IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,404

THOMAS M. OVERTON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MONROE COUNTY

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE(s)

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TABLE OF CITATIONS

CASES **PAGE(s)**

CONSTITUTIONS, STATUTES & RULES

ARTICLES & BOOKS

INTRODUCTION

This is a direct appeal from judgments of conviction and a sentence of death, entered following a jury trial before the Honorable Mark Jones of the Sixteenth Judicial Circuit, in and for Monroe County, Florida. In this brief, the record on appeal is cited as "R.," and the transcript of the proceedings as "T."

STATEMENT OF THE CASE AND FACTS

A. Introduction

On August 22,1991, Michael MacIvor and his wife Susan MacIvor were found murdered in their home on Tavernier Key (R. 1). Michael MacIvor was hit on the head with a blunt object and strangled (R. 1, 3624-5). Susan MacIvor, who was eight months pregnant, was also strangled (R. 1). She was found naked and bound in the bedroom of the house (R. 1).

A large-scale investigation took place involving the Monroe County Sheriff's Office, the Florida Department of Law Enforcement (FDLE), the Federal Drug Enforcement Administration, U.S. Customs, the FBI, and other law enforcement agencies (T. 4400-1, 4413; R. 768). The crime was one of the most highly publicized in Florida Keys history (R. 742-834). Multiple newspaper articles were published, television crime reenactments were aired, and billboards were erected showing a picture of the couple and offering rewards for any information concerning the killings (T. 4426; R. 768, 777, 831). Tourist leaders feared that the publicity would affect the islands' business interests (R. 777). One

editorial discussing the crime lamented that the Keys had lost the "innocence that once seduced many . . . to make these islands [their] home" (R. 767). Years passed from the date of the murders and no arrests were made (T. 1, 4426-7).

B. Events Leading to the Arrest of Mr. Overton

(1) Investigation of other suspects. The police received multiple tips that the MacIvor murders were drug-related (R. 786). Michael MacIvor bought and sold airplanes for a living (T. 3037, 4331). He traveled often to conduct business in South America (T. 3035, 4326, 4331). Several of his business contacts were investigated (T. 4353-63, 4402-13).

Just before the murder, MacIvor went to a government auction in Belize to buy an airplane which the government had seized because it had been used for drug trafficking (T. 4326, 4331, 4358). MacIvor was due to return to Belize to retrieve it the day after his death (R. 4331). One of the MacIvors' Tavernier neighbors, Joiy Holder, testified that in their last conversation MacIvor intimated that he needed to borrow money, but ultimately did not (T. 3075). The police investigated MacIvor's bank records and could not trace the $13,000 that he used to purchase the Belize aircraft (T. 4432).

Detectives traveled to Belize to speak to the friend with whom MacIvor had stayed, to interview the officials in charge of the auction, and to investigate the unsuccessful bidders (T. 4326, 4353-4, 4360). The detectives learned that Mr. MacIvor had traveled to a jungle airstrip and remained there for several days (T.

4361). The police were told that MacIvor went to see "pyramids or something" in a park (T. 4361).

Law enforcement officials also investigated leads connected to another airplane (T. 4409). A man named Donald Codekas had purchased this airplane and was missing the logbooks that documented the plane's maintenance and past repairs (T. 4409-10). Such logbooks are routinely transferred with an airplane when it is sold (T. 4409). The police received information that Michael MacIvor possessed the logbooks and was attempting to sell them (T. 4410). The logbooks were never found (T. 4410-11).

Another prominent lead in the investigation involved two Colombian suspects, Nestor and Ivan Clavejo (T. 4402). The police received information from at least two sources that Michael MacIvor had sold the Clavejo brothers a Cessna 404 Titan and had received a $250,000 down-payment from them (T. 4402, 4429). MacIvor's bank records did not reflect a deposit in this amount (T. 4430). Investigators were never able to locate the Clavejos[1] (T. 4402).

Numerous other suspects were investigated in the years that followed the murders: the MacIvors' handy-man Larry Herlth, their neighbor Joiy Rae Holder, someone named John Golightly, identified by an anonymous tipster, and several others (T. 4404, 4408-14, 4426). The police even consulted a psychic in Orlando (T. 3513-4). All of the leads proved fruitless (T. 4404-14, 4426-7).

[1]Later, the primary source for this lead, Mr. Codekas, told the police that he had provided false information to secure a deal from the government (T. 4403, 4430).

(2) Investigation of Mr. Overton. In 1991, Thomas Overton, then 36-years-old, was living on Tavernier Key and working at an Amoco gasoline station near the MacIvor home (R. 1; T. 4428, 4431). Members of the Monroe County Sheriff's Office suspected Mr. Overton as early as 1991 because he was a known "cat burglar," but Overton had no history of sexual offenses (T. 513-4, 1188). Mr. Overton was at one point a suspect in the murder of a woman named Rachel Surrett, but was never charged with that crime (R. 1188; T. 513-4).

Mr. Overton was formally identified as a suspect during an FBI "brainstorming session" in May of 1992 (T. 4385-6, 4413). The police nevertheless took no steps at that time to investigate whether Overton was working at the Amoco station on the night of the murders (T. 4388, 4414-5). Amoco destroyed the 1991 employee records in 1993 (T. 4428).

(3) Police set-up to arrest Mr. Overton for unrelated offenses. No probable cause existed to arrest Thomas Overton for the MacIvor murders (T. 503-4, 514). So, some time in 1993 or 1994, the police began to use confidential informants to attempt to arrest Mr. Overton for an unrelated offense for the purpose of procuring a sample of his blood to be compared to evidence from the MacIvor crime scene (T. 516-7, 3316). In one undercover operation, a wired informant attempted to sell Mr. Overton an "Uzi" firearm (T. 3316). The operation was unsuccessful (T. 3317).

In October 1996, while Mr. Overton was under police surveillance, a

confidential informant assisted the police in arresting him for the burglary of a trailer (R. 755; T. 503-4). The police told Mr. Overton that they would consider releasing him in exchange for a blood sample for DNA testing, but he declined to give one (T. 505). The police had never informed Overton that he was a suspect in the five-year-old MacIvor homicides (T. 505).

(4) Police procure Mr. Overton's blood and arrest him for the MacIvor homicides. After the burglary arrest, the police locked Mr. Overton in an isolation cell, under a 15-minute watch (T. 525, 560). Nevertheless, when Overton asked for a razor blade, he was given one, and Overton cut a deep gash on his neck while in the shower [2] (T. 526, 535-6, 553). Corrections officers pressed towels to the wound and sent them to the FDLE crime laboratory for DNA testing (T. 512, 537).

The FDLE declared that Overton's blood matched semen that was found on bed sheets collected from the MacIvor home during the initial crime scene investigation in 1991 (T. 3863-4122). In November 1996, five years after the crime, Thomas Overton was charged with two counts of first degree murder, burglary, sexual battery, and murder of an unborn child (R. 1-2, 8-15).

The state's evidence against Mr. Overton consisted of: 1) two DNA tests that matched Overton's blood sample to semen that the state contended was found

[2]Corrections Officer William Sheriff testified that it was the jail policy to provide even prisoners in isolation cells with a "safety razor" if they requested one (T. 526). Overton was facing life in prison for the armed burglary of the trailer, had been diagnosed with depression, and had attempted suicide in the past (T. 573). *See* § 810.02(2)(b), Fla. Stat. (1999).

on the MacIvors' bed-sheets, and 2) the testimony of two jailhouse snitches (T. 3701-3808, 3863-4122, 4139-4244). From the outset, Mr. Overton has consistently maintained that he did not commit this crime (R. 2). The defense position was that the DNA tests were incorrect, or, in the alternative, that Mr. Overton's semen must have been planted (T. 1166). Specifically, the defense asserted that the evidence collected at the crime scene in 1991 was mishandled, compromised, and contaminated, and that the semen tested by the FDLE may have been obtained from a condom supplied by Overton's then-girlfriend Lorna Swaybe and planted on the bed sheets (T. 3936, 4364-5, 4729, 4730, 4734-6).

C. Handling of Potential Serological Evidence by Pope

The murders of Michael and Susan MacIvor took place some time after 9:00 p.m. on the night of August 21, 1991 (T. 3032-4). The bodies were found at the MacIvor home the following afternoon (T. 3058-64). "Dr." Donald Pope[3] was responsible for the collection, handling, and testing of all serological evidence, such as blood, saliva, sweat, or semen, found at the crime scene (T. 3284, 3338).

Pope used an instrument known as the luma light that detects potential serological evidence by causing it to luminesce (T. 3339-40). The instrument does not positively identify these substances, but is used as a "first step" to detect fluids not visible to the unaided eye (T. 3127, 3265). The luma light instrument was new to the Monroe County Sheriff's Department in 1991 and had never before been

[3]Pope was a veterinarian, but took a job as a serologist (T. 3328).

used to investigate a potential sexual assault case (T. 3224-6). Prior to this investigation, Pope had attended a one-week workshop offered by the manufacturer of the instrument, and had practiced with it on his own (T. 3435-7). Using the luma light, Pope identified possible semen evidence both on the body of Susan MacIvor, which was allegedly collected on cotton swabs, and on the couple's bed sheets (T. 3347, 3351).

(1) The cotton swabs. Three areas of Susan MacIvor's body luminesced under the light, indicating possible semen evidence (T.3193-4, 3348, 3446). Pope testified that on August 22, 1991 he collected the suspect semen from these areas using cotton-tipped swabs and placed the swabs in three coin envelopes (T. 3348-9). However, the envelopes were dated August 23, 1991 (T. 3423-4). Detective Robert Petrick, who investigated the crime scene with Pope, did not see Pope collect this evidence (T. 3226-8, 3229). Although property receipts were prepared for most items of evidence collected at the crime scene, none were prepared for the swabs (T. 3227, 3451).

Nor did Pope take the swabs to a certified storage facility (T. 3480). Instead, he took them to his home, where he "air dried" them and placed them in his personal refrigerator (T. 3481, 3393). Dr. James Pollack, the FDLE serologist, testified that this is not the proper procedure for the collection of potential semen evidence (T. 4031, 4036).

On August 23, 1991, Pope took the swabs from his refrigerator to

Fishermen's Hospital, where Dr. Robert Nelms conducted the autopsies (T. 3422). At the autopsy, additional swabs were taken from Susan MacIvor's mouth, vagina and rectum (T. 3423, 3582-4). Pope testified that he placed the swabs collected at the crime scene, as well as those collected at the autopsy, in a sexual assault kit which he gave to a police officer, who checked it into custody (T. 3300, 3323-4). The property receipt created for the sexual assault kit did not reflect the presence of the semen swabs allegedly collected at the crime scene (T. 3586).

At some point thereafter, Pope conducted presumptive tests for the presence of semen on all of the swabs from the body [4] (T. 3424-5, 3427). All of the swabs, including those from the victim's vagina and rectum, tested *negative* for the presence of semen (T. 3425-6, 3583). Although Dr. Nelms testified that swabs from the body are usually the best evidence in cases involving a potential sexual assault (T. 3674), Pope persisted in the belief that there was semen on Susan MacIvor's body: He hypothesized that the semen test results were negative because heat and humidity had caused Ms. MacIvor's body to decompose and the seminal fluid to degrade (T. 3130, 3427). However, Dr. Nelms testified that Michael MacIvor's body did not show signs of decomposition (T. 3677). And Dr. Ronald Wright, a forensic pathologist, characterized the negative semen test results as "exceptionally surpris[ing]" given the relatively short period between

[4]Pope did not testify as to when these tests were conducted (T. 3326-3594). Moreover, the record is silent as to how the swab evidence was stored once it was checked into custody (T. 3288-3594).

the time of death and the time the swabs were collected (T. 4501-2).

Some time after Mr. Overton's arrest, the police decided to submit all the swabs to the FDLE crime laboratory for testing, but could not find them. (T. 4372-3). When questioned, Pope could not recall where he had put them (T. 4372). Ultimately the swabs were found in the sexual assault kit and sent to the FDLE, which determined that the swabs were negative for the presence of semen[5] (T. 3969,4031-2, 4372).

(2) The bed sheets. Pope testified that he also used the luma light to identify and mark potential semen stains on the MacIvor bed sheets (T. 3351). The stains were located on the bottom sheet and on the mattress pad (T. 3191, 3354-6, 3399). Pope cut a small piece of the stained bed sheet evidence for his "own purposes," with the intent to test this evidence "not through the laborious process of case notes" but for his "own particular interest" (T. 3351).

Pope and Petrick then folded the sheets and placed them in paper bags, which Petrick took to the Marathon evidence vault (T. 3194-7, 3356). Two days later, they were released to Pope for serological testing (T. 3197-8).

As he did with the swabs, Pope took the bed sheets *home* because, he said, the property room was closed and he needed to hang the evidence to dry (T. 3393). But Petrick testified that the sheets appeared very dry at the crime scene (T. 3224).

Pope hung the bed sheets in the "guest room, office, catch all" area of his

[5]The FDLE serologist speculated that bacteria from the body may have degraded any sperm cells (T. 3971).

home, using clotheslines to hang the sheets in a horizontal "dipped" position, without placing paper underneath the sheets to preserve possible trace evidence (T. 3393-4, 3505, 3535). According to Dr. Pollack, it is improper to take serological evidence to one's home and to hang it in this manner (T. 4027-30).

On August 26, 1991, Pope took the bed sheets to the police property room (T. 3395-6). However, he checked the evidence out of the property room the same day, and took it to his lab in Key West, where he tested the small bed sheet cutting he had made at the crime scene for his "own purposes" (T. 3395-6, 3427, 3432). Pope claimed this cutting tested positive for semen, but was consumed during testing, and therefore never submitted for DNA analysis (T. 3432, 3518, 3552).

More than two weeks after the alleged positive test of the consumed cutting, Pope made 10 more cuttings from the stained areas of the MacIvor's bottom sheet and mattress pad, and placed those cuttings in *unsealed* envelopes (T. 3406-7, 3419-21, 3520, 3818). Over the next year-and-a-half, Pope kept these unsealed envelopes initially in the *unlocked* refrigerator of his Key West lab[6], then later in a locked refrigerator-freezer in his Marathon lab (T. 3416, 3420, 3523-5). There are no notes that document how, when, or by whom the cuttings in the unsealed envelopes were transferred to Marathon (T. 3523-5, 3549). Pope did not test the cuttings until October 1992, more than one year after they were "stored" (T. 3521).

[6]Pope testified the lab was locked but the refrigerator was not (T. 3420). There was no evidence showing that Pope was the only person with access to the lab.

Presumptive tests were positive for semen[7] (T. 3410, 3420).

Six months later, in April of 1993, Pope resigned from the Monroe County Sheriff's office (T. 3417). All of the evidence in his possession was then transferred to the crime laboratory supervisor in Key West, who delivered about six containers full of envelopes to the property room custodian (T. 3417, 3693, 3695, 3831-2). It was not until then that the envelopes containing the MacIvor bed sheet evidence were finally sealed, and property receipts created documenting the existence of this evidence (T. 3494, 3818, 3836). Two months later the envelopes were finally sent to the FDLE for DNA testing (T. 3890-1).

D. DNA Tests of the Bed Sheet Evidence

(1) The first DNA test. Dr. Robert Pollack, an FDLE serologist, received the bed sheet clippings in June of 1993 (T. 3890-1). Using a method of analysis known as RFLP (restriction fragment length polymorphism), Pollack extracted DNA from two of the ten cuttings, and developed a DNA profile from five DNA locations or loci that were compared to the DNA from Mr. Overton's blood sample (T. 3876-7, 3942, 3953-4). Using computer imaging to estimate the relative size of profile bands, Pollack concluded that the profile from the bed sheet cuttings "matched" the profile from Mr. Overton's blood sample (T. 3949-50, 3955-6). Pollack testified that the chances of an unrelated individual having the same

[7]Pope conducted a P-30 protein test and a sperm search on the mattress pad, and an "alkaline phosphatase" test and sperm search on the sheet (T. 3410, 3420).

profile exceeded one in six billion (T. 3960, 4021).

On cross-examination, Pollack explained that RFLP testing cannot measure the exact size or composition of DNA fragments, but that a match is declared where bands are close enough in size to fall within the particular laboratory's accepted "match window" (T. 3981). Dr. Pollack admitted that measurement imprecision increases where bands exceed 10,000 base pairs in length, and that while some laboratories refuse to interpret these "upper region" bands, his laboratory does not: Fragments from one of the five loci examined were in excess of the 10,000 base pair limit (T. 3997, 4018-9).

(2) The second DNA test, and the State's failure to disclose documents necessary to determine the validity of that test. In February 1998, over one year after Mr. Overton was charged with this offense, the state announced that it might be seeking a second DNA test by an independent private laboratory called the "Bode Technology Group," which is located in Virginia (R. 1; T. 301, 4053-6). The second test would involve a newer DNA testing method known as "STR" or short tandem repeats (T. 462, 1068-9).

In June 1998, the parties reached an agreement regarding access to the bed sheet evidence: The state would first conduct its second DNA test; the defense would then perform its own testing on the remaining evidence for the presence of nonoxynol, a substance found in condoms, to corroborate the defense claim that Overton's semen was planted on the bed sheet evidence (R. 843; T. 592-3, 773,

815-16, 4493-4). Defense counsel explained to the court that the novel DNA testing sought by the state would require additional discovery (T. 597).

In July 1998, the state disclosed four volumes of new discovery documents unrelated to the second DNA test (T. 632). The state had not yet completed its second DNA test (T. 637; R. 956). Because of the state's late discovery disclosure, the court granted a continuance until January 11, 1999 (T. 650-1). The court had previously granted one joint continuance and one defense continuance (T. 250-2, 259, 422-8). The court announced this would be the final continuance (T. 650-1).

The Bode Technology Group finally completed the STR testing in October 1998, and submitted a brief summary of its findings, stating that the semen evidence provided by the state matched Mr. Overton's blood sample (R. 954; T. 760). On November 2, 1998, the defense filed a discovery request regarding the new DNA test seeking, *inter alia*, copies of the laboratory protocols, all validation studies relating to the testing method, and proficiency testing records of the laboratory personnel[8] (R. 526-33).

On December 18, 1998, defense counsel informed the court that the state had not yet complied with the STR testing discovery request, and that a continuance might be necessary (T. 754). On December 22, 1998, approximately three weeks prior to the trial date, defense counsel again brought this matter to the

[8]A similar discovery request had been made to the FDLE regarding the first DNA test (R. 104-123). The FDLE supplied the documents requested, and the defense expert reviewed the documents in preparation for trial (T. 794-5).

court's attention, explaining that his DNA expert needed to review the requested discovery documents in order to assist counsel in understanding the STR testing procedure, deposing the state's STR experts, and challenging the accuracy of their findings (R. 669, 671; T. 795-9). Thus, defense counsel asked that the court compel the state to submit discovery, and grant a continuance from the January 11th trial date sufficient for counsel and his expert to adequately examine the discovery and prepare for trial (R. 669-71; T. 796). In the alternative, in the absence of discovery, defense counsel asked that the state be precluded from presenting the new STR test results at trial (R. 669-71; T. 796). The trial court refused to exclude the state's evidence, but denied defense counsel's motions without prejudice, and ordered the state to supply any missing discovery items before December 31, 1998 (T. 803-5).

On December 29, 1998, defense counsel at last received a response from Bode Technology and immediately sent those documents to the defense DNA expert, Dr. Gary Litman (T. 938; R. 955). Dr. Litman reviewed the evidence on January 4, 1999, three days prior to the scheduled *Frye* hearing regarding the STR testing method, and found that several critical items of discovery were missing: 1) *the laboratory protocols,* 2) *validation studies,* and 3) *proficiency test results* (R. 901-8, 955-6, T. 938, 1017). The very next day, January 5th, defense counsel informed the court that critical documents were missing, and requested a continuance (T. 936-48). Defense counsel explained:

> [I]f the court would deny a continuance, or not be excluding this evidence, the defendant's due process rights and assistance of counsel under the U.S. [and] Florida constitutions would be lost . . . It's impossible that we independently assess the accuracy of these tests. It's impossible to prepare adequately to meet this evidence . . . I'm not a scientist. I need my expert . . . To have to confront this type of sophisticated evidence is, I would say, unconscionable at this point. . . [W]e're really put in an inferior position in litigating this matter and we're talking about someone's life on the line. (T. 940-5).

The defense submitted a second supplemental discovery request, and an affidavit from Dr. Litman to the court that the missing discovery was "*essential to the effective deposition as well as cross-examination of the relevant parties*" (R. 901-8, 954, 959; T. 938-9). Dr. Litman related that "the information sought is consistent with that which is obtained routinely in other cases from other DNA providers . . . who recognize the complexities and broad range of technology and interpretations that are involved with the . . . STR method of DNA typing" (R. 954, T. 939). Dr. Litman concluded that, without this discovery, he could not assist defense counsel in "addressing the relevant issues relating to the test findings, qualifications of staff, and overall competence of the laboratory in conducting DNA typing" (R. 958).

All defense motions were denied (T. 947). At the January 7th *Frye* hearing, and at several points before and during trial, defense counsel continually renewed his requests to compel discovery, grant a continuance, or exclude the state's STR evidence, urging that he could not confront the state's proof without the missing discovery, particularly the laboratory protocols explaining how the STR tests were

conducted, validation studies addressing the accuracy and reproducibility of the testing procedures, and proficiency tests bearing on the competence of the testers (T. 1017-33, 1162-73, 1236-40, 2960-62). The discovery was never provided to the defense, and the court ordered that the proceedings begin as scheduled, in the absence of STR testing discovery[4] (T. 1168, 1212, 1231, 1237).

The trial judge noted that he had already granted several continuances, that defense counsel's "choices" led to this, and, despite FDLE's compliance with a similar request (see footnote 8), that this discovery request was unnecessary and overreaching (T. 1029-30, 1168-73, 1240). The court found that defense counsel could have conducted depositions *prior* to receiving this discovery, despite Dr. Litman's assertion to the contrary (R. 954; T. 1168). The trial court also suggested that counsel should have traveled to the Bode laboratory in Virginia when the test results were first received (T. 1168). Defense counsel explained that when he received the Bode report he immediately consulted the defense expert, and filed a discovery request within two weeks (T. 1170). The Bode Laboratory's incomplete discovery response was not received until December 29th and was reviewed by the defense expert when he returned from out of town on January 4th, making it impossible for counsel to travel to Virginia to obtain the missing documents, and have them reviewed by the defense expert in time for the January 7th *Frye* hearing

[4]Defense counsel also offered to accept a listing by type of the proficiency tests and validation studies, in lieu of the complete tests and/or studies, in order to facilitate a more limited request for specific records, if necessary (R. 903, 956; T. 1027). Such lists were not provided (T. 939, 1022, 1237).

and the trial only four days later (R. 955, 959; T. 1170, 1239).

Despite defense counsel's protests that he could not effectively question the state's DNA experts without the discovery at issue, the court held a *Frye* hearing on January 7, 1999, and ultimately ruled that the Bode STR testing met the *Frye* test (T. 1021-23, 1017-1211).

At trial, Dr. Robert Bever, Bode's laboratory director, testified that he extracted DNA from the bottom sheet cuttings,[5] examined 12 loci using the STR typing method, and concluded that the DNA matched Overton's blood sample at the 12 locations (T. 4065-9, 4084-7). Bever opined that the probability of finding another Caucasian with an identical pattern was one in four trillion (T. 4088).

Renewing his objections, and emphasizing that he was unable to competently question Dr. Bever in the absence of the requested discovery, defense counsel conducted a brief cross-examination that did not address the testing procedures (T. 4091, 4094-4112). During the summation, the prosecutor relied on the evidence of the two different DNA methodologies collectively to argue that the semen on the bed sheet clippings belonged to Mr. Overton (T. 4712).

E. Evidence relevant to show that samples of Mr. Overton's semen had been planted on the bed sheet.

(1) Evidence regarding police officer's opportunity to plant Overton's semen and bias against Overton. During closing, defense counsel argued that given the strikingly defective chain of custody for the bed sheet evidence, there

[5]Bever was unable to extract DNA from the mattress pad cutting (T. 4084).

was ample opportunity to plant Mr. Overton's semen (T. 4729, 4756-73). One officer from the Monroe County Sheriff's Office, Charles Visco, knew Mr. Overton's former girlfriend, Lorna Swaybe, and contacted her approximately six times in less than six months, for reasons that were never explained (T. 4348, 4364-5). According to Visco, the contacts took place in 1990 or 1991 (T. 4364-5). Ms. Swaybe died of AIDS in April 1994 (T. 4418-20). Defense counsel argued that Visco may have been the officer that collected condoms filled with Mr. Overton's semen from his AIDS infected girlfriend, in order to plant the semen on the bed sheets (T. 4734-6).

Mr. Overton had filed an internal affairs complaint against Visco in 1990, asserting that he illegally took possession of Overton's car (T. 4196-7, 4300). Visco was ultimately cleared of the charges (T. 4297). Defense counsel attempted to elicit testimony regarding the internal affairs complaint to show that Visco was biased against Mr. Overton (T. 4297-8). The trial judge ruled that the testimony would open the door to evidence that Mr. Overton was a suspect in the murder of Rachel Surrett (T. 4303-4). Thus, defense counsel did not introduce this evidence (T. 4301). The prosecutor argued in closing that the defense had failed to show why any officer would want to plant evidence to incriminate Overton (T. 4818-9).

(2) The defense nonoxynol evidence in support of the planting defense. Nonoxynol-9 is a well-known spermicide commonly found in condoms (T. 4437, 4493). Phillip Trager, an expert in the analytical testing of pharmaceutical

products, tested samples of the bed sheet clippings made by Pope and found that they contained 53 micrograms of nonoxynol-9 (T. 696, 4436-9). Forensic crime scene expert Dr. Ronald Wright testified that in sexual assault crimes it is possible but "highly unusual" for the perpetrator to use a condom (T. 4494-5). Thus, Dr. Wright concluded that the presence of nonoxynol on the MacIvor bed sheet clippings, along with semen, suggested that the semen was obtained from a condom and planted on the sheet evidence (T. 4493).

(3) The state's late-disclosed nonoxynol expert, whose testimony was intended to negate the probative value of the defense nonoxynol evidence, and the trial court's refusal to appoint a defense chemist/nonoxynol expert, or permit further testing. The state sought to show that the nonoxynol detected by the *defense* test could have come from a source other than a condom (T. 811). In late November 1998, without informing defense counsel, the state made new clippings of the MacIvor bed sheets from the elastic areas and sent them to the defense analyst, Mr. Trager, for nonoxynol testing (R. 653, T. 752, 809). On November 20, 1998, the prosecutor also listed a new state witness, Richard Oliver, a chemist employed by the company that is the principal producer of nonoxynol (R. 837, T. 950, 4589-91).

On December 16, 1998, less than one month prior to the January 11th trial date, the state submitted its testing results: One test was positive for nonoxynol; a second test found no detectable levels of the substance (R. 653, 1189-90, 4440-

41). The state intended to introduce the new sheet clippings and the positive nonoxynol test results at trial, and to elicit from Mr. Oliver that: 1) nonoxynol is present in a "commercial" form in certain products including laundry detergents, and 2) the nonoxynol test performed by the defense does not distinguish between the spermicidal form of nonoxynol and its commercial form (T. 954-6, 4440-1). Citing "confidentiality reasons," Mr. Oliver refused to divulge which laundry detergents or household products contain nonoxynol (T. 956). This nondisclosure prevented the defense from ruling out the MacIvors' household products as the source (T. 1189-90).

Oliver's proposed testimony surprised defense counsel, whose only source of "expert" information was Dr. Ronald Wright (T. 756, 962). Dr. Wright is a forensic pathologist and crime scene expert, not a chemist, and has no expertise regarding the chemical nonoxyonol (T. 756, 4491). Trager had no knowledge of whether nonoxynol is present in detergents (T. 4461).

In response to the state's actions, defense counsel filed several motions for the appointment of a defense expert[6] (R. 652, 672, 837-9). Explaining that he could no longer confer with Trager, who was now conducting tests for the state, defense counsel asked the court to appoint a defense chemist or nonoxynol expert (T. 778, 953). Defense counsel needed to confer with an expert on several issues: 1) whether Oliver's assertions were accurate; 2) whether a more specific test could

[6]Mr. Overton was declared indigent and court-appointed counsel depended upon the court to award all fees necessary for Overton's defense (T. 55, 778).

be conducted to identify the spermicidal form of nonoxynol; 3) whether nonoxynol is commonly present in detergents, and if so, which products or detergents contain nonoxynol; and 4) whether nonoxynol would remain present on fabric after washing, and if so, how it would be distributed[7] (T. 954-6, 967, 1194).

Counsel moved for a continuance in order for the defense to confer with an expert, conduct follow-up tests, and pursue investigation regarding which laundry detergents might have been used by the MacIvors, and whether they contained nonoxynol (T. 956-9). In the absence of a defense nonoxynol expert or further testing, defense counsel asked that the state be precluded from introducing its late-disclosed evidence regarding nonoxynol to attack the planting defense (T. 2971). The trial court denied all of the defense requests, and proceeded to trial as scheduled on January 11, 1999 (T. 2970).

Detective Powell testified that he made the new cuttings from the upper corner of the fitted sheet, near the elastic, far away from the area where the original cuttings were made (T. 4395-6). No tests were conducted to determine whether the new cuttings were semen-free (T. 4395-6). Trager testified that one of the two sample cuttings submitted by the state contained 50 micrograms of nonoxynol, but no nonoxynol was apparent on the second cutting (T. 4440-1).

Mr. Oliver testified that where nonoxynol is available in a sufficient

[7]Mr. Oliver had opined that if the source of the nonoxynol at issue were laundry detergent, the chemical would be distributed throughout the sheets (T. 967, 4597, 4600, 4605). Thus, defense counsel sought to perform nonoxynol tests on larger parts of the sheets or on the whole sheet (T. 811, 829).

quantity, its manufacturer can distinguish between the spermicide form and the commercial form, but that the tests conducted by Mr. Trager could not distinguish between the spermicide and the commercial form (T. 4594-5).

While Oliver testified that it is "conceivable" that nonoxynol from laundry detergent would remain on cloth material after washing, he acknowledged that he had never attempted to validate this assertion (T. 4596-7, 4600). Both Trager and Oliver testified that if the source of the nonoxynol on the sheets were laundry detergent, the chemical would likely be distributed fairly uniformly across the material (T. 4468, 4605). Oliver said that Trager's tests suggested that nonoxynol was distributed fairly uniformly on the MacIvor sheets (T. 4606). But Trager said that the pattern of nonoxynol distribution could not be determined from the three tests that he had performed (T. 4468).

(4) The state's late-disclosed evidence of condoms at the crime scene. Defense counsel was not informed that there were any condoms found at the crime scene until June 1998, when the state first disclosed a report dated April 1992, the only documentation of the existence of condoms at the crime scene (R. 43, T. 4376). This report was disclosed one month after defense counsel announced that he would be seeking nonoxynol testing to establish that planting took place (T. 633-4, 4377, 4384).

Detectives Petrick and Jones testified at trial that they recalled seeing condoms in a basket in the bedroom where Ms. MacIvor's body was found (T.

3262, 4316). Petrick testified that the condoms were not collected on the day that they were found because he assumed that the condoms belonged to the victims, notwithstanding the fact that Ms. MacIvor was eight months pregnant (T. 3263-5). Petrick also testified that the luma light presumptively indicated the presence of semen, suggesting that the perpetrator did not use a condom (T. 3263-5).

Jones said that he impounded the basket and its contents, including the condoms, two days after the initial investigation on August 24th (T. 4317). However, while the property receipt for this basket listed several items contained therein, such as K.Y. jelly, vaseline, and body lotion, it omitted any mention of condoms (T. 4318-9). Jones claimed that he made a mistake (T. 4318-9).

At trial, the state introduced a 'three-pack' containing two empty condom wrappers and one sealed condom (T. 4325). Jones stated that when he saw the three-pack at the crime scene it appeared as it did on the day of trial (T. 4342). However, Detective Powell testified that when he saw the three-pack for the first time in the property room in April 1992, all three condoms were sealed[8] (T.4382).

F. Other Evidence at the Crime Scene

(1) Tire tracks, shoe prints, palm prints, and hair evidence. Tire tracks and shoe prints were found in the sand alongside the MacIvor home in the area

[8]Detectives Jones and Powell testified that on this date they went to the property room to view the serial numbers on the condom packages in order to determine when and where the condoms were manufactured and purchased (T. 4320, 4378-9). The police report states that the information acquired was not helpful to the investigation (T. 4321).

where visitors would park (T. 3208, 3253-4). Tire track castings were made (T. 3208). There was no evidence that the tires came from any vehicle connected with Mr. Overton. The shoe prints were photographed and measured at size eleven and one-half (T. 3208-10, 3252). There was no evidence that Mr. Overton wore a size eleven and one-half shoe (T. 3252, 3256, 3030-4262).

There was a partial palm print on a pipe found in the kitchen[9] (T. 3256). Detective Petrick testified that he did not know if this print was compared to Mr. Overton's prints (T. 3256). Officers Andrews and Daniels testified that Overton's prints did not match partial palm prints found in the home (T. 3306, 4418). There were also latent prints found on a cellophane tape wrapper that the police believed had been used by the perpetrator, but there was no evidence that these prints matched Mr. Overton (T. 3309, 3030-4262).

Hair was found and collected at the crime scene, but FDLE testing of Mr. Overton's head and pubic hair did not produce a match (T. 3852-3, 3856-7).

(2) Evidence of more than one perpetrator. There were 22-caliber firearm shell casings on the bedroom floor, about one foot from the doorway (T. 3189, 3261), and a bullet hole in the wall near the bedroom curtain that appeared as though it were shot at close range (T. 3309, 4510). Dr. Wright testified that the gunshot hole did not match the 22-caliber cartridge case found at the scene, indicating that two different firearms were used in the bedroom, and that it would

[9]James Zientek, one of the state's snitch witnesses, testified that Mr. MacIvor was hit on the head with this pipe (T. 4155). See page 30, *infra*.

be "outrageously unusual" for one perpetrator to use two different firearms during a crime (T. 4491, 4506, 4510). Dr. Nelms testified that Mr. MacIvor's size (six foot one and 200 pounds) and the fact that he and Mrs. MacIvor were in separate rooms suggest that more than one person committed this crime (T. 3636, 3672-3). There was no evidence or even an allegation that Overton had an accomplice.

Mrs. MacIvor's body was in the bedroom, on top of a comforter on the floor at the foot of the bed (T. 3136). Her purse had been emptied and the contents were under the comforter (T. 3136, 3139, 3168). An address book with the *first few pages* torn out was found next to the bed along with layers of masking tape (T. 3138). It appeared as if the perpetrators were looking for something (T. 3669).

(3) Mode of entry and cause of deaths. The MacIvor home is a two-story stilt house in a gated community next to an airstrip (T. 3037, 3089). The master bedroom and spare bedroom both have sliding glass doors that lead to balconies (T. 3120-3121). The glass doors of both rooms were open, and the front door of the house was locked (T. 3121, 3042). While there was no evidence of a break-in, there was a ladder leading up to the balcony of the spare bedroom and pieces of cut clothesline in the balcony area, in the hallway, and in the doorway of the master bedroom (T. 3121, 3135-6, 3186). The telephone lines in the "junction box" outside of the home were cut (T. 3212).

In the kitchen was a pipe wrapped in a towel (T. 3122). The kitchen led to the living room area where the body of Michael MacIvor was found (T. 3120).

The living room couch and table were moved about 18 inches, indicating a struggle, and papers from a living room desk were strewn about (T. 3129, 3134-5).

Mr. MacIvor's head was wrapped in masking tape, with only his nose exposed, and a sock under the tape over his eyes (T. 3130-1, 3134, 3161). MacIvor had bruises on his lower abdomen, and no defensive wounds (T. 3622, 3636). Dr. Nelms concluded that MacIvor was struck on the back of the head, possibly with a blunt object, rendered unconscious, and strangled to death (T. 3622-9, 3632).

Mrs. MacIvor was nude (T. 3140). Her ankles were tied to her wrists with belts (T. 3140, 3149). She had ligature marks and abrasions on her neck (T. 3643, 3661). Her eyes were covered with masking tape (T. 3158).

Dr. Nelms concluded that the deaths of Susan MacIvor and the fetus were caused by strangulation, that the fetus may have lived longer than she did, and may have kicked after her death (T. 3655, 3660, 3664). Dr. Nelms deduced that Susan MacIvor was sexually assaulted because she was bound, undressed, and the rope around her ankles had been cut presumably to allow movement of her legs (T. 3659). However, there was no physical evidence of a sexual penetration of any sort (T. 3662). A "rather minor" abrasion on Mrs. MacIvor's vulva was consistent with either non-sexual activity or a sexual assault (T. 3675-6).

G. Snitch Testimony

A centerpiece of the trial was the testimony of two jailhouse snitches – Guy Green and James Zientek. Both were heavily impeached with evidence of bias,

motive, and numerous prior convictions. In addition, their testimony was inconsistent with each other's and inconsistent with the physical evidence.

(1) Guy Green. Guy William Green, a nine-time convicted felon, was incarcerated on burglary charges (T. 3702). He had lost nearly five years of gain time due to disciplinary problems in jail, including attempted escape, possession of narcotics, sex acts, inciting riots, and lying to prison personnel (T. 3806). In 1996, the police approached Green regarding Thomas Overton, whom Green had met in 1992, and Green provided a statement (T. 3702, 3778-9). One year later, the police promised Green that if he cooperated in the Overton prosecution, they would assist him in recovering his lost gain time, and wrote several letters to the Department of Corrections on Green's behalf (T. 3780, 3804-5, 4420-2). Green admitted that he hoped to receive his gain time as a result of his trial testimony, and that if he did he would be close to his release date (T. 3805-7). Furthermore, Green acknowledged that he had lied on several occasions in the past in order to receive benefits or to mislead people (T. 3781-2).

According to Green, in 1992, just 10 days after they first met, Mr. Overton told him that he had committed a burglary in a "real exclusive" wealthy area of the Keys where the owner had an airplane and a private airstrip (T. 3703-4, 3782). Overton allegedly stated that when he entered the house a "fat bitch" jumped on his back and fought with him, and he killed her (T. 3704). Overton also said that he struggled with another person in the house (T. 3783). Green testified that

Overton's stated purpose for the break-in was to burglarize the home for someone else (T. 3704), despite the fact that the only items apparently missing from the home were some photographs of Mrs. MacIvor. (T. 4261-2).

Green also testified to a general conversation about committing burglaries, during which Overton said that in the past he had cut telephone lines, worn gloves, and used a kit including a gun, knife, and disguises (T. 3776-7). Green added that Overton also said that the best time for a burglary is during a power outage or storm (T. 3777). The latter statement was not included in Green's original statement to the police, nor did he testify to it in his deposition (T. 3802). Green explained the omission by stating that "little bits and pieces" of his 1992 conversation with Overton kept "popping up" in his head (T. 3802). While Green wrote to a friend that statements made by another inmate resembled the facts of the MacIvor case (T. 4308), Green also said that he did not believe Overton's statements and considered them "general b.s. between friends" (T. 3705, 3777).

(2) James Zientek. At the time of Mr. Overton's trial, James Robert Zientek, (a.k.a James Robert Pesci, a.k.a. James Robert Stonewall, a.k.a. James Radrick, a.k.a. James Gwavacki, a.k.a. James Glowscki) was a forty-year-old three-time convicted felon. He resided in the Monroe County Detention Center due to pending charges that originally consisted of sexual battery, sexual assault, robbery, grand theft auto, and resisting arrest without violence (T. 4139-40). He was an admitted liar who fabricated stories because he wanted to "[f]eel[] special"

and to have others view him as being special (T. 4189, 4191-93). Based upon the original charges pending against him, Zientek was facing thirty-six years in prison, exclusive of any enhancement due to habitualization.[10] As a result of his testimony against Mr. Overton, Zientek received a plea which capped his maximum sentence at seven years, served in a federal rather than a state facility, and provided for the possibility of a sentence as low as five years (T. 4186-87).

Zientek admitted that he does not respect the legal system, considers himself "very clever" with the law, and knows how to set up a plan to get what he wants from law enforcement officials (T. 4193, 4224). He had worked undercover in the past (T. 4198-9). In 1997, Overton and Zientek, who was aware of the publicity surrounding the MacIvor case, were incarcerated in the same cellblock (T. 4141, 4194-5, 4203). Representing himself as a paralegal, Zientek wrote to Overton, stating, "Our lives are at stake at the hands of this bullshit legal judicial system," and asked to review the materials in Overton's case (T. 4196, 4202-3). Mr. Overton showed Zientek photographs of the crime scene, including the telephone lines, the ladder outside of the house, the pipe in the kitchen, the living room, the bedroom, and the victims (T. 4226-4227). Zientek also saw autopsy pictures, and read newspaper articles regarding this case (T.4151, 4201, 4225).

Zientek gave the police three different statements, adding new information each time, regarding conversations he allegedly had with Thomas Overton over a

[10] *See* §§ 775.082(3)(4); 794.011(5); 812.13(2); 812.014; 843.02, Fla. Stat. (1999).

two-month period (T. 4424). According to Zientek, Overton told him that he entered the MacIvor home, which he had surveyed from a "back room located by the residence" knowing that Michael MacIvor was there, with the intent to sexually assault Susan MacIvor, whom he had met when he worked at the nearby Amoco station (T. 4152-3, 4169). In his initial statement, Zientek claimed that Overton obtained the MacIvor's address from a check written by Susan MacIvor at the Amoco station (T. 4217). Zientek later changed this statement, and testified at trial that Overton obtained the address from a credit card receipt (T. 4152-3, 4217). There was no evidence of any such credit card receipt[11] (T. 3030-4262).

Having seen the state's photographs, Zientek testified that on the day of the crimes, Mr. Overton cut the telephone lines of the MacIvor home and gained entry by climbing a ladder (T. 4154-5). Overton heard Michael MacIvor awaken and go to the kitchen (T. 4155). As MacIvor walked through the hall of the home on his way to the bedroom, Overton approached him from behind and hit the back of his head with "a pipe that he grabbed right from the house" (T. 4155). The two struggled and Overton hit him with his fist, knocking him unconscious (T. 4156).

According to Zientek, Overton then tied Susan MacIvor, who pleaded with him, and stated that she knew who he was, even though Overton was allegedly

[11] The state did not present any witnesses to corroborate Zientek's testimony that Mr. Overton and Susan MacIvor knew each other (T. 3030-4262). The only other testimony on this subject came from a friend of Susan MacIvor's, who testified only that Mrs. MacIvor was a customer at the Amoco station, which was located one-half mile from the MacIvor home (T. 3044, 3055-6).

wearing a mask at the time (T. 4156-7). He then returned to the area where Mr. MacIvor lay unconscious, placed a sock over MacIvor's eyes, and taped his face (T.4157). Zientek claimed Mr. Overton did this because MacIvor's eyes would bulge and his nose would bleed when he strangled him (T. 4157, 4166).

Overton returned to the bedroom, raped Susan MacIvor, and strangled her (T. 4158). According to Zientek, Overton felt the fetus kick (T. 4179). Zientek also testified that Overton told him that the firearm shell casing found in the doorway of the MacIvor bedroom and the bullet hole in the wall had "absolutely nothing" to do with the murders (T. 4168).

Overton then went to the living room where Mr. MacIvor was "apparently just becoming conscious," kicked him in the "solar plexus region" and strangled him (T. 4159). Overton said that he killed the MacIvors because he "doesn't leave witnesses" (T. 4159). He then "confuse[d] the crime scene" by moving Michael MacIvor's body so that it would appear as if he had been watching television, and by ripping pages from the MacIvor's address book to suggest to the police that the perpetrator's name was listed there (T. 4173-4). Zientek also testified that Overton planned to blame the murders on another inmate named Ace (T. 4148).

Zientek testified that after his conversation with Mr. Overton he immediately called the F.B.I. and, after a few days, spoke to Chaplain Judy Remley, wife of Lieutenant Remley, who runs the jail. Zientek had met with the chaplain in the past and considered himself to be "on her good side." (T. 4205).

Over defense objection, Chaplain Remley testified to Zientek's ostensible emotional state-- he appeared very upset and he cried-- when he spoke to her regarding Mr. Overton's statements (T. 4248, 4253, 4350). Chaplain Remley knew Zientek as James Pesci (T. 4253). Zientek admittedly used this alias to falsely represent himself as being related to the actor Joe Pesci, so that others would treat him as if he were a celebrity (T. 4192).

At the conclusion of the trial, Mr. Overton was found guilty as charged on all counts (R. 1136-40).

H. Jury Selection

Defense counsel moved to strike juror William Heuslein for cause on two grounds: 1) the juror learned through the media that Mr. Overton was wearing a concealed electric-shock stun belt and leg shackles, and could not understand why he should presume the defendant innocent given these extreme security measures, and 2) the juror could not set aside his bias in favor of imposing the death penalty in all first degree murder cases (T. 2441-2). Counsel also moved to strike juror Harry Russell for cause where 1) the juror could not follow the law on the right to remain silent, and 2) the juror was also aware of the concealed shock-belt, as well as other inadmissible facts, and had a preconceived opinion of Mr. Overton's guilt (T. 1674-5, 1899-1900). Both cause challenges were denied (T. 1900-1, 2443). Defense counsel exhausted his peremptory strikes, requested additional strikes,

and identified jurors that he sought to strike[12] (T. 2443, 2447-8, 2454, 2906-13).

I. Penalty Phase

The state did not present any additional evidence during the penalty phase, with the exception of victim-impact statements from the family of the victims (T. 4927-58). Mr. Overton waived the presentation of mitigating evidence (T. 4896-4911). Defense counsel informed the court that there was mitigating evidence that could be presented relating to the defendant's school background, mental health, medical records, and possible history of drug abuse (T. 4900, 5037). Defense counsel offered to proffer this mitigating evidence in a memorandum to the court (T. 4898). However, counsel later stated that Mr. Overton did not want the court to consider this evidence, and had asked that counsel not submit the memorandum (T. 5035). The court did not require defense counsel to proffer the existing mitigating evidence, but confirmed with Mr. Overton that this was his desire, and noted for the record that there was relevant mitigating information that would not be considered pursuant to the defendant's request (T. 5038-9).

The state argued that five aggravators were proven with regard to each of the two victims: 1) the defendant was convicted of another capital felony, in that there were two contemporaneous convictions for first degree murder, 2) the capital felonies were committed during the commission of a burglary and/or sexual battery, 3) the murders were heinous, atrocious, and cruel (HAC), 4) cold

[12]A full discussion of the jurors' responses follows in the Argument section.

calculated and premeditated (CCP), and 5) the purpose of the murders was to avoid arrest (T. 4991-9). With regard to the last three aggravators, the state relied upon the testimony of James Zientek regarding how the murders were perpetrated and Overton's alleged unverified statements that he knew Susan MacIvor, surveyed the house before the crime, and that he does not leave witnesses (T. 4993-8). The jury was not given a precautionary instruction on how to evaluate the testimony of a jailhouse snitch (T. 4999-5014). The jury rendered a divided advisory vote in favor of the death penalty as to both victims: 8 to 4 with regard to Mr. MacIvor, and 9 to 3 with regard to Mrs. MacIvor (T. 5018).

The trial judge found that all five aggravators were proven by the state with regard to each victim (R. 1191-4). The court found that the HAC aggravator was proven as to Michael MacIvor "in that he was strangled to death . . . after his pregnant wife had been sexually battered and murdered" (R. 1193).

SUMMARY OF ARGUMENT

I. The trial court erroneously denied challenges for cause against two jurors. Juror Heuslein learned through the media that Mr. Overton was wearing a concealed electro-shock "stun belt" and leg shackles. The juror's awareness of the extraordinary restraints caused him to "really wonder" why these security measures were necessary, and impacted his ability to presume Overton innocent. The juror *never* unambiguously stated that he could set this knowledge aside.

Heuslein also believed that the death penalty should be imposed in all first

degree murder cases, and that a life sentence is both too lenient and too costly for taxpayers. When the prosecutor and the trial judge attempted to rehabilitate him, he equivocated. Heuslein's responses failed to eliminate reasonable doubt regarding his ability to follow the law and set aside his strong bias in favor of imposing the death penalty.

Juror Russell asserted his "honest belief" that a person accused of a crime should testify "unless he has something to hide." Despite attempts by the court to rehabilitate him, Russell continually vacillated between his professed ability to be impartial and his firm belief that the defendant would testify if he were innocent.

Russell had also read about the extreme security measures used on Mr. Overton, and knew other damaging facts not introduced at trial. The juror's responses demonstrated that given this knowledge, he could not be impartial.

II. The trial court denied Mr. Overton's right to an adversarial *Frye* hearing regarding the state's new STR/DNA test. Defense counsel had repeatedly sought discovery of critical documents from the testing laboratory, including validation studies, the protocol manual, and proficiency tests. These documents were essential for the defense DNA expert to independently assess the reliability of the state's test. The trial court refused to compel discovery, and/or grant a continuance for counsel to obtain the records, on the erroneous ground that they were unnecessary. The defense was forced to proceed to a *Frye* hearing without them, and thus was denied the basic due process right to challenge the state's

proof at the hearing.

III. The documents relating to the STR test were also necessary to confront the state's evidence at trial, and thereby enable the jury to properly weigh and evaluate the DNA evidence. The court's refusal to allow the defense an opportunity to access these basic records rendered the defense DNA expert ineffective, and precluded meaningful cross-examination of the state's experts.

IV. The defense asserted that the police had contact with Mr. Overton's AIDS-infected girlfriend, and obtained a used condom from her containing Mr. Overton's semen, in order to plant the semen on the bed sheet evidence. To show that the semen originated from a condom, the stained bed sheet clippings were tested and proved positive for the presence of nonoxynol, a spermicide commonly found in condoms. At the eleventh-hour, the state listed a chemist with expert knowledge on nonoxynol to testify that the source of this chemical on the bed sheet may have been laundry detergent, *not* a condom. The state also retained the defense's only chemist expert to conduct testing for the prosecution. Thus, the defense was confronted with new state expert evidence, aimed at undermining the planting defense, and no longer had its own expert. The defense sought an expert chemist to 1) conduct further testing on the sheet to determine whether the nonoxynol at issue was the *spermicidal* form, and 2) confront the state's expert's assertion that the nonoxynol came from a detergent. The court's refusal to appoint a defense chemist resulted in a fundamentally unfair trial.

V. Despite the defense's repeated pre-trial requests for additional chemical testing, the prosecutor argued in closing that the defense had requested *only one* nonoxynol test, while the prosecution sought additional testing. This misleading argument suggested that the defense was hiding unfavorable evidence, and thus warranted a mistrial.

VI. The state's theory regarding how the crime occurred, and the motive for it, and three of the five aggravating circumstances, were established through the testimony of the snitch James Zientek, who was heavily impeached with evidence of prior violent crimes, motive to fabricate, and past lies. In an attempt to overcome the obvious credibility problems, the state presented hearsay testimony from a chaplain who testified that Zientek was "devastated" and crying as he spoke to her about Overton's purported confession. Because the motive for Zientek to fabricate his testimony arose well before his account to the chaplain, the evidence was wrongly admitted. This testimony cannot be deemed harmless where it placed an impermissible cloak of credibility on a key state witness.

VII. The defense sought to establish that Mr. Overton had filed an internal affairs complaint against Officer Visco for illegally towing his car, to show this officer's bias against Overton and motive to plant evidence. The trial court erroneously precluded this testimony by ruling that evidence of the complaint would open the door to testimony that Overton's automobile was searched in relation to a collateral murder investigation.

VIII. The evidence was insufficient to support the HAC aggravator as to Mr. MacIvor. In addition, the HAC, CCP, and avoiding arrest aggravators were established *solely* by the snitch Zientek, whose testimony was severely impeached. The trial court committed fundamental error in failing to instruct the jury to consider his uncorroborated testimony with great caution.

IX. The trial court was required to weigh all of the available mitigating factors, regardless of defendant's request to the contrary. The trial court erred in failing to require defense counsel to proffer mitigating evidence regarding the defendant's school background, mental health, medical records, and drug abuse.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S CAUSE CHALLENGES AGAINST JURORS HEUSLEIN AND RUSSELL.

A. Introduction – General Standards on Juror Challenges for Cause

A criminal defendant has a constitutional right to an impartial jury. Art. I, § 16, Fla. Const.; U.S. Const., 6th Am. The standard for determining whether a juror can be impartial is stringent: "[I]f there is basis for *any reasonable doubt* as to any juror's possessing that state of mind which will enable him to render an impartial verdict" he must be excused for cause. *Singer v. State*, 109 So. 2d 7, 23-24 (Fla. 1958); *Accord Hamilton v. State*, 547 So. 2d 630 (Fla. 1989); *Hill v. State,* 477 So. 2d 553 (Fla. 1985). "A juror is not impartial when one side must overcome a preconceived opinion in order to prevail." *Hill,* 477 So. 2d at 556.

Where a juror has responded to questions in a manner that warrants a challenge for cause, the prosecutor or trial judge may "rehabilitate" the juror. However, rehabilitation requires the *elimination* of reasonable doubt as to the juror's ability to be fair and impartial, not merely obtaining a contradiction or a retraction. *See Bryant v. State,* 601 So. 2d 529, 532 (Fla. 1992). In resolving a challenge to a juror's competence, the juror's assurance that he or she will follow the law announced at the trial is not determinative of his competence, "if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so." *Singer,* 109 So. 2d at 24. Because the impartiality of jurors is critical to our system of justice, "[c]lose cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality." *Sydleman v. Benson,* 463 So. 2d 533 (Fla. 4th DCA 1985); *Leon v. State,* 396 So. 2d 203, 205 (Fla. 3d DCA 1981).

B. Juror Heuslein Should Have Been Dismissed for Cause, Where He Could Not Presume the Defendant Innocent Because He Knew of the Extraordinary Restraint Measures Used on Mr. Overton During Trial, and He Was Strongly Predisposed Toward the Death Penalty and Never Unequivocally Expressed That He Could Follow the Law.

(1) Knowledge of Security Restraints Throughout the trial, Thomas Overton was required to wear an electro-shock "stun belt" around his waist and shackles around his ankles. The stun belt was remote-control operated, giving a corrections officer the power to administer an incapacitating 50,000 volt electric shock. (T. 933-6).

The trial court recognized that if the jurors became aware of these security measures Mr. Overton's right to be presumed innocent would be impaired (T. 935-936). Thus, the trial court allowed the restraints, over defense objection, but required that they be concealed from the jury (T. 916-917, 936). The stun belt was worn underneath Mr. Overton's clothing, plastic was placed around the shackles to silence them, and counsels' tables were "skirted" to hide the leg restraints (T. 929, 936). Mr. Overton was at all times seated at counsel table prior to the arrival of the jury in the courtroom (T. 931, 936).

Despite the numerous precautions taken to prevent the jury from learning of the extreme restraint measures, two venirepersons – William Heuslein and Harry Russell – disclosed during jury selection that they had heard of the security arrangements in the media[13] (T. 2322, 1674-5). Defense counsel moved to strike these jurors for cause (T. 1899-1900, 2441-2). Despite having previously acknowledged the prejudicial impact of these restraints, the judge refused to grant the cause challenges (T. 1901, 2443). The denial of these challenges was error.[14]

Both the Supreme Court of the United States and this Court have recognized

[13]One Herald article states: "The crime is one of the most bloody and violent in memory in the usually quiet Upper Keys and the formidable Overton is considered a major security risk. Overton appeared at Thursday's hearing . . . shackled hand and foot, leather straps binding his wrists and an electrical stun device strapped to his chest. One of the three deputies accompanying him held a remote unit to unleash a disabling jolt of electricity should Overton become unruly." (R. 780).

[14]The erroneous denial of the cause challenge against juror Russell on this ground is discussed in the following subsection.

that it is "*inherently prejudicial*" for jurors to see the accused physically restrained with shackles during trial. *Holbrook v. Flynn,* 475 U.S. 560, 568-569 (1986), *citing Illinois v. Allen*, 397 U.S. 337 (1970); *Bello v. State,* 547 So. 2d 914, 918 (Fla. 1989). Several other courts have noted the dangers inherent in restraining the accused in the presence of the jury.

> [T]he presumption of innocence requires the garb of innocence . . . When the court allows a prisoner to be brought before a jury with his hands chained in irons . . . the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers . . . [W]e note the inherent prejudice to the accused when he is cast in the jury's eyes as a dangerous, untrustworthy and pernicious individual from the very start of the trial.

Kennedy v. Cardwell, 487 F.2d 101, 104-6, 111 (6th Cir. 1973) (citations omitted). *See also U.S. v. Samuel*, 431 F.2d 610, 614-5 (4th Cir. 1970) ("unusual restraints" mark defendant as an obviously bad man and suggest his guilt as a "foregone conclusion"); *Dorman v. U.S.,* 435 F.2d 385, 398 (D.C. Cir. 1970) ("jury should be allowed to weigh the evidence without feeling the terror of impending doom if they acquit the defendant"); *People v. Duran*, 545 P.2d 1322, 1327 (Cal. 1976) (where defendant is charged with a violent crime, physical restraints are "likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged"); *Elledge v. Dugger*, 823 F.2d 1439, 1450 (11th Cir. 1987) (in a capital case, jury may view restraints "as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the

courtroom may also be unmanageable in prison," making death proper penalty).

The electro-shock belt worn by Mr. Overton during this trial was an extreme security measure, not an ordinary or traditional restraint such as handcuffs or shackles. Awareness by jurors of this device is "even more prejudicial than handcuffs or leg irons because it implies that *unique force* is necessary to control the defendant." *State v. Flieger,* 955 P.2d 872, 874 (Wash. Ct. App. 1998).

Juror Heuslein spontaneously disclosed during the general-panel voir dire that he was aware of the security arrangements (T. 2152). Defense counsel had asked, "As you look over at Mr. Overton do you have any sort of gut feelings about him, any sort of impressions that come to mind?" In response to this open-ended question, Heuslein stated: "Just from what you've read and whatnot and he says he's innocent . . . I say everyone in court is innocent until the jury decides they're guilty. *I mean, why a person has so many restraints on them while in court and whatnot makes you really wonder.*" (T. 2152).

During the individual questioning, Heuslein specified that he had read in the newspaper about the concealed stun belt and the leg shackles. The juror's awareness of the "heavy restraints" impaired his ability to be impartial and presume Mr. Overton innocent.

> [DEFENSE]: You had mentioned yesterday about reading about restraints.
>
> [HEUSLEIN]: Oh, yeah. I'm sorry. *The newspaper said that the front of the table is going to be covered because of leg restraints and*

stun belts and all of that.

[DEFENSE]: Did that have an affect on you?

[HEUSLEIN]: Well, the only reason I even brought that up yesterday is *everybody is saying you're innocent when you come into court. Well, if he's innocent, why is he in all of these heavy restraints. Why can't he just sit there the way we sit there? That was all that I meant about that.*

[DEFENSE]: Okay. So you think that, to you, indicates that he's not innocent?

[HEUSLEIN]: No. I just, you know, *think it's rather weird. You're expecting us to instantly believe a person's innocent. Why are you restraining him?* (T. 2152, 2322).

Further, Heuslein never unequivocally expressed that he could set aside his knowledge of the restraints and presume Mr. Overton innocent. Instead, when asked if the restraints would impact him, he said "I don't *think* so" (T. 2323). When asked if he could put his knowledge about the extreme restraints out of his mind, Heuslein candidly admitted "I don't know, to tell you the truth" (T. 2324).

Ambiguous responses such as these have repeatedly been found insufficient to rehabilitate a prospective juror. *See Price v. State,* 538 So. 2d 486, 489 (Fla. 3d DCA 1989) (juror's responses of "I could do it" and "I think so" when asked if she could be fair were insufficient); *Brown v. State*, 728 So. 2d 758, 759 (Fla. 3d DCA 1999) (juror's response of "Yeah, I think so" when asked if he could follow the law was equivocal); *Williams v. State,* 638 So. 2d 976, 978 (Fla. 4th DCA 1994) (no rehabilitation where juror asked if he could be fair and responded "I hope so,"

despite final statement by juror that he would be impartial); *Imbimbo v. State*, 555 So. 2d 954 (Fla. 4th DCA 1990) (no rehabilitation where juror stated that she "probably" could follow the court's instructions).

The prosecutor attempted to rehabilitate Heuslein by explaining the different standards of proof for arrest and conviction, and asking the juror generally if he could set aside everything he had read in the newspaper.[15] Notably, though, the prosecutor did *not* explain that physical restraints are not proof of guilt, and did not question Heuslein on whether knowledge of the restraints would impact his ability to presume the defendant innocent (T. 2326-8). Immediately thereafter, defense counsel again specifically questioned Mr. Heuslein regarding the security measures, and the juror again responded equivocally, twice saying "I don't think so" when asked if the restraints would seep into his thinking when considering the verdict (T. 2328-29). The juror's responses to defense counsel's final questions regarding the concealed restraints were equivocal and insufficient to eliminate reasonable doubt as to whether Mr. Heuslein's knowledge of the restraints impaired his ability to presume Mr. Overton innocent. *See Price,* 538 So. 2d at 489; *Brown*, 728 So. 2d at 759; *Williams,* 638 So. 2d at 978.

The physical restraints, particularly the unusual electric-shock stun belt, branded Mr. Overton as dangerous and uncontrollable. Any juror who became

[15]Heuslein had disclosed that he read every newspaper article about this case, and knew "the whole story," from "the sperm being found to DNA fingerprint . . . the deaths, the rape, the child," and "everything the papers said." (T. 2320).

aware of the hidden stun belt would inevitably be prejudiced against Mr. Overton. *See Holbrook v. Flynn,* 475 U.S. at 568-570 ("little stock" need be placed in juror's claims that he or she is unaffected by restraints); *Kennedy,* 487 F.2d at 105-106 (jury "must necessarily conceive a prejudice" where defendant is chained). Heuslein candidly admitted that the extreme restraints affected his ability to presume Mr. Overton innocent, and never unambiguously stated that he could set aside this prejudice. Thus, the court erred in failing to grant defense counsel's cause challenge against Heuslein on this ground, requiring a new trial.

(2) Strong Disposition Toward Death Never Unequivocally Renounced

The test for determining if a prospective juror should be excluded for cause because of his or her views on the death penalty is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Bryant v. State,* 601 So. 2d 529 (Fla. 1992), *quoting Wainwright v. Witt*, 469 U.S. 412, 424 (1985). If there is a basis for any reasonable doubt as to whether a juror can follow the court's instructions and render an impartial recommendation as to punishment, the juror must be excused for cause. *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985).

Where the record preliminarily establishes that a juror's views on the death penalty could prevent or substantially impair his or her duties, the juror may be rehabilitated. However, the prosecutor or judge must "make sure" that the prospective juror can be impartial. *Bryant*, 601 So. 2d at 532. A statement by the

juror that he can follow the law in rendering a sentencing recommendation does not control, where the juror's other responses are "sufficiently equivocal to cast doubt on this." *Bryant v. State,* 656 So. 2d 426, 428 (Fla. 1995).

Juror Heuslein expressed a strong bias in favor of the death penalty and was never sufficiently rehabilitated. During the general-panel questioning, the prosecutor explained the law regarding the weighing of aggravators and mitigators, and asked jurors if they could "go through that process" (T. 2081). Heuslein responded, "[Y]es, I could weigh it both ways. *I just agree with the death penalty rather than the United States people paying the jail for 25 years . . . on serious cases of murder and whatnot.*" (T. 2082). When asked if he could recommend the death penalty, Heuslein responded, "Sure." (T. 2082). When asked if he could conceive of recommending a life sentence, the juror said, "Depending on the circumstances." (T. 2082).

During the individual questioning, Mr. Heuslein stated "*I believe if someone planned to murder somebody that their life should be taken*." He said he thought that *everyone* convicted of first degree murder should get the death penalty, and that no further aggravating circumstances should be necessary. Moreover, the juror found it "remarkable that it costs so much money to keep an inmate in prison." When asked if his views on the cost of keeping people in prison would enter into his views, Heuslein responded "that's my personal feeling. So I guess you would have to say that would enter in my views." (T. 2332-4).

The prosecutor attempted to rehabilitate Heuslein, but his responses regarding whether he could follow the law were equivocal.

> [STATE]: And if he [the judge] tells you that you are not to be biased one way or the other on any phase here and you are to give weight to each of these factors and determine what the weight is, can you do that?
>
> [HEUSLEIN]: *I would think so.*
>
> [STATE]: And do you think you could set aside your personal leanings towards the death penalty while you were doing that?
>
> [HEUSLEIN]: *I would have to see when the time came, but I would think so.*

When asked if he could "set aside [his] personal leanings," Heuslein responded "I would say so." (T. 2332-4). Such ambiguous responses are insufficient to eliminate any reasonable doubt regarding a juror's ability to be impartial. *See Price,* 538 So. 2d at 489; *Brown*, 728 So. 2d at 759; *Williams,* 638 So. 2d at 978.

Thereafter, the trial judge also attempted to rehabilitate the juror by asking several leading questions, but Heuslein continued to equivocate, saying "I *think* I could do what you ask me to do" (T. 2335). When asked if he could "do this by the book and not be influenced by some preconceived notion," Heuslein responded "*I think I could*" (T. 2336-7). The judge then asked Heuslein if he could entertain the possibility of coming back with a recommendation of life, and the juror answered "*I think so*" (T. 2337).

After a few more questions, the trial judge posed a leading question –

"Despite what you personally thought, can you put that out of your head, can you start from a clean slate and apply the scheme as the Court gives it to you?" – and finally got Heuslein to answer "yes" (T. 2337). Immediately thereafter, though, when defense counsel said to Heuslein that he seemed to be hedging a bit concerning his ability to apply the statutory sentencing scheme, Heuslein replied "*Like I said, you'd have to just see what, you know, what went at that time*" (T. 2338). When defense counsel pressed further, explaining that the questions were an attempt to find out if Heuslein would be carrying opinions into the jury room despite saying he'd follow the judge's instructions, the juror responded "*See, I've never been in this situation*" (T. 2339).

Mr. Heuslein's assurance of impartiality must be viewed in light of his other responses. *See Parker,* 641 So. 2d 369, 373 (Fla. 1994). "It is difficult for any person to admit that he is incapable of being able to judge fairly and impartially." *Singer,* 109 So. 2d at 24. Once a juror "demonstrates a predilection" incompatible with impartiality, "a subsequent change in that opinion, arrived at after further questioning by the parties' attorneys or the judge," is suspect. *Club West, Inc. v. Tropigas of Florida, Inc.,* 514 So. 2d 426, 427 (Fla. 3d DCA 1987); *see also Singer,* 109 So. 2d at 24 ("subsequent statements, in response to questions from the trial judge," may be insufficient to "overcome the effect of what [the juror] had previously said as to his state of mind").

There is "no doubt but that a juror who is being asked leading questions is

more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions, and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented." *Price,* 538 So. 2d at 489. In *Johnson v. Reynolds*, 121 So. 793, 796 (Fla. 1929), this Court noted:

> It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Mr. Heuslein's responses, viewed together, failed to establish that he could set aside his bias in favor of the death penalty and follow the law. Thus, the trial court erred in failing to excuse him for cause. *See Bryant,* 656 So. 2d at 428 (error to deny cause challenge where juror biased in favor of death stated that he could follow the law but other equivocal responses cast doubt on this). This error requires a new penalty-phase proceeding. *See Bryant,* 601 So. 2d at 532.

(3) Preserved Trial Court Error Defense counsel was forced to use a peremptory strike to remove juror Heuslein (T. 2443). Thereafter, counsel exhausted his peremptory strikes, identified several jurors that he wished to strike peremptorily, and requested additional peremptory challenges, which the court refused (T. 2447-2448, 2454, 2906-2913). Thus, this issue was properly preserved. *See Trotter v. State,* 576 So. 2d 691, 693 (Fla. 1990).

C. Russell Should Have Been Dismissed for Cause Where His Responses Raised a Reasonable Doubt as to Whether He Could Follow the Law Regarding the Right to Remain Silent, He Knew of the Drastic Security Restraints Used on Mr. Overton, and He Knew of Other Prejudicial Facts Not Introduced at Trial.

(1) The Right to Remain Silent The presumption of innocence is defeated if "a juror is taken upon a trial whose mind is in such condition that the accused must produce evidence of his innocence to avoid a conviction." *Singer*, 109 So. 2d at 24, quoting *Powell v. State,* 131 Fla. 254, 175 So. 213, 216 (1937). *Accord Hamilton,* 547 So. 2d at 633 (juror who would require defendant to prove innocence is not impartial).

Juror Harry Russell's responses during voir dire raised a reasonable doubt as to whether he could follow the law regarding the right to remain silent.

> [DEFENSE]: Mr. Russell, how do you kind of weigh in on this [right to remain silent]?
>
> [RUSSELL]: I understand what Judge Jones said, but I kind of believe like, I'd want to get up there if I was innocent, you know, and say what I had to say to explain myself. You know what I mean?
>
> [DEFENSE]: Right. So would you kind of expect --
>
> [RUSSELL]: To me, I don't know, I always think if a person's innocent they should get up on that stand and speak up for themselves. That's the way I believe. But also, I understand what the Judge said, too. It's like -- it's like confusing to me.
>
> [DEFENSE]: Well, if --
>
> [RUSSELL]: *But in all honesty, that's what I really believe. I believe a person should get up there and say, I didn't do this.*

[DEFENSE]: That's what you would want someone to do?

[RUSSELL]: *Yes.* (T. 1490).

Russell then told the court that he could follow the law, but added a caveat:

[RUSSELL]: *It's like I said, I could follow the Judge's rules, but I still feel the person should get up there if they're innocent*"

[DEFENSE]: Okay.

[RUSSELL]: *I can't -- I can't see myself sitting there and being accused of a crime and not getting up there and trying to clear myself, you know*.

[DEFENSE]: Uh-huh.

[RUSSELL]: *That's the way I believe*. (T. 1492).

In subsequent individual questioning, Mr. Russell told the court that he could follow instructions, and agreed that if the defendant did not testify it would not come into his deliberations (T. 1681). But when the court asked about reservations Mr. Russell had expressed the previous day, he responded "*Well, that's -- right, that's the way I always feel about it when someone doesn't take the stand, I figure they've got something to hide. That's the way I've always believed*." (T. 1681-2). Russell then reiterated his belief that "[t]he person charged should always testify," and "*if I was charged with a crime that I'd want to get up there knowing that I'm innocent and tell it to the jury myself.*" (T. 1683).

[DEFENSE]: Well, what about other people? You wouldn't tend to hold that against someone who wouldn't take the stand?

[RUSSELL]: No, that's -- it's --

> [DEFENSE]: You wouldn't think, well, why didn't he?
>
> [RUSSELL]: I *would* think that, but I would close that out of my mind, because the Judge said to close it out of your mind.
>
> [DEFENSE]: Well, I mean, --
>
> [RUSSELL]: I wouldn't consider that if that's what you're asking me. I wouldn't hold that against him. (T. 1683-4).

Although Mr. Russell compliantly stated in response to leading questions that he could follow the law, he candidly admitted that he has "always believed" that an innocent person would testify, and that he would think about that if the defendant chose not to present evidence. Mr. Russell's statement that he could "shut out" his beliefs because the judge told him to, must therefore be viewed with skepticism, in light of the juror's other responses.

Jurors very often respond to leading questions with the "correct" answers so as to please the court and/or the attorneys. *See Price,* 538 So. 2d 489. However, "subsequent statements, in response to questions from the trial judge," may be insufficient to "overcome the effect of what [the juror] had previously said as to his state of mind." *Singer*, 109 So. 2d at 24.

Mr. Russell's responses, viewed as a whole, demonstrate that the juror could not readily abandon his belief that the accused would testify if he were innocent. *See Parker,* 641 So. 2d at 373 ("[I]n evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror"). His statement that he could abide by the trial judge's instructions did

not erase all reasonable doubt as to his competency, given his repeated assertions that "in all honesty" what he "really believe[d]" is that "a person should get up there and say, I didn't do this." (T. 1490). It is simply asking too much to expect that Mr. Russell, when deciding the fate of a person accused of two brutal murders, could scrupulously set aside strongly held life-long beliefs that told him if Mr. Overton was *really* innocent, he would take the stand. Here, as in *Hamilton v. State*, 547 So. 2d at 633, "[a]lthough the juror . . . stated in response to questions from the bench that she could hear the case with an open mind . . . [i]t is clear that the juror did not possess the requisite impartial state of mind necessary to render a fair verdict and thus should have been dismissed from the jury pool."

(2) Knowledge of Security Restraints and Other Prejudicial Facts Like Heuslein, Mr. Russell was aware from the media of the concealed restraint measures used on Mr. Overton (T. 1674-5). Russell felt that Mr. Overton might be "very dangerous," and seemed to recall reading that Overton "wanted to escape" (T. 1675). Russell had also read that Mr. Overton had attempted suicide by cutting his throat after his arrest, another very prejudicial fact *not* presented at trial (T. 1674). The juror admitted that based on what he read he believed that Mr. Overton was guilty (T. 1671).

> [DEFENSE]: Well, do you think given what you've read, do you think that he's probably guilty?
>
> [RUSSELL]: Do I think he's guilty?

[DEFENSE]: Yes.

[RUSSELL]: *I think he's here for a reason, but I'd have to hear, you know, like I said inside, I'd have to hear the whole case.*

[DEFENSE]: Right. Given the fact that you, you know, read the "Citizen" every day and there's been quite a few articles in the "Citizen" over a long period of time about this, as you were reading it did you think that Mr. Overton was guilty?

[RUSSELL]: *Yeah.*

[DEFENSE]: Okay. And you based that on what you read, correct?

[RUSSELL]: Uh-huh. (T. 1674-6).

Upon further questioning the juror vacillated, stating that he could presume the defendant innocent, while asserting that the newspaper "points a finger" at Overton, and that he must be there "for a reason" (T. 1677-80). The juror also acknowledged that in considering the evidence he would "[p]robably . . . be wondering why there's, you know, so much security, what was the real reason for it." (T. 1680). Russell could not remember ever reading of other similar security measures being used and, concerning the heightened security, said "I'm glad it's here, you know. I feel very relaxed with everything." (T. 1679).

When questioned by the prosecutor, Russell changed his response, and stated that he would not think about the security while deliberating (T. 1677). The juror also stated that if he were selected, he would presume the defendant innocent, as if he did not know anything about the case and everything were "fresh" (T. 1679). But Mr. Russell's knowledge of the concealed security

measures necessarily prejudiced the juror against Mr. Overton. *See Holbrook,* 475 U.S. at 568-569 (shackles and gags inherently prejudicial); *Bello,* 547 So. 2d at 918 (shackles inherently prejudicial). The United States Supreme Court has noted that "little stock" need be placed upon a juror's assurances that he is uninfluenced by manifestly prejudicial restraints. *See Holbrook,* 475 U.S. at 568-570. This is especially true here, where the juror observed that the security must be there for "some special reason," speculated that the defendant may be "very dangerous," and admitted he was "glad" the heightened security was there (T. 1675, 1679-80).

In addition to his knowledge of the hidden restraints, juror Russell also knew that Mr. Overton attempted suicide after his arrest, a fact not introduced by the prosecution at trial (T. 1674, 3847-53). A juror's knowledge of inadmissible and highly prejudicial facts requires that the juror be excused for cause, regardless of the juror's assurances that he can be impartial. *See Reilly v. State,* 557 So. 2d 1365, 1367 (Fla. 1990) (holding that although juror stated that he could be impartial, it was unrealistic to expect him to entirely disregard knowledge of a suppressed confession, no matter how hard he tried); *Overton v. State,* 757 So. 2d 537 (Fla. 3d DCA April 12, 2000).[20]

[20]After this trial, Mr. Overton was brought to trial on the burglary charge for which he was originally arrested. *See* Facts section, pg. 4-5. Several prospective jurors were aware that Overton was sentenced to death in this case. The same trial judge refused to excuse the jurors for cause, based on their assurances that they could set this knowledge aside. The Third District reversed, holding that the jurors' knowledge of the outcome of this case required that they be excused for cause, regardless of their assertions that they could be impartial.

(3) Preserved Trial Court Error Mr. Russell's repeated assertions that an innocent defendant would testify demonstrated that he was incapable of giving effect to the defendant's constitutional right to remain silent. The trial court thus erred in failing to excuse Mr. Russell. *Independently*, Mr. Russell's responses regarding the security restraints and other damaging facts also demonstrate that he could not be impartial. At the least, Mr. Russell's responses concerning prejudicial extraneous facts and the right to remain silent raise a reasonable doubt as to his ability to render an impartial verdict. The trial court thus erred in denying defense counsel's cause challenge to Mr. Russell.

Defense counsel was forced to use a peremptory strike to eliminate Russell from the panel (T. 1915). Thereafter, defense counsel preserved this issue by requesting additional peremptory challenges for specified jurors (T. 2906-2913). The court's refusal to strike juror Russell or grant additional challenges requires a new trial. *See Trotter*, 576 So. 2d at 693.

II. THE TRIAL COURT ERRED IN ADMITTING THE STATE'S SHORT TANDEM REPEAT DNA TESTING, WHERE THE DEFENSE WAS NOT PROVIDED THE LABORATORY'S VALIDATION STUDIES, PROTOCOL MANUAL, AND PROFICIENCY TESTS, MATERIALS THAT WERE ESSENTIAL TO EVALUATE THE RELIABILITY OF THE TESTING, AND THE DEFENSE WAS THEREFORE PREVENTED FROM CHALLENGING THE STATE'S PROOF AT THE *FRYE* HEARING, IN VIOLATION OF AMENDMENTS V AND XIV TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

The second DNA test procured by the state involved a new method of testing known as "STR" or short tandem repeats (R. 959; T. 937, 1068-9). The parties agreed that a *Frye* hearing would be necessary to judge the admissibility of this evidence[21] (R. 954, 957, T. 834, 1012). The defense DNA expert, Dr. Gary Litman, had advised counsel that STR is a newer, highly technical DNA typing method, and that he would need copies of certain critical documents from the testing laboratory to assess the reliability of the STR test, and to assist counsel in confronting the state's evidence, both at the *Frye* hearing and at trial. (R. 901-8, 953-8). The laboratory's *protocol manual* was necessary for Dr. Litman to understand *how* the test was performed, and to assess whether the laboratory adhered to the protocol in this case (R. 902, 954, 956-7). *Validation studies* were necessary to assess the reliability of the testing procedures, as applied by this laboratory, under various circumstances (R. 904, 954, 956, 958). *Proficiency test results* were also necessary to examine the laboratory's capability to carry out this testing, and the qualifications of the laboratory personnel (R. 903, 954, 958). Dr. Litman explained that these items are routinely obtained in other cases from other DNA test providers (T. 957-8). Despite repeated defense discovery requests (see Facts section at 13-16), these materials were not provided (T. 1237). The court refused to compel discovery and/or grant a continuance, concluding that the

[21]No Florida appellate court has addressed whether STR testing is admissible under *Frye.* Until a principle, test, or methodology has been subjected to a thorough *Frye* analysis in Florida, it must be *Frye* tested. *See Hadden v. State,* 690 So. 2d 573 (Fla. 1997).

requested discovery was unnecessary and "overreaching"[22] (T. 1030, 1168).

Numerous state and federal courts have recognized the need for extensive pre-trial discovery of materials relating to DNA tests, including the specific documents requested here, where a defendant seeks to challenge the admissibility of a DNA testing method.[23] The National Research Council's first report[24] states

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[22]Florida Rule of Criminal Procedure 3.220(f) states that "on a showing of materiality" a trial court may require such discovery to the parties "as justice may require." The second request for discovery and Dr. Litman's affidavit to the court explained that he could not independently evaluate the STR testing without the requested materials (R. 901-8, 953-8). The trial court erred in refusing to compel production of these documents. Alternatively, the trial court could have cured the problem by granting a continuance, giving counsel the opportunity to otherwise obtain or photocopy the documents at the laboratory in Virginia (T. 936-41). Instead, the trial court refused to compel discovery or postpone the proceedings, declared that the documents were unnecessary, and forced the defense to proceed without them (T. 1029-30, 1168).

[23]*See U.S. v. Yee,* 129 F.R.D. 629, 636 (N.D. Ohio 1990) (where defense counsel sought to obtain validation studies and proficiency tests prior to *Frye* hearing, court held that "the issue of admissibility fairly depend[s] on pre-hearing access by defense counsel and their experts to the [DNA testing] materials that are the subject of their discovery request.")*; Hunter v. State,* 857 S.W.2d 63 (Ark. 1994) (abuse of discretion to deny continuance where state did not provide discovery of all materials relating to DNA testing, including protocols, for review by defense expert); *State v. Charles,* 607 So. 2d 566 (La. 1992) (trial court ordered to provide defendant access to all documents pertinent to methodology used in DNA analysis sufficiently in advance of pre-trial hearing on admissibility); *Perry v. State,* 586 So. 2d 242, 254 (Ala. 1991) (finding that laboratory protocols, validation studies and proficiency tests are among the items of discovery that should be provided "to allow a proper, well-informed determination of the admissibility of DNA evidence"); *State v. Schwartz,* 447 N.W.2d 422, 427 (Minn. 1989) (where defense challenged admissibility of DNA test, pre-trial access to specific information relating to laboratory methodology and validation studies was "crucial" to ensure "at least an opportunity for independent expert review"); *See also Armstead v. State,* 673 A.2d 221 (Md. 1996) (state statute mandates that materials relating to DNA analysis, including laboratory protocols, must be provided to opposing counsel). *See generally* Anthony Pearsall, *DNA Printing: The Unexamined*

that "all data and laboratory records generated by analysis of DNA samples should be made freely available to all parties. *Such access is essential for evaluating the analysis.*" NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE at 150 (1992) (NRC I). The Council's second report reaffirms this principle, stating that "every jurisdiction should make it possible for all defendants to have *broad discovery and independent experts*." NATIONAL RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE at 41 (1996) (NRC II). Pretrial discovery is the "essential tool" needed to "unmask untrustworthy forensic analysis."[25] Trial judges "cannot adequately deal with scientific evidence without discovery, and *good science is the antithesis of trial by ambush*."[26]

Here, the materials requested by the defense were highly relevant to assess the reliability of the STR testing under *Frye.* Without critical validation studies, the protocol manual, and proficiency tests, Mr. Overton was denied the Fifth Amendment due process right to challenge the state's proof at the *Frye* hearing.

The Frye Hearing-- Adversarial requirement. The principal inquiry

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'Witness' in Criminal Trials, 77 CALIF. L. REV. 665, 676 (1989) (access to DNA test information is "vital" where defense seeks to challenge test results).

[24]This Court has relied on the National Research Council reports as a major authoritative source on forensic DNA testing. *See Hayes,* 660 So. 2d at 262; *Brim v. State,* 695 So. 2d 268 (Fla. 1997); *Murray v. State,* 692 So. 2d 157 (Fla. 1997).

[25]Edward J. Imwinkelried, *The Debate in the DNA Cases Over the Foundation for the Admission of Scientific Evidence: The Importance of Human Error as a Cause of Forensic Misanalysis,* 69 WASH. U. L.Q. 19, 38 (1991).

[26]Paul C. Gianelli, *The DNA Story: An Alternative View,* 88 J. CRIM. L. & CRIMINOLOGY 380, 414 (1997).

under the *Frye* test is whether the scientific theory from which an expert derives an opinion is reliable. *Ramirez v. State,* 651 So. 2d 1164, 1167 (Fla. 1995). The burden is on the proponent to prove by a preponderance of the evidence the general acceptance in the scientific community of both the underlying scientific principle *and the testing procedures used to apply that principle to the case at hand*. *Id.* at 1168.[27] In *Ramirez*, this Court explained that it is "impossible" for a trial judge to correctly determine whether the state has met its burden under *Frye* where the defense is denied the right to present evidence to the contrary.

> Just as important as the burden of proof is the fact that the hearing must be conducted in a fair manner. *There is no question that a hearing on the admissibility of novel scientific evidence is an adversarial proceeding in which conflicting evidence is presented to the trial judge as the trier of fact. Without the testimony of experts presented by both parties, the trial judge is denied a full presentation of relevant evidence. This is especially important in a criminal trial where the defendant is guaranteed certain constitutional rights, not the least of which is the due process right to present witnesses in one's behalf. Id.*

Defense counsel urged that he was not prepared to go forward with the *Frye* hearing, that he could not effectively cross-examine the state's expert witnesses, and that he could not present evidence where the defense expert had not reviewed the requested validation studies, protocol manual, and proficiency tests (T. 940-5, 1019-23, 1026-9). Counsel had repeatedly and diligently sought discovery of these documents (See Facts at 13-16). Nevertheless, the court refused to postpone

[27]In *Hayes v. State,* 660 So. 2d 257, 262-4 (Fla. 1995), this Court noted that while the "scientific underpinnings" of DNA testing are accepted by the scientific community, specific DNA testing procedures must also be generally accepted.

the hearing so as to allow counsel an opportunity to obtain copies of the critical materials, and found "absolutely no difficulty or problem in proceeding" (T. 1023, 1030). The court's actions prevented the hearing mandated by *Ramirez.*

Evidence presented The state presented the testimony of three experts. First was James Pollack, an FDLE forensic serologist who specialized in RFLP/DNA analysis, and had *no training* in STR testing (T.1034-6). Pollack testified that STR testing has not been "available to us until fairly recently," but that RFLP and STR fragments are "basically the same"[28] (T. 1051, 1069).

Next was Dr. Robert Bever, director of the Bode Technology Group, the laboratory that performed the STR test in this case (T. 1074). Bever explained that Bode is a "private business," stating, "We get paid for our services. I'm being paid today, I hope." (T. 1128). Bever outlined the basic STR process, and stated that STR, the method of testing used by his company, is generally accepted in the scientific community and considered "extremely reliable" (T. 1090, 1095-1105, 1127-8). Bever acknowledged that STR testing differs from RFLP, and that one difference is that STR testing procedures are prone to contamination (see following discussion on Validation Studies), but assured that his laboratory uses

[28]Pollack's testimony was inaccurate and misleading. The various types of DNA tests-- including RFLP, DQ alpha/polymarker testing, D1S80, AMP-FLP tests, and STR-- involve distinct procedures and examine different locations or "loci" on the DNA strands of different chromosomes. *See generally* William C. Thompson, *Guide to Forensic DNA Evidence, in* EXPERT EVIDENCE, A PRACTITIONER'S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL 202-22 (Bert Black & Patrick W. Lee eds., 1997).

several quality assurance controls to prevent contamination during testing (T. 1095, 1103, 1105, 1110-3).

Finally, Dr. Martin Tracey, a university biology professor, testified for the state regarding the competence of the Bode laboratory (T. 1133, 1141). Tracey's opinion was based on one informal "lunch-hour" tour of the facility, and two subsequent informal visits (T. 1144-5, 1152). Tracey admitted that he has never conducted a formal, independent review of any laboratory (T. 1152). Nevertheless, Tracey testified that he found no errors in Bode's procedures, and that Bode's testing methods are generally accepted in the scientific community (T. 1145). Tracey did not participate in or witness the testing in this case (T. 1153).

Without the validation studies, protocol manual, and proficiency tests, defense counsel could not cross-examine the state's witnesses or present controverting expert evidence (T. 1019-23, 1026-9, 1064, 1132, 1158-9). The trial court relied on the unchallenged self-serving testimony of the state's experts to find that the STR testing was admissible (T. 1169). The materials requested by the defense were highly relevant to assess the reliability of the STR test under *Frye*.

(1) Validation Studies

a) Validation of DNA testing procedures in general. "Validation" refers to the process used by the scientific community to acquire the necessary information to assess the ability of a procedure to reliably obtain a desired result, determine the conditions under which such results can be obtained, and determine

the limitations of the procedure. *See* Technical Working Group on DNA Analysis Methods (TWGDAM), *TWGDAM Guidelines for a Quality Assurance Program for DNA Analysis*, 18 CRIME LABORATORY DIGEST 44 (1991) (hereinafter TWGDAM at § 4.1.1).[29] Validation studies examine the accuracy and reproducibility of a technique, both within the laboratory and among different laboratories, and evaluate the sensitivity of testing methods using samples exposed to a variety of environmental conditions, deposited on typical crime scene evidence, and/or mixed with commonly encountered substances. TWGDAM at § 4.1.5. The National Research Council has stressed that all new DNA typing methods, substantial variations on an existing method, or new technical testing procedures must be "thoroughly tested" in both research and forensic settings to determine the circumstances under which they will yield reliable results. NRC I at 72, 104-5.

Many different types of validation studies are necessary to assess the reliability and limitations of complex DNA testing procedures. TWGDAM at §§ 4.1-4.5. Moreover, both developmental validation studies *and* internal validation studies by the laboratory that performed the testing at issue are necessary. *Id.* The

[29]The National Research Council has recommended that laboratories adhere to the quality standards defined by TWGDAM. *See* NRC II at 37. TWGDAM, established in 1988 under FBI Laboratory Division sponsorship, consists of government and private sector scientists from the U.S. and Canada. The group has published numerous quality assurance guidelines that are considered authoritative in forensic DNA analysis. *See* NRC II at 59; Lawrence A. Presley, *The Evolution of Quality Standards for Forensic DNA Analysis in the United States,* PROFILES IN DNA (1999), *at* <http://www.promega.com/profiles/302/302_10/default.htm>.

TWGDAM guidelines specify that "prior to implementing a new DNA analysis procedure, or an existing DNA procedure developed by another laboratory . . . *the forensic laboratory must first demonstrate the reliability of the procedure in-house*." TWGDAM at § 4.5. Internal validation studies assess the laboratory's ability to accurately perform a particular type of test. Such studies include testing of the method using known samples, testing of any material modifications to the analytical procedure, and tests that demonstrate that the laboratory's procedures do not introduce contamination that would lead to errors in typing. *Id.*

This Court has recognized that "adequate studies on the accuracy and reliability" of a DNA testing technique are critical to assessing its scientific reliability under *Frye*. *See Hayes v. State,* 660 So. 2d 257 (Fla. 1995) (quoting NRC I and concluding that band-shifting technique had not been sufficiently validated to have gained general acceptance). *Accord U.S. v. Bonds,* 12 F.3d 540 (6th Cir. 1992) (validation studies are integral to general acceptance analysis of DNA testing method); *Schwartz,* 447 N.W.2d at 426-7 (finding DNA test results inadmissible under *Frye* due, in part, to laboratory's failure to formally validate its methodology); *Yee,* 129 F.R.D. at 635 (tests sought by defense counsel on the effect of "environmental insults" on the DNA testing process were relevant to admissibility under *Frye*).[30] Rigorous validation testing is perhaps the single most

[30]*See also U.S. v. Lowe,* 954 F.Supp. 401 (D. Mass. 1996) (DNA profiling at D1S80 and polymarker loci was sufficiently reliable to be admissible where adequate validation studies had been conducted); Pearsall, *DNA Printing: The Unexamined 'Witness' in Criminal Trials* at 671-2 (validation studies are

important criterion in determining the reliability of scientific evidence. *See* DAVID L. FAIGMAN ET. AL., MODERN SCIENTIFIC EVIDENCE 20 & n.47 (1997) (testability of a method is generally a prerequisite for admissibility under *Daubert* standard).

b) Validation in the context of STR Testing. STR sequences are amplified using a process known as "PCR" or polymerase chain reaction. The National Research Council has warned that PCR-based DNA typing methods are very susceptible to error caused by contamination.[31] *See* NRC II at 70-71. Thus, TWGDAM recommends several types of validation studies to assess the conditions under which PRC-based methods will yield reliable results. *See* TWGDAM at § 4.4.

Several corporations create and sell STR testing "kits." The kits employ various testing procedures, increasingly new technologies, and use different STR loci.[32] A "multiplex" commercial STR kit was used to perform the testing in this case (T. 1107-8, 1115). Multiplex systems are those that amplify multiple STR loci together and run them in one gel. Coamplifying several loci can be problematic, and thus, very specific procedures must be followed during the

necessary to assess reliability of DNA testing methods when applied in forensic setting to typical crime scene samples).

[31]While most contamination will likely lead to a false-negative test result, false positive results are also possible. *Id.*

[32]*See* John M. Butler & Dennis J. Reeder, *Technology for Resolving STR Alleles* (last modified May 24, 2000) <http://www.cstl.nist.gov/div831/strbase/tech.htm>; *Published STR Multiplexes,* <http://www.cstl.nist.gov/div831/strbase/multiplx.htm>.

multiplex PCR amplification process. *See Published STR Multiplexes* at 5. The TWGDAM guidelines state that "where more than one locus is amplified in one sample mixture, *the effects of such amplification on each system (alleles) must be addressed and documented*." TWGDAM at § 4.4.1.6.

The National Research Council has noted the "potential for introduction of unreliable kits and the misuse of kits," and has recommended stringent testing of commercial kits before use in forensic DNA analysis. NRC I at 69. "Before a new STR system or STR multiplex may be routinely employed in human identity testing it should be *extensively validated* to insure the reliability of results."[33] In *Commonwealth v. Rosier*, 685 N.E.2d 739, 743 n.10 (Mass. 1997), where STR test results were found admissible, the reviewing court relied on the fact that "extensive validation tests" were conducted to evaluate the reliability and sensitivity of the STR kit at issue.

New STR kits are constantly being developed, and not all kits used by laboratories for forensic DNA testing have been adequately validated. Three trial courts around the country have recently refused to admit STR evidence, after conducting extensive *Frye* or *Daubert* hearings, where the STR systems or kits were not sufficiently validated.[34] In *People v. Bokin,* No. 168461 (Cal. Super. Ct.

[33]Butler & Reeder, *Validation Studies on STR Systems* (last modified May 24, 2000) <http://www.cstl.nist.gov/div831/strbase/valid.htm>.

[34]The trial courts' orders in these cases are available at http://www.scientific.org/news-notes/news.html

May 6, 1999), a California judge applying the *Frye* test excluded STR results obtained using the "Green One Kit." Although the state's expert testified that the use of STRs in general for forensic identification testing is accepted by the scientific community, the court found that the specific STR kit at issue and its procedures had not yet been sufficiently validated and subjected to peer review.

In *People v. Shreck,* No. 98CR2475 (Colo. Dist. Ct. 2000), a Colorado trial judge, also applying the *Frye* test, similarly excluded STR testing results, where the multiplex kit at issue used new loci, and had become commercially available only one year prior to the *Frye* hearing. The court found that this kit had not yet been rigorously validated, and noted that extensive validation is particularly necessary with regard to *multiplex* kits because co-amplifying multiple loci is a problematic and novel technique that may ultimately result in mistyping.

Finally, in *State v. Pfenning,* No. 57-4-96 (Vt. Dist. Ct. Apr. 6, 2000), a trial court applying the more lenient *Daubert* test also refused to admit STR test results obtained using two multiplex systems that had not been sufficiently validated by long use in a variety of settings, with a variety of forensic sample types. The court noted that STR testing is greater than the sum of its parts, and thus, the fact that the individual loci had been validated did not establish that the systems as a whole, which amplified several loci together, were scientifically reliable. The court also found that the fact that the kits were widely used by laboratories in constructing new offender databases did *not* establish the systems'

reliability, in the absence of proper validation studies.

c) Evidence of validation in this case. The defense was not provided with validation studies addressing the reliability of the STR test at issue (R. 901-8, 956; T. 1237). Defense counsel offered to accept a listing of the types of studies that had been conducted, to facilitate a more limited request for specific records, but such a list was not provided (R. 903, 957; T. 939, 1022, 1027, 1237).

Dr. Bever testified that a commercial kit was used in this case to coamplify four loci at one time (T. 1107-8, 1115). According to Bever, the 12 individual loci that were examined had been "thoroughly validated," and the commercial kit was internally validated by the Bode laboratory (T. 1114-5). The defense expert had no access to the Bode studies, and therefore Bever's self-serving testimony went unchallenged. The defense expert could not assess the extent to which this multiplex system was validated; whether the testing procedures were shown to be reliable and reproducible as applied by this laboratory; whether studies addressed the sensitivity of the procedure to contamination, environmental insult, or other conditions that might affect the testing; or whether any limitations to the testing had been identified. The trial court's refusal to allow the defense to review such critical information requires a new *Frye* hearing, where *both* parties can present evidence as to whether the multiplex kit at issue has been adequately validated.

(2) Protocol manual Even assuming that a DNA testing methodology has been adequately validated, such studies afford no assurance of the trustworthiness

of specific test results unless the forensic scientist followed the proper validated protocol during the test at issue. *See* Imwinkelried, *The Debate in the DNA Cases Over the Foundation for the Admission of Scientific Evidence* at 30. "The importance of complying with sound protocol is obvious when the scientific technique in question is a complex, multi-step procedure. The more complex the forensic test, the more critical it is that the forensic scientist scrupulously comply with proper protocol." *Id.*

STR testing is a highly technical process. Several different procedures and new technologies may be used. *See Technology for resolving STR alleles* at 1-8. In his affidavit to the trial court, the defense DNA expert explained:

> The testing company would possess a detailed laboratory manual describing the specific methods and procedures that they employ. . . *[G]iven the highly technical nature of the STR typing method, and the complexity of the individual case-specific . . . laboratory records . . . it would not be possible to understand what steps had been followed in the absence of a laboratory manual* . . . In well over 100 cases in which I have been appointed as a DNA expert, I could not recall a single instance in which a copy of the procedure manual, the primary document used to conduct the tests, had not been provided as there would be (at the very least) no basis for the expert to judge whether or not the test provider adhered to their defined procedures and standards. (R. 953-6).

The National Research Council reports stress the importance of protocol manuals, stating that "[e]ach DNA typing procedure *must* be completely described in a detailed, written laboratory protocol." NRC I at 8; *See also* NRC II at 48. "Such a protocol should not only specify steps and reagents, but also provide

precise instructions for interpreting results, which *is crucial for evaluating the reliability of a method*. Moreover, the complete protocol should be made *freely available* so that it can be subjected to scientific scrutiny." NRC I. at 53.

The NRC has explained that the issue of whether the analytical work done for a particular trial comports with proper procedure "can be resolved only case by case and is always open to question," even if the general reliability of the DNA typing method is proven. *Id.* at 134. The Council has recommended that "*DNA evidence should not be admissible if the proper procedures were not followed*." *Id.* Courts have followed this recommendation, and found that adherence to proper laboratory protocols is a relevant factor in assessing the reliability, and consequent admissibility, of the DNA test results.[35]

In the present case, the defense was not provided the protocol manual, and was therefore unable to assess *how* the laboratory performed the STR test at issue, and whether the analyst followed the prescribed steps during the testing. Without such basic information, the defense expert was foreclosed from evaluating the testing procedures and the reliability of the ultimate results.

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[35] *See Armstead,* 673 A.2d at 63; *Prater v. State,* 820 S.W.2d 429 (Ark. 1991)*; Commonwealth v. Rodgers,* 605 A.2d 1228 (Pa. Super. Ct. 1992); *Barnes v. State*, 839 S.W.2d 118 (Tex. Ct. App. 1992); *Perry v. State,* 586 So.2d 242, 254 (Ala. 1991); *Schwartz,* 447 N.W.2d at 426; *People v. Castro,* 545 N.Y.S.2d 985 (N.Y. App. Div. 1989). While some courts have departed from the NRC recommendation and found that the failure to adhere to proper protocol does not affect the *admissibility* of DNA test results, these decisions nevertheless recognize that such errors should be evaluated by the jury in determining the *weight* of the evidence (Issue III*, infra). See Armstead,* 673 A.2d at 63.

(3) Proficiency tests The defense was also denied access to the laboratory's proficiency test results. Proficiency testing is one of the primary methods used to determine whether a laboratory as an institution and its individual technicians are performing according to the standards of the profession.[36] Specimens are submitted to the laboratory in the same form as evidence samples, where the results are known by the test giver, for the purpose of evaluating the quality of the laboratory's performance and the reliability of its analytic results. NRC II at 76-78, 217. Such testing may be open, where the analysts are aware of the "mock case" testing, or blind. *Id.* at 78. Open proficiency tests evaluate analytical methods and interpretation of results, and identify systematic problems due to equipment, materials, laboratory environment (such as contamination), and analyst misjudgment. *Id.* at 79. Blind tests evaluate a broader aspect of laboratory operation, from the receipt of "evidence" through the analysis and interpretation, and arguably provide a more accurate reflection of true proficiency where the analyst does not know he or she is being tested. *Id.* Proficiency test results are reported, and if errors are made, corrective action must be taken. *Id.* at 24.

Regular proficiency tests, both within a laboratory and by external examiners, are necessary to monitor, verify, and document laboratory

[36]"Proficiency test results of many common laboratory examinations are alarming." Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA,* 44 VAND. L. REV. 791, 795 (1991). A national study of crime laboratory proficiency showed "decidedly mixed" performances. *See* Janine Arvizu, *Forensic Laboratories, Shattering the Myth,* THE CHAMPION, May 2000, at 22.

performance. *Id.* at 24, 88. The National Research Council has stated "laboratories should participate regularly in proficiency tests, *and the results should be available for court proceedings*." *Id.* at 88. Moreover, the NRC has recommended that proficiency testing should be a prerequisite to the admission of laboratory findings. *Id.* at 44.

This Court has relied, in part, on proficiency test results in finding that DNA test evidence from a particular laboratory was properly admitted. *See Henyard v. State,* 689 So. 2d 239, 249 (Fla. 1996). Other courts have also found that a laboratory's proficiency test results are relevant to determine the reliability and consequent admissibility of DNA evidence. *See Bonds,* 12 F.3d at 560; *Yee,* 129 F.R.D. at 630-6; *Barnes,* 839 S.W.2d at 124; *State v. Spencer,* 663 So.2d 271 (La. Ct. App. 1995).

Without Bode's proficiency test results, the defense was precluded from investigating this issue and presenting evidence at the *Frye* hearing regarding the competence of the laboratory in general, or the capability of the analyst who performed the test in this case.[37]

Conclusion The trial court denied Mr. Overton due process, and held that the state's STR test was admissible without a full presentation of evidence by both parties regarding critical validation studies, the testing protocol, and proficiency

[37]At *trial*, Bever testified that the analyst, Ms. Curry, had performed proficiency tests, and thus, Bever opined that she is competent (T. 4116). Defense counsel had no means by which to challenge this general self-serving testimony.

tests bearing on the laboratory's competence. The court's uninformed finding requires reversal. *See Ramirez,* 651 So. 2d at 1168 ("Without the presentation of Ramirez's evidence concerning the lack of reliability of knife-mark comparisons, the determination that the evidence was reliable was error.").

III. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A CONTINUANCE, WHERE THE DEFENSE WAS NOT GIVEN AN OPPORTUNITY TO ACCESS THE ESSENTIAL DOCUMENTS REQUESTED IN DISCOVERY, AND WAS THEREFORE PRECLUDED FROM CHALLENGING THE STATE'S STR/DNA EVIDENCE AT TRIAL, IN VIOLATION OF AMENDMENTS V, VI, AND XIV TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The validation studies, protocol manual, and proficiency tests requested by the defense were necessary to determine the reliability and admissibility of the state's STR test under *Frye*. For the same reasons outlined above, this evidence was also essential to effectively challenge the STR testing at trial.[38]

This Court has held that where the prosecution seeks to introduce scientific evidence at trial, due process requires that the accused be afforded "sufficient opportunity to question the results of the tests." *See Houser v. State,* 474 So. 2d 1193 (Fla. 1985). Effective cross-examination and refutation of scientific

[38]On January 11th, 1999, the date the trial was set to begin, counsel again requested that the court compel production of the missing documents, grant a continuance from the trial date, or suppress the state's STR/DNA evidence (T. 1236-7). The court denied the motions, finding again that further discovery was unnecessary, and that the trial would commence that day (T. 1240). Counsel unsuccessfully renewed his motions during the trial, emphasizing that the defense was denied an adequate opportunity to confront the STR test evidence (T. 2960-2).

evidence presuppose adequate pre-trial discovery and sufficient time to prepare any applicable defenses. *See Brown v. State,* 426 So. 2d 76 (Fla. 1st DCA 1983).

In the context of chemical analyses of blood alcohol content, this Court found that due process was protected where the defense was free to seek discovery regarding calibrating records to impeach the testing machine's reliability, and was able to cross-examine the machine operator regarding potential errors in the administration of the test. *See Houser,* 474 So. 2d at 1195.[39] In cases involving STR/DNA testing-- a far more complex procedure requiring sample preparation, extraction of DNA, instrumental analysis, use of databases, and interpretation of results-- the same principle applies: The opponent of a particular test must be able to garner the necessary information to challenge the reliability of the testing and to present the jury with a "balanced picture" of the DNA evidence. *See State v. Cauthron,* 846 P.2d 502, 512 (Wash. 1993).

DNA testing involves "highly technical methodology that the literature and case law suggest can be vulnerable to attack" *Cade v. State,* 658 So. 2d 550, 554 (Fla. 5th DCA 1995). Thus, it was necessary for the trial court to appoint a DNA expert. *Id.* However, the court's refusal to allow the defense the opportunity to access basic records from the laboratory, including the protocol manual that explained the testing procedures, and the laboratory's proficiency test scores,

[39] *See also Cloe v. State,* 613 So. 2d 70 (Fla. 4th DCA 1993) (defendant had sufficient opportunity to question blood alcohol test where machines were available for testing, "fail safe" procedures could be questioned, and defense cross-examined witness regarding testing methods and issues of reliability).

rendered the defense expert ineffective, for "much of what needs to be checked and called into question are the methods and judgment calls made by particular people in the testing process."[40]

As explained in Issue II, both the National Research Counsel reports and the decisions of numerous courts establish that the specific documents at issue should have been made available to the defense for independent expert evaluation, and for effective cross-examination of the state's expert witnesses. *Id.* The documents were relevant not only for admissibility purposes, but also for the jury to properly assess the weight of the state's STR evidence.[41]

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[40]*Development in the Law– Confronting the New Challenges of Scientific Evidence, DNA Evidence and the Criminal Defense,* 108 HARV. L. REV. 1557, 1563 (1995); *See also Hunter,* 875 S.W.2d at 66 (unfair prejudice where state did not provide materials relating to DNA testing, including laboratory protocol, the trial court refused to grant continuance, and thus, defense "could not possibly take advantage" of its DNA expert); *Schwartz,* 447 N.W.2d at 427 (due process requires that DNA test data and methodology be made available to defense for independent expert review).

[41]*See Woodson v. State,* 739 So. 2d 1210 (Fla. 3d DCA 1999) (no abuse of discretion in denying third deposition because state provided defense with DNA testing protocol and defense "was able to utilize such information to extensively cross-examine the state's DNA expert during the trial about whether the prescribed protocol and procedures were utilized."); *Yee,* 129 F.R.D. at 630-2, 635 (pre-trial disclosure of DNA test materials, including validation studies on environmental insult and proficiency test results, was necessary for defense to meet state's evidence and conduct cross-examination of expert witness); *Williams v. State,* 679 A.2d 1106 (Md. 1996) (error to restrict cross-examination where questions regarding frequency of errors and contamination in the laboratory could have been vital to jury determination of how much weight to give PCR/DNA test results); *State v. Morel,* 676 A.2d 1347 (R.I. 1996) (defendant must be afforded opportunity to cross-examine regarding potential weaknesses in DNA analysis, including record of proficiency); *State v. Tankersley,* 956 P.2d 486 (Ariz. 1998) (issues relating to lack of written protocols and proficiency testing should be

In the absence of the requested discovery, defense counsel conducted a very brief cross-examination of Dr. Bever (T. 4094-4112). Counsel could not inquire as to whether the designated testing procedures were followed without a protocol manual, could not explore the laboratory's competence and past record of errors without proficiency test results, and could not address the reliability of the testing method as applied by that laboratory, or the sensitivity of the method under various circumstances, without validation studies. Instead, the STR test conducted by the private Bode laboratory, and Dr. Bever's "expert" conclusions that Mr. Overton's blood matched the DNA from the bed sheet, stood unchallenged. The prosecutor argued in his summation that the STR test and the original RFLP test by the FDLE collectively established Mr. Overton's guilt (T. 4712). Where the state was permitted to present STR evidence to the jury, but the defense was precluded from meaningfully challenging such powerful evidence, Mr. Overton was denied basic due process, and such error cannot be found harmless.

IV. THE TRIAL COURT ERRED IN FAILING TO APPOINT A DEFENSE EXPERT, WHERE THE DEFENSE AT TRIAL DEPENDED UPON CHEMICAL TESTING, THE ONLY EXPERT APPOINTED TO ASSIST THE DEFENSE ALSO CONDUCTED TESTING FOR THE STATE, AND THE PROSECUTION LISTED A LAST MINUTE ADDITIONAL CHEMIST WITNESS, WHO TESTIFIED CONTRARY TO THE DEFENSE THEORY, AND WHOM THE DEFENSE COULD NOT MEANINGFULLY CROSS-EXAMINE, IN VIOLATION OF AMENDMENTS V AND XIV TO THE U.S.

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considered by the trier of fact in assessing the weight of DNA evidence); *Cauthron,* 846 P.2d at 512 (jury presented with balanced picture of DNA evidence where defense able to cross-examine expert regarding proficiency tests).

CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the Supreme Court held that an indigent defendant whose sanity is likely to be a significant factor at trial has a constitutional due process right to a state-appointed psychiatric expert to assist in the evaluation, preparation, and presentation of the defense, including cross-examination of the state's expert witnesses. This holding is based on the principle that fundamental fairness entitles indigent defendants to the "basic tools" necessary to "present their claims fairly within the adversary system." *Id.* at 77.

The *Ake* rationale also applies to requests for non-psychiatric expert assistance. *See Cade,* 658 So. 2d at 550 (error to deny DNA expert); *Dingle v. State,* 654 So. 2d 164 (Fla. 3d DCA 1995) (error to deny pediatric expert); *Little v. Armontrout,* 835 F.2d 1240 (8th Cir. 1987) (error to deny hypnotic expert); *United States v. Durant,* 545 F.2d 823 (2d Cir. 1976) (error to deny fingerprint expert). Where an indigent defendant shows a "reasonable probability" that an expert would aid the defense, and that denial of expert assistance would result in a fundamentally unfair trial, it is an abuse of discretion to refuse to appoint a defense expert. *See Cade,* 658 So. 2d at 554; *Dingle,* 654 So. 2d at 166 (adopting test announced in *Moore v. Kemp,* 809 F.2d 702 (11th Cir. 1987)).

The defense asserted that the police obtained a condom used by Mr. Overton from his AIDS-infected girlfriend Lorna Swaybe, and planted Overton's

semen on the bed sheet evidence (T. 4734). Given prior police contacts with Swaybe, and given the strikingly defective chain of custody for the bed sheet cuttings, there was ample opportunity for planting (T. 4729, 4734). However, to show that the semen on the bed sheets originated from a condom, counsel required the assistance of a chemist (T. 950). The defense asked Mr. Phillip Trager to test the cuttings for the presence of the chemical nonoxynol-9, a spermicide commonly found in condoms.[42] (T. 950, 4436). Upon receipt of the positive nonoxynol test results, defense counsel contacted Mr. Trager to discuss the defense case and to prepare for the trial (T. 951). Trager informed counsel that he had been retained by the state of Florida to conduct tests on their behalf, and that he would remain "independent." (T. 952). Moreover, the state had also listed an additional chemist witness, Richard Oliver, with expert knowledge regarding the chemical nonoxynol (T. 950). In his December 10th deposition, Mr. Oliver asserted that the nonoxynol detected by the defense test could have come from laundry detergent, as opposed to a condom, and refused to inform defense counsel which specific detergents contain nonoxynol (T. 955-6, 958). Thus, with only one month left before the trial, the defense was confronted with new state expert evidence, aimed at undermining the defense theory, and had no defense chemist expert to consult, testify at trial, and assist in cross-examining Oliver.

[42]"[N]onoxynol-9 in the test tube also wipes out HIV, and many have long assumed it helps protect people from the virus" although very recent studies show otherwise. Daniel Q. Haney, *Spermicide May Raise AIDS Risk, Study Says,* MIAMI HERALD, July 13, 2000.

Defense counsel immediately filed several motions for the appointment of a defense expert,[43] and/or additional testing, and/or a continuance (R. 652-6, 672-4, 837-9). Counsel explained that a defense chemist, comparable to the state's expert, was necessary to assess the validity of Oliver's assertions (T. 953-5, 2970). Defense counsel detailed the specific issues that he needed an expert to address: 1) whether a more specific test could be conducted to identify the spermicidal form nonoxynol from a condom, 2) whether the chemical nonoxynol is commonly present in detergents, and if so, which ones, and 3) whether nonoxynol would remain on fabric after washing with these detergents, and if so, how it would be distributed (T. 954-956, 967, 1194). Counsel explained that he could not confide in Trager where this expert was also working for the state (T. 980-1). The trial court found that the defense was not entitled to an expert, nor was additional testing or even a continuance necessary for the defense to prepare to confront the testimony of Mr. Oliver (T. 969-71). Defense counsel repeatedly renewed his requests for a defense expert, both before and during the trial. All motions were denied (T. 751-78, 806-32, 948-88, 2970-1).

The court's failure to appoint a defense chemist denied Mr. Overton due process and resulted in a fundamentally unfair trial. The defense at trial was planting, and thus, the issue of whether the semen on the bed sheets came from a

[43]Mr. Overton was declared indigent, and depended upon the court to award all costs necessary for his defense (T. 55, 778). *See* § 914.06, Fla. Stat. (1999).

condom was significant.[44] Defense counsel was entitled to a chemist expert in order to adequately cross-examine the state's expert on this issue, and/or present evidence to support the defense. *See Dingle,* 654 So. 2d at 167 (where timing of child's injuries was pivotal issue, and state's eleventh-hour additional experts added incriminating testimony on this issue, defense was entitled to comparable pediatric experts to challenge state's experts); *Little,* 835 F.2d at 1245 (where victim identified defendant months after hypnosis, and defense asserted that state hypnotist improperly influenced victim, court erred in denying comparable defense hypnosis expert to challenge state's evidence); *Durant,* 545 F.2d at 828 (where identification of defendant was contested and fingerprint evidence was pivotal, defense entitled to fingerprint expert to "educate[] defense counsel as to the technicalities of the field to make cross-examination more effective"); *United States v. Patterson,* 724 F.2d 1128 (5th Cir. 1984) (defense fingerprint expert necessary to evaluate state's evidence and cross-examine state expert).

The prosecutor argued, based on Oliver's assertions, that the defense did not

[44]The prosecutor argued, in the alternative, that even if the semen came from a condom, this fact did not necessarily show that planting took place because the perpetrator may have worn a condom that broke (T. 4722). This assertion was contradicted by state's own witnesses, who testified that semen was found in two different places on the bedding *and* three places on the victim's body, making it apparent that a condom was not used (T. 3193-4, 3263-5, 3354-6). Moreover, Dr. Wright, a forensic pathologist, testified that it is *highly unusual* for rapists to wear a condom (T. 4494-5). Finally, the state's own actions undercut this argument, where the prosecutor did not rely on the possibility that the perpetrator used a condom, but retained Mr. Oliver to testify regarding alternative sources for the nonoxynol on the bed sheets, other than a condom.

need an expert because no chemical test existed that would specifically identify the spermicidal form of nonoxynol, and show that the semen on the bed sheets came from a condom (T. 963-4). However, forensic chemists do use tests to identify trace particles, lubricant ingredients, and/or the spermicide nonoxynol from condoms. Such tests may even indicate the specific brand of condoms from which these chemicals or particles came. *See* Robert D. Blackledge, *Condom Trace Evidence: A New Factor in Sexual Assault Investigations,* FBI LAW ENFORCEMENT BULLETIN, May 1996, at 12-16.[45]

The defense had no expert to consult regarding possible additional tests, the validity of Oliver's testimony, or any other issues relating to preparation of the defense. The state wrongfully usurped the defense expert Mr. Trager, who could not be expected to aid and advise the defense in presenting its case, while simultaneously working for the state. *See Erickson v. Newmar Corp.,* 87 F.3d 298, 302-3 (9th Cir. 1996) (improper for attorney to have ex parte contact with opposing party's expert witness, and to offer that expert employment, thereby putting the expert "in the position of having divided loyalties" and "serv[ing] two masters."). Moreover, *Ake* explains that the role of an expert is not to remain "independent," but to aid the defense in evaluating its case, presenting evidence, and challenging the state's evidence. *See Ake,* 470 U.S. at 83. Thus, Mr. Overton's due process

[45]Such tests are conducted by the government in sexual assault cases where semen evidence is not found, and the police suspect that a condom was used by the perpetrator. *Id.*

rights were not adequately safeguarded by the appointment of Trager. *See United States v. Sloan,* 776 F.2d 926, 929 (9th Cir. 1985) ("The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution.").

The trial was fundamentally unfair where Mr. Overton was deprived of a chemist expert to address issues central to the defense, while the state was permitted to present the testimony of Mr. Oliver, who was listed at the eleventh-hour, and whom defense counsel could not adequately cross-examine. In our adversarial system, "it is dangerous to give all the tools to the state and hope it will do the right thing and always do it well." *Cade,* 658 So. 2d at 554. A new trial is required, where the defense is afforded the tools necessary to confront the state's evidence and present the defense case.

V. THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL, WHERE THE PROSECUTOR IMPROPERLY ARGUED THAT THE DEFENSE SOUGHT ONLY ONE NONOXYNOL TEST OF THE BED SHEET EVIDENCE, WHILE THE STATE REQUESTED FURTHER TESTING, SUGGESTING TO THE JURY THAT THE DEFENSE WAS CONCEALING HARMFUL EVIDENCE.

The defense test of the bed sheet cuttings made by Pope was positive for nonoxynol (T. 4436-9). The state then conducted two nonoxynol tests on new cuttings from the elastic area of the sheet: one was positive for nonoxynol but the second was negative (T. 4395-6; 4440-1). The state chemist Mr. Oliver testified that nonoxynol from laundry detergent may have remained on sheets after

washing, but acknowledged that he had never attempted to test this assertion (T. 4596-7, 4600). Both Trager and Oliver testified that if the source of the nonoxynol on the MacIvor sheets were laundry detergent, the chemical would likely be distributed fairly uniformly across the material (T. 4468, 4605). Trager testified that additional testing would be necessary to determine the pattern of nonoxynol distribution (T. 4468).

Based on this testimony, defense counsel argued in closing that the possibility of planting was not dispelled by the state's nonoxynol evidence, and that additional tests were necessary (T. 4733). In response, the prosecutor argued that the defense had requested "*only one*" nonoxynol test, while the state conducted further testing (T. 4804-5). The obvious inference was that the defense was concealing harmful evidence. Defense counsel immediately objected to this argument and moved for a mistrial, but the objection was overruled (T. 4804-7). Thus, where the defense repeatedly requested and was denied an expert chemist to conduct further testing of the bed sheet evidence, the jury was left with the impression that unlike the state, the defense did not seek to present the "whole story" at trial. Such arguments are improper, and "tip the scales of justice too heavily" against the party charged with concealing evidence from the jury. *Sun Charm Ranch, Inc. v. Orlando,* 407 So. 2d 938, 941 (Fla. 5th DCA 1981) (improper to argue that party's expert was originally retained by opposing counsel, thereby implying that the party who failed to call the expert was concealing harmful

evidence); *Bogosian v. State Farm Mut. Auto. Ins. Co.,* 25 Fla. L. Weekly D1306 (Fla. 3d DCA 2000) (same).

VI. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO IMPROPERLY BOLSTER THE TESTIMONY OF JAMES ZIENTEK BY INTRODUCING HIS PRIOR CONSISTENT STATEMENT TO THE CHAPLAIN.

The centerpiece of the prosecution case was the testimony of James Zientek. Through him, the state related its theory of the case, including how the crime occurred, the motive for it, and three of the five aggravating circumstances. Mr. Zientek was heavily impeached with evidence of motive to fabricate, past lies, and numerous prior convictions (see Facts section at 28-30). In an attempt to overcome the obvious problems with this witness's credibility, the prosecutor resorted to calling the jailhouse chaplain, Judy Remley, to testify that Zientek appeared upset, cried, and was "devastated" as he spoke to her about Overton's purported statements (T. 4252-3). Defense counsel promptly objected to the testimony as irrelevant and improper bolstering (T. 4247). The trial judge overruled the objection and admitted this testimony, on the theory that it was relevant to Zientek's "motivation" and "emotional response" (T. 4350).

The chaplain's testimony was inadmissible hearsay. Although the chaplain did not literally repeat Zientek's specific statements to her, the inescapable inference from her testimony was that Zientek told her that Mr. Overton had confessed. Thus, the testimony was hearsay. *See Postell v. State,* 398 So. 2d 851

(Fla. 3d DCA 1981); *Tumblin v. State,* 747 So. 2d 442 (Fla. 4th DCA 1999). Prior hearsay statements by a witness that are consistent with that witness's in-court testimony are inadmissible to bolster the witness's credibility. *See Chandler v. State,* 702 So. 2d 186 (Fla. 1997). Such statements are only admissible as non-hearsay to rebut a charge of improper influence or recent fabrication. However, the prior consistent statement must have been made *before* the motive to fabricate arose. *Id.*

On cross-examination, Zientek admitted that when he met Mr. Overton he was aware of the publicity surrounding the MacIvor case, and knew that Overton was facing the most serious charges of any prisoner in Monroe County (T. 4202-3). Zientek, who was charged with violent felonies including sexual battery, and faced at least 36 years in prison, had worked undercover for the police in the past, and admitted that he knew how to get what he wants from law enforcement officials (T. 4139-40, 4193, 4198-9, 4224). Zientek also knew that chaplain Remley was married to the lieutenant in charge of the jail (T. 4205). The motive to fabricate evidence was present well before Zientek gave his tearful account of Overton's alleged statements to the jailhouse chaplain. Therefore, the statements were wrongly admitted. *See Jackson v. State,* 498 So. 2d 906 (Fla. 1986) (prior consistent statements inadmissible where cross-examination established that motive to lie existed before the prior statement was made). This error cannot be deemed harmless where Zientek was a key state witness, his credibility was

severely impeached, and the state used a religious figure to place an impermissible cloak of credibility upon him.

VII. THE TRIAL COURT ERRED IN PRECLUDING DEFENSE COUNSEL FROM ESTABLISHING THAT THE DEFENDANT HAD FILED AN INTERNAL AFFAIRS COMPLAINT AGAINST OFFICER VISCO, TO SHOW THIS OFFICER'S BIAS AND MOTIVE TO PLANT EVIDENCE, BY IMPROPERLY FINDING THAT THIS TESTIMONY WOULD OPEN THE DOOR TO EVIDENCE OF OTHER CRIMES, IN VIOLATION OF AMENDMENT VI TO THE U.S. CONSTITUTION.

Defense counsel sought to show that in 1990, Mr. Overton filed an internal affairs complaint against Officer Charles Visco, asserting that he illegally took possession of Overton's car (T. 4196-7, 4300). Visco was ultimately cleared of the charges (T. 4297). The officer knew Mr. Overton's former girlfriend, Lorna Swaybe, and contacted her approximately six times in less than six months in 1990 or 1991 (T. 4348, 4364-5). The purpose of the proposed testimony was to show Visco's bias and motive to plant evidence to incriminate Mr. Overton (T. 4297-8).

The prosecutor maintained that any mention of the internal affairs complaint would open the door to testimony showing that *after* Overton's car was impounded by Visco and searched in relation to a burglary investigation, the police also obtained a warrant to search the car as part of an investigation of the murder of Rachel Surrett (T. 4302-3). The prosecutor argued that the murder investigation was relevant to show that Overton's complaint was unfounded (T. 4302-3). But defense counsel conceded that the complaint lacked merit, and

sought to introduce it only to show that the *fact* of a complaint made Visco angry at Mr. Overton (T. 4298-9, 4300-1). The Surrett investigation was irrelevant to this bias. The trial court ruled that if defense counsel elicited testimony regarding the internal affairs complaint, the state would be allowed to explain *all* of the "surrounding circumstances," including the Surrett murder investigation (T. 4303-4). Because of this ruling, defense counsel did not introduce evidence of the complaint to show Visco's bias against Mr. Overton (T. 4301). During closing arguments, the prosecutor argued that the defense failed to show why any officers would want to plant evidence to incriminate Overton (T. 4818-9).

The court's ruling was error. This Court has explained that the concept of "opening the door" allows the admission of otherwise inadmissible testimony, but only to the extent that such testimony is necessary to "*qualify, explain, or limit"* the testimony previously admitted. *Ramirez v. State,* 739 So. 2d 568, 579 (Fla. 1999) (questions by counsel, as to whether there was any evidence that contradicted defendant's assertion that he acted at co-defendant's direction, opened the door only to allow state to explain that co-defendant's confession contradicted assertion, but did *not* open door to questions suggesting details of what co-defendant said). Where defense counsel questions a witness regarding bias against the defendant, this Court has found that the prosecutor may introduce, on a "limited basis," evidence that explains the reason for the bias, or lack thereof. *Rodriguez v. State,* 753 So. 2d 29, 42 (Fla. 2000). However, this Court cautioned

that trial courts must exercise "extreme caution" in admitting evidence relating to collateral crimes, "even when faced with an argument by the State that the door has been opened. The issue is not always whether the door has been opened, but rather how wide it has been opened." *Id.*

Evidence of the internal affairs complaint filed by Mr. Overton against Officer Visco was clearly probative of the officer's bias and motive. *See Chadwick v. State,* 680 So. 2d 567 (Fla. 1st DCA 1996); *D.C. v. State,* 400 So. 2d 825 (Fla. 3d DCA 1981). This evidence would have opened the door to an explanation as to why the officer would, or would not, harbor ill-will as a result of the complaint. The defense conceded that the complaint had no merit, and the prosecutor was free to show that it had limited repercussions. However, the fact that the towing of Overton's automobile ultimately resulted in a search relating to the Surrett murder in no way addresses the basis for the bias at issue. Evidence of the complaint would *not* open the door to such inadmissible and highly prejudicial evidence, unrelated to the issue of bias. The trial court's erroneous ruling left defense counsel with no choice but to abandon the proposed testimony, so that the jury would not learn that Mr. Overton was a suspect in another, unrelated murder. This error was not harmless where the defense was planting, defense counsel was improperly precluded from establishing officer Visco's motive to plant, and the prosecutor benefitted from this error by arguing to the jury that the planting defense was not credible in the absence of proof of motive.

VIII. THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION REQUIRE A NEW SENTENCING HEARING, WHERE THREE OF THE FIVE AGGRAVATORS ARE INVALID AND, ABSENT THOSE FACTORS, THE JURY MAY HAVE RECOMMENDED AND THE TRIAL COURT IMPOSED A SENTENCE OF LIFE.

A. The evidence was insufficient to support the finding that the HAC aggravator was proven beyond a reasonable doubt as to Mr. MacIvor.

Aggravating circumstances must be proved beyond a reasonable doubt before they may properly be considered by a judge or jury. *See Atkins v. State,* 452 So. 2d 529, 532 (Fla. 1984). With regard to the heinous, atrocious, and cruel (HAC) aggravator, this Court has held that *conscious* suffering for more than a brief period of time is an essential element that must be established by the state.[46] The HAC aggravator cannot be based on speculative testimony regarding the victim's perceptions or equivocal evidence. *See Hartley v. State*, 686 So. 2d 1316, 1323 (Fla. 1996); *See also Hardwick v. State*, 521 So. 2d 1071, 1075-76 (Fla. 1988) ("mere speculation derived from equivocal evidence or testimony" cannot support finding of an aggravating circumstance).

The trial court erred in finding the HAC aggravator with respect to Michael

[46]*See Rhodes v. State*, 547 So.2d 1201, 1208 (Fla. 1989)(HAC not properly found where victim may have been semiconscious at time of death)*; Kearse v. State*, 662 So. 2d 677, 686 (Fla. 1995) (HAC improperly found where medical examiner stated that the victim could have remained conscious for a short time, *or* could have rapidly gone into shock); *Jackson v. State*, 451 So. 2d 458, 463 (Fla. 1984) (consciousness necessary for HAC); *Herzog v. State*, 439 So. 2d 1372, 1380 (Fla. 1983) (evidence insufficient where victim may have been semi-conscious); *Burns v. State*, 609 So. 2d 600, 606 (Fla. 1992) (error to find HAC where wound caused unconsciousness followed by death).

MacIvor. In its sentencing order, the court stated that MacIvor was "strangled to death in his own home after his pregnant wife had been sexually battered and murdered." (R. 1193). There was no evidence presented that Mr. MacIvor had any knowledge of what happened to his wife. Further, strangulation does *not* establish HAC where the evidence fails to show that the victim was conscious at the time.[47]

According to James Zientek, Michael MacIvor was first hit on the head with a pipe, punched during a brief struggle, and rendered unconscious (T. 4155-4156). The medical examiner, Dr. Nelms, testified that the head injury would have likely rendered MacIvor unconscious (T. 3625, 3675). Zientek testified that MacIvor was later strangled when he was "apparently just becoming conscious" (T. 4159). This speculative statement is insufficient to establish the victim's consciousness at the time of his death beyond a reasonable doubt.[48] Neither Dr. Nelms nor Zientek offered further testimony that would establish MacIvor's consciousness at the time of death (T. 3605-3686, 4139-4188). In the absence of such testimony, the court erred in finding the HAC aggravator.

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[47] *DeAngelo*, 616 So. 2d 440, 442-43 (Fla. 1993) (HAC established where strangulation is "perpetrated upon a conscious victim"); *Rhodes*, 547 So.2d at 1208 (HAC not properly found where victim may have been semiconscious at time of strangulation); *Herzog*, 439 So. 2d at 1380 (HAC not properly found where evidence unclear as to whether victim was conscious at time of strangulation).

[48] *See Hartley*, 686 So. 2d at 1323; *See also Rhodes*, 547 So.2d at 1208 (HAC not proven beyond reasonable doubt where defendant stated that victim "may have been semiconscious" at time of death); *Herzog*, 439 So. 2d at 1380 (HAC not proven where evidence showed that victim was unconscious during period before strangulation, and actual length of unconsciousness is unclear from the record).

B. Where the HAC aggravator as to Mr. MacIvor, the CCP aggravator, and the avoiding arrest aggravator were proven only through the testimony of a jailhouse snitch, who derived a significant reduction in his sentence in exchange for his testimony, it was fundamental error to not instruct the jury that it should use great caution in relying on the snitch's testimony.

At the time of Mr. Overton's trial, James Robert Zientek, also known as James Robert Pesci, also known as James Robert Stonewall, also known as James Radrick, also known as James Gwavacki, also known as James Glowscki, was a forty-year-old, three time convicted felon residing in the Monroe County Detention Center with charges pending against him that originally consisted of sexual battery, sexual assault, robbery, grand theft auto, and resisting arrest without violence (T. 4139-40). He was an admitted liar who fabricated stories because he wanted to "[f]eel[] special" and to have others view him as being special (T. 4189, 4191-93). He was also the sole provider of the evidence that supported three of the aggravators in the penalty phase of Mr. Overton's trial.

Based upon the original charges pending against him, Zientek was facing the possibility of approximately thirty-six years in prison, exclusive of any enhancement due to habitualization.[49] As a result of his testimony against Mr. Overton, Zientek received a plea which capped his maximum sentence at seven years, and provided for a possible sentence as low as five years. (T. 4186-7).

Based solely upon the testimony of Zientek, the court found that the state had proven the HAC, CCP, and avoiding arrest aggravators. With regard to CCP,

[49]*See* §§775.082(3)(4); 794.011(5); 812.13(2); 812.014; 843.02,Fla.Stat.(1999).

the court recognized that, to establish this aggravator, the state had to prove that Mr. Overton had a careful plan or prearranged design to commit murder, not some other crime, when the fatal incident took place.[50] (R. 1194). The court found that Mr. Overton's plan to commit a burglary and a sexual battery "included a design to commit murder. The statements which the Defendant made to James Zientek regarding the manner in which he conducted himself at the crime scene, show that he acted in a systematic and methodical manner." (R. 1194).

The trial court did not specify which of the defendant's purported statements to Zientek it relied upon in finding the CCP aggravator. The only statement the court could have relied on was that he strangled the couple because he "doesn't leave witnesses" (T. 4158-9). The court also relied on this statement, along with Zientek's testimony that Mr. Overton knew Mrs. MacIvor, to find the avoiding arrest aggravator (R. 1192). The state presented no evidence to corroborate these statements. Prior to its deliberations on the advisory sentence, the jury was not given any instructions on how to consider Zientek's testimony.

"Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony." *Dodd v. State*, 993 P.2d 778, 783 (Okla. Crim. App. 2000).

> The testimony of jail-house informants, or 'snitches,' is becoming an increasing problem . . . throughout the American criminal justice system. The present case is one of many across the nation where the

[50] *See, e.g.*, *Rodriguez v. State*, 753 So. 2d 29, 46 (Fla. 2000); *Woods v. State*, 733 So. 2d 980, 991 (Fla. 1999).

> truthfulness of the informant has been called into question. Informants . . . are offering evidence against their fellow inmates in exchange for reduced sentences. In the process of reaping their benefit, they are manipulating the system by helping to convict innocent citizens.

McNeal v. State, 551 So. 2d 151, 158 & n.2 (Miss. 1989).[51] The root of the problem is obvious: "The informant has incentive to strengthen testimony against the accused, because the informant has received benefits for that testimony." *State v. Allison*, 910 P.2d 817, 821 (Kan. 1996).[52]

To try to reduce the spectre of convictions obtained through the lies of snitch-informants, several jurisdictions have standard jury instructions that caution the jury to consider such testimony with greater care than the testimony of other witnesses. For example, the federal Eleventh Circuit Court of Appeals has the following jury instruction:

> The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. For example, . . . a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony

[51]*McNeal* cites to Curriden, *No Honor Among Thieves,* ABA Journal, June 1989, at 51, which discussed "several recent cases in which false testimony of informants has nearly led to an execution;" *see also*, Barry Scheck *et al.*, *Actual Innocence* 126-57 (2000).

[52]This Court has also recognized the dubious nature of snitch testimony in at least one case. "Tibbs also contends, and we agree after reading the transcript, that no credence can be given to the testimony of Tibbs' Lee County jailmate . . . to the effect that Tibbs confessed to the crime. This testimony appears to be the product of purely selfish consideration." *Tibbs v. State*, 337 So. 2d 788, 790 (Fla. 1976).

of other witnesses.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases with Annotations and Comments, Special Instruction 1.1 (1997).[53] Another federal court cautions juries concerning informant testimony that "you should consider the testimony of these individuals with particular caution. They may have had reason to make up stories or exaggerate what others did because they wanted to help themselves." *Pattern Jury Instructions of the First Circuit, Criminal Cases*, No. 2.07 (1998); *accord Pattern Criminal Jury Instructions: Sixth Circuit*, No. 7.06A ("you should consider [an informant's] testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.").[54]

The need for such an instruction can be traced back nearly half a century. In *Lee v. United States*, 343 U.S. 747 (1952), the United States Supreme Court held that the use of informers was "dirty business" which raised "serious questions of credibility," entitling a defendant "to have the issues submitted to the jury with careful instructions." *Id*. at 757. Thus, as here, " [i]f the incriminating testimony of an informer is uncorroborated or unsubstantiated, special cautionary

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[53] *Accord*, O'Malley *et al.*, *Federal Jury Practice & Instructions*, § 15.02 (5th ed. 2000) (testimony of an informant "must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated").

[54] Criminal jury instructions from the Seventh Circuit (No. 3.13) and the Fifth Circuit (No. 1.14) also instruct the jury to consider an informant's testimony with "caution" and "great care."

instructions are surely required." *Todd v. United States*, 345 F.2d 299, 300 (10th Cir. 1965). "Without the guidance of a carefully phrased instruction by the trial court, the jury was ill-equipped to reach a considered and fair verdict." *United States v. Garcia*, 528 F.2d 580, 588 (5th Cir. 1976).

In fact, when an informant's testimony is uncorroborated, the need for a special instruction is so great that the failure to give it is plain error requiring reversal, even absent a request for such an instruction. *See, e.g.*, *id*. ("the failure to caution the jury to scrutinize carefully [the informant's] uncorroborated testimony implicating [the defendant] was plain error and necessitates that his conviction be reversed"); *Smith v. State*, 485 P.2d 771, 773 (Okla. Crim. App. 1971) ("defendant was denied a fair trial by the failure of the trial court to give a cautionary instruction as to the testimony and credibility of the informer whose testimony alone placed defendant at the scene of the crime"); *United States v. Griffin*, 382 F.2d 823 (6th Cir. 1967) (failure of trial court to charge *sua sponte* without request by defendant that testimony of informer was required to be viewed with caution and weighed with great care was plain error requiring reversal of conviction).[55]

The fundamental error here in failing to properly instruct the jury on its

[55]As was the case here, "[t]he fact that the jury had heard evidence attacking the credibility of the witness did not diminish the need for cautionary instructions." *State v. Fuller*, 802 P.2d 599, 603 (Kan. App. 1990) (citing *Garcia*, 528 F.2d at 587-88). Indeed, "there was more than the usual need for a cautionary instruction" here because Zientek's criminal history, the significant benefit he received from his testimony, and the utter lack of corroboration of his testimony as to the CCP and HAC aggravators combined "to cast a dark shadow on [his] credibility." *Garcia*, 528 F.2d at 588.

consideration of Zientek's testimony is compounded by the fact that this is a death penalty case. Both this Court and the United States Supreme Court have "repeatedly emphasized that the Eighth Amendment requires a heightened degree of reliability in capital cases." *Allen v. Butterworth*, 2000 WL 381484, *7 (Fla. Apr. 14, 2000). "Because the death penalty is unique 'in both its severity and its finality,' we have recognized an acute need for reliability in capital sentencing proceedings." *Monge v. California*, 524 U.S. 721, 732 (1998) (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

The fundamental nature of the error is also underscored by the divided jury vote on the advisory sentence.[56] A jury's recommendation of life imprisonment must be given great weight. *Webb v. State*, 433 So. 2d 496, 499 (Fla. 1983). To override a recommendation of life, the "facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Dolinsky v. State*, 576 So. 2d 271 (1991). Here, if just two jurors had voted differently in the recommendation on the sentence for Mr. MacIvor, or three jurors had voted differently in the recommendation on the sentence for Mrs. MacIvor, Mr. Overton would have had the benefit of the "great weight" of the jury's recommendation of life imprisonment.

"[W]e must take certain precautions to ensure a citizen is not convicted on the testimony of an unreliable professional jailhouse informant, or snitch, who

[56]The vote was 8 to 4 for death as to Mr. MacIvor and 9 to 3 on Mrs. MacIvor.

routinely trades dubious information for favors. The use of such untrustworthy witnesses carries considerable costs, especially in death-penalty cases, by undermining the foundation of cases where the stakes are the highest." *Dodd v. State*, 993 P.2d at 785 (Strubhar, P.J., specially concurring). The precaution needed here was a simple instruction to the jury to consider Zientek's testimony with caution and great care before relying upon it to find the existence of any aggravating factor. Such an instruction was acutely needed here, given that Zientek was a confessed liar and convicted felon, he gained a better than eighty percent reduction in his sentence thanks to his testimony, and his testimony about his conversations with Mr. Overton was completely uncorroborated. Under these circumstances, the failure to give such an instruction was fundamental error which denied Mr. Overton his constitutional right to a reliable sentencing proceeding and to an advisory verdict rendered by a jury properly instructed on the law. A new sentencing hearing is required.

IX. THE TRIAL COURT ERRED IN FAILING TO CONSIDER AVAILABLE MITIGATING EVIDENCE, IN VIOLATION OF AMENDMENT VIII TO THE U.S. CONSTITUTION.

Where a defendant wishes to waive his right to present mitigating evidence, defense counsel must: 1) inform the court of the defendant's decision, and 2) indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented, *and what that evidence would be. Koon v. Dugger,* 619 So. 2d 246, 250 (Fla. 1993). The court must confirm on the

record that the defendant discussed the matter with counsel, and voluntarily wishes to waive the presentation of mitigating evidence to the jury. *Id.* At the conclusion of the penalty-phase proceedings, the court "must carefully analyze *all* the possible statutory and non-statutory mitigating factors against the established aggravators to ensure that death is appropriate." *Robinson v. State,* 684 So. 2d 175, 177 (Fla. 1996). In *Farr v. State,* 621 So. 1368 (Fla. 1993), this Court held that the trial court's duty to consider and weigh all the mitigating factors extends to cases where the defendant has asked the court *not* to consider this evidence, even where the defendant affirmatively argues in favor of the death penalty.

The trial court complied with *Koon* by confirming on the record that Mr. Overton discussed the mitigating factors with counsel, and voluntarily decided to waive his right to present mitigating evidence to the jury (T. 4898-4911). However, the court failed to consider and weigh the mitigating evidence found by defense counsel, in violation of *Farr v. State*.

Defense counsel informed the court that there was mitigating evidence that could be presented relating to the defendant's school background, mental health, medical records, and possible history of drug abuse (T. 4900, 5037). Defense counsel offered to proffer this mitigating evidence in a memorandum to the court (T. 4898). However, defense counsel later stated that Mr. Overton did not want the court to consider this evidence, and had asked that counsel not submit the memorandum (T. 5035). The court did not require defense counsel to proffer the

existing mitigating evidence for his consideration, as required by *Koon* and *Farr*. Rather, the court confirmed with Mr. Overton that this was his desire, and noted for the record that there was relevant mitigating information that would not be considered pursuant to the defendant's request (T. 5038-5039). In his sentencing order, the court wrote:

> While defense counsel, during the Court's inquiry, made some reference to the defendant having a possible substance abuse problem, *at the request of the defendant, no evidence of such a problem was ever presented.* Moreover, according to the Presentence Investigation, no evidence of such a problem was discovered. Certainly, the Court cannot consider this as a mitigating factor . . . While defense counsel, during the Court's inquiry, made some reference to the existence of mental mitigation, this was *never pursued per the defendant's request.* Moreover, according to the Presentence Investigation, the defendant appeared to be in good health except for a back injury and some gunshot wounds. The Court can find no mitigating factor pertaining to this aspect of the defendant's background. (R. 1196).

The court's failure to consider and weigh all of the available mitigating evidence found by counsel, in deference to the defendant's request, was error. This point is illustrated in *Robinson v. State, supra.* Like Mr. Overton, Robinson voluntarily waived the presentation of mitigating evidence during the penalty phase. In compliance with *Koon*, the defense in *Robinson* proffered the available mitigating evidence from a psychologist and the defendant's mother. As in this case, the trial court in *Robinson* declined to consider the mitigating evidence pursuant to the defendant's request. On appeal, this Court, citing *Farr*, held that the trial court's failure to consider and weigh all of the mitigating factors was

error, even where the defendant waived mitigation and requested that the court not consider the evidence. This Court wrote, "It is clearly the responsibility of the trial court to affirmatively show that *all possible mitigation* has been considered and weighed, and it is error to fail to do so." *Robinson,* 684 So. 2d at 179.

As in *Robinson*, the trial court erred in deferring to the defendant's request that counsel's memorandum on mitigating evidence not be submitted for the court's consideration. A new penalty-phase hearing before the judge is required.

CONCLUSION

In view of the foregoing grounds, this Court must reverse Appellant's convictions and sentences for a new trial, or alternatively, vacate Appellant's death sentence and remand for new sentencing proceedings.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellant's initial brief was served by U.S. mail on the Office of the Attorney General on this 28th day of July, 2000.

_____
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