

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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In this reply brief, appellant's initial brief is cited as "Initial Br." and appellee's answer brief is cited as "Answer Br." Appellant does not waive any points raised in the initial brief that are not specifically addressed in this reply brief.

ARGUMENT

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

A. Preservation

The state contends that this issue was not preserved for appeal because "Overton has failed to specify any juror who was objectionable, but had to be accepted and ultimately sat on the jury." Answer Br. at 48. This assertion is incorrect. After using peremptory challenges to eliminate jurors Heuslein and Russell, who should have been stricken for cause, counsel exhausted his remaining peremptory challenges, requested additional peremptory challenges, and **specifically identified the jurors that he wished to peremptorily strike**, including jurors Stoddard, Dale, Guevara, Baun, and Skifano (T. 2441-3, 2454, 2906-13). The additional peremptory challenges were denied, and these individuals served on the jury (T. 2925). Thus, all of the requirements set forth in *Trotter v. State*, 576 So. 2d 691 (Fla. 1990), were met in order to properly preserve the erroneous denial of defense counsel's cause challenges against jurors Heuslein and Russell.¹

¹*Trotter* states, "Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify

The state also asserts that “defense counsel was ultimately given another peremptory to take the place of that used on Heuslein.” Answer Br. at 51. Thus, the state contends that the denial of a cause challenge as to this juror was cured. This assertion is also incorrect. When defense counsel exhausted his peremptory challenges, he requested an additional peremptory on the ground that he was wrongfully denied a challenge for cause on Heuslein (T. 2449). This request was denied:

[DEFENSE]: We’ve moved for cause when we felt that it was appropriate to move for cause, such as with Mr. Heuslein and Mr. Archer, just the last two, we felt were very appropriate.

[COURT]: Well, I granted Mr. Archer.

[DEFENSE]: I mean, Mr. Heuslein.

[COURT]: Well, I’m going to deny any additional peremptory challenges. **I’ll deny that request. I’m satisfied that the Court’s made appropriate rulings on the cause motions.**

(T. 2449-50).

Thereafter, defense counsel challenged a juror named Mr. Fasano for cause, on the ground that the juror was exposed to extensive pre-trial publicity regarding this case (T. 2451). “Failing that,” defense counsel requested an additional peremptory

a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted.” *Trotter*, 576 So. 2d at 693.

challenge to strike the juror (T. 2451). The prosecutor suggested that the court should grant the additional peremptory (T. 2453). The trial court never ruled on defense counsel's cause challenge on juror Fasano, but instead granted the additional peremptory **to be used on Mr. Fasano:**

[COURT]: Okay. So be it. We'll grant your request at this time for one additional peremptory challenge.

[DEFENSE]: Judge, we'd also like to ask for an additional peremptory challenge to strike Mr. Stoddard.

[COURT]: Well, you've got one additional peremptory challenge and that's where it stands right now **and we're on Mr. Fasano.** So, you've got your one additional peremptory and if you want to make use out of it, **your going to use it for Mr. Fasano or –**

[DEFENSE]: **Yes, judge . . .**

(T. 2453-4).

It is clear that this additional peremptory challenge, which was the only additional peremptory granted to defense counsel, was to be used on Mr. Fasano to remedy any potential error with regard to the cause challenge against this juror. Where the trial judge never ruled on the Fasano cause challenge, and granted an additional peremptory in that limited context, it cannot be argued that this additional peremptory cured the erroneous denial of the cause challenge on juror Heuslein. This is especially true where the trial court had just denied a specific request for an additional peremptory challenge to cure the error relating to Mr. Heuslein (T. 2449-50).

After the exchange regarding Mr. Fasano, defense counsel requested additional peremptory challenges to strike jurors Stoddard, Dale, Guevara, Baun, and Skifano (T. 2454, 2906-13). Defense counsel explained that he was entitled to these additional peremptory challenges based on the previous cause challenges that were denied by the trial court (T. 2903-4). The court refused to grant any additional peremptory challenges, thereby preserving the cause challenge issues relating to jurors Heuslein and Russell.

Finally, the state acknowledges in its answer brief that defense counsel unsuccessfully requested several additional peremptory challenges, to be used on identified jurors. Answer Br. at 49. Nevertheless, the state argues that the cause challenge on Mr. Russell was not preserved for appeal because counsel “never identified which juror he was not able to peremptorily challenge that he would have had he not used a peremptory to remove Russell” Answer Br. at 49. This assertion is both factually incorrect and misconstrues this Court’s holding in *Trotter*. In requesting an additional peremptory challenge to strike a juror named Ms. Reid, defense counsel stated that he was entitled to an additional peremptory based on previously denied cause challenges, **including** the cause challenge on Mr. Russell² (T. 2904). Nevertheless, even if counsel had not reminded the court of the prior cause challenge against Mr. Russell when he requested additional peremptory challenges, this would not preclude review of the issue. *Trotter* requires only that counsel

²Ms. Reid was later stricken from the jury by the state (T. 2899).

exhaust his peremptory challenges, request additional peremptory challenges, and specifically identify the person or persons whom counsel seeks to strike peremptorily. *See Trotter*, 576 So. 2d at 693. Defense counsel met these requirements by identifying jurors Stoddard, Dale, Guevara, Baun, and Skifano (T. 2454, 2906-13). There is no additional requirement in *Trotter* that counsel must also remind the court of every juror that was unsuccessfully challenged for cause each time that an additional peremptory is requested.³ *Id*; *Hernandez v. State*, 763 So. 2d 1144 (Fla. 4th DCA 2000) (holding that counsel need not remind court of denied challenge for cause when requesting additional peremptory). Thus, the denial of the defense cause challenge against juror Russell was preserved.

B) Cause Challenge on Mr. Heuslein

Juror Heuslein learned through the media that Thomas Overton was wearing an electro-shock stun belt underneath his clothing, as well as leg shackles (T. 2322). The juror candidly stated that this knowledge impacted his ability to presume Mr. Overton innocent (T. 2152, 2322). The state argues that Mr. Heuslein was a qualified juror because “he could put aside the information from the newspapers, including reports that ‘they’ve got him chained up’ and decide the case solely on the merits” Answer Br. at 51. Contrary to this assertion, the record shows that the juror never

³Such an additional requirement, beyond what is contemplated by *Trotter*, would be particularly burdensome in a case such as this one, where the jury selection process took one full week, and three different panels-- a total of one-hundred- and-sixteen (116) jurors-- were extensively questioned, both in a group setting and individually (R. 1086-92, 1097-1108; T. 1261-2960).

unambiguously stated that he could set aside his knowledge regarding the extraordinary restraints. Initial Br. at 42-44; T. 2322-4, 2326-9. When specifically asked if the restraints would impact his ability to fairly evaluate the evidence, Heuslein repeatedly gave ambiguous responses such as, “I don’t *think* so” and “I don’t know to tell you the truth” (T. 2322-3). In his final response to this question, the juror twice stated, “I don’t *think* so.” Such responses have repeatedly been found insufficient to rehabilitate a juror. Initial Br. at 43-44.

With regard to Heuslein’s views on the death penalty, the state asserts that the juror “had no doubt that he would entertain the possibility of a life sentence.” Answer Br. at 52. Again, this assertion is inaccurate. Heuslein stated anyone convicted of premeditated murder should receive the death penalty, and that his personal views **would** influence him in deciding this case. Initial Br. at 46; (T. 2329-32). When asked by the prosecutor if he could set aside this view, Heuslein responded equivocally, stating, “I would have to see when the time came, but I *would think so . . . I would say so.*” (T. 2322-4). In his final response to the question of whether he would lean toward death in this case, the juror said, “Like I said, you’d have to just see what, you know, what went at that time . . . See, I’ve never been in this situation.” (T. 2338-40) Again, such ambiguous responses did not establish beyond a reasonable doubt, as the state asserts, that this juror could be impartial. Initial Br. at 47.

C) Cause Challenge on Mr. Russell

Juror Russell asserted that a person accused of a crime should testify on his

own behalf. The juror then vacillated several times between his professed ability to follow the law regarding the right to remain silent and his firm belief that an innocent defendant would testify (T. 1492, 1681-4). The totality of these responses raised a reasonable doubt as to his competency. See Initial Br. at 50-3.

Mr. Russell also stated that he read the newspapers daily and was exposed to extensive publicity regarding this case (T. 1674). When asked specifically what he had read, Russell explained that he was aware of the facts of the crime, the fact that Overton “cut his throat,” and he was also aware of the hidden security measures (T. 1674-5). Overton’s post-arrest suicide attempt was an extremely prejudicial fact not introduced at trial. Moreover, the juror also thought he recalled reading that Mr. Overton “wanted to escape” (T. 1675).

The state asserts that Russell’s awareness of the security measures and the suicide attempt cannot be considered on appeal because these issues “were not asserted as grounds underlying the for cause challenge below.” Answer Br. at 54, n. 23. However, defense counsel’s objection was sufficient to preserve these issues, where counsel asserted that Mr. Russell could not set aside the information from the newspaper, and that the juror’s responses “raised a reasonable doubt as to whether he could be fair and impartial **based upon the publicity in the case.**” (T. 1900).

Mr. Russell twice asserted that based upon what he had read, the “finger” was “pointing” at Mr. Overton, yet the juror promised to set the prejudicial information aside (T. 1678-9, 1684). With regard to the hidden security restraints, Russell

admitted that this caused him to think that Overton might be “very dangerous” (T. 1675).⁴ Russell was “glad” that the restraints were being used because it made him feel “relaxed.” (T. 1679). When asked if he would be thinking about the security measures in deliberating this case, the juror responded, “**Probably.** I’d be wondering why there’s, you know, so much security, what was the real reason for it” (T. 1675). Russell later disavowed this response, and told the prosecutor that he would not think about the restraints in deliberating the case (T. 1682).

The state seizes upon Mr. Russell’s final response and argues that “Russell was clearly an acceptable juror.” Answer Br. at 54. However, regardless of the last response, the juror’s *knowledge* of the hidden electrical stun belt, along with his knowledge of Overton’s near-suicide, and possible attempt to escape, made it impossible for him to sit as an impartial juror.

This Court has held that “trial courts must ascertain whether prospective jurors possess information which is not admissible in the trial in which they will serve as jurors and which is **so prejudicial to the defendant that the jurors’ knowledge of the information creates doubt as to whether the jurors can decide the case based solely upon the evidence that will be admitted at trial.**” *Kessler v. State*, 752 So. 2d 545, 551 (Fla. 1999), *citing Bolin v. State*, 736 So. 2d 1160, 1165-6 (Fla. 1999). A juror’s knowledge of certain presumptively prejudicial facts not introduced at trial may render that juror unqualified to serve, regardless of the juror’s assurances to the

⁴The juror also speculated that perhaps somebody was “out to get” Mr. Overton (T. 1675).

contrary. *See Overton v. State*, 757 So. 2d 537, 539 (Fla. 3d DCA 2000) (where several jurors had knowledge of “otherwise inadmissible and highly prejudicial information,” specifically that the defendant was sentenced to death in another case, “reasonable doubt existed as to their ability to serve as fair and impartial jurors, notwithstanding their assertions to the contrary”); *Cappadona v. State*, 495 So. 2d 1207 (Fla. 4th DCA 1986) (where jurors read in newspaper that defendant was convicted of same offense in a previous trial, prejudice was “inherent” despite jurors’ statements that they could be fair and set information aside); *Wilding v. State*, 427 So. 2d 1069, (Fla. 2d DCA 1983) (defendant was deprived of an impartial jury because jurors were “bound to be unfairly prejudiced” by knowledge of a previous unrelated arrest, despite their assertions to the contrary); *Goins v. McKeen*, 605 F.2d 947 (6th Cir. 1979) (where jurors learned through media that defendant wished to plead guilty to lesser offense in exchange for assisting in another investigation, this information was inherently prejudicial and the jurors could not serve, despite assurances that they could be fair); *United States v. Williams*, 568 F.2d 464, 471 (5th Cir. 1978) (“The effect of exposure to extrajudicial reports on a juror’s deliberations may be substantial even though it is not perceived by the juror himself, and a juror’s good faith cannot counter this effect.”).

With regard to the effect of physical restraints alone, both the Supreme Court of the United States and this Court have found that ordinary restraints such as gags and shackles -- measures far less severe than the electro-shock stun belt used in this

case -- are “inherently prejudicial” because they signal to the jury that the defendant is culpable and dangerous. *Holbrook v. Flynn*, 475 U.S. 560, 568-9 (1986); *Bello v. State*, 547 So. 2d 914, 918 (Fla. 1989); *See also* cases cited in Initial Br. at 41-2. Moreover, the United States Supreme Court has found that “little stock” need be placed upon a juror’s assurances that he is uninfluenced by such restraints. *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986). “Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused.” *Id.* In this case, juror Russell’s final assurance of impartiality is not controlling, where he, like Mr. Heuslein, was aware of the inherently prejudicial hidden electric stun belt, and where Mr. Russell also knew that Mr. Overton attempted suicide after his arrest.

The state cites *Neary v. State*, 384 So. 2d 881 (Fla. 1980) and *Heiney v. State*, 447 So. 2d 210 (Fla. 1984) to argue that the jurors’ knowledge of the shock belt was not sufficient to warrant the granting of challenges for cause. However, these cases do not involve cause challenges and are inapplicable. In both cases, jurors inadvertently saw the defendant being transported to the courtroom in handcuffs *after* the trial had begun, and the issue was whether the brief sightings were so prejudicial as to require a mistrial. A mistrial should be granted only when it is deemed “necessary to ensure that the defendant receives a fair trial.” *See Cole v. State*, 701 So. 2d 845, 853 (Fla. 1997). In contrast, during jury selection, the standard for

determining if a cause challenge should be granted is whether there is a “basis for any *reasonable doubt*” as to the juror’s impartial state of mind. *See Singer v. State*, 109 So. 2d 7, 23-4 (Fla. 1958).

Moreover, the juror’s extrajudicial knowledge in this case was far more prejudicial than in *Neary* and *Heiney*. The jurors in those cases saw that the defendant wore handcuffs or chains only briefly while being transported, a common practice that does not necessarily brand the defendant as being particularly dangerous. In contrast, jurors in this case learned that the defendant would be strapped to an electro-shock stun belt during all of the courtroom proceedings, an extreme security measure implying that “unique force is necessary to control the defendant,” even in a courtroom setting. *State v. Flieger*, 955 P.2d 872, 874 (Wash. Ct. App. 1998). This knowledge of such prejudicial and inadmissible information could not be readily erased from their minds, and was sufficient to create a reasonable doubt as to whether jurors Heuslein and Russell could render an impartial verdict.

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 state relies on *Wainwright v. State*, 704 So. 2d 511 (Fla. 1997), to argue

that the STR evidence was properly admitted. Answer Br. at 56-7. However, there was no *Frye* hearing in *Wainwright*, as there was in this case, to judge the admissibility of proposed STR evidence. The only issue in that case was whether the state was dilatory in providing additional RFLP⁵ test results on the first day of trial. The trial court gave the defense a 24-hour continuance to allow its expert to evaluate these RFLP results, and the defense made “**no subsequent objection.**” *Id.* at 515. In the absence of an objection, this Court found no abuse of discretion by the trial court. *Wainwright* has no application to this case, where the defense in this case repeatedly requested materials that were critical for the defense expert to evaluate the reliability of the state’s new STR test, and repeatedly objected on the ground that the absence of these materials effectively denied the defense the opportunity to participate in the *Frye* hearing. Initial Br. at 12-17.

The state also represents that the defense was given “complete access” to the requested material and “chose not to avail itself of the opportunity to acquire it.” Answer Br. at 7. Contrary to this assertion, the record shows that defense counsel repeatedly and diligently sought discovery of these items from Bode Laboratory, Bode Laboratory ultimately refused to comply with counsel’s reasonable discovery request, and thereafter, the trial court refused to compel discovery, and prevented counsel from personally obtaining the documents by refusing to grant a necessary continuance.

⁵RFLP is the older method of DNA testing found by this Court to meet the requirements of *Frye*. See *Henyard v. State*, 689 So. 2d 239 (Fla. 1996).

When the state conducted its initial RFLP test through the Florida Department of Law Enforcement (FDLE), a defense discovery request was directed to the FDLE, the FDLE complied with this request, and the defense expert reviewed the documents in preparation for trial (T. 794-5, R. 104-123). When the state completed the new STR test, performed by the Bode Laboratory in Virginia, defense counsel immediately filed a similar discovery request (R. 526-33, 954; T. 760). Defense DNA expert Dr. Gary Litman testified that the materials requested from Bode were documents routinely provided to him in other cases by 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. 957-8). With regard to the specific request for the laboratory’s protocol manual, Dr. Litman testified that in “well over 100 cases” on which he was retained, he “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 . . . ” (R. 956). Thus, the defense reasonably and diligently sought the materials at issue by filing a discovery request on November 2, 1998 directed to the Bode Laboratory.⁶

The defense made repeated efforts to compel speedy discovery. On December 18, 1998, defense counsel advised the court that Bode Laboratory had not yet complied with the STR discovery request, and that a continuance might be necessary (T. 754). On December 22, 1998, defense counsel again brought this matter to the

⁶Bode had completed the STR test in October 1998, and submitted only a brief summary of its findings to the defense (R. 954; T. 760).

court's attention, explained that his DNA expert needed to review the requested discovery documents, and asked that the court compel discovery (R. 669-71; T. 795-9). The trial court ordered the state to supply any missing discovery items by December 31, 1998 (T. 803-5).

Bode Laboratory finally responded on December 29th (T. 754, 795-9, 938; R. 955). That same day, defense counsel immediately notified the defense expert of the response (R. 955). Dr. Litman had arranged to travel out of the state for the holiday, and was not able to review the Bode discovery response until January 4, 1999, three days prior to the scheduled *Frye* hearing (R. 901-8, 955-6; T. 938). At this time, the defense expert discovered that critical items of discovery were still missing, including the protocol manual, validation studies, and the proficiency test results (R. 956). Bode's response stated that counsel would have to travel to the laboratory in Virginia to review these items (R. 956). The very next day, January 5th, defense counsel brought this matter to the court's attention and requested a continuance (T. 936-48). With only two days remaining before the January 7th *Frye* hearing, there was simply not enough time for counsel to arrange travel from Florida to Virginia, retrieve copies of the missing documents, have them reviewed by the defense expert, and prepare for the admissibility hearing (R. 955, 959; T. 1170, 1239). Nevertheless, the trial court denied counsel's request for a continuance (T. 947). Given these circumstances -- counsel's repeated discovery requests, Bode Technology's late and incomplete discovery response, and the trial court's refusal to allow any reasonable amount of

time for counsel to otherwise obtain the documents -- the state cannot assert that counsel did not “avail itself” of an “opportunity” to acquire the necessary materials.

The state also suggests that counsel should have obtained all of the necessary information found in the laboratory protocol manual, the validation studies, and the proficiency tests by deposing Dr. Bever, or by questioning him at the *Frye* hearing itself. Answer Br. at 57-8. However, defense counsel had been advised by his DNA expert Dr. Litman that given the highly technical nature of STR testing, and the variety of procedures that may be used, it was impossible for the expert to even understand *how* this STR test was performed without first examining the laboratory’s protocol manual (R. 954, 958). Thus, in the absence of discovery, Dr. Litman could not assist counsel, a lay person, in drafting relevant questions for an effective deposition or cross-examination of Dr. Bever (R. 956). Moreover, even if it were possible to elicit all of the information obtained in the protocol manual, the validation studies, and the proficiency test results through deposition -- information which the Bode Laboratory itself characterized as “voluminous” (R. 897) -- the defense would nevertheless need access to the materials themselves in order to independently evaluate Dr. Bever’s self-serving testimony regarding whether his laboratory followed proper protocol, whether it sufficiently validated the specific technology applied, and whether proficiency tests showed that the laboratory personnel was sufficiently qualified to conduct this testing (R. 958).

The state goes on to assert in its answer brief that even if the defense was

unfairly prevented from obtaining the requested information, Mr. Overton is nevertheless not entitled to relief because the discovery request was “overreaching.” Answer Br. at 58. The state provides no explanation as to why these materials were unnecessary, and makes no attempt to distinguish the numerous cases cited in the Initial Brief, all of which establish that the defense was entitled to the specific documents requested in this case. Initial Br. at 58 (footnote 23), 64, 66-67, 70 (footnote 35), 72. Moreover, the state makes no mention of the National Research Counsel reports or the TWGDAM guidelines, authoritative scientific sources that also establish that these materials were necessary to evaluate the reliability of the STR test. See Initial Br. at 62-73.

Next, the state argues that the STR test was properly admitted into evidence because the state’s witnesses testified that the test satisfied the requirements of *Frye*. Answer Brief at 58-64. This argument misses the point. In *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995), this Court held that a *Frye* hearing is an **adversarial proceeding**. Therefore, it is “impossible” for a trial court to correctly determine the admissibility of new or novel scientific evidence based only on the testimony of one side’s expert witnesses, where the other party is denied the opportunity present evidence to the contrary. *Id.* at 1168. By forcing defense counsel to proceed to the *Frye* hearing, without the defense expert having access to critical materials that bear directly on the reliability of the STR testing at issue, the trial court denied the defense due process and the right to a fair admissibility hearing.

As explained in the Initial Brief, there are various STR testing “kits” on the market that employ different testing procedures, new emerging technologies, and examine different locations or loci on the DNA strand.⁴ At least three trial courts around the country have refused to admit the results of STR tests, finding that the particular kits used in those cases had not gained general acceptance in the scientific community. See discussion in Initial Br. at 66-7. The state cites *Allen v. California*, 85 Cal. Rptr. 2d 655 (Cal. Ct. App. 1999), and *State v. Jackson*, 582 N.W.2d 317, 325 (Neb. 1998), for the proposition that STR testing has been found to pass the *Frye* test. While the STR kits used by the laboratories in those cases may have been sufficiently validated and proven reliable, these cases do *not* establish that any kit that employs the STR methodology is reliable.⁵ Moreover, as *Jackson, supra*, explains, even validated DNA tests are rendered unreliable and therefore inadmissible when the proper protocol is not followed. See *Jackson*, 582 N.W.2d at 325-6. The defense in

⁴See 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>>.

⁵“STR” or short tandem repeat tests are those that examine loci with multiple copies of an identical, short, DNA base-pair sequence, arranged in direct succession (for example the sequence CATCATCATCAT) (T. 1084, 1087). STRs are scattered throughout the human DNA strand in enormous numbers. NATIONAL RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE at 23. As more STR sequences are identified and validated for identification testing purposes, this type of testing is coming into wide forensic use. *Id.* However, NRC II explains that some STR loci “might not conform strictly to some of the population-genetics assumptions used in evaluating the significance of a match.” *Id. at 71.*

this case was unable to verify whether the proper protocol was followed because the Bode Laboratory refused to provide a copy of its procedure manual.

Finally, the state asserts that any error committed by the trial court in admitting the STR test was harmless because the state also introduced RFLP test results that incriminated Mr. Overton. Answer Br. at 65. However, it was the state that found it necessary to delay the trial for over six months to perform STR/DNA testing,⁶ and to incur the high cost of this testing, as opposed to relying upon the initial RFLP test to prove its case (T. 464; R. 959). Significantly, the state announced prior to trial that STR testing “**need[ed] to be done**” because it would have a “**significant impact** on the statistical reliability” of the state’s DNA evidence (T. 462).

Moreover, the original RFLP test was performed by a state agency, the Florida Department of Law Enforcement, whereas the STR test was conducted by an independent private laboratory. The essence of the defense in this case was that law enforcement agents sought to frame Mr. Overton for a crime he did not commit. See Initial Br. at 1-11, 17-32. The defense showed that there was an extremely unreliable chain of custody for the critical bed-sheet evidence, beginning when the police department serologist, Dr. Donald Pope, took the evidence to his *home* and “misplaced” swab evidence taken from the victim. Initial Br. at 6-11. The state recognized that the need for “independent testing” by a private laboratory would be

⁶The Bode Laboratory began the STR testing process in late June of 1998. It was not until December 29, 1998 that this laboratory sent an incomplete discovery response regarding the test to defense counsel (R. 959).

a “highly contested issue” at trial (T. 301). Thus, the state sought the additional STR test on this basis as well (T. 301).

After successfully securing state funds and additional time to conduct STR testing, the state presented the testimony of Dr. Bever at trial. Bever testified that his laboratory’s “quality controlled” method of STR testing matched Overton’s blood sample to DNA from the bed-sheet evidence, and that the probability of finding another Caucasian with an identical STR/DNA pattern was one in four trillion (T. 4085-8). In closing argument, the prosecutor relied on the evidence of the two different DNA methodologies to collectively argue that Mr. Overton was the person who committed the crime (T. 4712).

Having sought STR testing on the ground that it was necessary to the state’s case, and having presented this powerful scientific evidence from an “independent” private laboratory to the jury, the state cannot now claim, and prove beyond a reasonable doubt, as they must, that the STR evidence did not impact the jury in reaching its verdict. *See State v. Digulio*, 491 So. 2d 1129 (Fla. 1986); *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999) (reaffirming *Digulio* standard).

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 state asserts that this issue -- the trial court's erroneous denial of a continuance of the trial date -- is procedurally barred because the Initial Brief fails to "mention a continuance, much less identify when or where such was requested, or dealt with, in the lower court, or give the bases for denial of same." Answer Br. at 66. The state overlooks footnote 38, which specifically provides this information. Initial Br. at 73. Defense counsel made numerous requests for a continuance, both before and during the trial, arguing that he could not confront the state's STR evidence without the missing discovery, including the protocol manual, validation studies, and proficiency test results (T. 796, 936-48, 1017-33, 1162-73, 1236-7, 2960-2). This issue was clearly preserved for appeal.

The state again argues that the defense could have traveled to the Bode laboratory in Virginia to obtain the necessary discovery. As explained above, the defense expert reviewed the late discovery response from Bode and realized that critical documents were missing on January 4, 1999 (R. 956). The very next day, January 5th, defense counsel requested a continuance, but the request was denied (T. 936-48). The *Frye* hearing was held two days later on Friday, January 7th, and jury selection began on Monday, January 11th (T. 1017, 1212). The state suggests that the defense could have obtained the necessary discovery for trial purposes some time between January 11th and January 20th, when the actual trial began. Answer Br. at 67. However, the jury selection process took one full week, from Monday, January 11th through Friday, January 15th (R. 1086-1108; T. 1261-2960). Three panels-- a total of

one-hundred- and-sixteen (116) jurors-- were extensively questioned, both in a group setting and individually (R. 1086-92, 1097-1108). It was necessary for both defense attorneys to be present to assist each other during this long voir dire process. The trial began three working days later, on Wednesday, January 20th. Again, without a continuance, there was simply insufficient time for counsel to travel to Virginia to obtain missing discovery, have the discovery reviewed by the defense expert, and work with the expert in preparing cross-examinations of the state's experts before the January 20th start of the trial.

Finally, the state maintains that the defense had requested "multiple continuances" in the past, that the trial judge was "fed up," and therefore, that the defense was not entitled to another continuance to obtain missing STR discovery. Answer Br. at 68-9. This assertion is incorrect. The court had previously granted a *joint* continuance in December of 1997 (T. 257-9). Only *one* defense continuance was requested and granted in March of 1998 (T. 422-8). Thereafter, in July of 1998, the court was forced to grant another continuance because of the *state's* actions, where the state disclosed four new boxes of discovery to the defense at this late date (T. 632, 650-1). The trial judge, upset that he had to postpone the trial, announced that this would be the final continuance (T. 650-1). In December 1998, when the problem of the missing STR discovery first arose, defense counsel sought a necessary continuance, brought about by Bode laboratory's late and incomplete discovery response. The trial judge unjustly concluded that defense counsel had been

sufficiently “indulged” and refused to grant additional time. Neither the previous continuances, nor the need for a continuance in December 1998, were occasioned by the actions of the defense.

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

A theory of defense at trial was that the police, who had previous contacts with Mr. Overton’s AIDS-infected girlfriend Lorna Swaybe, obtained a used condom from Swaybe containing Overton’s semen and planted it on the bed-sheet evidence. The defense established that the highly unusual and defective chain of custody for the bed-sheets provided ample opportunity for tampering with this evidence⁷ (T. 4729). But expert- chemist testimony was necessary to show that the semen found on the bed-sheets, which contained the chemical nonoxynol-9, originated from a condom.

⁷The state asserts that the “crux of the defense” was that Mr. Overton’s semen was planted on the MacIvor bed-sheets *at the crime scene*. Answer Br. at 72. Contrary to this claim, the defense extensively cross-examined the state’s witnesses, particularly Dr. Pope, regarding the strikingly defective chain of custody for the bed-sheet evidence, starting in 1991 when the evidence was collected through 1993 when it was for the first time placed in a secured evidence locker. *See* Initial Br. at 6-11. Defense counsel argued to the jury that this corrupted chain of custody provided a wide range of opportunity for tampering with the evidence (T. 4729).

The state concludes in its brief that no such expert was needed because Overton, “who may have been used to using condoms when he had sex with his AIDS-infected girlfriend,” used a condom in committing this crime and spilled the contents at the scene, thereby explaining the presence of nonoxynol-9. Answer Br. at 70-1. However, the trial prosecutor did not rely on this theory, but instead retained Mr. Oliver to testify regarding alternative sources for the nonoxynol on the bed sheets, other than a condom. Moreover, the state’s theory on appeal was contradicted by state’s witnesses at trial, who testified that a condom was *not* used by the perpetrator, as shown by the fact that semen was found in two different places on the bedding *and* three places on the victim’s body (T. 3193-4, 3263-5, 3354-6). The state’s appellate theory that the condom broke during intercourse, or accidentally spilled when it was removed, would not account for this widespread presence of semen. Finally, Dr. Wright, a forensic pathologist, testified that it is *highly unusual* for a sexual assailant to wear a condom (T. 4494-5).

In the alternative, the state argues that no independent chemist could have aided the defense, based upon the state expert’s testimony that no existing test could distinguish between the spermicidal form of nonoxynol-9 and nonoxynol from a detergent. Answer Br. at 72. However, as discussed in the Initial Brief, there are tests used by forensic chemists to identify trace particles, lubricants, and/or the spermicidal version of nonoxynol from condoms. *See* Robert D. Blackledge, *Condom Trace Evidence: A New Factor in Sexual Assault Investigations*, FBI LAW ENFORCEMENT

BULLETIN, May 1996, at 12-16. Without a chemist expert, the defense could not explore the possibility of such testing to support its defense of planting.

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 state argues in its answer brief that Zientek's statement to chaplain Remley was admissible to rebut a charge of "recent fabrication." Answer Br. at 79-80. However, defense counsel's cross-examination of this witness established that his motive to fabricate evidence existed well before the tearful account to the chaplain. Counsel first established that Zientek had worked undercover in the past, had no respect for the legal system, and knew how to set up a plan to get what he wants from law enforcement officials (T. 4193, 4198-9, 4224). Counsel also elicited that Zientek was aware of the vast publicity surrounding the MacIvor case, falsely represented himself to Mr. Overton as a paralegal, asked to review the materials in Overton's case, and also read the newspaper articles regarding the case (T. 4141, 4194-5, 4196, 4200-1, 4202-3). These events-- introduced by defense counsel to show Zientek's plan to frame Overton-- all took place **before** Overton's alleged confession, and before Zientek's "emotional" account of a confession to the chaplain (T. 4151-2). Because counsel established that the motive to fabricate existed before the prior consistent statement to the chaplain was made, this prior statement was not admissible. *See Jackson v. State*, 498 So. 2d 906 (Fla. 1986); *Chandler v. State*, 702

So. 2d 186 (Fla. 1997); *Keffer v. State*, 687 So. 2d 256 (Fla. 2d DCA 1996); *LeBlanc v. State*, 619 So. 2d 1021 (Fla. 3d DCA 1993).

The state also asserts that the chaplain's testimony was not inadmissible hearsay because "'hearsay' is a statement . . . [and] Ms. Remley's testimony did not relate any statements, but reported only her observations when Mr. Zientek was speaking with her." Answer Br. at 80. The state ignores the line of cases establishing that the rule against hearsay is violated when the nature of the statement can be "readily inferred" from the testimony, notwithstanding the fact that the actual statement of the declarant was not repeated. *See Postell v. State*, 398 So. 2d 851 (Fla. 3d DCA 1981); *Davis v. State*, 493 So. 2d 11 (Fla. 3d DCA 1986); *Wilding v. State*, 674 So. 2d 114 (Fla. 1996); *Keen v. State*, 25 Fla. L. Weekly S754 (Fla. Sept. 28, 2000). Here, the inescapable inference from the chaplain's testimony-- regardless of the fact that the statement was not repeated-- was that Zientek told her that Mr. Overton had confessed. Therefore, the testimony was hearsay, in the form of a prior consistent statement introduced to improperly bolster the credibility of Zientek's trial testimony regarding the alleged confession.

Finally, the state contends that this issue was not preserved because defense counsel, in voicing his objection, did not state that the chaplain's testimony was hearsay. Answer Br. at 80-1. However, counsel objected on the ground of improper bolstering, and thereby put the court on notice that the proposed testimony by the chaplain regarding Zientek's prior consistent statement was inadmissible to buttress

Zientek's credibility, or to rebut any charge of fabrication, as the trial prosecutor alleged (T. 4247). Therefore, this issue was properly preserved.

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.

The state makes several inaccurate factual representations in support of its argument that the HAC aggravator was established with regard to Michael MacIvor.

The state asserts:

Overton told **Green and Zientek separately** that when he was burglarizing the home . . . the 'lady' came screaming out of the bedroom and jumped on his back **while he was attacking the male.**

* * *

Overton taped Michael's face so he would not have to see his eyes bulge . . . **Nonetheless, Michael knew what was happening.** His wife came screaming out of the bedroom while Overton was **first attacking him.**

* * *

. . . [H]e was **clearly conscious** of both [his] attacker and [his] impending death in the moments preceding [his] actual death.

Answer Br. at 86-7, 89 (emphasis added). The state then argues that the "events leading up to [MacIvor's] death, as set out above, were themselves heinous, atrocious, and cruel." Answer Br. at 89.

In contrast to the state's account, the record does **not** establish that Michael MacIvor was aware of the assault on his wife, nor does the record show that MacIvor was conscious when his face was taped. Rather, the evidence shows that Mr. MacIvor was immediately knocked unconscious, and it is unclear whether he regained consciousness before he was killed (T. 4156, 4159).

Only the two "snitch" witnesses testified regarding the actual murders -- Guy Green and James Zientek. Green testified that Overton entered the home to commit a burglary, that a "fat" woman jumped on his back and fought with him, and that he had to kill her (T. 3704). Green testified Overton also struggled with "another person" in the house, but Green did not describe that struggle, or say when it took place, nor did Green testify that it resulted in another killing (T. 3783). The only testimony by Green that could have possibly referred to Michael MacIvor was the following:

[COUNSEL]: In part of this statement you said that this crime was committed in a very wealthy, exclusive neighborhood; is that correct?

[GREEN]: Yes.

[COUNSEL]: And that there was a big struggle with a fat woman?

[GREEN]: Yes, sir.

[COUNSEL]: **And another person?**

[GREEN]: **Yes, sir.**

(T. 3782-3). Green did not offer any testimony whatsoever regarding the murder of

Michael MacIvor (T. 3701-3807). Moreover, this brief and vague reference did not establish, as the state contends, that Mr. MacIvor witnessed or was aware of an assault upon his wife.

The testimony of James Zientek also failed to establish that MacIvor was aware of the assault on his wife, and does not conclusively show that he was conscious in the moments before his death. Zientek testified that Overton surprised Mr. MacIvor from behind, hit him on the head with a pipe, and then knocked him unconscious with his fist (T. 4155-6). **After** MacIvor was knocked unconscious, when Overton was tying him, Ms. MacIvor ran out of the bedroom and, according to Zientek, Overton chased her back into the room (T. 4156). Overton then returned to the area where Mr. MacIvor lay **unconscious** and taped his face (T. 4157). Zientek testified that Overton knew that MacIvor was “temporarily knocked out” at this point (T. 4157). There is no testimony whatsoever to support the state’s claim that Michael MacIvor “knew what was happening” when his wife came out of the bedroom and his face was taped.

Zientek testified that after these events, Susan MacIvor was raped and killed in the bedroom (T. 4158). Overton then returned to the living room area where Michael MacIvor lay and saw that Mr. MacIvor was “**apparently just becoming conscious.**” (T. 4159). It was at this point, according to Zientek, that MacIvor was kicked in the stomach and strangled (T. 4159). This testimony that MacIvor was “apparently just” entering consciousness was the only basis upon which the court

could find that Mr. MacIvor was conscious and aware of his own strangulation. As set out in the numerous cases cited in the Initial Brief, such speculative testimony is insufficient to establish the HAC aggravator beyond a reasonable doubt. Initial Br. at 89-90.

Finally, the state contends that the HAC aggravator was established because Michael MacIvor was “incapacitated and bludgeoned” before he was strangled. Answer Br. at 90. This assertion is incorrect.

The factor of heinous, atrocious or cruel is proper only in unnecessarily torturous murders. *See Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (quoting *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973)); *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992), *citing Sochor v. Florida*, 504 U.S. 527, 536-37 (1992). There must be competent, substantial evidence of either prolonged suffering or anticipation of death in order for this aggravating factor to apply. *See, Elam v. State*, 636 So. 2d 1312, 1314 (Fla. 1994) (HAC not properly found because there was no prolonged suffering or anticipation of death; although the victim was bludgeoned with a brick and had defensive wounds, the attack took place in “a very short period of time”--a minute or half a minute--and the victim was unconscious at the end of this period); *Kearse v. State*, 662 So. 2d 677, 686 (Fla. 1995) (HAC improperly found where, although the victim suffered several wounds, he either remained conscious for a short time or rapidly went into shock); *Gorham v. State*, 454 So. 2d 556, 559 (Fla. 1984) (insufficient evidence that victim who was shot twice in the back apprehended certain

death “more than moments before he died”); *Bundy v. State*, 471 So. 2d 9, 22 (Fla. 1985) (evidence insufficient to support HAC where no evidence victim experienced extreme fear and apprehension before death); *Jackson v. State*, 451 So. 2d 458, 463 (Fla. 1984) (because the victim remained conscious only a “few moments” after being shot in the back the first time, he was “incapable of suffering to the extent contemplated by this aggravating circumstance”). Compare *Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993) (defendant drove five-year-old child to a bridge, severely beat and strangled him, then threw him, still conscious, to the water seventy feet below).

The evidence in this case did not show any anticipation of death or prolonged suffering before Mr. MacIvor was rendered unconscious. Zientek testified that MacIvor was surprised from behind with a quick blow to the head, punched, and immediately rendered unconscious (T. 4155-6). Dr. Nelms confirmed that MacIvor had no defensive wounds, and that the trauma to the head would likely have rendered him unconscious (T. 3624-5, 3636). Zientek’s uncertain testimony that MacIvor was “apparently just” regaining consciousness when he was strangled does not establish conscious suffering or awareness of impending death. Therefore, the evidence was insufficient to support the finding of HAC.

The state cites *Henry v. State*, 613 So. 2d 429 (Fla. 1992) and *Wilson v. State*, 493 So. 2d 1019 (Fla. 1986) in support of its argument. Neither of these cases is applicable. In *Henry*, the victim suffered a head wound, was set on fire resulting in burns to 90 percent of her body, *remained conscious* throughout this ordeal, and died

the next day. A second victim was bound and set on fire after the first victim was set on fire. Unlike this case, where Mr. MacIvor was immediately rendered unconscious, the evidence in *Henry* established excruciatingly prolonged suffering and an awareness of impending death. In *Wilson*, although the victim was brutally beaten with a hammer, he remained conscious, struggled with the defendant, and attempted to fend off blows before he was fatally shot. During this struggle, a 5-year-old relative was stabbed by the defendant. The evidence in that case showed sufficient time for the victim to anticipate death and to consciously suffer from repeated blows. *Wilson* is not analogous to this case, where Mr. MacIvor was surprised from behind, received one blow to the head, was immediately rendered unconscious, and did not struggle or defend himself.

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.

The state argues that Zientek's testimony was corroborated by the DNA evidence and the medical examiner's testimony, and therefore, there was no fundamental error in instructing the jury during the penalty phase. Answer Br. at 92-

3. This argument misses the point. While Overton's presence at the crime scene may have been corroborated by the state's evidence⁸, Zientek's testimony regarding

⁸The state points to the officers' testimony regarding the burglary tools, the placement of the ladder, and weather conditions, and argues that this testimony independently corroborated Zientek's story. However, it should be noted that Zientek had viewed all of the crime scene photographs before his statement to the

Overton's alleged statements as to premeditation, intent, and the manner in which the crimes were committed was the sole evidence upon which the trial court could rely in finding the CCP and avoiding arrest aggravators. See Initial Br. at 91-2.

Contrary to the state's assertion, Ms. MacIvor's friend's testimony did not corroborate Zientek's claim that Overton and Ms. MacIvor knew each other before the murders took place, in support of the CCP aggravator. Rather, this friend only testified that Susan MacIvor was a customer at a gasoline station where Overton was employed, and offered no testimony regarding whether they had ever met or were acquainted (T. 3044, 3055-6).

In the absence of any testimony to corroborate Zientek's claims that the murders were carefully planned (CCP), or to corroborate his testimony that Overton murdered the victims to avoid leaving witnesses (avoiding arrest aggravator), the jury should have been instructed during the penalty-phase to consider this snitch's testimony with great caution.

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

The state argues that the trial court complied with his duty to consider “**all possible**” mitigating evidence, *see Robinson v. State*, 684 So. 2d 175, 179 (Fla. 1996), because he considered all of the evidence contained in the record. Answer Br. at 99. Again, this argument misses the point. Where the trial court was aware that defense

police, and therefore had access to all of this information. See Initial Br. at 29.

counsel had uncovered possible mitigating evidence relating to Mr. Overton's mental health and substance abuse, and prepared a memorandum concerning this evidence, the trial court was under an obligation to consider this evidence, and erred in deferring to the defendant's request that the memorandum not be made part of the record.

Finally, the state asserts that "even if the trial court erred in regard to the proffered mitigation" any error was harmless. Answer Br. at 100. However, it is impossible to ascertain whether the error is harmless without any knowledge as to what the evidence regarding mental health or substance abuse would be. The appropriate remedy is for the trial judge to hear the proffered mitigating evidence, and consider it in light of the properly proven aggravators (see issue VIII.) to determine the correct sentence.

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

Undersigned counsel certifies that a true and correct copy of Appellant's reply brief was served by U.S. mail on the Office of the Attorney General on this 4th day of January, 2001.

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

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