
NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
RWANDA GENOCIDE PROSECUTION

MEMORANDUM FOR
OFFICE OF THE PROSECUTOR

ISSUE # 7:
WHAT ARE THE ELEMENTS NECESSARY
TO PROVE BY CIRCUMSTANTIAL EVIDENCE
THE DEATH OF A PARTICULAR PERSON

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December 2000

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XIII. Introduction and Summary of Conclusion

A. ISSUE

This research memorandum seeks to examine the following issue:

Criminal Prosecution of a Defendant for Murder Through Circumstantial Evidence Where There is No Body or Remains to be Identified, or The Body or Remains are not Identifiable.

The conclusion reached is that a Defendant can be convicted for murder through the use of circumstantial evidence when there is no body or remains or a body or remains that is identifiable.

XIV. Factual Background

The concern here is that due to the genocide committed in Rwanda there were mass graves dug for the burial of the many victims. As a result, there are many people that have been killed that are not identifiable. Many people that are presumed dead were never actually seen being victimized to the point of death, by direct evidence, which the prosecution fears the defense will say is necessary to show death. Furthermore, there are instances where a victim's dead body was seen but since there is no direct evidence of how the death came about the prosecution also fears that the defense will claim it necessary to show death was through instrumentation of criminal activity. Case law shows that all elements of murder may be proven through circumstantial evidence with or without an identifiable body or remains.

XV. Legal Discussion

A) The origins of the corpus delicti rule can be traced back to the United States and was established as a way to determine when extrajudicial confessions were admissible.

The underlying purposes of the corpus delicti requirements are to guard against the conviction for a criminal homicide when none was committed and to minimize the weight of a confession and require collateral evidence to support a conviction.¹ It has

¹ Lemons v. State, 433 A.2d 1179, 1181 (Md. 1981) [Reproduced at Tab #27] (Hereinafter Tab #__).

been held that the main reason for the corpus delicti rule is to prevent deranged people from being punished for imaginary crimes they claim to have committed.² For instance, in *Perry's Case*, “a suspect confessed to the murder of a man and in his confession, implicated his mother and brother. All three were executed. Later, the alleged victim “materialized with a bizarre story about having been sold into slavery in Turkey.”³ Instances such as this, is the precise reason why the corpus delicti rule was created.

In the United States the corpus delicti rule requires “that a defendant’s confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing [1] the occurrence of the specific injury [for example, death in the case of homicide] and [2] some criminal agency as the source of the injury.”⁴ This is held to be the case in every jurisdiction of the United States.

Although it appears that the standard by which the corpus delicti must be proved to admit a confession varies slightly between states, this is not actually the case. States either require a “tendency”⁵ or a “preponderance”⁶ of some independent evidence establishing the elements of the corpus delicti in order to admit a confession into evidence. In other words, it is sufficient if there is some evidence outside of the

² State v. Hansen, 989 P.2d 338, 345 (Mont. 1999). (Tab #34).

³ State v. Hansen, 989 P.2d 338, 344 (Mont. 1999), *citing*, *Perry's Case* (1660). (Tab #34).

⁴ Fisher v. State, 851 S.W.2d 298, 302 (Tex. 1993). (Tab #44).

⁵ State v. Christman, 1999 WL 343411, 9 (Ohio Ct.App. 1999) (Tab #37); State v. Lerch, 677 P.2d 678, 688 (Or. 1984) (Tab #39); Fischer v. State, 851 S.W.2d 298, 302 (Tex.Crim.App. 1993) (Tab #44); State v. Thompson, 870 P.2d 1022, 1026 (Wash.Ct.App. 1994) (Tab #47).

⁶ People v. Brasic, 429 N.W.2d 860, 863 (Mich.App. 1988) (Tab #30).

confession that proves some material element of the crime charged has been committed.⁷

Furthermore, it is an inaccurate and unwarranted reading of the history and purpose of the corpus delicti rule that suggests the need for independent proof of each and every element of the particular grade and kind of common-law or statutory criminal homicide charged as a condition of admissibility of a defendant's confession.⁸ For instance, in *State v. Christman*, the state did not need to show the manner of death or the defendant's connection with the crime.⁹ In *Ausmus v. People*, it is stated that the identity of the victim need not be proven in order to establish a prima facie case of the corpus delicti of murder.¹⁰ Therefore, once there is some proof that the corpus delicti of the crime is established, it is appropriate for the extrajudicial confessions of the accused to be admissible.¹¹ Hence, all elements of the crime need not be proven before the confession is admissible.

B) The “Old Corpus Delicti Rule” required either a dead body or direct proof of death.

1. The “Old Corpus Delicti Rule” in the United States.

In the United States some states used to require a body or direct evidence of death to convict a person of murder. The reasoning behind the old rule was founded upon a desire to avoid the swift execution of a potentially innocent person, particularly with the growing popularity of exploring the rugged frontier, where the alleged deceased might

⁷ *Smith v. State*, 968 S.W.2d 461, 461 (Tex.App. 1998) (Tab #46).

⁸ *People v. Brasic*, 429 N.W.2d 860, 863 (Mich.App. 1988) (Tab #30).

⁹ *State v. Christman*, 1999 WL 343411, 9 (Ohio Ct.App. 1999) (Tab #37).

¹⁰ *Ausmus v. People*, 107 P.204, 209 (Col. 1910). (Tab #8).

¹¹ *State v. Lerch*, 677 P.2d 678, 691 (Or. 1984) (Tab #39).

have simply moved on to another place, never to be seen again.¹² Texas appears to have been the only state to have enacted such a provision; while some other states adopted less radical rules, requiring “direct proof” of the corpus delicti of death, but even those provisions have long since been repealed.”¹³ For instance, Montana, New York, and North Dakota were identified as having statutes requiring proof of death by direct evidence, but those provisions are now repealed.¹⁴ For example, a New York court held in, *People v. Seifert*, that direct proof of death was no longer needed to prove corpus delicti.¹⁵ Hence, the fact that Mark Seifert’s body was never found did not impede the conviction of Mark’s brother for his murder.¹⁶

1. The “Old Corpus Delicti Rule” in Canada.

Canada followed the same law as the United States that a murder conviction could not be proven without either a dead body or direct proof of that body.¹⁷ To support this rule one court cited to a statement by Sir Matthew Hale, of Britain, “I would never convict any person of murder or manslaughter, unless the fact was proved to be done or at least the body found dead.”¹⁸ In the same case the court also cited to a New York case

¹² McDuff v. State, 939 S.W.2d 607, 622 (Tex.Crim.App. 1997) (Tab #45).

¹³ McDuff v. State, 939 S.W.2d 607, 622 (Tex.Crim.App. 1997) (Tab #45).

¹⁴ Id. (Tab #45).

¹⁵ People v. Seifert, 152 A.D.2d 433, 440 (New York 1989) (Tab #36).

¹⁶ People v. Seifert, 152 A.D.2d 433, 440 (New York 1989) (Tab #36).

¹⁷ The King v. Charles King, 9 C.C.C. 426 (Supreme Court of Northwest Territories, 1905) (Tab F).

¹⁸ Id.; (citing to 2 Hale’s O.C. 290). Note that this is an incorrect interpretation of Hale’s statement which will be further discussed *infra* section D). (Tab F).

where a defendant was not convicted of murder because the body was not identifiable, hence, there was no direct proof that the alleged victim was the deceased, and therefore murdered.¹⁹ In *Desellier v. The King*, a case trying to prove the corpus delicti of incest, it was held that the corpus delicti here must be proven by direct proof just as is necessary to prove the corpus delicti of murder with a dead body.²⁰

3. There was never a corpus delicti rule in England requiring a dead body.

English common law never required a body for conviction of murder.²¹ For example, in *R. v. Onufrejczyk*, the court held that the appellant was guilty of murder where circumstantial evidence showed the appellant told conflicting stories of where the victim has gone too, where blood was found in the victim's house, the appellant was last seen with the victim, and the victim's family has not been contacted by the victim as normal.²² Also, in *The King v. Horry*, the court held that the defendant was guilty of murdering his wife, proven by circumstantial evidence, where he once explained his wife's disappearance due to the ship they were traveling on was torpedoed by a submarine, and later told someone she ran off with another man; since his wife never heard from again and the defendant remarried and opened bank accounts under an

¹⁹ Id.; (citing to *People v. Palme*, 119 New York Reports 110). (Tab F).

²⁰ Desellier, et al. v. The King, 45 C.C.C. 246 (Quebec Court of King's Bench, 1925). (Tab G).

²¹ See e.g., R. v. Onufrejczyk, 1 QB 388 (1955) (Tab A); State v. Hansen 989 P.2d 338, 344 (Mont. 1999) Citing *Rex v. Hindmarsh* (Tab #34).

²² Id. (Tab A, Tab #34).

assumed name the court found there no other explanation of her disappearance other than the reasoning that he murdered her.²³

4. Reasons the United States and Canada abandoned the “old corpus delicti rule”.

The courts concluded that to enable a murderer to escape punishment for his crime by so mutilating or burning the body of this victim as to prevent its identification or recognition was abhorred idea.²⁴ “The fact that a murderer may successfully dispose of the body of the victim does not entitle him to an acquittal. That is one form of success for which society has no reward²⁵ Furthermore, retention of a body requirement would contradict our holdings that circumstantial evidence and direct evidence are of equal value.²⁶

In *McDuff v. State*, during the Court’s analysis of why the “old corpus delicti rule” was no longer needed the court cited to a statement of a Virginia supreme court stating how in modern society where it is exceedingly rare that a person can vanish of their own volition there is no need for the requirement of a body anymore.²⁷ Furthermore, in *Charemski v. The Queen*, the Supreme Court of Canada held that the corpus delicti need not be proven by direct or positive evidence, especially in “those cases of the worst secrecy.”²⁸ Hence, there is no reason in modern day society to allow

²³ People v. Scott, 1 Cal.Rptr. 600, (Cal. 1959), *citing*, *The King v. Horry*, 1952 N.Z.L.R. 111 (Tab #5).

²⁴ State v. Poor, 228 S.W.2d 810, 815 (Mo. 1921) (Tab #32).

²⁵ McDuff v. State, 939 S.W.2d 607, 622-623 (Tex.Crim.App. 1997) (Tab #45).

²⁶ McDuff v. State, 939 S.W.2d 607, 624 (Tex.Crim.App. 1997) (Tab #45).

²⁷ McDuff v. State, 939 S.W.2d 607, 623 (Tex.Crim.App. 1997) (Tab #45).

²⁸ Charemski v. The Queen, 157 D.L.R. (4th) 603 (1998) (Tab H).

murderers to go free simply because there is no direct proof of death or identification of a victim.

c) The current corpus delicti rule does not require a body nor does it require direct evidence of death.

The concept of corpus delicti refers to the body, foundation, or substance of the crime, not dead body.²⁹ Corpus delicti is the objective proof or substantial fact that a crime has been committed.³⁰ The corpus delicti of a crime is proof of an act and proof of criminal agency.³¹ The corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another.³²

A popular misconception has grown up that the police cannot prove a murder unless they find a body. This is not so. Producing the corpse only proves a death, not a crime. Murder has been proven many times by circumstantial evidence of the crime even though the body was lost forever.³³ A state's inability to produce and identify the body or remains of the victim does not preclude a murder conviction so long as the corpus delicti is proven by circumstantial evidence.³⁴ In Texas, the court held that "as a result of the legislative repeal of article 1204, the State's inability to produce and identify the victim's body does not preclude a conviction for murder so long as the corpus delicti of the offense is proven by way of circumstantial evidence."³⁵

1. The elements of corpus delicti in the United States.

²⁹ State v. Hansen, 989 P.2d 338, 344 (Mont. 1999) (Tab #34)

³⁰ State v. Hansen, 989 P.2d 338, 344 (Mont. 1999) (Tab #34).

³¹ State v. Christman, 1999 WL 343411, 9 (Ohio Ct.App. 1999) (Tab #37).

³² Smith v. State, 968 S.W.2d 461, 461 (Tex.App. 1998) (Tab #46); Fischer v. State, 851 S.W.2d 298, 303 (Tex.Crim.App. 1993) (Tab #44).

³³ State v. Hansen, 989 P.2d 338, 344 (Mont. 1999) (Tab #34).

³⁴ Smith v. State, 968 S.W.2d 461, 461 (Tex.App. 1998) (Tab #46).

³⁵ Fischer v. State, 851 S.W.2d 298, 302 (Tex.Crim.App. 1993) (Tab #44).

All of the states within the United States, except Florida, are in agreement that the two elements of the corpus delicti of murder consists of 1) the death of a person, and 2) that the death was cause by a criminal agency. In addition to the two elements required by all states to prove corpus delicti Florida requires the identification of the deceased person.³⁶ Hence, the corpus delicti of any crime simply consists of the fact that someone has committed the crime in question and that the crime has been committed.³⁷

For Example, in Michigan, the corpus delicti of murder requires proof both of a death and of some criminal agency that caused that death.”³⁸ In Montana, “the corpus delicti in a murder case consists of two elements; first, the death of a human being and, second, the criminal agency of another in causing the death.”³⁹ In Nevada, “determining whether a crime has been committed two elements, i.e. the corpus delicti, must be established. The two elements of the corpus delicti for murder are (1) the fact of death, and (2) a criminal agency of another responsible for that death.”⁴⁰ In Texas, “the corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another, and the State is not required to produce and identify the body or remains of the decedent.”⁴¹ In Washington, “to establish the corpus delicti of murder, the State must show (1) the fact of death and (2) a causal connection between the death and a criminal agency.”⁴²

³⁶ Golden v. State, 629 So.2d 109, 111 (Fla. 1994) (Tab #11); Mackerley v. State, 754 So.2d 132, 135 (2000) (tab #12).

³⁷ McDuff v. State, 939 S.W.2d 607, 622 (Tex.Crim.App. 1997) (Tab #45).

³⁸ People v. Brassic, 429 N.W.2d 860, 863 (Mich.App. 1988) (Tab #30).

³⁹ State v. Lieberknecht, 608 S.W.2d 93, 98 (Mo.Ct.App. 1980) (Tab #33).

⁴⁰ Sheriff, Clark County v. Larsgaard, 611 P.2d 625, 626-627 (Nev. 1980) (Tab #35).

⁴¹ McDuff v. State, 939 S.W.2d 607, 614 (Tex.Crim.App. 1997) (Tab #45).

⁴² State v. Thompson, 870 P.2d 1022, 1026 (Wash.Ct.App. 1994) (Tab #47).

1. The elements of corpus delicti in Canada.

Canada also follows the rule that murder can be proven by circumstantial evidence. Originally, the Canadian courts held that death must be proven by direct evidence while all other elements may be proven by circumstantial evidence.⁴³ However, this requirement was not strictly applied in practice. For instance, any remains of the victim satisfied the requirement that death actually occurred, since the Canadian court's held that remains of any sort identifiable or not were direct proof of death.⁴⁴ In *R. v. Clowes*, the court found that where a body was found partially clothed and buried under a barn there was direct proof of death.⁴⁵ Hence, even in 1905 the Court really did not require direct evidence of death, although it did require some sort of remains at that time.

2. The elements of corpus delicti in Britain.

Britain also follows the corpus delicti rule that no body is necessary to prove murder. On a charge of murder the corpus delicti may be proved by such circumstantial evidence as leaves open no other rational hypothesis than murder.⁴⁶ The crown relied upon a body of circumstantial evidence to convict the appellants of murder where the

⁴³ The King v. Charles King, 9 C.C.C. 426 (Supreme Court of the Northwest Territories, 1905) (Tab F).

⁴⁴ *Id.* at 430 (Tab F).

⁴⁵ Id., citing, *R v. Clowes*. (Tab F).

⁴⁶ R. v. Onjufejczyk, 1 QB 388 (1955). (Tab A).

victims' bodies have never been found.⁴⁷ Other cases also cite that no body is needed to prove murder through circumstantial evidence.⁴⁸

Corpus delicti means, first that a crime has been committed, that is to say that the man is dead, and that his death has been caused by a crime.⁴⁹ Just as larceny can be proved without recovering the stolen jewels, kidnapping without finding the victim, England's great train robbery without the million pounds the prosecution can prove by other evidence that a crime was committed.⁵⁰

A) The role of circumstantial evidence in the law today.

Proof of the corpus delicti may be made completely by direct evidence, partially by direct evidence and partially by circumstantial evidence, or completely by circumstantial evidence.⁵¹ For example, other courts considering "no body" murder cases have allowed evidence of the victim's personal habits and relationships as circumstantial evidence from which an inference could be drawn that the victim's sudden disappearance was the result of death by a criminal act.⁵²

⁴⁷ Id. (Tab A).

⁴⁸ Baughman v. R, Privy Council, May 25, 2000 (Tab E); Warren v. State, Privy Council, December 9, 1999 (Tab C); R.V. Bowen, May 28, 1999 (Tab D).

⁴⁹ R. v. Onjufejczyk, 1 QB 388 (1955). (Tab A).

⁵⁰ Id. (Tab A).

⁵¹ Sheriff, Clark County v. Larsgaard, 611 P.2d 625, 627 (Nev. 1980) (Tab #35); State v. Berry, 2000 WL 1100330, 4 (Tenn.Crim.App. 2000) (Tab #42); Matthews v. Superior Courty, 247 Cal. Rptr. 226, 229 (Cal. 1988) (Tab #10); Shipley v. State, 570 A.2d 1159, (Del. 1990). (Tab #10).

⁵² State v. Owens, 359 S.E.2d 275, 278 (S.C.1987) (Tab 41); State v. McDonald, 872 P.2d 627, 634-636 (Ala. 1994). (Tab #3).

It has long been the rule in the United States that all of the elements of corpus delicti and murder, including the fact of the death of the person alleged to have been murdered, as well as the criminal agency of the accused and the identity of the deceased, may be proved by circumstantial or presumptive evidence, when direct proof is not obtainable.⁵³ Other States also seem to believe that all elements of corpus delicti may be proven by circumstantial evidence. Circumstantial evidence is sufficient to prove the death of the victim.⁵⁴

In the *Henderson Case*, we said that the two elements of corpus delicti in a murder case consist of the death of the person alleged to have been murdered and the criminal agency causing the death; that while both of these must be established to sustain a prosecution for murder, the fact of the death need not be established by direct and positive evidence, but now by the weight and authority in this country, the fact of the death, as well as of criminal agency, may be shown by circumstantial evidence, when that is the best evidence obtainable, and provided always that it is sufficient to produce conviction in the minds of the jury beyond a reasonable doubt.⁵⁵

Many courts also feel compelled to state that when circumstantial evidence is used it must rule out all other reasonable hypothesis as to the disappearance of the victim (i.e. accident or suicide); however, this will be met when the second element of the corpus delicti rule is proven beyond a reasonable doubt. For example, Oklahoma states that circumstantial evidence may be used to prove the corpus delicti.⁵⁶ Since the only admissible evidence regarding intent is circumstantial, the State's evidence must exclude every reasonable hypothesis except that of malice aforethought.⁵⁷ Texas also states it is

⁵³ State v. Poor, 228 S.W.2d 810, 815 (Mo. 1921) (Tab #32).

⁵⁴ State v. Christman, 1999 WL 343411, 9 (Ohio Ct.App. 1999) (Tab #37).

⁵⁵ State v. Poor, 228 S.W.2d 810, 815 (Mo. 1921) (Tab #32).

⁵⁶ Arnold v. State, 903 P.2d 1145, 1148 (Okla.Crim.App. 1990) (Tab #38); O'Shields v. State, 689 So.2d 227, 232 (Ala. 1996).

⁵⁷ Arnold v. State, 903 P.2d 1145, 1148 (Okla.Crim.App. 1990) (Tab #38); Hurley v. State, 483 A.2d 1298, 1305 (Md. 1984). (Tab 28).

well established that a conviction on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt and proof amounting only to a strong suspicion is insufficient.⁵⁸

Courts now hold that there should be no distinction between direct and circumstantial evidence as to degree of proof.⁵⁹ The court in *State v. Krummacher*, had in effect abolished the distinction between circumstantial evidence and direct evidence as to quality of proof.⁶⁰ Furthermore, it does not take a great deal of imagination to think of situations where the average fact finder would give more weight to circumstantial evidence than direct evidence. For example, circumstantial evidence in the form of a fingerprint might merit more weight than the direct eyewitness testimony of a person previously convicted of perjury.⁶¹ Additionally, dispensing with the body requirement is consistent with the increasingly accepted view that direct and circumstantial evidence are equally valuable.⁶²

The British Justice Oliver stated, “It is indeed a grave stop to find a murder proved when there is no body, but it is not the law, and I do not believe it has ever been the law; it is certainly not the law today that if a body can be got rid of so that no trace of it can be found, a murderer who has done so is not to be convicted. That is not the

⁵⁸ Templin v. State, 677 S.W.2d 541, 543 (Tex.App. 1983) (Tab #43); *see also*, Bruner v. People, 156 P.2d 111, 118 (Co. 1945). (Tab #9).

⁵⁹ State v. Lerch, 677 P.2d 678, 690 (Or. 1984) (Tab #39).

⁶⁰ State v. Lerch, 677 P.2d 678, 680 (Or. 1984) (Tab #39).

⁶¹ State v. Lerch, 677 P.2d 678, 690 (Or. 1984) (Tab #39).

⁶² McDuff v. State, 939 S.W.2d 607, 623 (Tex.Crim.App. 1997) (Tab #45).

law.’⁶³ Sir Matthew Hale did not say, “and it is often quoted as though he had said, that you cannot convict a man of murder unless you can produce the body.’⁶⁴

1. Death can be proven by circumstantial evidence.

In *R. v. Bowen*, the court held that death of the victim could be shown by evidence she did not disappear, or commit suicide. The court pointed to evidence that the victim believed suicide was a very selfish act and inconsiderate of the loved ones you leave behind.⁶⁵ The Court said death could also be inferred because she did not take her pain medication with her or place a new order for the pills even though she was known to take up to eight of these pills a day.⁶⁶

In *Dansby v. State*, the Court held that death could be proven by facts that the mother and son were never seen again by any of the family, the mother never returned to work, the mother never picked up her paycheck for the month of March, and the vehicle in which the two victims were driving in was found abandoned by the side of the road.⁶⁷

In *R. v. Onufrejczyk*, the Court found that death could be shown by way the fact that the victim never went to the doctor, as told to the police by the defendant, he never went back to Poland, where his family was, he never contacted his family in Poland, even though he regularly did, etc.⁶⁸

⁶³ Id. (Tab #45)

⁶⁴ Id. (Tab #45).

⁶⁵ R. v. Bowen, (Court of Appeal 1999). (Tab D).

⁶⁶ Id. (Tab D).

⁶⁷ Dansby v. State, 675 So.2d 1344, 1347-1348 (Crim. App. Alabama, 1995) (Tab #1).

⁶⁸ R. v. Onufrejczyk, 1 QB 388 (Crim. App. 1955) (Tab A).

Hence, many cases throughout the U.S., Canada, and Britain have established the alleged victims death through different circumstantial evidence. Evidence that people lose contact with family members they generally keep in contact with, evidence that the victim no longer goes to work where they consistently show up for work, lack of activity in bank accounts, no appearance of intent to leave (i.e. automobile abandoned, no clothes packed, all identification left behind, money left behind, not telling anyone their plan to leave etc.) All of these examples and more are used in Courts to establish death of the alleged victim through circumstantial evidence.

2. Criminal agency can be proven by circumstantial evidence.

In *Baughman v. R.* the court found sufficient circumstantial evidence to prove the defendant committed the murder. The court found that if his wife had simply fallen over the edge of the building her body would not have landed so far out, where she would have fallen further away from the building if she were pushed.⁶⁹ In *State v. Thibodeaux*, death was shown to be by criminal agency because autopsy showed evidence of strangulation.⁷⁰ In *People v. Seifert* the Court found the defendant guilty of murder because blood, and other evidence found at the murder scene was also found within the defendant's vehicle.⁷¹ In *People v. Scott* the court found there was sufficient evidence to show that the defendant killed his wife because he did things within a week of her disappearance, which showed he believed she was not coming back. For instance, he sold off her clothes, gave her makeup to his daughters, something the victim would never

⁶⁹ Baughman v.R., (Privy Council 2000). (Tab E).

⁷⁰ State v. Thibodeaux, 750 S.O.2d 916, 921 (La. 1999). (Tab #25).

⁷¹ People v. Seifert, 152 A.D.2d 433, 443 (NY1989) (Tab #36).

have allowed, the fact that the appellant was the last person seen with the victim, and neighbors heard the appellant and the victim arguing the night she disappeared.⁷² It has been held that, where the indictment charges that the murder was committed in some way and manner and by some means, instruments and weapons to the jury unknown, it is sufficient.⁷³ For instance, “while not describing the weapon used to effect the death, it does, as is permissible, allege that the means employed by the defendant whereby he deprived the deceased of his life were unknown.”⁷⁴ Hence, allegations may state in the alternative the manner and instrumentality of death or may state that death was caused by a means or instrumentality unknown.⁷⁵

3. The identity of the killer can be proven by circumstantial evidence.

The majority of U.S. states recognize that the defendant need not be proven as the killer in order to prove corpus delicti, however, it necessary in order to convict the defendant for murder. For instance, Montana states that proof that the accused was the criminal agency causing the death is not an element of the corpus delicti; but it is required to convict the accused.⁷⁶ “The prosecution is not required to prove the identity of the perpetrator of the crime as part of the proof of the corpus delicti, nor is the identity of the victim required to be proven. Proof that the defendant was the person who engaged in the unlawful conduct is of course necessary for a conviction, but it is not an

⁷² People v. Scott, 274 Cal. App.2d 905, 909 (Cal. App. 1969) (Tab #6).

⁷³ State v. Poor, 228 S.W.2d 810, 813 (Mo. 1921) (Tab #32).

⁷⁴ State v. Poor, 228 S.W.2d 810, 813 (Mo. 1921) (Tab #32).

⁷⁵ State v. Owens, 359 S.E.2d 275, 277 (S.C. 1987) (Tab #41).

⁷⁶ State v. Lieberknecht, 608 S.W.2d 93, 98 (Mo.Ct.App. 1980) (Tab #33).

element of the corpus delicti.’⁷⁷ “Proof that the defendant was the person who engaged in the unlawful conduct is necessary for a conviction, but it is not an element of the corpus delicti.’⁷⁸

Circumstantial evidence may be used to show that the defendant is indeed the person who committed the murder.⁷⁹ “The fact that a crime has been committed (corpus delicti), and that it was done by the defendant, may be lawfully established by circumstantial evidence alone.’⁸⁰ For instance in *Johnston v. State*, circumstantial evidence proved the defendant was the murderer because the victim’s blood was found in the trunk of his car.⁸¹ In *People v. Avery*, the court found the defendant to be the murderer because of conflicting stories she told to various people.⁸²

This rule remains true in both Canada and Britain. Canada has always held this fact to be true. “Circumstantial evidence is admissible to prove the identity of the remains and also the identity of the person who caused the death.’⁸³ As Britain has always held that all elements of a crime may be proven by circumstantial evidence as long as it does so beyond a reasonable doubt.⁸⁴

⁷⁷ *State v. Hansen*, 989 P.2d 338, 345 (Mont. 1999) (Tab #34).

⁷⁸ *State v. Hansen*, 989 P.2d 338, 347 (Mont. 1999) (Tab #34).

⁷⁹ *Womack v. State*, 161 So. 747 (Miss. 1935) (Tab #31).

⁸⁰ *State v. Lerch*, 677 P.2d 678, 689 (Or. 1983) (Tab #39).

⁸¹ *Johnston v. State*, 578 N.E.2d 656, 660 (Ind. 1991). (Tab #19).

⁸² *People v. Avery*, 410 N.E.2d 1093, 1095-1098 (Ill. 1980). (Tab #17); *see also*, *State v. Johnson*, 556 P.2d 168 (Kan. 1976). (Tab #22).

⁸³ *Supra* note .

⁸⁴ *Supra* note .

4. The identity of the victim can be proven by circumstantial evidence.

“Although it was not necessary for the state to prove the identity of the victim to satisfy its burden concerning the corpus delicti rule, the state does have the burden of proving beyond a reasonable doubt that the person named in the indictment as being murdered is the same person proved murdered at trial. This may be done by circumstantial evidence.”⁸⁵ Moreover, it has been held that a State is not required to conduct DNA test on a decomposing body in order to prove the identity of the victim is indeed that of the corpse. Other circumstantial evidence can be used to prove this.⁸⁶

In *State v. McClurg*, the victim’s charred remains were identified by pieces of clothing remaining on corpse, which was identified by the victim’s son as belonging to his mother.⁸⁷ In *Pressley v. State*, his belt that was found near the remains of an unidentifiable body identified the victim.⁸⁸

In *State v. Berry*, the Court held that

Circumstantial evidence which may be admitted to establish the victim’s identity may include fingerprints, medical and dental testimony, fragments of bone and portions of a body, clothing found on or near the body, other personal effects found on or near the body, photographs of the living victim or of the body, a dying declaration, and other kinds of evidence.⁸⁹

Courts through the U.S., Britain, and Canada have also accepted that remains can be proven by circumstantial evidence to be the alleged victim of the crime.

⁸⁵ State v. Lieberknecht, 608 S.W.2d 93, 101 (Mo.Ct.App. 1980) (Tab #33); *see supra* notes .

⁸⁶ State v. Berry, 2000 WL 1100330, 5 (Tenn.Crim.App. 2000) (Tab #42).

⁸⁷ State v. McClurg, 300 P. 898, 915 (Idaho 1931) (Tab #16).

⁸⁸ Pressley v. State, 53 S.E.2d 106, 108 (Ga. 1949). (Tab #13).

⁸⁹ State v. Berry, 2000 WL 1100330, 5 (Tenn. Crim. App. 2000) (Tab #42); Gibson v. Commonwealth, 192 S.W.2d 187, 188 (Ken. 1946). (Tab #24).

5. Different degrees or types of murder can also be proven by circumstantial evidence.

The court held in *State v. Anderson*, that an accused's intent could be drawn from the act itself or from existing circumstances.⁹⁰ In *Jones v. State*, intent to kill was established by the fact that an infant was beaten to death, obviously ruling out hypotheses of natural causes and suicide.⁹¹ In addition, the court held in *State v. Rice*, that the defendant's intent to murder was proven when he continued to beat his wife after she had lost consciousness.⁹²

A) Effect of the International Criminal Tribunal of Yugoslavia finding Dusko Tadic not guilty of murder.

The Tribunal found that the castration events taken place at the Omarska Hangar building on June 18, 1992 did in fact occur but nevertheless did not hold Tadic accountable.⁹³ The Tribunal concluded that "the Prosecution had failed to elicit clear and definitive evidence from witnesses about the condition of the four prisoners after they had been assaulted, let alone that they died or that death resulted from the assault upon them."⁹⁴ It was not deemed sufficient that the four men never returned to their cells or were ever seen again by the witness.⁹⁵

⁹⁰ *State v. Anderson*, 409 A.2d 1298, 1296 (Md. 1984) (Tab #26).

⁹¹ *Jones v. State*, 701 N.E.2d 863, 868 (Ind. 1998). (Tab # 20).

⁹² *State v. Rice*, 932 P.2d 981, 997 (1997). (Tab #23).

⁹³ MICHAEL P. SCHARF, INTERNATIONAL DECISION: *Prosecutor v. Tadic*, 91 A.J.I.L. 718, 719 (October, 1997) (Tab J).

⁹⁴ *Id.* (Tab J).

⁹⁵ *Id.* (Tab J).

1. Reasons why Dusko Tadic was not convicted.

The reason for the judges conservative application of the *corpus delicti* rule could be a result of the fact that reports that surfaced during the deliberations told that after the Government of Bosnia had convicted a Bosnian Serb of murder and sentenced him to death, his alleged victim were discovered to be alive and well in another part of Bosnia.⁹⁶ Furthermore, the conservative application of the corpus delicti rule could be a result of the presiding judge, Gabrielle Kirk MacDonald, “who was a former federal district court judge in Texas, the only stat which until recently statutorily required “the body of the deceased or portions of it “ for a murder conviction.”⁹⁷

2. How the Dusko Tadic case can be distinguished.

First, there is no concern that a person found guilty of murder will be sentenced to death before it is discovered the alleged victims of the crime are still alive because the ITCR does not have a death penalty. Moreover the ICTR has a provision that would reopen the investigation of a conviction where there is evidence the conviction was incorrect. Hence, the concerns facing the ICTY in the case of murder convictions does not apply to the ICTR obviating the need for such a conservative application of the corpus delicti rule.

⁹⁶ *Id.* (Tab J).

⁹⁷ *Id.* (Tab J).

