and presented no witnesses or evidence.

The jury received instruction from the court on June 5, 2007, (T2 at 99-117), and began its deliberations at 3:40PM. (T2 at 165). At some time soon thereafter, a note was received from the jury. (T2 at 166). The court's response to this note indicates that it concerned a juror's child-care arrangements and was similar to a note already received on the subject. (T2 at 166). All parties were still present when this note was received and the court responded to the note, "Please inform your foreperson of your circumstance." (T2 at 166).

The parties were excused from the courtroom at 3:42PM. (T2 at 167). However, at 4:07PM, the jury sent another note. (T2 at 167). This note was

never discussed on the record, despite the fact that the appellant and his counsel returned to the courtroom at 5:00PM. (T2 at 167-68). The trial record is silent as to the content of this note, or the court's response. Further, there is no indication of discussion of the 4:07 p.m. note with either party. (T2 at 167-68).

The jury was dismissed at 5:00 p.m. on June 5, 2007. (T2 at 168). They resumed deliberations at 9:40 a.m. the following day. (T3 at 2). A verdict was reached at 10:15 a.m. on June 6, 2007. (T3 at 2). Again, on June 6, 2007, the record is silent as to the note received from the jury at 4:07PM on June 5. (T3 at 2).

On June 14, 2007, Appellant moved for a new trial. On September 9, 2007, Appellant appeared for sentencing. In argument in support of his motion for a new trial, defense counsel referenced the jury note. (S at 11). He explained that the note contained three substantive questions: "Where is Mr. Chase? Does Mr. Taylor know Mr. Chase? And why was Mr. Taylor arrested prior to DNA evidence? What evidence was there?" (S at 11). The note is not referenced again in the trial record by the court, the State, or defense counsel.

Additional facts will be presented as required during argument.

## ARGUMENT

**POINT ONE – THE EVIDENCE PRESENTED WAS LEGALLY INSUFFICENT TO SUSTAIN APPELLANT'S CONVICTION ON ALL COUNTS WHEN THE ONLY EVIDENCE CONNECTING HIM TO THE CHARGED CRIMES WAS DNA RECOVERED FROM THE COMPLAINANT OF WHICH HE COULD NOT BE EXCLUDED AS A POSSIBLE CONTRIBUTOR.**

*A. Preservation for Appellate Review*

As a threshold matter, it is necessary to address this Court's authority to address this issue. Although defense counsel made a motion for judgment of acquittal after the State's case (T2 79-16), he did not renew the motion after at the close of all evidence ordinarily required by Maryland Rule 4-324 to preserve the issue of whether the evidence was legally sufficient. This Court should nonetheless exercise its discretion to decide in the context of this appeal whether the evidence was legally sufficient to support Appellant's conviction. See Rule 8-131(a) (providing in pertinent part that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal").

In Testerman v. State, 170 Md. App. 324, 907 A.2d 294 (2006), this Court held on a direct appeal from a criminal conviction that defense

counsel had rendered ineffective assistance by failing to preserve a sufficiency issue for appeal by making an appropriate motion. The Court considered the sufficiency issue in the context of the ineffective assistance claim. Finding that the evidence was insufficient and that defense counsel rendered ineffective assistance by failing to preserve the issue, this Court reversed the conviction for which the evidence was insufficient. Id. at 301, 305-06. It is equally appropriate for this Court to consider the sufficiency of the evidence in this case because, if the evidence was insufficient, than counsel was undoubtedly ineffective for failing to renew the motion for judgment of acquittal. There was no conceivable strategic reason for failing to renew the argument counsel had made already. This failure to renew the motion seriously prejudiced the Appellant; if, as argued below, the evidence was insufficient, it could have caused the trial judge to acquit him of the charges or, at the very least, it would have properly preserved the issue for appeal and resulted in relief at this stage.

In Moosavi v. State, 355 Md. 651, 736 A.2d 285 (1999), the Court of Appeals explained that it and this Court each had "'independent discretion' to excuse the failure of a party to preserve an issue for appellate review." Id. at 661, 736 A.2d at 290. In that case, the Court of Appeals reasoned that two circumstances warranted its exercise of discretion to address an

insufficiency claim that the petitioner had not raised in his brief to this Court. First, if the statute that the petitioner was convicted of violating was entirely inapplicable to the conduct proved at trial, then he would be entitled to relief on an ineffective assistance claim in a post-conviction proceeding, and it would save judicial resources for the appellate court to address the issue on direct appeal instead. Second, the Court noted that where a defendant was convicted under an entirely inapplicable statute but had not raised the issue on appeal, it had reviewed the issue on the theory that the resulting sentence was an illegal sentence that could be challenged at any time. Id.. at 661-63, 736 A.2d at 290-91. Additionally, the court in Warfield v. State, 315 Md. 474, 554 A.2d. 1238 (1989) held that when a defendant makes a motion for judgment of acquittal after the close of the state's case and is denied by the trial court, a second motion for a judgment of acquittal is not needed even if the defendant offers some evidence. In the instant case, the defense did not present a case and offered no evidence. Therefore, the Court should consider the sufficiency of the evidence in the context of this direct appeal for the reasons set forth above.

In the instant case, the trial counsel did move for a judgment of acquittal and specifically laid out the grounds for that motion. (T2 79-16). Counsel moved for the judgment of acquittal because the only evidence

linking Appellant to the alleged offense was the testimony of the DNA analyst, a Maryland State Police employee, who testified that the Appellant's DNA could not be excluded from the samples collected from the victim. (T1 123-14). In Shand v. State, 103 Md. 465, 653 A.2d. 1000 (1995), the court held that trial counsel did properly preserve the issue of sufficiency of the evidence when counsel argued that the State failed to introduce any direct evidence that the defendant was the person who committed the sexual assault upon the victim. In that case, because the trial counsel specifically indicated that there was a lack of evidence presented by the state as to the issue of the identity of the defendant during the motion for a judgment of acquittal argument, the record was properly laid for appeal purposes. Id. at 1002. Therefore, the issue of the sufficiency of the evidence has been properly preserved for appeal.

*B. Insufficiency of Direct or Circumstantial Evidence*

It is well settled that "appellate review of the sufficiency of the evidence in a criminal case tried by a jury is predicated on the refusal to grant a motion for judgment of acquittal." Lotharp v. State, 231 Md. 239, 189 A.2d. 652 (1963). According to Maryland Rule 4-324 and Whiting v. State, 160 Md.App. 285, 863 A.2d. 1017 (2004), the rule requires that "as a prerequisite for appellate review of the sufficiency of the evidence,

defendant move for judgment of acquittal, specifying the grounds for the motion is mandatory, and review of a claim of insufficiency is available only for the reasons given by the defendant in his motion for judgment of acquittal."

In determining whether the trial court properly followed Maryland Rule 4-324 as applied in Cleckley v. State, 42 Md. 80, 399 A.2d. 903 (1979) is whether "admissible evidence adduced at trial either showed directly, or circumstantially, or supported a rational inference of fact to be proved, from which a jury could be fairly convinced, beyond a reasonable doubt, of defendant's guilt of the offense charged." Essentially, the trial court must determine whether the facts presented by the State on its case-in-chief are legally sufficient to submit the case to the jury.

Turning to the issue as to whether the evidence adduced at trial was insufficient to convict Appellant, the trial court erred in denying the Appellant's motion for judgment of acquittal because there were no facts proved that could lead a rational inference of guilt by proof beyond a reasonable doubt.

In reviewing a claim of legal insufficiency, this Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements

of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); see Rivers v. State, 393 Md. 569, 580, 903 A.2d 908 (2006); Moye v. State, 369 Md. 2, 12, 796 A.2d 821 (2002); White v. State, 363 Md. 150, 162, 767 A.2d 855 (2001); State v. Albrecht, 336 Md. 475, 479, 649 A.2d 336 (1994). Appellate courts must give due deference to the jury's finding of facts and its responsibility to weigh and resolve conflicting evidence, draw reasonable inferences from the evidence, and determine witness credibility. Jackson, 443 U.S. at 319, 99 S.Ct. 2781; Moye, 369 Md. at 12, 796 A.2d 821; McDonald v. State, 347 Md. 452, 474, 701 A.2d 675 (1997), cert. denied, 522 U.S. 1151, 118 S.Ct. 1173, 140 L.Ed.2d 182 (1998); Dawson v. State, 329 Md. 275, 281, 619 A.2d 111 (1993). Moreover, appellate review of the sufficiency of evidence should not involve undertaking "a review of the record that would amount to a retrial of the case." Winder v. State, 362 Md. 275, 325, 765 A.2d 97 (2001).

Circumstantial evidence is as persuasive as direct evidence. Mangum v. State, 342 Md. 392, 400, 676 A.2d 80 (1996) (internal citations omitted); see also Hebron v. State, 331 Md. 219, 226, 627 A.2d 1029 (1993); Handy v. State, 175 Md.App. 538, 562, 930 A.2d 1111, cert. denied, 402 Md. 353, 936 A.2d 851 (2007); Wagner v. State, 160 Md.App. 531, 560 n. 22, 864

A.2d 1037 (2005); Allen v. State, 158 Md.App. 194, 249, 857 A.2d 101 (2004), aff'd, 387 Md. 389, 875 A.2d 724 (2005); Hagez v. State, 110 Md.App. 194, 204, 676 A.2d 992 (1996). Indeed, "circumstantial evidence ... is 'sufficient to support a conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused.'" Painter v. State, 157 Md.App. 1, 11, 848 A.2d 692 (2004) (citation omitted); accord Wilson v. State, 319 Md. 530, 536-37, 573 A.2d 831 (1990); Veney v. State, 251 Md. 182, 201, 246 A.2d 568 (1968), cert. denied, 394 U.S. 948, 89 S.Ct. 1284, 22 L.Ed.2d 482 (1969); Hall v. State, 119 Md.App. 377, 393, 705 A.2d 50 (1998).

However, as with direct evidence, circumstantial evidence is only sufficient "'if the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture....'" State v. Pagotto, 361 Md. 528, 564, 762 A.2d 97 (2000) (quoting Taylor v. State, 346 Md. 452, 458, 697 A.2d 462 (1997)). Thus, " 'evidence which merely arouses suspicion or leaves room for conjecture is obviously insufficient. It must do more than raise the possibility of guilt or even the probability of guilt. [I]t must...afford the basis for an inference of guilt beyond a reasonable doubt.'" Pagotto, 361 Md. at 564, 762 A.2d 97 (internal quotations omitted); see State v. Suddith,

379 Md. 425, 446, 842 A.2d 716 (2004) (recognizing that jury has "the duty of resolving factual disputes" and of making "reasonable inferences").

As this Court observed in Dukes v. State, 178 Md.App. 38, 47-48, 940 A.2d 211, cert. denied, 405 Md. 64, 949 A.2d 652 (2008):

> Maryland courts have long drawn a distinction between rational inference from evidence, which is legitimate, and mere speculation, which is not. See, e.g., Benedick v. Potts, 88 Md. 52, 55, 40 A. 1067 (1898) ("[A]ny ... fact ... may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them.").

In Bell v. Heitkamp, 126 Md.App. 211, 728 A.2d 743 (1999), this Court endorsed the following test to distinguish between inference and speculation: "'where from the facts most favorable to the [party with the burden of proof] the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence), the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be permitted to draw it.'" Id. at 224, 728 A.2d 743 (quoting Chesapeake & Potomac Tel. Co. v. Hicks, 25 Md.App. 503, 524, 337 A.2d 744, cert. denied, 275 Md. 750 (1975)).

The question of whether the judgment of acquittal should have been granted is directed to the facts presented by the State's case in chief.

Furthermore, if the State's case lacks direct evidence of the defendant committing the offense then the court must look at whether the circumstantial evidence can support the trial court's decision to submit the case to the jury. Maryland courts have consistently held that circumstantial evidence is sufficient to support a conviction only when "if the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture." State v. Pagotto, 361 Md. 528 (2000). There, the court went on to explain that, "evidence that merely arouses suspicion or leaves room for conjecture is obviously insufficient. It must do more then raise the possibility of guilt or even probability of guilt. [I]t must....afford the basis for an inference of guilt beyond a reasonable doubt." Id. at 564.

In this case, there was no direct evidence linking Appellant to the crimes charged by the State. The victim was unable to identify Appellant in any pre-trial identification procedure or make an in-court identification at trial. While she had given police and the trial jury a description of a silver jacket with some writing on the sleeve, she was unable to identify the blue and grey jacket recovered from Appellant's home, and admitted into evidence over defense objection, as the jacket worn by her assailants.

There was no evidence that the DNA sample collected from the victim's body was positively identified as the Appellant's DNA. The only evidence

presented as to whether Appellant was even present at the scene of the crime was that the Appellant could not be excluded as a possible contributor of the DNA taken from the victim's body.

Specifically, the Maryland State police employee Ms. Kempton testified:

> [w]hen we have a mixture like this, I cannot say definitively that Edward Taylor's DNA is in the mixture because of the type of mixture that it is, because there are types from more than one person, because they share some types, and also because he's not the major contributor in this mixture. (T1 at 134).

Thus, the DNA results could only state that 1 out of every 10,000 people could have left that DNA sample on the victim's body. (T1 127-14).

In a very recent case this Court was presented with similar question regarding DNA evidence and sufficiency thereof. In State v. Brown, __ A.2d ___, 2008WL4427214, No. 945, September Term 2006, the defendant was convicted of first and second degree assault, use of a firearm in commission of a felony, and of wearing or transporting a handgun. In that case, the victim never positively identified the defendant at trial, but had positively identified him as the attacker from a photographic array 11 days after the incident. The State presented evidence that the defendant "could not be excluded as a possible contributor" of DNA recovered from a pair of sunglasses found at the crime scene. Further, DNA expert testified that such

an inconclusive test result did not establish that the tissue found on the sunglasses was the defendants. Thus, the State did not produce any DNA evidence linking Brown to the crime scene.

In partially reversing the convictions, this Court noted that the "possible contributor" DNA evidence meant that "the State did not produce any DNA evidence linking Brown to the crime scene." Id. However, as the State did not rely on the DNA evidence at trial or on appeal, id. at footnote 23, this Court affirmed Brown's convictions for the assault charges, citing the State's reliance on the victim's prompt pre-trial identification of the defendant from a photo array, the victim's testimony that he had fired several shots at his assailant, the defendant's appearance at a local hospital the same night with a gunshot wound, the defendant's fabricated statement regarding a robbery, the defendant's use of a false name at the hospital, and the defendant's sudden flight from the hospital before being treated and after being told to stay there by police. Id. at 23.

In the instant appeal, therefore, no evidence exists to support Appellant's conviction. The DNA evidence was not simply insufficient, rather it was non-existent, as this Court has held on identical facts. Since there was no other direct evidence in this case on which the State could rely, the only way the jury could have convicted the Appellant is by conjecture

and rank speculation. As stated above, there was such a dearth of evidence that Appellant was even present at the scene, let alone an active perpetrator of the crimes, that the only rational way for the jury to convict Appellant was for them to speculate that because his DNA could not have been excluded as a possible match then he must have committed all of the offenses for which he was charged.

The erroneous admission of the blue and gray Tommy Hilfiger jacket into evidence, despite the victim's testimony that she did not recognize it as the jacket worn by one of her assailants, takes on a new meaning when viewed in conjunction with the weak DNA evidence presented by the State. It simply added to the conjecture and speculation that since the jacket that Appellant had in his home, mass-produced by a major name-brand clothing manufacturer, bore some resemblance to the jacket worn by one of the perpetrators, Appellant must have been guilty of the charged crimes.

Taken together, there is every indication that jury was affected by the gruesome details of the crimes committed, and convicted Appellant based not upon the quality of the evidence, but in response to the judge submitting the case to the jury. The jury notes bore witness to this fact. In asking "Where is Mr. Chase? Does Mr. Taylor know Mr. Chase? And why was Mr. Taylor arrested prior to DNA evidence? What evidence was there?" the jury

signaled that they recognized that there was a complete lack of evidence linking Appellant to the commission of the charged crimes and to the victim. As stated by the DNA expert for the State of Maryland, it was only a mere possibility that the Appellant's DNA was recovered from the victim's body. (T2 123-14). A mere probability cannot be proof beyond a reasonable doubt.

Here, because Appellant was convicted of numerous offenses not indirectly or directly linked to the DNA recovered from the victim, the circumstantial evidence submitted to the jury required the jury to speculate and use conjecture in order to convict Appellant of those counts listed above. As a consequence, this Court should reverse the Appellant's convictions, and dismiss the indictment, or in the alternative, grant the Appellant a new trial.

**POINT 2 - THE TRIAL COURT DID VIOLATE MARYLAND RULE 4-326(d) AND DID DENY TAYLOR HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS TRIAL AND HIS RIGHT TO A FAIR TRIAL WHEN, DURING DELIBERATIONS, THE COURT RECEIVED NOTES FROM THE JURY CONTAINING SUBSTANTIVE EVIDENTIARY QUESTIONS BUT FAILED TO INFORM APPELLANT OR MAKE THESE NOTES PART OF THE TRIAL RECORD.**

The trial court did commit error when the court received a note from the jury during deliberations, never informed Appellant or his attorney, ever

discussed the contents of that note, never discussed the contents of that note on the record, and did not have Appellant present when the trial court responded to that note. Due to the apparent absence of Appellant during the unilateral action by the trial court in responding to that note the Appellant was denied his right to be present during all critical stages of the trial.

This action by the trial court is in direct violation of Maryland Rule 4-326(d). That rule provides that "the court shall notify the defendant and the state's attorney of the receipt of any communication from the jury pertaining to the action as promptly as practicable and in any event before responding to the communication." The rule goes further to state that "all such communications between the court and the jury shall be on the record in open court or shall be in writing and filed in the action. The clerk or the court shall note on a written communication the date and time it was received." The trial court in the present case failed to follow this rule.

This cited rule above has been interpreted by the courts as to govern all communications from the jury to the trial judge. Wagner v. State, 160 Md. 531, 864 A.2d. 1037 (2005). This rule has been strictly construed by the courts to be a rigid rule; it is a mandatory function that the trial court must undertake and is not discretionary in any way. The court in Winder v. State, 362 Md. 275, 765 A.2d. 97 (2001) held that Maryland Rule 4-326 is

not a set of abstract guidelines but rather a set of mandatory requirements that must be strictly followed, as they deal with a defendant's right to a fair trial and his right to be present at all critical stages of that trial. This strict interpretation of Maryland Rule 4-326 was also followed in Taylor v. State, 352 Md. 338, 722 A.2d. 65 (1998) where the court held that the failure to notify the defendant of a jury communication to the trial judge was fundamental error. The same result was found in Stewart v. State, 334 Md. 213, 638 A.2d. 754 (1994) where it held that any jury communications must be read into the permanent record of the trial in addition to notifying the defendant and that the failure to do so is error.

In the present case, there was a jury note that was initially received by the court and all parties were present for that note. That note was properly addresses in accordance with the rule. A short time later the parties were excused from the courtroom. (T2 at 167). However, the jury sent another note. (T2 at 167). This note was never discussed on the record, despite the fact that Appellant and his counsel returned to the courtroom at 5:00 p.m. (T2 at 167-68). The trial record is silent as to the content of this note, or the court's response. Further, there is no indication of discussion of the 4:07 p.m. note with either party. (T2 at 167-68). This action by the trial court to

disregard the rule governing jury communications indicates that error was committed and the rights of the Appellant were violated.

Due to the fact that there is no indication on the record of any discussion between the trial judge, trial counsel, and the prosecutor, it cannot be said with certainty that the Appellant was present during this discussion or participated in framing the response, or was able to object to the trial court's response, in any way. Appellant's due process rights under both the Maryland and the United States constitution were violated by this error by the trial court. Appellant had a right to be present during that passage of information by the jury to the judge and he was never given an opportunity to address that communication. The trial court could have had waited until Appellant had returned to the courtroom to address that communication. The trial court could have recessed court until the next day so that the communication could have been addressed properly. Only later was it apparent from the record that that communication contained a critical question raised by the jury. (S at 11). During the trial counsel's motion for new trial he explained that the note contained three substantive questions: "Where is Mr. Chase? Does Mr. Taylor know Mr. Chase? And why was Mr. Taylor arrested prior to DNA evidence? What evidence was there?" (S at 11). The note is not referenced again in the trial record, by the court, the

State, or defense counsel. It is hardly coincidental, and not at all surprising, that the questions raised by the jury relate directly to the insufficient nature of the evidence presented to them, which is the first point raised on this appeal.

The question presented to the judge from the jury had to do with substantive matters that were critical to Appellant's right to a fair trial and right to be present at all critical stages of that trial. Maryland courts have consistently held that it is fundamental error for the trial courts to respond to jury questions in this fashion. In Fields v. State, 172 Md.App. 496, 916 A.2d. 357 (2007), the court held that the failure for the trial court to respond to the jury communication was error. It also held that the trial court's failure to afford the defendant's an opportunity to participate in the determining the proper response also constituted fundamental error. The facts in that case are almost identical to the facts in the present case. Additionally, because in the motion for new trial the trial attorney for the defendant raised the point of the jury note, that question has been properly preserved for appeal. See Wagner, 864 A.2d. at 1037; Miles v. State, 365 Md. 488, 781 A.2d. 787 (2001) (holding that raising the issue of the failure of the trial court to properly handle a jury note at a post-trial motion was sufficient to preserve the issue for appeal).

Due to the plain language of Maryland Rule 4-326 and the way that the appellate courts have strictly interpreted the spirit of the rule, the appellant's constitutional rights have clearly been violated. This error cannot be harmless, as the record is silent as to the exact nature of the communication sent by the jury to the judge and the response by the judge back to the jury as to such critical issues. Due to the fact that Appellant did not have an opportunity to have their input presented to the response to the jury note, the trial court committed fundamental error.

## CONCLUSION

Based upon the foregoing reasons, this Court should reverse Appellant's convictions and vacate the sentences imposed thereon, and dismiss the indictment, or in the alternative, remit this matter for a new trial.

Respectfully Submitted,

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Text of Rules Cited

Rule 8-131(a). Scope of Review.

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal

Rule 3-324. Motion for Judgment of Acquittal.

(a) Generally. A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.

(b) Action by the Court. If the court grants a motion for judgment of acquittal or determines on its own motion that a judgment of acquittal should be granted, it shall enter the judgment or direct the clerk to enter the judgment and to note that it has been entered by direction of the court. The court shall specify each count or degree of an offense to which the judgment of acquittal applies.

(c) Effect of Denial. A defendant who moves for judgment of acquittal at the close of evidence offered by the State may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the defendant withdraws the motion.

Rule 3-324(d). Motion for Judgment of Acquittal.

(d) Communications With Jury. The court shall notify the defendant and the State's Attorney of the receipt of any communication from the jury pertaining to the action as promptly as practicable and in any event before responding to the communication. All such communications between the court and the jury shall be on the record in open court or shall be in writing and filed in the action. The clerk or the court shall note on a written communication the date and time it was received from the jury.

# APPENDIX

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IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND

vs. Criminal Trial 06-1270A

EDWARD ORLANDO TAYLOR, II,

Defendant.

_____/

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

(Trial on the Merits)

Volume I of III

Upper Marlboro, Maryland

Monday, June 4, 2007

BEFORE:

HONORABLE LARNZELL MARTIN, JR., Associate Judge

APPEARANCES:

For the State of Maryland:

RENEE BATTLE-BROOKS, ESQUIRE

For the Defendant:

DENT G. LYNCH, ESQUIRE

Cindy S. Davis, RPR
Official Court Reporter
Post Office Box 401
Upper Marlboro, Maryland 20773

and these are a swab usually of an area on the body where a victim indicates that they were bitten or licked and there might be saliva from a perpetrator there. Saliva was indicated on one of the two swabs in that packet, and so that item was taken on for DNA testing.

Q. Now, just so we clarify, bite mark/licking swabs, that's the category that it's always referred to as?

A. That's correct.

THE DEPUTY CLERK: State's Exhibits 1 through 16 marked for identification.

(State's Exhibit Nos. 1 through 16 were marked for identification.)

BY MS. BATTLE-BROOKS:

Q. I'm showing you what has been marked as State's 9. Do you recognize that?

A. Yes, I do. This is the sexual assault kit from Heather Jasper. I recognize it by our DNA analysis -- our DNA lab number on the back. Also, my initials are here when I took it into possession. And, also, when I was finished testing it, I resealed the package, and my initials and date are on there as well.

Q. Now, when you received that package, was it sealed or unsealed?

A. It was sealed.

Q. I'm showing you what has been marked as State's 15.

Do you recognize that?

A. Yes. This is my item number X-1, and this is an oral swab standard from Edward Taylor, II.

Q. Now, when you say standard, what does standard mean?

A. A standard means that it's the sample that we're using as the known person's -- that we're considering that the person's known profile.

In most cases from a person, we take their standards simply as an oral swab. We take what essentially is a sterile Q-Tip. Rubbing along the inside of the mouth, you collect cells from the inside of the cheek. Then it's packaged. The person who collects it can verify that this case came from the mouth of that person, and we use that as the standard profile for a person.

Q. When you say profile, what do you mean?

A. When we talk about a DNA profile, what we're determining is the DNA types that a person has at 13 different locations in their DNA. It's kind of similar to blood types. You know, someone might have a type-A blood or a type-O blood or A-B. At each of these 13 locations, a person will have one or two DNA types, and they're referred to with numbers in this type of DNA testing.

So, for example, at the first location that we look at, we might say that a person's profile at that location is

a 17-18. What that means is that they've got a type-17 from one of their parents and a type-18 from their other parent. Otherwise, a person might just be a type-17 at that location. That would mean that they got a type-17 from both parents. Just like someone who is a type-A blood probably got a type-A from both parents.

So when we talk about a DNA profile, we're talking about what types a person has over all 13 of the locations that we look at.

Q. And when you received, for the record, State's 15, was it sealed or unsealed?

A. It was sealed.

Q. And, again, what is inside of State's 15?

A. This contains two oral swabs taken from Edward Taylor, II.

Q. I'm showing you what has been marked as State's 14. Do you recognize that?

A. Yes. This is item X-10, and this is an oral swab standard from Robert Leon Chase James.

Q. And when you received State's 14, was it sealed or unsealed?

A. It was sealed.

Q. Now, when you conducted your analysis, did you also have a standard from Heather Jasper?

A. Yes, I did. We used the oral swabs from her sexual

assault kit as her known standard, so that we would have her standard profile as well.

Q. And what tests or what did you do relative to the biting/licking swab that you received in the rape kit?

A. I performed our standard DNA testing on it, which involves a first step that we call extraction, which is where we take a cutting from the swab and we treat it with chemicals that break apart the cells, and we purify the DNA and whatever cells are on that swab.

The second step we call amplification. In this step we use an enzyme to make millions of copies of the 13 different areas of the DNA that we're looking at. This allows us to take a fairly small amount of DNA and end up with enough DNA that we can actually get a DNA profile from it.

And that's the third step, which is our analysis step. We take the DNA that we have copied, and we put it through our genetic analyzer instrument, and it detects different types of DNA are in that sample and, in the end, we get a profile from that sample.

Q. Were you able to obtain any profiles from the bite mark/licking swab?

A. Yes, I did.

Q. And what DNA profiles did you obtain from that one swab?

A. From that swab I obtained a DNA profile that had DNA from more than one person. The way that we can tell this is that there's -- as I explained, one person, at any one DNA location, is going to have, at most, two types. If you've got the same from your mother and father, you'll just have one type at that location but, if you got a different type from your parents, you'll have two types at that location.

Well, if we see three or four or five types at a single location, that's telling us that there's DNA from more than one person there, because one single person can't have more than two types, except in very rare circumstances, at any location.

So when I looked at this profile that I had, I saw a number of types at many of the different locations. So I knew I had DNA from more than one person here. And there also was considerably more DNA from one person than from another that was in there.

The data that comes out of the genetic analyzer is, essentially, like peaks on a graph, and the peaks have heights that the computer measures and tells us how high they are. So, if we have a number of peaks that are at one height and then a number of peaks that are at a significantly lower height, then we have a lot more DNA from one person and a lower amount from another person.

So that was the case I had here. I had DNA from

someone, a male in this case, because our testing also gives us the sex of the person. So I had DNA from one person at a fairly high level from one male, and I also had DNA at a lower level from another person.

Q. And did there come a time when you were able to identify or put names and a profile to these people that you found on the swab?

A. Yes. I compared this profile from the bite mark/licking swab to the known profiles of Heather Jasper, Edward Taylor and Robert James, and my conclusions were that Robert James was the primary contributor of the DNA from the bite mark/licking swab. His was the DNA that was present at the higher level.

Edward Taylor could not be excluded as the minor contributor. That means that all of his types in his DNA profile were present in this mixture. He was not the primary contributor, but all of his types were present at the lower levels.

By doing a statistical calculation about how common or rare these different DNA types were --

MR. LYNCH: Objection, Your Honor.

THE COURT: Your next question.

MS. BATTLE-BROOKS:

Q. Were you able to do statistical analysis in terms of the types?

A. Yes.

Q. What was your finding?

A. Given the mixture profile that I had of DNA from more than one person, over 99.99% of people would be expected to be excluded from this mixture. However, Edward Taylor could not be excluded from the mixture.

Q. And when you say primary contributor, what would make somebody a primary contributor?

A. That's saying that there's more DNA from that person there. So, for whatever the reason, they deposited more cells on that area than the person whose DNA is there at a lower level.

Q. What is serology?

A. Serology is the area of testing that we use for actually finding the body fluids. Mostly what our serology consists of are color tests.

For example, the tests that I do to look for saliva, I take a small cutting from the swab, I put it in a test tube with a chemical, I put it in a water bath for half an hour, and, if saliva is present, it will turn blue. If no saliva is present, it will stay clear.

So serology refers to different color tests that we use to look for body fluids.

Q. And in the major contributor, could you tell whether it was serology or cells from a body?

A. All I can tell about this item is that saliva was indicated on this swab and there was DNA from more than one person. I can't say if it was saliva of two people.

It was not semen, because there weren't any sperm cells in this -- well, actually, I can't say that. I did not do a specific microscopic exam for sperm cells on that sample, but I would not expect that to have been semen.

However, it could have been saliva from two people. It could have been saliva from one person and a small amount of blood from another person or sweat from another person. I can't tell that specifically.

Q. And who was the third person? You've talked about two people. Who was the third contributor?

A. There was one type in this profile that was not attributable to either Edward Taylor or Robert James. That one type does match a type in the profile of Heather Jasper. So that could be accounted for by a small amount of her DNA having been picked up from this swab.

Q. Now, were you able to reach a conclusion, to a reasonable degree of scientific certainty, based on your testing and analysis of the evidence in this case?

A. Yes.

Q. What was your conclusion based on this reasonable degree of scientific certainty?

A. My conclusions were that Robert James was the

primary contributor of the DNA found on the bite mark/licking swab, and that Edward Taylor could not be excluded as the minor contributor, but over 99.99% of people in the population would be expected to be excluded from that mixture.

Q. All the procedures that you used, are they generally accepted within the scientific community?

A. Yes, they are.

Q. Was this analysis that you did subject to peer review?

A. Yes, it was.

Q. What reasons would there be that semen would not be found?

A. There are a number of reasons --

MR. LYNCH: Objection.

THE COURT: Sustained.

BY MS. BATTLE-BROOKS:

Q. In your field, your training, your knowledge, your experience, do you have to, as part of your analysis, find out why evidence is present or not present?

A. No.

Q. Now, you've been an analyst for how many years?

A. I've been a DNA analyst for about 12 years.

Q. Is it normal for you to find semen on swabs in cases of allegations of rape?

MR. LYNCH: Objection, Your Honor.

THE COURT: I'll sustain.

MS. BATTLE-BROOKS: Thank you. I have no further questions.

THE COURT: Mr. Lynch.

**CROSS-EXAMINATION**

BY MR. LYNCH:

Q. Hi, Ms. Kempton. When you say -- I know you said 99.99 but, just for conversational purposes, I'm going to say 99%. So that's 99 out of every 100.

A. Yes.

Q. So that means one out of every 100 people could have been included in that, correct?

A. Yeah -- well, in this case -- I mean to say 99.99%, that would be one out of every 10,000 people, not one out of 100.

Q. But you're saying 99 percent.

A. Yes.

Q. Ninety-nine percent is 99 out of 100 percentage.

A. Yes.

Q. So that would be one -- one out of 100 could be that particular person, when you're using it as a percentage.

A. Could be included, yes.

Q. Now, when you did the report -- do you have it, ma'am?

A. Yes, I do.
Q. It's July 13, 2006?
A. Yes.
Q. Calling your attention to your conclusion, it starts off "DNA from at least three individuals," correct?
A. Hang on. I've got two different reports here. Let me get the right one here. Yes, DNA from at least three individuals.
Q. From at least three. Now, when you were forwarded -- I'm calling your attention to your report of April 5, 2006.
A. Yes.
Q. That's when you had been forwarded, previously, the sexual assault kit for analysis.
A. Yes.
Q. And, in that analysis, you have several -- 12 items to examine; would that be correct?
A. Yes.
Q. And I'm looking at that report. The first item is a portion of a swab. It tested negative for the presence of blood, acid phosphatase and saliva.
A. Yes. That's for the control swabs. Those are included in the rape kit just to make sure that there is nothing unusual about the swabs in that kit that they might give us a false-positive reaction on one of our tests.

Q. And the second item is the first vaginal swab. I believe that would be taken from Ms. Jasper at the hospital, correct?

A. Yes.

Q. I'm reading from your report. Blood was indicated on a portion of the swab, but the portion of the swab tested negative for the presence of semen, correct?

A. That's correct.

Q. And the third item is vaginal/cervical swabs, again of Ms. Jasper, right?

A. Yes.

Q. And a portion of swab, one tested negative for the presence of blood and semen.

A. Yes.

Q. The fourth one, two oral swabs, whose were those?

A. That's also from Heather Jasper.

Q. And it state's in there that blood was indicated on a portion of swab one.

A. Yes.

Q. A portion of swab one tested negative for the presence of semen, correct?

A. That's correct.

Q. And also, swab one was sampled for DNA testing and used as the victim's standard.

A. Yes.

Q. Now, the next item, two anal swabs, they were also from Ms. Jasper, correct?

A. Yes.

Q. And blood was indicated on a portion of swab one, and a portion of swab one tested negative for the presence of semen.

A. Yes.

Q. Now, the next item was the bite mark/licking swab, and that was the swab that Ms. Battle-Brooks questioned you about and that's where the DNA was found.

A. That's correct.

Q. Now, following on from that was a pubic hair combing and this item was not opened.

A. Correct.

Q. That pubic hair combing would be from Ms. Jasper?

A. Yes.

Q. And the next item was a bra. This item was not tested.

A. Correct.

Q. Now, the next item was the victim's socks, the victim being Ms. Jasper.

A. Yes.

Q. And two stains on the socks tested negative for the presence of acid phosphatase. A third strain tested negative for the presence of semen.

A. That's right.

Q. The next item was a pink, hooded sweatshirt. I believe that came from Ms. Jasper?

A. Yes, it did.

Q. And there were no biological stains observed on that particular item.

A. That's correct.

Q. And the next item was toilet tissue. Five stains on this item tested negative for the presence of semen.

A. Yes, that's correct.

Q. And the following items, there were five items listed that were not tested at that particular time, correct?

A. Yes.

Q. Those items which had been forwarded to you had been forwarded from the Prince George's County Police Department as part of their crime processing, correct?

A. Yes.

Q. And those items which were forwarded to you, the first one was a box containing two serology swabs from the steering wheel, gear shirt, break handle, and turn signal lever; would that be correct?

A. I had indication that those were from the vehicle. I don't know that I have the specific parts of the vehicle that they had come from.

MR. LYNCH: Your Honor, may I have this marked?

THE WITNESS: I can check my notes. I only had indications that those were swabs from the car, not the specific parts of the car that they were from.

THE DEPUTY CLERK: Defendant's Exhibit 1 marked for identification.

(Defendant's Exhibit No. 1 was marked for identification.)

BY MR. LYNCH:

Q. I'm going to show you what's been marked as Defendant's Exhibit No. 1 from the Prince George's County Forensic Services Division. These items which were listed, I believe they're identical to the ones that are in your report. The identification numbers -- correct me if I'm wrong -- start with "DH."

A. Yes. DH-8 through 12, yes.

Q. Could you just read to the jury what each one of those are.

MS. BATTLE-BROOKS: Objection. That's not her report, Your Honor.

THE COURT: Objection overruled.

MS. BATTLE-BROOKS: Thank you, Your Honor.

THE WITNESS: DH-8 was a box containing two serology swabs from the steering wheel, gear shift, break handle, and turn signal lever.

DH-9 was a box containing two serology swabs from

the driver door armrest, the door release handle and the window lever.

DH-10 was a box containing two serology swabs from the rear passenger door, driver side armrest, the door release handle, and the window lever.

DH-11 was a box containing two serology swabs from the front passenger door armrest, door release handle and window lever.

DH-12 was a box containing two serology swabs from the rear passenger door, passenger side armrest, door release, and window lever.

BY MR. LYNCH:

Q. Thank you. And those are the five specified by identification of items that were not tested, correct?

A. Correct.

MR. LYNCH: Thank you. I have no further questions, Your Honor.

**REDIRECT EXAMINATION**

BY MS. BATTLE-BROOKS:

Q. Just briefly. Why did you not test the items mentioned, the pubic combing, the bra, the vaginal swabs?

A. We routinely do not test the pubic hair combings. Those are primarily taken if it's desired to do a microscopic hair comparison to try to determine if a hair might have come from a particular person or not.

I did not test the bra because our procedure is that, if we find something that indicates DNA on any of the swabs that are taken during a rape exam, those are the items that we test first, because they are indicative of intimate body contact between two people. Or, if it's semen, it's indicative of sexual intercourse.

So those are the items that we do first. If we do obtain a male profile from them, often we don't go on forward and do anything else on the case.

Q. Now, you used the words "cannot be excluded." Why do you use those words instead of "it is X," "it is Y," in terms of a person?

MR. LYNCH: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: When we have a mixture like this, I cannot say definitively that Edward Taylor's DNA is in this mixture because of the type of mixture that it is, because there are types from more than one person, because they share some types, and also because he's not the major contributor in this mixture.

What my statement means, in saying that he cannot be excluded, is that all of his types are present in this mixture. In fact, with the exception of the one type that could come from Heather Jasper, all the other profiles are consistent with being a mixture of Edward Taylor and Robert

James.

So in saying that he cannot be excluded, scientifically, I cannot state definitively that he is in that mixture, but all of his types are in that mixture.

Q. When you say types, what do you mean by types?

A. The DNA types that make up his DNA profile, the types that he has, what we call the numerical types at each of the 13 locations that we look at.

Q. And in response to defense attorney's questions about the 99.99 people in the population being excluded and the discussion about one out of 100, you said one out of 10,000. What does that mean? What were you referring to?

A. Well, we're talking about 99% versus one percent. My report states that more than 99.99% of the population would be excluded. That equals less than one in 10,000 people. So it's not like one out of 100, if you're just talking about 99. So the more decimal places is important if we're trying to talk about exactly how many people might be included in this mixture.

Q. So 99.99% of all people would not be Edward Taylor in that swab.

A. They would have types -- they would be expected to have types that wouldn't be found in that mixture and then, therefore, they would be excluded.

MS. BATTLE-BROOKS: Thank you. I have no further

questions.

THE COURT: Anything additional?

MR. LYNCH: Following up on that, Your Honor.

**RECROSS-EXAMINATION**

BY MR. LYNCH:

Q. What database do you use for that numerical?

A. We use a database that was compiled by the FBI, and we use three different population groups, Caucasians, African-Americans, and Southeast Hispanics.

Q. How many people are included in the FBI database?

A. There are several hundred in each of the population groups.

Q. Several hundred.

A. Several hundred. I don't know the exact number.

Q. Does Maryland have a database?

A. Maryland does not have their own database.

Q. So this profile is based on the FBI database.

A. That's correct.

MR. LYNCH: Thank you.

MS. BATTLE-BROOKS: Just one.

THE COURT: Ask another, and that will be the last round.

MS. BATTLE-BROOKS: Thank you.

**FURTHER REDIRECT EXAMINATION**

BY MS. BATTLE-BROOKS:

Q. The FBI database, is that something that is scientifically accepted in terms of usage of their database?

A. Yes, it is.

Q. Is that used everywhere in this country?

A. It's used by a large number of labs in the country. Some areas do have their own databases, but the majority of labs in the country use the FBI database.

MS. BATTLE-BROOKS: Thank you. No further questions.

THE COURT: Is it anticipated that Ms. Kempton would be recalled as a witness?

MS. BATTLE-BROOKS: Not by the State, Your Honor.

MR. LYNCH: No, sir.

THE COURT: Ms. Kempton, you're free to go. We have a rule on witnesses. Do not discuss, with any person who might be called as a witness, any of your testimony, any questions asked of you, or any of the evidence that comes through any other witness.

THE WITNESS: Thank you.

MS. BATTLE-BROOKS: The State calls Heather Jasper.

**HEATHER JASPER,**

a witness produced on call of the State, having first been duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION**

BY MS. BATTLE-BROOKS:

Q. On the 911 tape you described the jacket. Just so the record is clear, what, if any, jacket do you recall seeing the description of?

A. I remember the jacket because, as I had mentioned earlier, the blindfold kept loosening, and I remember when the one guy put it over me, I had to put it over my head, and I just kind of looked down at it, and I could see that it was kind of like a grayish, maybe bluish in color. But, again, it was at night, so.

Q. I'm showing you what has been marked as State's 16. Do you recognize this jacket?

A. I can't positively say I do.

Q. Does it look familiar or not at all?

A. Just the color, but I can't positively identify it.

Q. Now, on the 911 tape you mentioned something about they were spitting on you or spitting and then something about "spitting inside of me." Do you recall? What did you mean by that?

A. I have to be honest, I have done my best to block it out. I don't remember. To the best of my knowledge, I don't remember.

Q. Okay. And at any time did you give anyone permission to use your car?

A. No.

Q. At any time did you give anyone permission to steal

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND

vs. Criminal Trial 06-1270A

EDWARD ORLANDO TAYLOR, II,

Defendant.

_____/

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

(Trial on the Merits)

Volume II of III

Upper Marlboro, Maryland

Tuesday, June 5, 2007

BEFORE:

HONORABLE LARNZELL MARTIN, JR., Associate Judge

APPEARANCES:

For the State of Maryland:

RENEE BATTLE-BROOKS, ESQUIRE

For the Defendant:

DENT G. LYNCH, ESQUIRE

Cindy S. Davis, RPR
Official Court Reporter
Post Office Box 401
Upper Marlboro, Maryland 20773

swabbed the inside of his jaw and gum.

Your gums and your inside of your mouth and the saliva contain a lot of DNA. That's a really good place to collect it. You collect it, you put it in an envelope, you seal it, and I submit it directly to the DNA lab.

Q. Now, did there come a time when you also obtained a search warrant for this defendant's house?

A. Yes.

Q. And what address was that?

A. Without looking at the search warrant, I couldn't say. I know it's on Murkirk Road, but I cannot remember the exact number.

Q. Murkirk Road in what county?

A. Prince George's County.

Q. And what city?

A. I think that's in Laurel.

Q. Did you recover anything, relating to this case, in the house?

A. Yes. We recovered --

MR. LYNCH: Objection.

THE COURT: You may approach the bench.

(Counsel approached the bench and the following ensued.)

MR. LYNCH: The question she asked, if he recovered anything relating to this case. We don't know if anything is

related to this case or not. It's for the jury to determine.

THE COURT: Rephrase your question.

(Counsel returned to trial tables and the following ensued.)

BY MS. BATTLE-BROOKS:

Q. What, if anything, did you recover from the Murkirk address in Prince George's County?

A. We recovered a blue and gray jacket, a Tommy Hillfiger jacket.

Q. Why did you recover that? Why did you seize that?

A. It matched the description or it was similar to the description of the jacket worn by the defendant that the victim had described.

Q. What was the description that Heather gave to you about the jacket?

A. It was a silver jacket with writing on the sleeve.

Q. That's what she told you?

A. Yes.

Q. Showing you what has been marked as State's 16. Actually, you should wear the gloves.

A. Yes. This is a blue hood with a gray body, Tommy Hillfiger jacket that we recovered from 9534 Murkirk Road in Laurel, Maryland.

Q. How do you know that that is the jacket that you recovered?

but --

THE COURT: So you want to read it to the jury?

MS. BATTLE-BROOKS: Yes.

MR. LYNCH: Yes.

MS. BATTLE-BROOKS: Maybe we can just say -- that's confusing -- the Prince George's County Hospital. Do you mind?

MR. LYNCH: No.

MS. BATTLE-BROOKS: Just redacting out that.

(Counsel returned to trial tables and the following ensued.)

THE COURT: Ladies and gentlemen, a stipulation is an agreement between the parties that something that might otherwise be in dispute is to be taken as not being a matter of dispute.

In this instance, there is a stipulation between the State and the defendant that I'm going to give to you right now. That stipulation is that, on February 9, 2006, at 12 noon, Sergeant Jeffrey Schreiber went to Prince George's County Hospital to pick up the rape kit done by Dr. Claudia Ranniger on Heather Jasper.

That is to be taken as proven.

MS. BATTLE-BROOKS: Thank you, Your Honor. The State would move into evidence State's 16.

THE COURT: Any objection to State's Exhibit 16?

MR. LYNCH: Yes, sir. There's no indication of any relevance whatsoever. This case has already been -- Ms. Jasper could not even identify this jacket.

MS. BATTLE-BROOKS: That is not entirely accurate.

THE COURT: State's Exhibit 16 is admitted into evidence.

MS. BATTLE-BROOKS: The State would move into evidence State's Exhibit 9.

THE COURT: Why don't you come up and watch as she does it. What is nine?

MS. BATTLE-BROOKS: It's the rape kit.

MR. LYNCH: No objection, Your Honor.

THE COURT: State's Exhibit 9 is admitted into evidence.

(State's Exhibit No. 9, previously marked for identification, was received in evidence.)

MS. BATTLE-BROOKS: The State would move in State's 3.

MR. LYNCH: No objection.

THE COURT: State's Exhibit 3 is admitted into evidence.

(State's Exhibit No. 3, previously marked for identification, was received in evidence.)

Now, you need not believe any witness, even if the testimony is uncontradicted. You may believe all, part or none of the testimony of a witness.

Two witnesses qualified as experts in particular fields, Dr. Ranniger and Julie Kempton. An expert is a witness who has special training or experience in a given field. You should give expert testimony the weight and the value that you believe it should have. You are not required to accept any expert's opinion. You should consider an expert's opinion together with all of the other evidence. In weighing the opinion of an expert, you should consider the expert's experience, training and skills, as well as the expert's knowledge of the subject matter about which the expert is expressing an opinion.

As I explained during voir dire -- voir dire is the process of selection, when we present the questions to you -- Mr. Taylor has an absolute constitutional right not to testify. The fact that he did not testify must not be held against him. It must not be considered by you in any way or even discussed by you.

There may be reference to "intent" during the course of my description of the elements of the crimes charged. Intent is a state of mind and, ordinarily, cannot be proven directly because there is no way of looking into a person's mind. Therefore, a defendant's intent may be shown

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND

vs. CT06-1270A

EDWARD ORLANDO TAYLOR, II,

Defendant.

- - - - - - - - - - - - - - - - - -

STATE OF MARYLAND

vs. CT06-1270B

ROBERT LEON CHASE JAMES,

Defendant.

_____/

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Sentencing Hearing)

Upper Marlboro, Maryland
September 7, 2007

BEFORE:

HONORABLE LARNZELL MARTIN, JR., ASSOCIATE JUDGE

APPEARANCES:

For the State:

RENEE BATTLE-BROOKS, ESQ.

For the Defendants:

DENT G. LYNCH, ESQ.
LUIS F. GOMEZ, ESQ.

EVADNEY R. KEY, RPR
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know if your appearance is in this case.

MR. RYAN: Michael W. Ryan, Jr. I was hired by the James family. What my feeling was was that there was a lot of information that I need to look at. I have not had the opportunity to talk to Mr. Gomez in detail. There's a lot to look at. And in what Mr. James is looking at, I would request a continuance.

THE COURT: The Court is going to deny the request for the continuance. This has been previously set for a sentencing. When the case was accepted, it was understood that a sentencing proceeding was pending.

I'm going to give Mr. Gomez an opportunity to review the pre-sentence investigation with his client. We'll give you 30 minutes to do so. We'll come back and we'll -- let me hear the motion for new trial first. Let me start with the A defendant. On behalf of Mr. Taylor, Mr. Lynch.

MR. GOMEZ: May I approach and view the Court's file during that time?

MR. LYNCH: Your Honor, we filed a motion for new trial on behalf of Mr. Taylor after his conviction in this matter. The entire basis is there was insufficient evidence whatsoever presented to the

tryer of fact for determination of Mr. Taylor's guilt.

During the course of the trial there was a prejudicial incident that occurred. And each time we asked for a motion for mistrial. The first time was during the State's opening statement when it mentioned Mr. James in its opening statement or during the voir dire.

In its opening statement, the State mentioned that the Sexual Assault Unit would testify that a rape had taken place. We moved for a mistrial on that. And we moved for mistrial later in the case with regards to a Mr. Graves who testified. We didn't believe the trial should go further on those three items. The jury was prejudiced by what it had heard.

I believe the Court may have cured the one with Mr. Graves when we had a conference with him outside the presence of the jury with regard to prior sexual conduct but indicated he had been with the defendant the evening it's alleged to have taken place.

When the statement was presented to the jury in the course of the voir dire, it mentioned Mr. James, then again in the opening a prejudicial remark about the rape. I think at that point in time it prejudiced my client such that the jury from that point on was waiting, I believe, for him to prove himself innocent,

rather than the State to prove himself guilty beyond a reasonable doubt. And during the course of the trial, Ms. Jasper, the putative victim in this case, testified as to what occurred that night. We're not going to go through any of that. But during the entire testimony of her and the many other witnesses that the State presented, there was no evidence whatsoever to tie Mr. Taylor to this crime.

Some of the evidence that could have been presented, for instance, video evidence of whether or not he was in the Wal-Mart, whether it was the Giants, in the parking lot of the Giants, any video evidence that might have exonerated him, there are no tapes. They did not secure any tapes. The tapes weren't there.

Then when Ms. Jasper testified, it came out in the evidence through Detective Lancaster, there was a photo spread. She could not identify the defendant. Part of that was because through her testimony, she indicated various times during several hours that she was blindfolded, but there were several hours when she was not blindfolded, several points in time, and could see either one or both of the alleged perpetrators of the crime.

There was no fingerprint evidence. Now,

this crime was supposed to have taken place in that automobile over a period of time. There were no fingerprints of Mr. Taylor anywhere in that car. And the police had checked for fingerprints in the car.

Initially when the event started to take place, there was supposedly a Mr. Simmonds who testified that he was in the parking lot and saw people around the car, but he could not identify Mr. Taylor.

And then the Sexual Assault Unit. When that lady testified, her testimony was just saying basically things were consistent. This was consistent, whatever. But her report was never put into evidence by the State. They just had her testify.

The only thing, the only thing that in any remote way tied Mr. Taylor to Ms. Jasper was the possibility of DNA evidence. Now, the DNA evidence as to one of the perpetrators, as is stated in the reports, was conclusive. It couldn't be anybody else but him. However, with regards to Mr. Taylor, it was quite the opposite. And she testified that he could not be excluded. And then when she did testify, she was extrapolating numbers which were entirely prejudicial. She said, well, he couldn't be excluded, but we're 99 percent sure. And 99 percent means one out of a hundred was not. And then she said, well, the

FBI uses 99.99. They could have stretched it out forever to the Nth degree if they want, but it still excluded a major basis of the population.

What she testified to on cross-examination is that the basis the FBI uses for the DNA analysis was 250 Caucasians, 250 African Americans, 250 Hispanics. There are 250 people that the FBI uses in the database to reduce numbers from 300 million people in this country alone. That was the sector they were taking to hypothesize and try to zero in on Mr. Taylor. And it was nothing other than that.

The state of Maryland, the database that they use for analyzing is over 20,000. That's 80 times what the FBI is supposed to have used.

When she testified -- I believe it was Ms. Kempton -- she testified she could not tell how it got there. She couldn't say when it got there and she couldn't say how long it had been there. And the DNA showed in her report that there was more than one person involved, but he was not excluded and it was a very low level of evidence.

When people throw around, they say the FBI, the FBI, the FBI, they say, wow, it's the Federal Bureau of Investigation. That must be conclusive. Well, recently, Your Honor -- and I had the fortune, or

misfortune, to be involved in a case with the exact same thing with regards to FBI analysis where 40 years the FBI was using comparative lead bullet analysis, meaning that when they could not find by ballistics that this particular bullet came from this particular gun, they started saying, well, we'll analyze the composition of the bullet to say, well, that bullet was made from this and, therefore, it was made from the same bullet that occurred in the crime and made from the same offense. They did that analysis over 40 years in over 2,500 cases.

Finally, a person from the FBI would come in and say we've been doing this for 35 years. We've been doing this for 40 years. We're the FBI, the same FBI the jury heard about with Mr. Taylor in their database.

A couple of years ago, a case first in federal court. The National Academy of Sciences said it's a bogus science. What the FBI had been doing for 40 years could no longer be offered as forensic evidence by the FBI laboratory. That was not DNA, but the same analogy holds that since the FBI said it, it must be true.

Ms. Kempton testified, we just use the FBI numbers we extrapolate. With one out of a hundred within a country of 300 million people. It wasn't

conclusive. It just means it couldn't be excluded, DNA of his type. That's exactly the words. His type DNA was found to be on the victim, Ms. Jasper. Since that was the only connecting link whatsoever in this case with Mr. Taylor, we don't believe there was any sufficient evidence whatsoever to tie him to this crime.

The other thing about the prejudice from being mentioned with the co-defendant who had previously been convicted two weeks prior, when the jury went out, it sent a note to the Court with three questions: Where is Mr. Chase? Does Mr. Taylor know Mr. Chase? And why was Mr. Taylor arrested prior to DNA evidence? What evidence was there? That was their question. What evidence was there? And the response by the Court was, you must rely on the collective memory of all jurors as to the evidence presented. So they were already tying the other defendant, the other alleged perpetrator of the crime, to him.

And when it says in their own note that prior to the DNA, what other evidence was there and there was no other evidence presented during the course of the trial and of course in response to the note there was no response to that, we think that all these factors, taken together, that there's totally

insufficient evidence for this man to have been convicted from what was presented at trial back in June to the jury. They had no rational basis to conclude beyond a reasonable doubt that this man was the perpetrator of the crime. They might infer it. What they might infer it from is when they hear about the FBI or when Ms. Kempton stretches out numbers saying that's what the FBI does.

And what they had done before in the database, in DNA, they don't do it anymore because they're not allowed. They would say what are the chances it could be somebody else? They would say one in 400 trillion or some magical number just to impress the jury. Finally, it said you can't do that anymore. And when they tried to do that in this court, they reject it. But that's how they would build the case. So they couldn't build the case against Mr. Taylor from facts as presented to the jury, so they tried to build the case on inferences just connecting dots that didn't even exist.

I believe when the State's Attorney argued to the jury, because there was a quotation made that Ms. Jasper testified to sort of like hurry up, Chase -- they called the other person Chase -- there was no connection between this man, Mr. Taylor. She was

saying there was so much of coincidence, but for there to be a coincidence, there has to be two things. There might be a coincidence as to a person named Chase, but no coincidence to a person named Edward Taylor.

So, on that, we believe there was totally insufficient evidence on the grounds stated with regards to the conviction. We're asking the Court to set aside that conviction and grant him a new trial so that the tryer of fact at the new trial, which they can again try to determine from facts presented, from facts presented in a court of law whether or not he was guilty or not guilty beyond a reasonable doubt.

THE COURT: Ms. Battle-Brooks.

MS. BATTLE-BROOKS: Your Honor, the purpose for motion for new trial is whether there was any newly discovered evidence that could not have been discovered at the time of the trial as well as prejudicial factors and all the other things.

As this Court knows, tryer of facts, the jurors, heard all the evidence presented. They are the ones that can determine what weight to put on what evidence, what weight to put on any testimony that was given. They heard all the DNA evidence. They heard Mr. Lynch's very skillful argument to the jury about the DNA and why they should discount it. Very similar

to what he's proffering to the Court this afternoon. They heard all of that. They are the tryer of fact. They decided they wanted to give as much weight.

For the record, I will say my recollection is not that the State elicited any statistics. That didn't come from any question that I asked Ms. Kempton. That was something asked by the defense. So it's a little bit disingenuous to ask the question, then to argue today because the answer was given, somehow it's prejudicial and there should be a new trial.

Your Honor, there was sufficient evidence for the tryer of the facts to convict Mr. Taylor. In terms of DNA evidence, as the Court knows, it was accepted. That's it for us.

MR. LYNCH: My notes show that conclusion on numbers when 99.9 percent was elicited on direct testimony. We asked the question about the database but not the 99.9 percent. And the basis in the statute, the rule states a motion for new trial can be granted within the judge's discretion based on insufficient evidence presented by the tryer of fact.

Thanks.

THE COURT: Considering the record in this case, including particularly the record of the trial before the jury, the Court denies the motion for a new

trial with regard to Mr. Taylor.

Mr. Gomez, for Mr. James, the motion for new trial has been filed. I will hear from you.

MR. GOMEZ: Your Honor, preliminarily, to the extent they are applicable to Mr. James, I will adopt and incorporate Mr. Lynch's argument regarding statistics.

THE COURT: Let me say the statistics were a lot different with regard to that and the trials were very different. You may continue.

MR. GOMEZ: My first point was the evidence against Mr. James was -- the first foundation for the motion for new trial in this case, there was no eyewitness evidence of Mr. James being present. There was no fingerprint evidence that Mr. James was present in the vehicle. There was no crime scene provided in this case. There was no evidence of videotape of the bank which would have clearly showed Mr. James being present at the bank, which was a foundational predicate to this crime.

The evidence of the eyewitness who saw them in the parking lot did not describe, as was provided in the statements and incidents that was nefarious in nature. On cross-examination, I asked him, so you saw two people in the parking lot? He said yes.

The evidence against Mr. James, there was no statement or confession that he was involved in this incident. There is no direct link between Mr. James and this incident, say one spot of DNA on the breast of the victim. There was no explanation as to how that got there and we have the confession of the co-defendant who says that he was the one who had relations with this woman on the night in question.

We believe that the cumulative effect of the evidence is insufficient, and we would ask the Court to strike the conviction, set the motion in for a new trial on those grounds.

Your Honor, additionally, there were multiple discovery violations with regard to DNA. Your Honor may recall that even through the trial we were still receiving new DNA evidence to be considered by our experts. Evidence that had to be e-mailed to the experts in the evenings during the trial. Evidence that had to be discussed between myself and our experts during the trial itself. Cell phone calls made in the hallway which gave us insufficient opportunity to truly evaluate the sufficiency of the DNA testing and sufficiency of the evidence itself.

I asked on many occasions for mistrial due to discovery violations. Each of those were denied.

And we believe that that should be an additional foundation for a new trial.

Another reason for a new trial, Your Honor, is that this jury was picked. There were 70 or 80 people in the large ceremonial courtroom in the courthouse and this jury was picked with Mr. Taylor and Mr. James both being present in the courtroom. The introductory statement to the jury panel was that two men had been accused of this crime, of involvement in this crime. At that time, they saw myself and Mr. Lynch, Mr. James, and Mr. Taylor seated up at the front.

Mr. Lynch and Mr. Taylor participated in the jury selection process. At one point, I believe Ms. Battle-Brooks indicated that we were picking our jurors jointly, that we were collaborating on who to strike and who not to strike. So that the jury was not a jury made up of our selection but of our selections and Mr. Taylor's selections, employing Mr. Taylor's strikes and employing our strikes. There were occasions when Mr. Taylor struck jurors that we may have wanted to keep on the jury, had we had full consideration that this would have been a one-defendant trial and that that was the jury that was seated for Mr. James.

Upon selection of the jury, Your Honor asked Ms. Battle-Brooks if the State was satisfied with the jury panel. She said she was. They asked Mr. Lynch if Mr. Taylor was satisfied with the jury panel. He indicated in the positive. And he asked Mr. James, through me, if Mr. James was satisfied with the jury panel, and at the time being they were co-defendants to be tried, we were satisfied with the jury panel.

After that and after the jury had been removed from the courtroom as well as the remaining panel had been removed from the courtroom, Mr. Lynch made a motion for severance. That severance was granted. At that point, I moved for a mistrial because that was not a jury -- that may not have been the jury that we would have picked had we known this was a sole-defendant trial. Further, our entire strategy at that point was forced to shift from a two-defendant trial to a lone-defendant trial, which was unreasonable to have to make that adjustment in the moments before the opening statements.

And we believe that that is an independent reason for the motion for a new trial to be granted, for the conviction to be stricken, and for the trial to be set in for a new jury selection process and a new jury panel in its entirety.

Your Honor, during this trial, Mr. James -- we attempted to introduce evidence that someone else had admitted to this crime. We attempted to move in Mr. Taylor's statement admitting that he had had relations with the victim on the date and in the location of this incident, and this was denied. That statement against penal interest of Mr. Taylor, we believe, were significant to this case because it would have shown the jury that the person that they saw during the selection process had actually admitted to the crime and that it was not Mr. James that committed the rape in question.

You will recall during the DNA evidence or testimony that there was evidence of three individuals present at the crime scene. Present at the crime scene by DNA on the victim's breast. That same spot from which Mr. James's DNA was developed was also the spot where Mr. Taylor's DNA was developed and another person, as yet unnamed, was developed.

Recall, Your Honor, that the victim testified that she did not see the faces or the identities of people who were there. She could not say whether it was two or three people who were there. She testified that she had heard voices between two people, but she did not say with any degree of certainty the

amount of people that were there and she could not identify anyone.

We believe that Mr. Taylor's statement admitting to having relations with this woman would have explained his DNA and would have thrown into doubt the rest of the case against Mr. James. And we believe that that is a reason, a foundation, for a new trial.

Your Honor, finally, I received a call late last week, early this week from Mr. James' father, Robert James, Sr., who said that he was speaking with friends of his, friends of his son, a Nan David and a Drew David. That he was speaking to them about the trial and he had related to them that the victim had been watching the Oscars or the Grammy's, an awards show that evening. It's at that point that Ms. David and Mr. David, who I believe would be entering the courtroom hopefully soon -- and they were identified to me today -- stated, "Robert was with us that night. I recall him being there watching the Oscars with us on that night."

Now, you will take into account, Your Honor --

THE COURT: Is that an alibi?

MR. GOMEZ: That would be an alibi, Your Honor. That's newly discovered evidence that was

discovered this week or last week.

THE COURT: The Court's query would be if it's an alibi, I don't want to get into attorney-client communications, but it seems to me that might have been part of the investigation in preparation for defense of the case. If information existed at that point in time, it existed then and would be quite stale.

MR. GOMEZ: Your Honor, if I may, without breaching the attorney-client shield, through his statement that he gave, he never offered where he was. He didn't have to provide that to the jury, as he had a Fifth Amendment right against self-incrimination.

If he had never offered throughout the investigation as to his whereabouts on the night in question, one could presume that he was unaware of where he was on February 9, 2006, and it is other parties who have that recollection for Mr. James. That it is something that he was previously unaware of.

Case in point, Your Honor -- the point is that we didn't learn until her testimony that the victim had been watching the Grammy's or the Oscars on the night of the crime. That she had been at a male friend's house watching that show, that specific show. She didn't say I was watching reruns with friends. She said I was watching the Oscars that night.

Upon recounting this conversation with the Davids, Mr. James, the father, was informed at that point that Mr. James was with them that night and could not have committed this crime. I will proffer to the Court that this is newly discovered evidence; that this evidence was not available to the defense before the trial. This evidence was not available to the defense during the trial. Information came out during the trial, during the victim's testimony, as to the night of the events, a night that would be ubiquitous otherwise, a night that would be like any other otherwise, but a night that had the airing of a show that happens once a year. And that when this came to light last week, Mr. James, the father, informed me. I asked him to contact these people and have him contact me immediately. I was informed today in the courtroom of their identities. Nan David and Drew David. And that if the jury were to hear this evidence, the verdict might be significantly different than it was when the verdict came in in this case for the sentencing that we're here for.

The rule says that a motion for a new trial can be had on newly discovered evidence, and that is what I'm presenting to the court now.

Your Honor, I'm not certain whether this is

appropriate, but I believe the Davids are present in the courtroom.

MR. RYAN: They're coming to the courtroom.

MR. GOMEZ: Or will be present in the courtroom shortly.

Your Honor, this is significant. In its timeliness, it is credible in how it came to be, and we would ask the Court to strike the verdict in this case and set this matter in for a new trial for this and all the other ones.

THE COURT: On behalf of the State.

MS. BATTLE-BROOKS: Defense counsel is not quoting the rule in its entirety, because it says -- I don't have the rule in front of me. The Court does. It's newly discovered, but that could not have been discovered.

The dates have been provided in the beginning. It was Grammy's, not the Oscars. Grammy's are something everybody can look up to see when they are - February 8, 2006. That was provided in Mr. James' case. Discovery went out in 2006. So as to the newly discovered, and that it could not have been discovered, it certainly could have been discovered.

Furthermore, defendant was here during the whole trial. He heard the testimony of Ms. Jasper. If

there was truly an alibi that could have been presented at that point or that time, the Court could have been identified.

As to insufficient evidence and DNA, I do have a clear recollection of this case and it was Defense that elicited the statistics from Ms. Kempton, and it is this defendant's DNA, one in three quadrillion, I believe were the numbers Ms. Kempton gave. There was certainly sufficient evidence. Alibi or not is not something that is new, and it could have been presented if that was, in fact, what happened.

Your Honor, we are now at the point where the tryer of facts have rendered their verdict. This defendant has been found guilty of the crimes that were alleged and there is nothing new that has been presented pursuant to the rules for the motion for a new trial. And the State would ask that the Court deny defendant's motion.

MR. GOMEZ: If I may, Your Honor. Allow me to be clear, Your Honor. I'm not proposing or proffering to the Court that this newly discovered evidence comes from my client. I'm saying that this newly discovered evidence comes from the outside world into this trial. That it is nothing that was manufactured by my client. It's not a new recollection

that he had that we could have run out of the courtroom and explore during the trial after the victim's testimony. This is the recollection of other folks, parties to this case but who recall vividly that Mr. James was present in their home at the date and time when this offense was to have occurred.

The jury should be allowed to hear this, a fresh jury. A jury selected solely for Mr. James's case should be allowed to consider this in determining whether or not Mr. James is guilty beyond a reasonable doubt of these crimes. He's facing a substantial sentence.

The guidelines alone state in this case that they are 55 to 97 years. Your Honor, discretion, we would respectfully pose, would be best served -- would be best to allow Mr. James a new trial to present this new evidence to a jury. And it is not Mr. James that's bringing this evidence about.

THE COURT: Your motion for a new trial is denied.

Does anyone else need a copy of this pre-sentence investigation?

MR. GOMEZ: I need to have one for myself and one for Mr. James.

THE COURT: Let me start on behalf of