CASE NO. SC11-2403

LOWER COURT CASE NO. 91-12952

BY

BRETT A. BOGLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

Mr. Bogle has presented several issues which involve mixed questions of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Bogle's jury would have viewed those facts. See Porter v. McCollum, 130 S.Ct. 447 (2009).

REQUEST FOR ORAL ARGUMENT

Mr. Bogle has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Bogle lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Bogle, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE[1]

On October 2, 1991, Brett Bogle was indicted for First Degree Murder; burglary of a dwelling with assault or battery; retaliation against a witness; and robbery (R. 24-6). Trial commenced on September 28, 1992. The trial court entered a judgment of acquittal as to the robbery (R. 181). Bogle was found guilty as to the remaining charges (R. 179-80). Subsequent to a penalty phase, the jury recommended death by a vote of 7 to 5 (R. 182). However, on December 22, 1992, the trial court granted a motion for new trial as to the penalty phase (R. 217).

Thereafter, Bogle filed a notice of potential conflict (R. 226-8). The basis for the motion was that Bogle's counsel, Doug Roberts, had accepted a position with the State Attorney's Office (Id.). At a hearing it was revealed that Roberts had discussed Bogle's case with ASA Nick Cox (R. 938, 944-5). The circuit court held that Bogle was not prejudiced (R. 948).

On February 8, 1993, a second penalty phase commenced. The jury recommended death by a vote of 10 to 2 (R. 234). On February 15, 1993, Bogle was sentenced to death (R. 261-7). On direct appeal, this Court affirmed Bogle's convictions and sentences. Bogle v. State, 655 So. 2d 1103 (Fla. 1995).

Bogle filed a series of Rule 3.851 motions. The following year, the State moved to obtain biological samples from Bogle in order to re-test evidence (PC-T. 1-9). On June 6, 2001, the court granted the motion (PC-R. 1354-5). Bogle appealed the

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[1]The following will be utilized to cite to the record: "R. ." - record on direct appeal; "T. " - transcript of the trial; "PC-R. ." - record on appeal on postconviction; "PC-T. ." - transcript of postconviction proceedings; "Ex. ." - exhibits.

order (PC-R. 1361-2), which this Court denied (PC-R. 1652). See Bogle v. State, FSC Case No. SC01-1607.

Prior to the evidentiary hearing, Bogle requested that he be permitted to test the fingernail scrapings from the victim and hair that was introduced as being found on Bogle's pants (PC-R. 1895-9, 1972-4, 1977-87). The court granted his motion.

On October 30, 2006, Bogle filed a motion to disqualify due to the fact that a witness in the case recalled the judge's name in connection with the adoption of her child (PC-R. 2023-31). On December 14, 2006, Bogle filed a renewed motion to disqualify (PC-R. 2079-82). The motion was denied (PC-R. 2085). Bogle filed a second motion to disqualify based upon a phone conversation Judge Timmerman had with Bogle's counsel when Bogle was attempting to interview Judge Timmerman's wife in relation to her interaction with witness Marcia Turley in 1992 (PC-R. 2527-37). Judge Timmerman denied the motion (PC-R. 2615-7).

An evidentiary hearing commenced on June 9-13, 2008. Subsequently, Bogle filed a writ of prohibition with this Court, which was denied on March 5, 2009. See Bogle v. State, FSC Case No. SC08-1290.

Bogle's evidentiary hearing continued on November 30-December 1, 2009, and August 23-24, 2010. Closing arguments were submitted in the beginning of 2011 (PC-R. 2855-903).

In March, 2011, the State notified the circuit court of the DNA analysis regarding Guy Douglas (PC-R. 3040-51). On July 25, 2011, the State notified Bogle of additional information relating to the prosecution of George Schrader for the murder of a woman (PC-R. 3079-83). Bogle sought to investigate the Schrader case

and requested additional discovery.

On October 25, 2011, the court denied Bogle's 3.851 motion.

Bogle filed a motion to compel relating to the Schrader prosecution (PC-R. 3202-4). The motion was never considered.

Bogle timely filed a notice of appeal (PC-R. 3211-2).

STATEMENT OF FACTS

A. THE TRIAL

On September 13, 1991, Robert Wolf noticed a body behind the Beverage Barn (T. 193). The Beverage Barn was located next to Club 41 (T. 196). Upon the arrival of law enforcement, a portion of the back wall was removed because there were some marks on it "where somebody was up against it." (T. 203).[2]

Dr. Adams was called to the scene. He told the jury that:

> The body was in a grassy area . . . There were articles of clothing near the body, a head band, shorts, a brassiere and socks scattered around. The other sock was still on the body, the only garment left on the body. And also near the body were three pieces of concrete which - two of which appeared to be broken from one piece.

(T. 208). One of the pieces of concrete appeared to have blood on it (T. 209); there was blood splatter at the scene (T. 213).

The victim, Margaret Torres, had a laceration to her head and multiple skull fractures; the injuries were consistent with the piece on concrete found at the scene and would have rendered Torres unconscious and caused her death (T. 220, 239).

Adams testified that there were injuries to Torres' anus; she had "several tears ... there was hemorrhage into the tissue" and some "microscopic hemorrhage into the lining of the rectum." (T. 222). The injuries were consistent with anal intercourse (T.

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[2]Dr. Vernon Adams, the medical examiner, described the marks as possibly being "palm prints" (T. 249).

222), though Adams could not determine whether the intercourse was consensual (T. 248). Adams opined that the injuries were inflicted within 3 hours before her death (T. 247). Adams approximated the time of death as 3:00 a.m. on the 13th.

Torres blood alcohol content was .26% or .29% (T. 245).[3]

Brett Bogle became the prime suspect in the crime. He had been dating Katie Alfonso, Torres' sister, during the summer of 1991 (T. 263). At this time, Torres' young children lived with Alfonso in a trailer (T. 261-2). Torres came by the trailer every day (T. 262).

Bogle moved in with Alfonso for 5 or 6 weeks (T. 264). Bogle and Torres "never got along" and bickered a lot (Id.). Alfonso said that Bogle tried to get along with Torres but they continued to argue "mainly about who was cooking or, you know stuff like that." (T. 266). Alfonso finally asked Bogle to leave (T. 266-7). Bogle moved out at the end of August, 1991, but continued to call Alfonso (T. 268).

On September 1, 1991, Bogle called Alfonso and asked if she wanted to go to Pinellas County to buy some beer (T. 269). Alfonso testified: "he was trying, and, you know, I wanted to give him another chance and stuff like that." (Id.). Alfonso and Torres went with Bogle. On the way back, Bogle and Torres argued (T. 270). The group went to Bogle's apartment and Bogle wanted Alfonso to enter his apartment without her sister. Alfonso refused (Id.), and the group then drove to Alfonso's (T. 271).

On the ride home, Bogle called Torres a "bitch, whore" and a

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[3]Adams testified that this level of alcohol could have had an effect on Torres' ability to feel pain (T. 1361-2).

troublemaker (Id.). According to Alfonso, when the group arrived at her trailer, Bogle tried to enter. Torres threatened "to call the cops and [Bogle], he just blew up." (T. 272). He busted the screens and threw Alfonso out of the way to enter the trailer (T. 273). He grabbed the phone from Torres and twisted her arm (T. 274). Then, he took $54.00 from Alfonso's pocket and told Torres that "if she called the cops and pressed charges on him ... that she wouldn't live to tell about it." (T. 275).

That same day, a 911 call was placed from Alfonso's trailer (T. 255). Deputy Zdanwic responded and spoke to Alfonso and Torres (T. 256). She believed they had been drinking (T. 258). Zdanwic observed some red marks on Torres' neck and wrist (T. 256). She also noticed that a screen on a few doors were torn and the front door was damaged (T. 256). There were also smashed telephones in the trailer (T. 256-7).

Within a few days, Bogle called and threatened Torres if she pressed charges (T. 277). Bogle called again and Alfonso told him they were not going to press charges (T. 278).

On the evening of September 12th, Bogle was seen at the Red Gables Bar (T. 374-5). Jeff Trapp testified that Bogle was with an individual named Guy Douglas (T. 375).[4] Trapp also testified that he arrived at the Red Gables Bar to get Jeanie [Burile] because her sister, Marcia [Turley], "was real drunk at Club 41 passed out in a car" (T. 376). He testified that he drove Bogle,

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[4]Trapp testified at the penalty phase. See R. 1216-30. As to Bogle's conversation with Torres, he testified that it did not appear heated, but "normal" and neither appeared upset with the other (T. 1219, 1230). He changed his testimony as to what Bogle told him about Torres saying that Bogle had observed that she was "real trashed" (Id.).

Douglas and Jeanie to Club 41 (Id.). When the group arrived at Club 41 between 10 and 11 p.m., Trapp saw Torres, who was by herself (T. 376, 379). Bogle approached Torres and they had a conversation (T. 377). Bogle told Trapp that Torres was "real trash" (T. 377). Trapp didn't notice any injuries or scratches to Bogle (T. 378). Trapp left the bar 30 to 45 minutes later (T. 379). According to Trapp, Bogle was still at Club 41, but Douglas, Marcia and Jeanie had all left (T. 377-8).

Bogle called Alfonso around 11:00 p.m. and asked if he could come over (T. 281). Alfonso said "no" and Bogle became furious and told her that he loved her, but she "can be a real bitch sometimes." (T. 281).

Phillip and Tammy Alfonso saw Torres at Starky's Bar at 10:30 p.m. (T. 407, 432). After about 45 minutes the Alfonso's left Starky's and went to a friend's house (T. 408-9, 432). Sometime between 11:30 p.m. and midnight the Alfonsos arrived at Club 41 and saw Torres again, alone (T. 433). Torres joined the Alfonsos at their table. Bogle approached the table and inquired if Torres was with them (T. 410, 434). Phillip responded "no" (Id.). Bogle showed him a scar he had from a car accident (T. 411).[5] Phillip saw Torres leave the bar around 1:00 - 1:15 a.m. (T. 412).[6] He saw Bogle walk by him a few minutes later (T. 413). At 2:00-2:30 a.m. the Alfonsos left Club 41. They testified that they saw Bogle (T. 413). Though Tammy could not

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[5]The Alfonsos testified that they noticed no injuries to Bogle or scratches on his forehead (T. 411, 435).

[6]During his testimony, Phillip insisted that he never saw Torres leave the bar earlier in the evening and, though he never spoke to Torres during the evening, she was not drunk (T. 418-9).

really see Bogle, her husband asked him why he was so dirty (T. 436). Phillip testified that Bogle looked like "he had been walking in the mud" and his crotch was wet (T. 414). Bogle said he had passed out in a van (T. 414, 437). Tammy testified that she noticed some scratches on his forehead at this time (T. 437).

On September 13, 1991, Bogle was arrested at a trailer. Detective Larry Lingo located Bogle in the bathroom, behind a shower curtain (T. 359).[7] Lingo also testified that Bogle "had what appeared to be scratches on his forehead and they appeared to be fresh to me at that point." (T. 363).

Ronald Cashwell, who worked in the crime scene unit, testified that he collected a pair of white pants from a bathtub and the pants "were still damp" (T. 346). Cashwell testified:

> Q: When you collected the shoes and the pants and you packaged them, where did you take them?
> A: Packaged them separately and transported them to the ID garage.
> Q: Okay. And are they - were they put in a secured area?
> A: Yes, ma'am.

(T. 346-7; 350).

Corporal Art Picard photographed Bogle on September 14th (T. 339); see State's Trial Exs. 20 A, B and C. On September 17th Lingo checked Bogle's pants out of evidence and examined them:

> A: I took a piece of brown wrapping paper put out on the counter and opened the pants up on top of this and as they were laying on the paper looking down at them, the zipper part opened, I found several what appeared to be pubic hairs inside of the pants and also inside the legs of

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[7]Lingo testified at the penalty phase. See T. 1264-94. During his testimony, Lingo told the jury that Torres' clothes were stacked beside her body in a pile and her sneakers were placed together on the other side of her body (T. 1281). They were not ripped or strewn about (T. 1282). And, there was a lot of blood in the area (T. 1282).

the pants.

(T. 366).[8]

FBI Agent Michael Malone examined and compared the contents of S-Ex. 13, which was the debris from Bogle's pants, with the known head hair and pubic hair from Torres (T. 317). There was a single "Caucasian pubic hair which matched the pubic hairs of Margaret Torres. In other words it was microscopically indistinguishable from her's and, therefore, I concluded this one pubic hair from the pants was consistent with coming from Margaret Torres." (T. 317-8). Malone testified that the hair was shed naturally. Malone also testified that he identified a Caucasian characteristic head hair, which exhibited mixed race characteristics that did not match Bogle or the victim and was identified as coming from "debris from the victim" (T. 328).

FBI Agent Robert Grispino testified that he identified a small drop of blood on Bogle's left shoe, but could not classify it any further (T. 392). Grispino's analysis also determined that blood was present under Torres' right fingernails (T. 394).

FBI Agent Harold Deadman was provided the vaginal swabs on which another agent had identified seminal fluid and "portions of cloth having been removed from the victim's panties" (T. 462). Deadman explained that he was able to extract DNA from the panties but: "I obtained insufficient DNA to conduct our analysis." So, the result was inconclusive (T. 464). As to the vaginal swabs, Deadman testified:

> [T]here was only a very small amount of DNA obtained from the vaginal swabs of the three tests that I conducted.

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[8]Lingo testifief that no one had come into contact with the pants prior to this time (T. 366).

> I obtained DNA patterns for two of the tests and one test I obtained no patterns. The sensitivity of that particular test was not sufficient to generate any results. So, again on one of the tests, the results would be inconclusive because nothing was obtained.
>
> On one of the tests I did on the - a DNA profile from the vaginal swab DNA that was matching to Brett Bogle's DNA profile. The second produced a result was also determined to be inconclusive, but for a technical reason.

(T. 465). Deadman testified that statistically the profile meant that one in twelve Caucasians would exhibit the same profile (T. 467). Deadman opined that the database overestimated the statistics so the percentages would be smaller (T. 468).

The jury convicted Bogle and a penalty phase was held the following day. During its rebuttal, the State presented testimony about hearsay statements allegedly made by Patricia Murray, Bogle's former girlfriend, about prior acts of violence committed by Bogle. See T. 808-20. While the jury recommended death by a vote of 7 to 5, Bogle filed a motion for new trial and presented the testimony of Murray. The court characterized Murray's testimony as "substantially" different from that of the State's witnesses and ordered a new penalty phase (R. 217).

At the second penalty phase the State presented much of the evidence that had been presented at the guilt phase. Bogle presented the testimony of psychiatrist, Dr. Arturo Gonzalez. Gonzalez testified that Bogle was raised in a "very, very dysfunctional family" (T. 1397). Gonzalez testified that Bogle's father forced his kids to use marijuana at a young age and that the children were abused (T. 1399-400). Gonzalez also mentioned that Bogle used drugs at an early age and became addicted to pot and cocaine (T. 1400-1). Gonzalez explained that acute substance abuse affects one's capacity to think and reason so there would

be "diminished capacity" (T. 1401). Gonzalez testified that on the night of the crime, Bogle had drank approximately twelve beers (T. 1403). Gonzalez opined that Bogle "was under ... some type of influence of emotional disturbance" (T. 1403).

On cross examination, Gonzalez admitted that he had conducted no testing with Bogle (T. 1406, 1409). The prosecutor asked whether or not Bogle had any psychiatric disorders (T. 1408). Gonzalez responded: "Well, he has a personality disorder also, which I would characterize as borderline. He sort of been impulsive, that type of thing." (T. 1409). On redirect, Gonzalez testified that because of the alcohol and his upbringing, Bogle's ability to conduct his - conform his conduct to the requirements of the law was impaired to some extent (T. 1427).

In addition, a few of Bogle's family members testified. The family described Bogle's father as a "violent man" who beat his children and wife (T. 1433, 1441-2, 1445, 1451, 1505, 1519, 1531). Bogle's father had mood swings (T. 1445, 1532). He used marijuana, cocaine and alcohol and often left his children home alone (T. 1447-8, 1506). Bogle's father introduced him to marijuana when he was only five or six years old and introduced him to cocaine when he was thirteen (T. 1517-8). Bogle's father was diagnosed with schizophrenia (T. 1532).

Bogle's mother told the jury that Bogle had been prescribed Ritalin as a child and he suffered from chemical pnemonia when he was 18 months old because he drank pine oil cleaner (T. 1529).

In the months preceding the crime, Bogle was using crack cocaine (T. 1460). However, shortly before the crime he had attempted to stop using drugs (T. 1464). Then, a week before the

crime, Bogle was involved in a car accident (T. 1465-6). Bogle was not wearing a seat belt and his face and head hit the windshield (T. 1466). Bogle also sustained three cracked ribs and a broken rib that punctured his lung (T. 1475, 1537).

The jury recommended death by a 10 to 2 vote. The trial court imposed death, finding 1) a prior violent felony relating to the September 1st burglary and assault; 2) the crime was committed while Bogle was engaged in the commission of a sexual battery; 3) the crime was committed to avoid a lawful arrest; and 4) the crime was heinous, atrocious and cruel (R. 261-7).

The court found no statutory mitigation. As to nonstatutory mitigation, the court found that Bogle's family background was entitled to substantial weight; the court gave little weight to Bogle's drug and alcohol use because "there was little evidence of alcohol or drug dependency at the time of the murder." (R. 266). The court gave some weight to Bogle's good conduct at trial and to his kindness to his mother (Id.).

B. THE POSTCONVICTION PROCEEDINGS

At the evidentiary hearing, trial counsel, Doug Roberts explained his perception of the case against Bogle:

> The State's case was that he was the most likely suspect because he had been arguing with her and there was just nobody else that they wanted to investigate.

(PC-T. 586). Roberts believed that the 'scientific evidence was the big deal in the case" (PC-T. 680). But, the case against Bogle was "circumstantial" (PC-T. 588, 651). Roberts believed that Bogle was innocent (PC-T. 589).

1. Marcia, Marcia, Marcia

Guy Douglas was a target of investigation of Bogle's defense

(PC-T. 594). ASA Karen Cox' notes reflect she had been provided information that Douglas confessed to involvement in the crime:

> Marcia Bowerly, sister of Jeane Burile, 6903 Michigan Avenue, Gibsonton, FL
>
> Guy Douglas 92-7731 capias
>
> talk to re: **Guy Douglas confessed to being involved.**

(D-Ex. 2)(emphasis added). The information contained therein was not disclosed to trial counsel (PC-T. 593-4).

Cox testified that she was unsure as to when or how she came into possession of the information that Douglas had confessed (PC-T. 425-6). However, Cox' file reflects that she was involved in the prosecution of Douglas where he had viciously beaten a pregnant Marcia as early as May 22, 1992. See D-Exs. 7, 8.[9] Indeed, Cox had an investigative subpoena issued for Marcia to meet with her on August 5, 1992 (PC-T. 430, D-Ex. 5).

As Bogle's trial approached, Cox' file makes clear that she or someone with the State spoke to Marcia and that Marcia had been the source of the information regarding Douglas' confession and involvement in Torres' murder. Just days before Bogle's trial was to begin, local attorney Wayne Timmerman returned a call from Cox (D-Ex. 9). At the evidentiary hearing, the notes reflecting a return phone call from Timmerman to Cox were explained: In 1991, Marcia became pregnant with Douglas' baby. Marcia was in fear of Douglas due to her knowledge of his involvement in killing Torres. She decided to place her child for adoption and contacted Timmerman (PC-T. 1026). Though

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[9]At the time of the prosecution of Bogle, Marcia's married name was "Turley". However, she used her maiden name of Baurle because she was intermittently separated from her husband.

Timmerman did not handle family law matters, he referred Marcia to another attorney with whom he shared office space (PC-T. 5255). That attorney, Elizabeth Hapner, used the services of Timmerman's wife, Suzanne, in her practice. However, whether it was because she initially attempted to retain Wayne Timmerman or because Suzanne Timmerman was present when Marcia gave birth to her child[10], or whether Marcia simply recalled Timmerman's name from the office building where she met with Hapner, Marcia confusedly reported that she was represented by Timmerman in the adoption proceedings and she reported that she had told her attorney about her reasons for giving up her baby and what she knew about Douglas' involvement in Torres' killing.[11]

Marcia told Cox that she had spoken to her attorney about Douglas' involvement in killing Torres and Cox attempted to verify the information. Cox did not disclose the information. Cox also attempted to verify the information with Marcia's husband, Gary Turley. See D-Ex. 15.

Had Cox disclosed the information Marcia possessed, the defense would have learned that Marcia and Douglas were dating in 1991 (PC-T. 491-2). In September 1991, Marcia lived at the Gables Motel and worked at the bar (PC-T 493-4). Marcia met Bogle on the night of the crime (PC-T. 494). Marcia observed scratches on Bogle's face and forehead, that he had difficulty walking and was wearing a sling (PC-T. 494, 530). Bogle explained that he had been involved in a car accident (PC-T.

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[10]Suzanne Timmerman recalled being present when Marcia's baby was born (PC-T. 817-8).

[11]Hapner recalled that the father may have committed a murder in the Gibsonton area in 1991 (PC-T. 5258).

494). In the early evening, Marcia, Douglas, Bogle and a girl named "Trish" went to the Red Gables bar for drinks and proceeded to Club 41 (PC-T. 495-6). When the foursome arrived, they played pool for awhile and then Marcia sat at the bar (PC-T. 497). Marcia recalled that later, she and Douglas argued and she decided to leave (PC-T. 498). Marcia, who had been drinking, went out to the parking lot and fell asleep in a car (Id.). When she awoke, she entered the bar, had a glass of water, used the restroom and left Club 41 to walk to the motel (PC-T. 499).

While walking back to the motel, Marcia was approached by a police officer who asked for identification (PC-T. 500). Douglas walked by them but denied knowing Marcia (PC-T. 501). The police officer gave Marcia a ride to the motel (Id.). Marcia fell asleep but was awakened by Douglas' entering the room (PC-T. 502). The next time Marcia woke up, it was daylight and Douglas was coming out of the shower (PC-T. 503). Marcia's sister, Jeanne, also saw Douglas coming out of the bathroom, holding his clothes in his arms (PC-T. 826). Marcia and Douglas argued briefly and he told her to "shut the fuck up bitch." (PC-T. 504).

Later, after learning that Torres had been killed, Douglas told Marcia that Bogle had been arrested, but he [Douglas] did not have to worry because he had been with Marcia all night (PC-T. 505). Marcia was shocked because he was not with her all night and when she said this to Douglas, "[h]e told me that he was with me all night and I needed to - that I didn't need to say anything other than that or they would be lucky if they found my body." (Id.). That same day Marcia moved out of the motel and left her employ (PC-T. 505, 830). She was frightened about what

Douglas may do to her if she did not provide him with an alibi and believed that his threat was in relation to Torres' murder (PC-T. 513, 523). Jeanne confirmed that Douglas had told Marcia she should supply an alibi for him and that Marcia was "scared to death" of Douglas based on what happened (PC-T. 827).

Marcia's recollection was hazy as to what else Douglas told her and what she observed on the night of the crime, but she did recall speaking to her sister, her husband, and others about Douglas (PC-T. 506-7). In fact, Jeanne recalled that Marcia had told her that the clothes Douglas held as he was leaving the motel were bloody (PC-T. 827). After Marcia learned that she was pregnant with Douglas' baby, she decided to place the child for adoption because she did not want to have anything to do with Douglas after he had threatened her or raise a child with such a violent person (PC-T. 513-4).

In 1992, while pregnant, Douglas beat Marcia and told her "to quit running [her] mouth." (PC-T. 518). Marcia assumed that her sister had mentioned that Marcia had told her about what she saw on the night of the crime because Douglas and her sister were together the night before the beating occurred (PC-T. 518-9).

Gary Turley remembered the night of September 12, 1991. He recalled seeing Douglas leaving Club 41, after dark, in his truck with Torres (PC-T. 1013). They headed north from Club 41 (PC-T. 1014-5). After going into Club 41 to look for Marcia, Turley left and saw Bogle get into another car with a dark-haired, heavy-set female (PC-T. 1016). Turley observed that car head south from Club 41 (PC-T. 1016). When Turley passed the Beverage Barn, he saw what he thought was Douglas' truck in the parking

lot (PC-T. 1017). Sometime later, Marcia told Turley that Torres had been killed; Marcia was hysterical because Douglas had threatened her and she was scared (PC-T. 1019).

Patricia Bowmen, whose maiden name was Diaz, was the "Trish" that spent time with Bogle on the night of September 12, 1991 (PC-T. 1143). At this time Bowmen had dark hair, weighed over 200 pounds and was 5 feet 2 inches tall (PC-T. 1144-5). She considered herself heavy-set (PC-T. 1145). Law enforcement wanted to speak to her because it was believed that Bowmen gave Bogle a ride home on the night of the crimes (D-Ex. 55). Bowmen remembered the sequence of events consistently with Marcia (PC-T. 1143-4). Bowmen also testified that she had driven Bogle home from the club in the morning hours of the 13th (PC-T. 1145). At the time, Bogle was staying with Douglas at his trailer (Id.). A detective came to see Bowmen the next day and she recalled telling him that she had driven Bogle home (Id.).

Trial counsel acknowledged the significance of this information and testified that he would have considered presenting such evidence in Bogle's defense (PC-T. 605-6).

Bogle also presented evidence that in a sworn deposition, Roger Kelly testified that Torres was drinking and dancing with a man - not Bogle (D-Ex. 24). As Kelly was leaving Club 41, he saw Torres outside standing next to the dumpster arguing back and forth with a man (Id.). Kelly maintained that Torres was arguing with Douglas (Id.). Bogle was not present during the argument.

And, even before the evidence concerning Douglas came to light, Cox was informed that Katie Alfonso had called the victim's advocate to report that there were two people involved

in killing Torres (D-Ex. 1). Though Cox believed that this was the type of information she would want to investigate, she did not disclose the information to the defense.

2. Forensic Issues

a. Hair

At trial, Cox presented evidence that a pubic hair that matched Torres had been discovered on Bogle's pants. However, at the evidentiary hearing, Detective Lingo admitted that his trial testimony concerning the storage of evidence and collection of the hair was not accurate (PC-T. 1404). The prosecution failed to reveal that after Crime Scene Technician Ron Cashwell collected Bogle's pants:

> CST Cashwell placed the evidence in the drying shed where they were left to air dry for approximately six (6) hours, when he removed them and placed them in the Evidence Room on September 14, 1991. ...
>
> On September 17, 1991, Detective Larry Lingo checked the pants out of the Evidence Room for investigative purposes. He found the pants to still be wet. Also, on September 17, 1991, CST Don Hunt removed the pants from the Evidence Room and air dried them until September 18, 1991 when he placed them back in the Evidence Room.

(D-Ex. 12). In Cashwell's own written statement he noted: "The items placed in the [drying] shed **are unable to be separated from each other and could contaminate each other and the shed was full of other evidence drying.**" (D-Ex. 12)(emphasis added).

In addition, at the hearing, it was revealed that Lingo was removing evidence from the secure evidence room to conduct "investigation". See S-Ex. 6; D-Ex. 60. Though Lingo had no training in the collection of evidence and there were crime scene technicians who were specially trained to collect and maintain evidence (PC-T. 1371), he took it upon himself to remove the white pants as well as evidence collected from the victim during

the autopsy (see D-Ex. 12; S-Ex. 6). During the evidentiary hearing, he could not explain why he had removed the evidence (PC-T. 1375). It was during this "investigation" that Lingo, who had no training in the comparison of hairs, happened to find what he described as a "pubic hair" on Bogle's pants.[12]

Lingo's testimony about what he collected from Bogle's pants was never consistent. At one point he indicated that he happened upon a single hair which he claimed he collected individually (D-Ex. 12); later he said he had collected several hairs. Malone testified that the envelope he received with the hair contained several hairs, fibers, grass and dirt.[13]

The prosecution also failed to supply trial counsel with FBI agent Malone's bench notes which reflected a critical discrepancy (PC-T. 634). In his testimony and report, Malone indicated that the hair found on Bogle's pants was a pubic hair. He testified that the pubic hair matched the known sample of pubic hair taken from Torres. However, Malone's bench notes indicated that the hair on Bogle's pants actually matched the known head hair taken from Torres (PC-T. 5192-3, 5196; see also D-Ex. 21).[14]

Dr. Terry Melton, an expert in mitochondrial DNA (mtDNA) analysis, testified that Malone overstated the results of his

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[12]Lingo described the hair as a pubic hair, though he admitted he would not be able to tell the difference between a pubic hair and a hair that originated from a leg, arm, the chest, neck or any other body area (PC-T. 1376, 1406).

[13]Bogle told Lingo that his pants were dirty because he fell in a ditch (PC-T. 1407).

[14]Malone also testified that no records or chain of custody was kept as to the hair and fiber evidence that was submitted to the FBI (PC-T. 1476-7).

comparisons (PC-T. 1090).[15] Melton testified that independent studies have demonstrated that hair comparison has a high error rate, generally between 5-10% (PC-T. 1093; see also D-Exs. 38, 39). Melton testified that it is not uncommon for microscopists to determine that hairs "match", but mtDNA testing demonstrates that hairs do not match (PC-T. 1092-3). And, it is no longer acceptable to characterize microscopic hair comparisons as matching. Today, a confirmatory DNA test is required to include an individual as being the donor of the hair (PC-T. 1094).

At the evidentiary hearing, trial counsel testified that he did not hire a microscopist to compare the hairs (PC-T. 668). He believed that Malone helped the defense (PC-T. 670).

b. DNA

i. The DNA profile from the blood beneath Torres' fingernails

Bogle had the fingernail cuttings from Torres subjected to YSTR DNA testing. DNA Analyst Huma Nasir testified:

> YSTR testing is a type of testing that is used in forensic case work that is only targeted towards finding male DNA in a sample.

(PC-T. 1771-2). Nasir swabbed the bottom part of Torres' fingernail clippings and conducted YSTR testing (PC-T. 1820). The results of the testing reveal that two male individuals did leave some genetic material beneath Torres' fingernails on the night she was killed - but neither of those individuals is Bogle

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[15]Malone's work has been criticized and courts have found him to have testified falsely and overstated his results. He was investigated and removed from the laboratory. See Office of the Inspector General's Report: The FBI Laboratory, April 1997; see also Rhodes v. State, 986 So. 2d 501, 506 (Fla. 2008); Bleau v. Wall, 808 A.2d 637, 643 (R.I. S.C. 2002).

(PC-T. 1782, 1837, 1902, 1911-2, 1943,[16] D-Exs. 76, 77). Nasir testified that Torres would have had "to come in direct contact with the individual" to have his DNA beneath her nails (PC-T. 1802, 1817). She believed Torres would have had to rub her hand against him or scratched him (PC-T. 1802). And, after the DNA was deposited "not a lot of cleaning [of Torres' hands] took place" (PC-T. 1803).[17]

ii. RFLP DNA testing in 1991-92

Bogle presented evidence that unbeknownst to him, Detective Lingo checked out vital evidence, including the vaginal, anal, and oral swabs obtained from Torres, for a period of four hours after it had been submitted to the evidence section of the sheriff's office (D-Exs. 11, 60 and S-Ex. 6).

Bogle also presented evidence that in 1992, RFLP DNA testing was in its infancy and was not generally accepted (PC-T. 1185-6). The FBI's bench notes and data concerning the DNA testing evidenced several problems with the RFLP testing. See D-Ex. 20.[18]

In Bogle's case there was no chain of custody documented and no documentation concerning the integrity of the evidence (see D-Ex. 20, PC-T. 1232, 5102). The file does reveal that controls and tests were not run which may have effected the position of the fragments (PC-T. 1180-1). The file also reveals inexplicable difficulties and inconsistencies in the results of the tests (D-

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[16]The State's expert, Dr. Martin Tracey confirmed Nasir's conclusion: "It is not [Bogle's] DNA." (PC-T. 1943).

[17]Tracey commented that if there had been a positive test for blood, then it would indicate that the DNA was developed from a blood source (PC-T. 1954).

[18]The file was not disclosed to Bogle (PC-T. 634).

Ex. 20). There were artifacts in some of the autoradiographs that suggested the possibility that the samples had mixed (PC-T. 1198, see also D- Exs. 20 and 43). And, the fact that no result was produced demonstrated a problem with the testing (PC-T. 1199-200). There was no reproducibility of the result (PC-T. 1207).[19]

In addition, neither Bogle, nor the jury, was made aware that the DNA testing was conducted by an analyst whose name was never revealed until 2008 (PC-T. 1176-7). At the evidentiary hearing, agent Deadman testified for the first time in Bogle's case that he did not conduct the analysis of the vaginal swabs:

> There would be a biologist, physical science technician that would do essentially all of the laboratory work. They would be responsible for extracting the DNA, running through the RFLP procedure.

(PC-T. 1261). Deadman agreed that it was not made clear to Bogle's jury that there was a team analyzing the DNA as opposed to just him (PC-T. 1292).

Deadman also explained that what he characterized as a "match" in 1992 and 1993 only meant that "one could not exclude a particular person" (PC-T. 1252). And, the single probe "match" in Bogle's case was "relatively common" (PC-T. 1267).

While Deadman insisted that there were controls run and procedures followed to avoid contamination (PC-T. 1255-6), he pointed only to the possible control when a mixture of male and female was present and using the female fraction as a control (PC-T. 1257), and the only procedure he could identify was that only one sample was tested at a time (PC-T. 1255). He did not

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[19]Dr. Libby, a DNA expert, opined that consistency at a single locus with no reproducibility was unreliable (PC-T. 1211).

identify any specific control or procedure to avoid contamination in Bogle's case and the file reflects none. See D-Ex. 20.[20] Deadman conceded that there was some band shifting, though he did not believe that it made a difference (PC-T. 1251).

iii. STR DNA testing in 2002

Former FDLE Analyst, Patricia Bencivenga, testified as to the STR DNA analysis that was conducted on the vaginal swabs. When Bencivenga received the swabs they were not sealed and she had no idea when the swabs were packaged (PC-T. 1578-9). She also had no idea whether the items that came from Bogle, including buccal swabs, blood and clothes had been stored with the unsealed vaginal swabs (PC-T. 1592). If the vaginal swabs had been contaminated by Bogle's DNA due to the way items were stored there would be no way to know (PC-T. 1593). Indeed, STR DNA testing is very sensitive and causes more likelihood that contamination can occur (PC-T. 1593).

The results of combining all of the tips from the swabs (PC-T. 1559), was a mixture (PC-T. 1564). Bencivenga's interpretation of the mixture was subjective (PC-T. 1608, 1612).

The State's expert, Tracey, testified that while the data was consistent with two donors, "[y]ou could make the argument that there were three and they were undetected . . ." (PC-T. 1939). Furthermore, Tracey testified that the data was not conclusive evidence that the DNA reflected a male and a female (PC-T. 1940).

Upon interpreting the data, Bencivenga submitted what she

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[20]In fact, on the second run, technician Alice Hill did not run the female fraction (PC-T. 1286, see D-Ex. 20).

believed was the male profile to CODIS and received a hit that matched Bogle (PC-T. 1566-7). Bencivenga also testified that the semen found on Torres' panties was analyzed and she interpreted the mixture as being the DNA profile for one male and one female (PC-T. 1569). She had obtained a profile at only one allele (PC-T. 1569). The one allele on the male profile was consistent with Bogle's (Id.).

Elaine Cherry, a custodian of records for the Clerk of Court's evidence section, testified that she had no knowledge as to how the items had been maintained since being admitted at Bogle's 1992 trial (PC-T. 1520-1).

Detective Lingo testified at the evidentiary hearing that Bogle denied having sex with Torres (PC-T. 1367). However, his notes that were taken contemporaneously in his interview with Bogle include no reference to Bogle denying he had sex with Torres (PC-T. 1421, D-Ex. 62). Lingo's report was not written until nine days after his interview with Bogle (PC-T. 1421).

c. Laboratory Issues

Bogle's jury also never knew that the lab that Cox characterized as "the greatest crime laboratory in the world" (R. 556-7), was investigated, and in April, 1997, the Inspector General issued a report, stating:

> Our investigation identified policies and practices in need of substantial change. ... In a number of key instances, we found problems that Whitehurst [the whistleblower] had not raised. ... we also found some Laboratory supervisors and examiners whose performance merits critical comment, and raises serious questions about whether they should continue in their current roles with the Laboratory. Accordingly, in addition to general recommendations we made about Laboratory practices and procedures, we recommend that certain supervisors and examiners be reassigned from their current positions.

Office of the Inspector General's Report: The FBI Laboratory, April 1997, page 1. Malone was one of those examiners who was reassigned due to substandard work.[21]

d. Trial Counsel

At the time of Bogle's trial, his counsel characterized the forensic issues as the "whole thing was a lot of mumbo jumbo" (PC-T. 635). In 1991, he did not believe that there were labs with which to consult about the forensic issues (PC-T. 627).

3. Bogle's Auto Accident

Bogle was involved in an automobile accident on September 6, 1991. The prosecution obtained the accident report which contained information that on September 6, 1991, Bogle and George Schrader were riding in a car on their way to work when another car ran a red light and slammed into Schrader's vehicle, sending the vehicle head-on into a telephone pole (D-Ex. 13).

Bogle, his mother, and another friend, Mary Schraeder, explained the accident to trial counsel and urged him to investigate the matter and obtain the photos taken of Bogle in the hospital (PC-T. 858, D-Exs. 48, 49).

Bogle, who was not wearing a seat belt, was thrown head first into the windshield of the car and suffered major trauma. He was rushed to Tampa General Hospital. Bogle's records reflect that he sustained lacerations to the head and face (D-Ex. 33, see also PC-T. 884). He received sutures for the laceration over his right eye (Id.). He suffered traumatic pneumothorax," a collapsed lung caused by fractured or bruised ribs and an injury

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[21]The Inspector General also found that Malone had testified falsely and outside his area of expertise in the Hastings matter. Id. at 21.

to his eye (Id.). He complained of pain on his left side. Bogle remained in the hospital for three days (Id.).

Mary Schraeder informed the defense investigator that "Brett had a tremendously difficult time walking, sitting, etc. after the accident. Mary saw Brett on the Tuesday before the murder and said that he needed help getting his shirt off because of his injuries." (D-Ex. 50). Bogle's mother also described the injuries her son had suffered during the accident, including the injuries to his head. See D-Ex. 51. Photos were available of Bogle shortly after the accident occurred which depicted several facial lacerations. See D-Exs. 26, 27.[22].

According to trial counsel's testimony at the evidentiary hearing, he failed to investigate Bogle's injuries and obtain the photos of Bogle because of the belief that Philip Alfonso testified that Bogle's facial scratches could have been caused during the accident (PC-T. 657); and, that the State did not have forensic evidence proving that it was Bogle's blood or skin beneath Torres' fingernails (PC-T. 657).

4. What Occurred On September 1, 1991?

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[22]Dr. Edward Willey testified as to the healing process of abrasions and lacerations (PC-T. 880-1). After reviewing records and photographs, Willey testified that Bogle's account of the accident was consistent with the description of the injuries noted in the records, i.e. injuries to his forehead and right cheek from being thrown into the windshield (PC-T. 884). Based on the photographs from the hospital, Willey would not expect the wounds to Bogle's forehead and face to heal in seven days (PC-T. 886)("Lacerations usually take somewhat longer than that"). The wounds depicted in the photographs taken after Bogle was arrested do not appear "fresh" and they do not look like wounds that were received within three days of the photographs, i.e., the time of the crime, because they were clean and depressed (PC-T. 886). The wounds in Bogle's post arrest photos also appeared in the same general area as was described in the medical records from Bogle's accident (PC-T. 887. And, they did not appear to be "reopened or reinjured" (PC-T. 889).

Shortly before Bogle's trial, the defense investigator interviewed Everett Smith (D-Ex. 52). Smith told the defense: He knew Bogle because they lived at the same motel in September, 1991 (PC-T. 709). On September 1st, he and Bogle picked up Alfonso and Torres and they drove to Manatee County to purchase beer (PC-T. 712-13). From what Smith could tell Alfonso was happy and excited to see Bogle (PC-T. 714). After they picked up the beer, the foursome drove back to the motel where Smith and Bogle lived (PC-T. 714). Other individuals socialized with them (PC-T. 714). Neither Alfonso nor Torres indicated any fear around Bogle (PC-T. 715). Rather, Bogle and Alfonso acted like a couple getting along (PC-T. 716).

In the afternoon, Bogle asked Smith if he would take the girls home (PC-T. 716). Smith drove, Bogle was the passenger, and Alfonso and Torres sat in the backseat (PC-T. 717-8). While in the car, Smith did not hear any arguments or threats (PC-T. 717); he did not hear Bogle call Torres any derogatory names (PC-T. 717). When they arrived at Alfonso's trailer, Alfonso, Torres and Bogle walked into the trailer (PC-T. 718). No one was arguing (PC-T. 718). A few minutes later, Smith heard some arguing from inside the trailer (PC-T. 718-9). As Bogle left the trailer he kicked the screen out of the door (PC-T. 719). Bogle got in the car and the two men left (PC-T. 719).

Trial counsel could not recall any strategic reason for failing to present Smith (PC-T. 646).

5. Impeachment Evidence Of Prosecution Witnesses

Phillip and Tammy Alfonso and Trapp testified at trial about Bogle's movements and demeanor on the night of the crime. The

Alfonsos, by Phillip's account to law enforcement, had been drinking for five hours when they observed Bogle's appearance and demeanor. They were not asked about their intoxication.

In addition, Trapp was inexplicably not questioned about his outstanding criminal issues. And, Trapp's testimony was contradicted by the Alfonsos who testified that Bogle did not speak to Torres at the bar (R. 412). Trapp also gave conflicting accounts of how much he drank at Club 41.[23]

Trial counsel testified that "the general impression is that everybody was drinking", so he did not ask about the amount each witness had drunk or how it effected him (PC-T. 667). Trial counsel was under the mistaken belief that the jury knew that "they go from bar to bar" (Id.).

6. Trial Counsel's Conflicts Of Interest

At the time of Bogle's trial, Douglas was charged with aggravated battery and burglary. See D-Ex. 8. The public defender was representing him (D-Ex. 25), though Douglas was a viable suspect in Bogle's case. Trial counsel testified that the representation of Douglas presented a significant potential conflict in representing Bogle (PC-T. 612).

Trapp was on probation for possession and delivery of cocaine (D-Ex. 22). The public defender was representing him.

Also, trial counsel was informed that the public defender had previously represented Torres (D-Ex. 53).

SUMMARY OF ARGUMENT

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[23]As will be discussed herein, Bogle also introduced the grand jury testimony at the evidentiary hearing (D-Ex. 63), which demonstrates inconsistencies between the grand jury testimony and trial testimony of several witnesses, including the Alonsos and Detective Lingo.

The errors that occurred in Bogle's case were caused individually and collaboratively by due process violations by the State, the introduction of shoddy scientific evidence, an unreasonable failure to investigate by trial counsel and by witnesses who were biased and made false statements. This conflux of errors severely prejudiced Bogle. This Court is required to analyze the prejudice of the errors not only individually, but also cumulatively. See Parker v. State, 89 So. 3d 844, 867 (Fla. 2011); State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996).

The evidence presented at Bogle's evidentiary hearing undermined his convictions and sentence. The evidence establishes that someone other than Bogle murdered Torres. The blood beneath her fingernails was from two males. Indeed, the prosecutor had information that two individuals were involved in the murder of Torres, but the information was not disclosed to defense counsel. Further, Cox was aware of Douglas' involvement in the crime, and though the evidence demonstrates that she attempted to follow-up on the exculpatory information Marcia possessed, she failed to provide the defense with that same opportunity. Had the defense had that opportunity, witnesses could have completely exonerated Bogle and undermined the prosecution's witnesses. Mr. Bogle is entitled to a new trial.

ARGUMENT

ARGUMENT I

BOGLE WAS DENIED DUE PROCESS AND A FULL AND FAIR POSTCONVICTION PROCEEDING.

A. EXAMINATION OF WITNESSES

1. Michael Malone, Steve Robertson & Terry Melton

Malone testified at Bogle's trial and penalty phase. During his testimony, Malone outlined his extensive training in hair analysis, telling the jury that he had given hundreds of lectures, published articles and testified four hundred and fifty times (T. 304-5). Malone also testified:

> Now, I've been doing this for eighteen years and I've looked at hairs from thousands and thousands of people over that time and I've only had three occasions now in eighteen years where I had hairs from two different people that I looked at and I could not tell apart.

(T. 313-14). And, Malone stated: "In the debris from Mr. Bogle's pants, I was able to find one Caucasian pubic hair which microscopically matched the pubic hairs on Margaret Torres." (T. 317-18).

In 1997, the Department of Justice, Office of the Inspector General, completed an investigation of the FBI Lab which criticized the work of thirteen examiners, including Malone. Bogle's case was submitted for review by Steve Robertson, who determined that Malone's documentation was insufficient to conclude whether the analysis was done in a scientifically reliable manner (S-Exs. 5, 5A), and that Malone's testimony as to the Q 18 "match" to the victim's pubic hair was inconsistent with Malone's bench notes that indicated a hair in Q 18 "matched" the victim's head hair (S-Ex. 5 and 5A, PC-T. 5196).[24]

At the evidentiary hearing, the State attempted to cure the problem by presenting the testimony of Malone that he made a transcription error as to the "K7", instead meaning "K6". This testimony was pure speculation and logically, if a transcription

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[24]Robertson also noted that Malone's bench notes were not adequately documented and inconsistent with his report (S-Ex. 5 and 5A).

error occurred, it could have just as easily been an error in writing the "PH" for pubic hair rather than "HH" for head hair.

Bogle attempted to cross examine both Malone and Robertson regarding Malone's shoddy work and false testimony over the years. See PC-T. 1463-71; 5209-19. The circuit court refused to allow Bogle to pursue this impeachment (PC-T. 1469, 5218-19).

The rules governing cross examination apply to an expert witness to an even greater latitude than a lay witness. See Fla. Evid. Code § 90.702.5. Bogle's inquiry pertained to the critical and relevant issue of whether the circuit court should accept Malone's explanation for the inconsistency between his bench notes and testimony. Robertson's testimony about his review of Malone's cases went to the very heart of his credibility: whether Malone was a competent analyst, his work product was shoddy, and he provided misleading and false testimony in other cases.

Bogle also sought to present the testimony of Dr. Melton regarding the limits of hair comparison and how hair comparison is no longer used to "match" known and unknown hairs (PC-T. 1071-89).[25] The court refused to allow Melton's testimony, so Bogle proffered her deposition. See PC-T. 1104, D-Ex. 40.

2. Karen Cox

In attempting to refute Bogle's claims that Cox had violated his right to due process, Cox referred to her "standard practice" and speculated as to what she had disclosed in Bogle's case. See PC-T. 408, 410, 413, 426, 429, 430-1, 434-5, 439, 442, 476, 477. Bogle sought to cross examine Cox about her prosecutorial

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[25]Melton was qualified as an expert in mtDNA analysis. Due to her expertise, Melton was familiar with the limitations of microscopic hair comparison. See D-Ex. 40.

misconduct in other cases, however, the circuit court refused to allow Bogle to question Cox (PC-T. 488-9). Bogle was entitled to ask her about her previous prosecutorial conduct to demonstrate her true "standard practice" and her credibility.

3. Patricia Bencivenga

Bencivenga conducted the STR DNA analysis at FDLE. Bogle sought to cross examine Bencivenga about problems that had occurred at FDLE. The circuit court refused to allow Bogle to cross examine Bencivenga in this regard (PC-T. 1582-4).

Bencivenga was an expert and her competence is inextricably intertwined with the competence of FDLE's lab and procedures. Because there was a high instance of problems or "cross over and contamination" that was documented, Bogle was entitled to cross examine Bencivenga about the specific problems with the lab. See Fla. Evid. Code § 90.702.5.

4. Marcia Turley and Gary Turley

In examining Marcia, Bogle attempted to establish her relationship with Douglas, Gary Turley and others and what she told people about her observations and conversations with Douglas relative to the crime. In questioning Marcia about her fear of Douglas, the State objected. Counsel for Bogle explained that the testimony was relevant to show: "What would have been learned had someone actually spoken to [Marcia]" at the time of Bogle's prosecution (PC-T. 507-8). The court refused to allow Bogle to ask questions, or even proffer them because it believed Bogle was attempting to re-try the case. See PC-T. 507-13. Likewise, the court refused to allow Bogle to elicit testimony from Gary Turley about what Marcia had told him in regard to her observations of

Douglas on the night of the crime. See PC-T. 1019-24.

The court mistakenly believed that because the testimony was hearsay it was inadmissible. However, Bogle was attempting to establish the evidence that could have been developed in 1991-92 had Cox disclosed the information she had obtained. See PC-T. 1019-24. While the testimony may have been inadmissible at trial, it was admissible to establish what could have been uncovered had Cox revealed Gary Turley's name.

5. Roger Kelly

Kelly was at Club 41 the night that Torres was killed. He testified in a deposition but died before Bogle's trial. Bogle sought to question trial counsel about Kelly's deposition testimony to establish what could have been done with the information in the deposition had Cox disclosed what she knew about Douglas and whether there was a basis to admit Kelly's deposition testimony at trial. See PC-T. 594-9, 600-3, D-Ex. 24.

The circuit court precluded Bogle from asking about the deposition because it was hearsay. The court also precluded Bogle's counsel from making an argument as to how the deposition was relevant to Bogle's claims and admissible under Chambers v. Mississippi, 410 U.S. 284 (1973).

6. Brian Bogle

Brian Bogle is Bogle's twin brother. A letter he wrote was read at both penalty phase proceedings. The court refused to permit Brian from testifying about portions of his letter because "it was omitted by order" of the judge. See PC-T. 768-9.

The circuit court missed Bogle's point. Had Brian's testimony been presented, rather than the letter, additional

evidence could have been presented.

The court's refusal to allow Bogle to develop his claims was reversible error. Bogle was deprived of a full and fair hearing.

B. ACCESS TO DISCOVERY

The circuit court refused to allow Bogle discovery relating to Malone's errors and false testimony since testifying at Bogle's trial, though Bogle provided specific cases in which Malone's analysis and testimony had been criticized and characterized as "false". See PC-R. 2741-2819; PC-T. 1881-4). The court also refused to allow Bogle access to the DNA database upon which the State relied to quantify the DNA evidence. See PC-R. 2733-5; PC-T. 1875-8. And, the court denied Bogle's motion for access to jail calls while the State was such access for "investigative purposes". See PC-R. 2736-8; PC-T. 1884-8.

Bogle is entitled to a level playing field. The circuit court's refusal to allow Bogle the discovery he requested violated his right to due process. See Dillbeck v. State, 642 So. 2d 1027, 1030 (Fla. 1994)("No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved."). Bogle was deprived of a full and fair hearing.

C. DISQUALIFICATION AND DEPOSITION

In preparing for the evidentiary hearing, a representative from Bogle's defense team spoke to Marcia Turley. In doing so, Bogle's counsel learned that Marcia had been previously involved in an adoption matter in 1992 by an attorney whose name she believed to be "Timmerman". Marcia recalled that she provided information which related to her case, but also concerned Bogle's

case, to her attorney.[26]

Based on the information concerning the adoption, Bogle filed a motion to disqualify Judge Timmerman (PC-R. 2023-31). Bogle also filed a Motion for Deposition of Judge Timmerman (PC-R. 2057-8). On November 20, 2006, Judge Timmerman informed the parties that he did not practice adoption law in 1992, and that he had no recollection of Turley (PC-T. 248-86). Judge Timmerman mentioned that while he did not previously practice adoption law, Elizabeth Hapner, an attorney with whom he shared office space, may have (PC-T. 258). Following the hearing, Bogle's investigator spoke to Hapner, who recalled that in 1992, Judge Timmerman referred a case to her; the case concerned Marcia's desire to place her child for adoption. Hapner recalled that Marcia had explained that her decision for placing the child for adoption involved the biological father's involvement in a homicide. And, on the day Marcia's child was born, Judge Timmerman's wife accompanied Hapner to the hospital at which time Hapner again consulted with Marcia. Based on these facts and the fact that Bogle now desired to speak to Judge Timmerman's wife, Bogle filed a Renewed Motion to Disqualify Judge on December 11, 2006 (PC-R. 2079-82), and on December 6, 2006, Bogle filed a Renewed Motion for Deposition (PC-R. 2068-72).[27] On December 14,

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[26]Specifically, Marcia believed that the father of her baby was Douglas. One reason for her placing the child for adoption was because she was afraid that Douglas had killed Torres.

[27]Additionally, the relevance of a document in the State Attorney file in Bogle's case was suddenly clear - Cox received a phone message from Wayne Timmerman on September 7, 1992. Mr. Timmerman was returning Cox' phone call. In light of the fact that Marcia recalled the name "Timmerman" as being her adoption attorney it is clear that Cox spoke to Marcia and wanted to confirm the information she had received.

2006, Judge Timmerman denied Bogle's motions (PC-R. 2085).

In anticipation of his evidentiary hearing, Bogle sought to interview Suzanne Timmerman. Bogle's postconviction counsel called Judge Timmerman's residence. No one answered and she left a message indicating that the message was for Suzanne Timmerman regarding the Bogle case. Later, Bogle's counsel missed a call from the Timmerman number. Bogle's counsel again called the Timmerman phone number. A male answered the phone and counsel identified herself and noted that she had just missed a call from the Timmerman phone number. Judge Timmerman identified himself and asked: "What do you want with my wife." Bogle's counsel informed Judge Timmerman that she wanted to speak to his wife concerning information about an adoption proceeding of one of the defense witnesses.

On June 5, 2008, Bogle filed another motion to disqualify Judge Timmerman, based on the circumstances surrounding his wife's involvement in Bogle's case (PC-R. 2527-37). The motion was denied. On the first day of the evidentiary hearing, Mrs. Timmerman did not appear to testify though she had been properly served. In fact, Judge Timmerman accepted service of the subpoena at his home. Also, Judge Timmerman asked Bogle's investigator if she had been the one to serve his wife with a subpoena. Judge Timmerman's tone and demeanor clearly demonstrated that he was upset.

On the second day of Bogle's hearing, Judge Timmerman asked Bogle's counsel if she still intended to call his wife to testify. She indicated she did. Judge Timmerman then informed counsel that she could call his wife to arrange to have her

testify and provided his wife's cell phone number.

That afternoon, postconviction counsel called Mrs. Timmerman and asked her to be present first thing in the morning. Mrs. Timmerman indicated that she was aware that the issue had to do with an adoption proceeding and that she recalled being present at a hospital once to assist in such a matter. However, Bogle's counsel had never had the opportunity to discuss the substance of her testimony previously. Thus, the only way she could have known about the issue was from Judge Timmerman.

On the third day of the evidentiary hearing, Judge Timmerman and his wife entered the courthouse together and passed postconviction counsel in the hallway. Mrs. Timmerman testified first that morning.

Bogle's counsel was never able to conduct a comprehensive interview with Mrs. Timmerman or to ask Judge Timmerman about the phone call he made to Cox on September 7, 1992.

In the Preamble, the Code of Judicial Conduct states:

> Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.

In addition, Canon 3(E)(1)(d)(iv) of the Code makes clear that a judge **must** disqualify himself where the judge or his spouse "is to the judge's knowledge likely to be a material witness in the proceeding."

Whether or not the judge or his spouse is a "material" witness is simply to be determined by the fact that a party **considered** the judge or his wife a material witness. Hooks v.

State, 207 So. 2d 459, 461 (Fla. 2d DCA 1968). The circuit court erred in denying Bogle's motion.

D. CONCLUSION

Bogle requests a full and fair hearing where he is entitled to discovery, access to evidence, and to present evidence and testimony in support of his claims.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING BOGLE'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS BECAUSE THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE AND MISLEADING EVIDENCE AND/OR ARGUMENT.

A. INTRODUCTION

At every turn, ASA Cox hid evidence, distorted the truth and mislead the defense, the jury and the judge. Cox' conduct characterizes the quintessential "foul" blows described in Berger v. United States, 295 U.S. 78, 88 (1935). Review of Cox' misdeeds must be cumulative. See Berger, 295 U.S. at 89.

Preliminarily, Bogle submits that the circuit court erred because it refused to allow him to examine Cox about her conduct and pattern of suppressing evidence and misleading the defense and the court. Yet, the court then found Cox to be "highly credible" (PC-R. 3089). Cox has repeatedly demonstrated that she it is not highly credible and uses deceit and subterfuge to obtain convictions. See Mordenti v. State, 894 So. 2d 161 (Fla. 2004); The Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001); Rogers v. State, 783 So. 2d 980 (Fla. 2001); Ruiz v. State, 743 So. 2d (Fla. 1999); United States v. Sterba, 22 F. Supp 2d 1333 (Fla. M.D. 1998).

B. UNITED STATES v. GIGLIO

In United States v. Giglio, 405 U.S. 150, 153 (1972), the U.S. Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" If the prosecutor intentionally or knowingly presents false or misleading evidence or argument, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 437, 433 n.7 (1995).

1. Guy Douglas And Other Suspects

Cox repeatedly argued that Bogle was the only person who had the motive and could have killed Torres. She stated:

> What happened to Margaret Torres was no random act of violence. This wasn't a killing by a stranger. This was a killing by someone who knew her, someone who despised her. She was killed by Brett Bogle because he hated her.

(T. 542). Cox also repeatedly told the jury that every avenue of investigation was conducted (R. 599). Cox went on to state:

> It was abundantly clear at this point in the investigation who killed Margaret Torres. There was a well-connected chain of events that leads to one conclusion and one conclusion alone, but the Hillsborough County Sheriff's Office continued their investigation and enlisted the help of the greatest crime laboratory in the world, the FBI Crime Laboratory and you've heard from many experienced professional forensic experts and all the investigation that they did didn't contradict what was abundantly clear.

(T. 556-7). When Cox made her arguments to the jury she was in possession of information that Douglas had confessed and that more than one person was involved in Torres' death. Her arguments were false and misleading. See D-Exs. 1, 2.

Further, as to Douglas, at the second penalty phase, Cox asked Lingo about Douglas' alibi for the night of the crime:

Q: Detective, pursuant to your investigation, you

determined Guy Douglas's whereabouts on the night of the 12th and the early morning hours of the 13th?

A: Right, he was at Club 41.

Q: And when he left the Club 41, did he go back to his trailer?

A: No, he went to a another motel on the Gibsonton area.

Q: Did he go with anybody?

A: He went with his girlfriend at the time.

Q: And did Brett Bogle go with him?

A: No.

(T. 1294). In closing argument, Cox told the jury that Douglas had an alibi for the night of the crime (T. 1578). Cox never revealed that Lingo had not confirmed Douglas' alibi. Lingo's testimony was false and Cox knew this. Contrary to the court's analysis (PC-R. 3093), Bogle established that the testimony and Cox' argument were false and misleading.

2. Forensic Issues

At trial, Detective Lingo testified about the collection of the hair from Bogle's pants:

Q: Detective Lingo, showing you what's been marked as State's Exhibit 13 for identification, do you recognize this?

A: Yes, this was an exhibit that I recovered from the trousers and entered into evidence.

Q: Okay. And where were the trousers when you collected that hair?

A: I checked them out in the evidence room. . . .I checked them out of evidence, opened them up on a counter that was in the evidence room there and checked them.

Q: Okay, and where did you find the majority of the hair and fiber that you collected?

A: I took a piece of brown wrapping paper put out on the counter and opened the pants on top of this and as they were laying on the paper looking down at them, the zipper part opened, I found what appeared to be pubic hairs inside of the pants and also inside of the legs of the pants.

* * *

Q: And what date was this that you did this?

A: It was on the 17th of September.

Q: **And had anybody else come into contact with the pants from the time that they were put into property until the time that you took them out to collect this evidence**?

A: **No, they were sealed when I checked them out.**

(T. 365-6)(emphasis added). At the evidentiary hearing, Lingo

admitted that his trial testimony was not accurate (PC-T. 1404).

The circuit court characterized Lingo's testimony as "ambiguous, not conclusively false." (PC-R. 3096). The court then failed to consider Lingo's "ambiguous" testimony under the Brady standard. First Lingo's testimony was "ambiguous"; he told the jury that no one had come into contact with the pants. And, Cashwell's statement shows that Lingo's testimony is false because Lingo left out that the evidence was placed in the drying room where "The items ... [were] unable to be separated from each other and could contaminate each other and the shed was full of other evidence drying."[28] (D-Ex. 12)(emphasis added). The jury was deprived of critical evidence regarding physical evidence that the prosecution maintained linked Bogle to Torres. Bogle has established that the reprimand and statements made concerning the evidence effect the credibility of not only the witnesses, but also the evidence itself. See Giglio, 405 U.S. at 154. There is a reasonable likelihood that the false and misleading evidence could have effected the jury's judgement.

Also, at trial, agent Deadman testified that he conducted the RFLP DNA analysis (T. 465). However, the prosecution failed to reveal that Deadman's testimony was false. Deadman was not the DNA analyst. Bogle and the jury were misled.

The circuit court forgave Deadman's false testimony, citing to the fact that Deadman testified he was "a supervisor", thus, "clearly indicating that multiple people were involved." (PC-R.

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[28]Lingo confirmed that there were several items of evidence in the drying room (PC-T. 1401).

3128).[29] However, this contradicted the court's comment during the evidentiary hearing that: "[j]ust being a supervisor doesn't mean you know everything that the technician is doing." (PC-T. 1812). In holding: "Bogle submits that Deadman's testimony was clear to the extent that he indicated he had conducted the analysis. And, even if Bogle should have known that "multiple people were involved" when Deadman gave his credentials, due to the timing of this revelation, there was no way for Bogle to confront the analyst who actually conducted the DNA analysis", the circuit court completely ignores the confrontation error that occurred at Bogle's capital trial.

3. Automobile Accident

Cox knowingly argued false information to the jury in relation to the lacerations that appeared on Bogle's forehead and face. Cox argued that the scratches on Bogle's face could only have come from the violent sexual battery when Cox was fully aware that Bogle had been in a serious automobile accident just 7 days before he was arrested. See D-Ex. 13. Cox was aware that Bogle had suffered facial lacerations as a result of the accident. Cox asked every witness who observed Bogle on the night of the crime about his appearance (T. 378, 411, 437). And, in her closing argument, Cox told the jury that the only explanation for the scratches on Bogle's face was because of the struggle he had with Torres before he murdered her (T. 548-9; 553-4, 556, 1275-6).

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[29]Bogle does not quarrel with the court's determination that Deadman interpreted the data (PC-R. 3128). But, it was equally important for Bogle to have the opportunity to confront the analyst who conducted the testing in order to determine why the data indicated problems with the analysis.

The circuit court characterized Cox' statement as a "reasonable inference" based on the testimony (PC-R. 3130). A review of the record defies the court's conclusion.

C. BRADY v. MARYLAND

A prosecutor must comply with due process and disclose evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. at 434.

1. Guy Douglas

At a minimum, Cox knew that Marcia had relevant information concerning Douglas; that Marcia shared that information with her husband and the lawyer handling the adoption proceedings, whom she believed was named "Timmerman"; that Douglas was being prosecuted for a violent aggravated battery of Marcia; and that an individual named Andy had information about who was involved in the crime. The circuit court dismissed Bogle's claim stating:

> The evidence presented at the evidentiary hearing only shows that Ms. Cox was looking into (1) whether Mr. Douglas confessed to being involved in the murder and (2) whether an unidentified person named Andy was telling people there were multiple people involved in the offense. There was no persuasive evidence presented that **Ms. Cox had any actual**

evidence that either of these things were true.

(PC-R. 3089)(emphasis added)[30]. However, Brady, requires disclosure of "material information within the State's possession or control that tends to negate the guilt of the defendant." Mordenti, 894 So. 2d at 168. Contrary to what the circuit court espoused, Cox was not the "architect of the proceeding", Brady, 373 U.S. 87-88, and thus, she was required to reveal the evidence to Bogle so that he could investigate it and present it in his case. The court ignored the law that under Brady, "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Floyd v. State, 902 So. 2d 775, 785 (Fla. 2005), citing United States v. Bagley, 473 U.S. 667, 683 (1985).

The circuit court also believed that no Brady violation occurred because "Bogle failed to show that Ms. Cox had any communication with Ms. Turley." (PC-R. 3089). Whether Cox communicated with Marcia, the information that Cox did obtain regarding Marcia, Douglas and Andy was required to be disclosed. See Floyd, 902 So. 2d at 785.

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[30]The circuit court's distinction between "actual" evidence and other evidence demonstrates the court's misunderstanding of Brady. Evidence is evidence. According to the Bing online dictionary, evidence consists of any sign or proof of the existence or truth of something, or that helps someone come to a particular conclusion. In Bogle's case, there is no doubt that the evidence possessed by Cox was material and exculpatory and would have led to additional material, exculpatory evidence that Bogle could have presented to demonstrate that he did not commit the murder and that law enforcement's investigation was rushed and not thorough; it would have helped the jury come to the conclusion that there was reasonable doubt about Bogle's guilt.

Furthermore, there is no doubt that Cox spoke with Marcia. On July 30, 1992, after an information had already been filed against Douglas, Cox herself, directed that an investigative subpoena be served on Marcia, even though Cox was not the assistant state attorney prosecuting Douglas. See D-Ex. 5. Clearly, Cox "connected the dots" as to Marcia and Douglas' involvement in the Bogle case. See PC-R. 3090.

And, importantly, the only way Cox could have known of Gary Turley and Wayne Timmerman and their connection to the Bogle case was through Marcia. Indeed, at the time, Marcia was using her maiden name "Baurle" because she and Gary were separated, thus, there would have been no reason for Cox to order Gary Turley to her office from the jail without information from Marcia. See D-Ex. 15. Likewise, the only reason that Cox wanted to speak with Timmerman was to verify what Marcia had told the attorney handling her adoption. See D-Ex. 9.

In addition, the record clearly refutes the notion that Marcia was making herself scarce (PC-R. 3090). Marcia was interviewed in connection with the aggravated battery case and provided her address and phone number. See D-Ex. 23. The address is the same address provided in discovery, but different from the address used by Cox in issuing the investigative subpoena. Thus, it is abundantly clear that Cox and/or someone from the State spoke to Marcia between July 31 and August 11, 1992. At that time, Marcia supplied her phone number and address. Marcia was not making herself scarce.

The circuit court erroneously addressed the prejudice of the suppressed evidence without consideration of how Bogle was

handicapped in his ability to investigate "or present other aspects of the case." Floyd, 902 So. 2d at 785. The court focused only on Cox's notes and e-mail, rather than consider what the defense could have done with the information. And, the court erroneously employed a standard requiring that Bogle's evidence "exonerate" him (PC-R. 3092). See Kyles, 514 U.S. at 434.

Furthermore, in holding that prejudice was lacking, the circuit court relied on evidence that had been undermined. For example, the court relied on Katie Alfonso's testimony about the events of September 1st to discount the Brady evidence. However, Smith's testimony disproves much of Alfonso's testimony. Bogle was not "so angry" at Torres that he "busted their screened-in porch" (PC-R. 3091). According to Smith, Bogle calmly entered Alfonso's trailer and there had been no disputes or arguments that he had seen. And, Alfonso testified before the grand jury that she had told law enforcement that she was dropping the charges against Bogle because he had agreed to leave them alone (D-Ex. 63). Alfonso did not mention any threats after September 1st to the grand jury. As far as Bogle knew, Torres was not pressing charges (D-Ex. 63).

The circuit court also relied on the testimony of Phillip Alfonso and Trapp that Bogle did not have any scratches on his face when they first saw him on the night of the crime (PC-R. 3123). However, Bogle introduced his medical records, including the descriptions and diagrams of facial injuries from the car accident a week before the crime and medical testimony from Dr. Willey that based on the photographs from the hospital, Willey would not expect the wounds to Bogle's forehead and face to heal

in seven days (PC-T. 886). The wounds depicted in the photographs taken after Bogle was arrested do not appear "fresh" and they do not look like wounds that were received within three days of the photographs because they were clean and depressed (PC-T. 886). The wounds in Bogle's post arrest photos also appeared in the same general area as was described in the medical records from Bogle's accident (PC-T. 887). And, they did not appear to be "reopened or reinjured" (PC-T. 889).

Further, the newly discovered YSTR DNA evidence in and of itself refutes the circuit court's analysis as to this point. If Torres had scratched Bogle, either causing Bogle's scratches or "re-opening"[31] the scratches, then Bogle's DNA would have been identified from the victim's fingernail cuttings. The State's own expert, Dr. Tracey, testified that if there had been a positive test for blood, which there was, then it would indicate that the DNA was developed from a blood source (PC-T. 1954).[32]

Likewise, Lingo's testimony that the scratches on Bogle's face were fresh is refuted by Willey and Schrader's testimony, the medical records and photographs and the YSTR test results. Further, Lingo has admitted to giving false testimony at trial. A review of his testimony before the grand jury also demonstrates that he provided false testimony. The circuit court erred in

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[31]If Torres re-opened Bogle's scratches then they existed earlier in the evening. Bogle's medical records, photos, Willey's testimony, and the YSTR results undisputably establish that Trapp and Alphonso's trial testimony was untruthful as to whether Bogle had lacerations to his face when they first saw him on September 12, 1991.

[32]The YSTR results refute the court's determination that there was no evidence to substantiate the information from Andy that two individuals were involved in the crime.

placing any credibility on Lingo's testimony.

Additionally, the circuit court's reliance on Malone's testimony is illogical. Bogle submits that microscopic hair analysis is unreliable. Likewise, Malone has been repeatedly found to have given false testimony, made mistakes and failed to adequately document his analysis. No reasonable jurist would credit any of Malone's testimony, particularly in light of the uncertainty of microscopic hair analysis.

Finally, the circuit court's reliance on the RFLP DNA testing is equally faulty. At the evidentiary hearing, Bogle presented evidence that in 1992, RFLP DNA testing was in its infancy and was not generally accepted (PC-T. 1185-6). And, the FBI's bench notes and data concerning the DNA testing evidenced several problems with the RFLP testing conducted on the vaginal swabs. See D-Ex. 20; see also pages 55-7, *supra*. Because of the inconsistencies in the result and the unreliability of the data, it is clear that contamination occurred (PC-T. 5102).

The circuit court's reliance on evidence that has been irreparably undermined and impeached is error. Had the circuit court properly analyzed Bogle's claim, the court would have considered what the defense could have discovered and presented. Bogle would have learned that Marcia and Douglas were dating in 1991 (PC-T. 491-2). Marcia met Bogle through Douglas on the night of the crime (PC-T. 494). Marcia observed scratches on Bogle's face and forehead, and that he had difficulty walking and was wearing a sling (PC-T. 494, 530). Bogle explained that he had been involved in an automobile accident (PC-T. 494). Later, in the early evening, Marcia, Douglas, Bogle and a girl named

"Trish" went to the Red Gables bar for a few drinks and then proceeded to Club 41 when it was dark outside (PC-T. 495-6). When the foursome arrived at Club 41, they played pool for awhile and then Marcia sat at the bar (PC-T. 497). Marcia recalled that later, she and Guy argued and she decided to leave (PC-T. 498). Marcia, who had been drinking, went out to the parking lot of the club and fell asleep in a car (Id.). When she awoke, she re-entered the bar, had a glass of water, used the restroom and left Club 41 to walk back to the Red Gables Motel (PC-T. 499).

While walking back to the motel, Marcia was approached by a police officer who asked for identification (PC-T. 500). Douglas walked by them but denied knowing Marcia to the officer (PC-T. 501). The police officer gave Marcia a ride to the motel (Id.). Upon her arrival at the motel, Marcia fell asleep but was awakened for a short time by Douglas entering the room (PC-T. 502). The next time Marcia woke up, it was daylight and Douglas was coming out of the shower (PC-T. 503).

After learning that Torres had been killed, Douglas told Marcia that Bogle had been arrested, but he [Douglas] did not have to worry because he had been with Marcia all night (PC-T. 505). When Marcia responded that she hadn't been with Douglas all night, "He told me that he was with me all night and I needed to - that I didn't need to say anything other than that or they would be lucky if they found my body." (Id.). That same day Marcia moved out of the motel and left her employ (PC-T. 505, 830). She was frightened about what Douglas may do to her if she did not provide him with an alibi and believed that his threat was in relation to Torres' murder (PC-T. 513, 523). Jeanne

confirmed that Douglas had told Marcia she should supply an alibi for him for the preceding night (PC-T. 827).

Marcia recalled speaking to her sister and her husband about Douglas (PC-T. 506-7). In fact, Jeanne recalled that Marcia had told her that the clothes Douglas held as he was leaving the motel were bloody (PC-T. 827).[33] After Marcia learned that she was pregnant with Douglas' baby, she made the decision to place the child for adoption because she did not want to have anything to do with Douglas after he had threatened her or raise a child with such a violent person (PC-T. 513-4).

In 1992, while pregnant, Douglas beat Marcia and told her "to quit running [her] mouth." (PC-T. 518). Marcia assumed that her sister had mentioned that Marcia had told her about what she saw on the night of the crime because Douglas and her sister were together the night before the beating occurred (Id.).

Gary Turley, Marcia's husband, also remembered the night of September 12, 1991.[34] He recalled seeing Douglas leaving Club 41

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[33]The circuit court dismisses Bratton's testimony because she was interviewed by Lingo the day after Torres' body was discovered and failed to mention "Douglas' insistence that Ms. Turley be his alibi." (PC-R. 3088). However, the court ignores Bratton's testimony at the evidentiary hearing that she was uncertain when Marcia told her about Douglas' threats or the information about the bloody clothes (PC-T. 847). And, Bratton testified that the information about Douglas only became significant to her when she was asked specific questions about Douglas and the night of the crime (PC-T. 848).

[34]The circuit court dismisses Turley's testimony because he had numerous felonies and had a strong dislike for Douglas (PC-R. 3088). However, the court ignores that Cox had wanted to speak to Turley at the time of the prosecution of Bogle. And, Turley's testimony was largely consistent with the other witnesses. Additionally, Trapp was a convicted felon who was accused of violating his probation at the time of Bogle's trial. Most importantly, it is the jury's job to assess the credibility of the witnesses. See Porter v. McCollum, 130 S.Ct. 447, 454 (2009); Kyles, 514 U.S. at 449.

after dark in his truck with Torres (PC-T. 1013). They headed north from Club 41 (PC-T. 1014-5). After going into Club 41 to look for Marcia, Turley left and saw Bogle get into another car with a dark-haired, heavy-set female (PC-T. 1016). When Turley passed the Beverage Barn, he saw what he thought was Douglas' truck in the parking lot (PC-T. 1017). Later, Marcia told Turley that Torres had been killed; Marcia was hysterical because Douglas had threatened her and she was scared (PC-T. 1019).

Patricia Bowmen was the "Trish" that spent time with Bogle on the night of September 12th (PC-T. 1143). Then, Bowmen weighed over 200 pounds and was 5 feet 2 inches tall (PC-T. 1144-5). She considered herself "heavy-set" (PC-T. 1145). Bowmen remembered the sequence of events consistently with Marcia (PC-T. 1143-4).[35] Bowmen also testified that she had driven Bogle home from the club in the morning hours of the 13th (PC-T. 1145). Bowmen was certain that she had relayed this information to law enforcement.

After Bogle presented the majority of his evidence concerning Douglas, the following occurred:

> MR. PRUNER: Yesterday after close of proceedings petitioner's counsel and counsel for the State met with Your Honor and this Court expressed an interest in Mr. Guy Douglas' DNA being analyzed. ...
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> THE COURT: ... Let me make it clear to you on the record. Just out of curiosity I guess my judicial assistant went on-line and found him. I didn't even ask her to. That was probably six months to a year ago.
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> * * *
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> THE COURT: There is certainly - I am not going to use probable cause, but his name certainly has come up very prominently in this case in some very suspicious circumstances. That's what gave me concern from the time I heard it. Of course, I am sure you all feel the same.

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[35]Marcia, Bratton and Bowmen's testimony directly refutes Trapp's trial testimony.

(PC-T. 1850-4). The circuit court's concern and directive to obtain a DNA sample from Douglas demonstrates that confidence in the outcome of Bogle' case was undermined due to the suspicious circumstances surrounding Douglas. In it's order denying relief, the court failed to properly analyze Bogle's claim.

2. Forensic Issues

a. Hair Evidence

Perhaps the most damning evidence against Bogle was evidence that a pubic hair that matched Torres' pubic hair had been discovered on Bogle's pants. The prosecution failed to reveal that after collecting evidence:

> CST Cashwell placed the evidence in the drying shed where they were left to air dry for approximately six (6) hours, when he removed them and placed them in the Evidence Room on September 14, 1991. . . .
>
> On September 17, 1991, Detective Larry Lingo checked the pants out of the Evidence Room for investigative purposes. He found the pants to still be wet. Also, on September 17, 1991, CST Don Hunt removed the pants from the Evidence Room and air dried them until September 18, 1991 when he placed them back in the Evidence Room.

(D-Ex. 12).[36] In Cashwell's own written statement he noted: "The items placed in the [drying] shed **are unable to be separated from each other and could contaminate each other and the shed was full of other evidence drying.**"[37] (D-Ex. 12)(emphasis added). Cashwell and Lingo's statements conflicted with the sworn testimony that each gave at Bogle's trial.

The circuit court dismissed Bogle's claim finding that the

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[36]Trial counsel testified that he did not receive the documents or information contained therein concerning the collection and storage of evidence (PC-T. 630).

[37]Lingo confirmed that there were several items of evidence in the drying room (PC-T. 1401).

"reprimand would have had minimal impeachment value to the defense." (PC-R. 3095). However, the court incorrectly suggests that Bogle had to prove that the pants "touched or otherwise came into contact with another piece of evidence." (PC-R. 3095).

Bogle could have made much hay out of the fact that the pants were placed in an area in the shed that Cashwell believed could subject them to contamination. See D-Ex. 12. Indeed, Cashwell made clear in his undisclosed statement that the drying room was "full of other evidence". See D-Ex. 12. There is no doubt that under Brady, not only could Bogle have impeached Cashwell and Lingo's testimony, but he also could have attacked the "the probative value of crucial physical evidence and the circumstances in which it was found" in addition to the "thoroughness and even the good faith of the investigation". See Kyles, 514 U.S. 445-46.

Likewise, the prosecution suppressed the fact that Lingo was removing evidence from the secure evidence room to conduct "investigation". See S-Ex. 6; D-Ex. 60. For example, though Lingo had no training in the collection of evidence, he took it upon himself to remove the white pants as well as evidence collected from the victim during the autopsy (see D-Ex. 12; S-Ex. 6). During the evidentiary hearing, he could not explain why he had removed the evidence. It was during this "investigation" that Lingo happened to find what he described as a "pubic hair" on Bogle's pants. Lingo testified:

> Q: What training do you have in hair analysis?
> A: As to?
> Q: Comparing hairs to indicate whether it is consistent with somebody or not consistent with somebody?
> A: I don't have any formal training in that?
> Q: Any training as to identifying the race of a hair?

A: No, sir.
Q: Any training whether identifying it is a head hair or a leg hair?
A: No.
Q: Any training whether it is a pubic hair?
A: No.
Q: When you find a hair are you in a position to say whether it is a pubic hair?
A: No, sir.

(PC-T. 1376).

Lingo's testimony about exactly what he collected from Bogle's pants was never consistent. At one point he indicated that he happened upon a single hair which he claimed he collected individually (D-Ex. 12); later he said he had collected several hairs. Agent Malone testified that the envelope he received with the hair contained several hairs, fibers, grass and dirt. Lingo's fortuitous "discovery" was made at the same time he had checked out known evidence from the victim. The circuit court failed to address this aspect of Bogle's claim.

In addition to the information concerning the maintenance and collection of evidence, the prosecution also failed to supply trial counsel with Malone's bench notes which reflected a critical discrepancy between his notes from his analysis and his testimony.[38] In his testimony and report, Malone indicated that the hair found on Bogle's pants was a pubic hair. He testified that the pubic hair, designated as Q 18, matched the known sample of pubic hair taken from Torres. However, Malone's bench notes indicated that the hair on Bogle's pants actually matched the known sample of head hair taken from Torres (PC-T. 5192-3, 5196;

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[38]The circuit court suggests that the bench notes do not constitute Brady material because they were not normally turned over (PC-R. 3127). The circuit court's analysis is contrary to U.S. Supreme Court law. See Kyles, 514 U.S. at 437.

see also D-Ex. 21).[39]

At the evidentiary hearing, the State attempted to "cure" the Brady violation by presenting the testimony of Malone to say that it was simply a transcription error at the time he created the notes. The circuit court found Malone's testimony to be "extremely persuasive" because Malone insisted that he would not have confused a head hair with a pubic hair and because another analyst confirmed the result (PC-R. 3126). However, there are numerous flaws in the circuit court's determination. First, Malone cannot "cure" the Brady claim by attempting to explain away the problem in postconviction. The jury was entitled to know that his notes reflected something other than his testimony.

Second, while Malone and the court both insist that he would not have confused a pubic hair with a head hair, their logic does not mean that the hair was in fact a pubic hair. The transcription error, if that is what occurred, could have been the "PH" rather than the "K7". Indeed, Malone testified that he compared the hairs to both Torres' head hair and pubic hair (T. 317). Therefore, there must have been head hairs present within Q 18. So, the testimony and the court's order is based on nothing more than speculation. In fact, Robertson testified, contrary to Malone and the court's conclusion that: "We don't know if Q18 is a head hair or pubic hair. We don't know that it matches which known." (PC-T. 5223).

Third, Malone's testimony about the confirmation makes no sense. This confirmation was not disclosed by the FBI in the

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[39]Robertson also concluded that Malone's documentation was insufficient to conclude whether the analysis was done in a scientifically reliable manner (State. Exs. 5 and 5A).

file that was turned over to Bogle. It was a piece of paper fortuitously produced by Malone while he was testifying. And, Malone insisted that the reviewing analyst did not know what had "matched". If this is the case, then there is no way to know what the reviewer confirmed. He may have confirmed that a head hair matched the head hair of the victim, or he may have confirmed something else.[40]

Cox told the jury in closing argument that the FBI was "the greatest crime laboratory in the world." (R. 556-7). However, the jury did not hear about the shoddy work and inconsistencies that plagued the lab. Due to an investigation, Malone was reassigned due to substandard work.

b. RFLP DNA Analysis

The circuit court failed to consider the evidence that the prosecution suppressed the fact that the FBI analysts were hidden from the defense. Here, Bogle had no idea that Deadman did not analyze the vaginal swabs. This suppression not only presents a violation of Bogle's right to confrontation, but also proves that the prosecution did not prove the chain of custody that was necessary for the admission of the evidence at trial.

Further, Bogle was never provided with the FBI file concerning the DNA testing. See D-Ex. 20. The file reflects that no chain of custody or protocols to maintain the evidence were

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[40]Also, Robertson testified as to this issue, that though there appeared to be a confirmation, he knew nothing about the second examiner's qualifications and could not determine what was confirmed (S-Ex. 5 and 5A).

followed (D-Ex. 20).[41] Had the prosecution revealed the file, there is no doubt that trial counsel could have prevented the evidence from even being admitted at trial, or at a minimum could have completely undermined the value of the evidence. The circuit court failed to consider Bogle's claim.

A review of the RFLP DNA file reveals inexplicable difficulties and inconsistencies in the results of the tests (D-Ex. 20). For example, according to the yield gel produced on the Q19-22 sample (the vaginal swabs), there was some degradation of the DNA material, but there appeared to be enough quantity of sample to obtain a result (PC-T. 1191-2). However, that was not what occurred on the first run at three different loci, and varying the exposure time, there was no result (PC-T. 1197-9; see also D-Exs. 20, 43). Yet, there were artifacts in some of the autoradiographs that suggested the possibility that the samples had mixed (PC-T. 1198; see also D-Exs. 20, 43). In any event, the fact that no result was produced demonstrated a problem with the testing (PC-T. 1199-2000).

On the second run, without explanation, the analyst failed to run the female fraction of the sample (PC-T. 1202, see also D-Exs. 20, 43). But, because Bogle neither had the file nor knew that someone other than Deadman ran the test, he could not inquire about this curious and incompetent decision. Of all of the locis tested in the second run, only one produced a result (PC-T. 1205, see also D-Exs. 20, 43). That was the only loci

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[41]Moreover, the FBI file also reveals that the RFLP DNA testing was not monomorphic, did not use a blind sample, and did not test for degradation of the sample, all of which could have effected the position of the fragments (PC-T. 1180-1)

that showed any consistency with Bogle's DNA profile (PC-T. 1206). However, there was no reproducibility of the result (PC-T. 1207), which means that there was a problem with the testing and speaks to the reliability of the testing and conclusions (PC-T. 1211). Had the evidence about the testing been known, it would not have been admissible at trial.

Deadman testified that the DNA results were reliable. The circuit court found that Deadman's testimony concerning the analysis, despite the fact that he did not analyze the evidence, to be persuasive and thus, the impeachment value to be minimal. Yet, it is not for the circuit court to assess the credibility of the witnesses - that is the jury's job. See Porter, 130 S.Ct. at 454; Kyles, 514 U.S. at 449. Thus, the jury may well have determined that Deadman, because he was not the DNA analyst, was not in a position to explain the inconsistencies in the data. Indeed, the jury may have wondered why they had heard nothing about a first run or that there was difficulty in obtaining a result. The evidence would have provided Bogle with an opportunity to challenge the credibility of Deadman, the DNA analysis and the thoroughness of the investigation. See Kyles, 514 U.S. at 445-46.

The circuit court also suggests that because the statistical value of the "match" was limited, Bogle has not established that the results of the proceedings would have been different. The court erroneously analyzed the evidence. Bogle need not show that the result of the proceeding would have been different, but that confidence in the proceeding would have been undermined.

The court's analysis also ignores the powerful impact of

DNA. See House v. Bell, 547 U.S. 518, 540-1 (2006).[42] The RFLP DNA evidence was critical to the prosecution's theory of the case. Had Bogle been provided the exculpatory evidence to which he was entitled, he could have undermined the results and caused the jury to disregard the evidence.

3. Grand Jury Testimony

The State failed to disclose the grand jury testimony to Bogle (PC-T. 1676). It matters not that Cox did not have the transcript. Kyles, 514 U.S. at 438.

The circuit court held that the inconsistencies between the transcripts were "minor", thus, Bogle "failed to demonstrate that there is a reasonable probability that, had the grand jury transcripts been disclosed to the defense, the result of the proceeding would have been different." (PC-R. 3093-4).

A review of the grand jury transcript demonstrates that the circuit court erred in denying Bogle's claim. Bogle could have used the inconsistencies to impeach the witnesses who testified at trial, demonstrate that the witnesses' testimony evolved over time and further substantiate the witnesses' motives to point the finger at Bogle.

Notably, during Katie Alfonso's grand jury testimony, she stated that when they arrived at Bogle's apartment upon returning from Manatee County, she and her sister entered his apartment. See D-Ex. 63. Torres used the restroom and then sat on the porch (Id.) Bogle then requested that she close the door because he

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[42]Here, Deadman repeatedly referred to the results as a "match". See T. 465-8. He told the jury that the statistical probability was "smaller" than the statistics he provided (T. 468).

wanted to be with Alfonso. (Id.). Alfonso, Torres, Bogle and only one other individual traveled back to Alfonso's trailer.

A few days later, Alfonso told law enforcement that she did not intend to press charges (Id.). Alfonso convinced her sister not to press charges because "he promised to leave us alone" (Id.). Alfonso also identified a "boyfriend" of Torres' who had, in the past, picked her up when she walked home from Club 41, named "Dan" (Id.).

Alfonso was a critical witness to the events on September 1st. However, her grand jury testimony and trial testimony are riddled with inconsistencies. The inconsistencies included information as simple as where the group went that day to buy beer, who was present, and where her money was when Bogle allegedly took it. Additionally, her testimony differed as to the situation that occurred once the group arrived at Bogle's apartment and that she actually told the police that she and her sister did not wish to prosecute Bogle based on the September 1st events. There were also additional details in her trial testimony that she did not provide to the grand jury; additions that were more incriminating of Bogle.

Undoubtedly the events that occurred on September 1, 1991, were critical to the prosecution's case against Bogle. The fact that Bogle had physically assaulted the women and threatened to kill Torres were beneficial to the prosecution's case. Thus, the credibility of Alfonso's testimony as to those events was a critical issue in the case. However, Bogle was deprived of his right to confront Alfonso with the inconsistencies in her testimony because the State did not disclose the prior

inconsistent testimony.

Likewise, during the grand jury proceedings, Phillip Alfonso was asked about his contact with Bogle on the night of September 12, 1991. Alfonso testified that Bogle approached him at his table and said "something about an accident he had had a couple of weeks ago ..." . See Def Ex. 63. However, at trial, Alfonso's recollection of his conversation with Bogle changed and he testified that Bogle approached his table and asked whether Torres was with Alfonso (T. 410). The change in Alfonso's testimony benefitted the State. In the State's closing argument, Cox argued that this case was a very clear one of premeditation.

Alfonso was the only witness who testified at trial that when Torres left the bar Bogle walked in the same direction (toward the beverage barn) a few minutes later (T. 412-13). Likewise, he testified that he saw Bogle a short time later covered in dirt with a a wet spot on the crotch area of his pants (T. 414). Thus, Alfonso's credibility was important for the State's prosecution of Bogle. Any inconsistencies would have impeached the credibility of his entire testimony.

Lingo testified before the grand jury about his investigation into the homicide of Torres. He testified that through the course of his investigation he spoke to Katie Alfonso about the events surrounding September 1, 1991. Some of the information he testified he obtained from Alfonso was: Bogle and an individual named Guy Scott dropped Alfonso and Torres off at Alfonso's trailer. See D-Ex. 63. After thirty minutes, Bogle returned and broke in to the trailer (Id.). Scott heard screaming and saw Bogle kick out the screen after leaving the

trailer (Id.). This was not the version of events that the jury heard at trial. Likewise, no one named Guy Scott was ever listed by the State as a witness in Bogle's case.

As to the events that occurred on September 12 - 13, 1991, Lingo testified before the grand jury that Keith Gadd made a statement that Bogle left the bar first and Torres followed him (Id.). When Lingo was asked: "was it possible that she was going to have sex with him down by the beverage store?" Lingo responded, "I don't know." (Id.).

Much of Lingo's testimony was not memorialized in either his notes or reports. Much of his testimony could have been used to impeach other witnesses as well as his own trial testimony. Again, Bogle had no opportunity to conduct additional investigation or impeach the prosecution's witnesses because the sworn testimony was not disclosed.[43]

4. Jeffrey Trapp

At the time of the prosecution of Bogle, Trapp was on probation; he had specific special conditions that he was required to follow or he would be sent to prison (D-Ex. 22). Trapp's statement to law enforcement was evidence that he had violated his probation, but the prosecution did not take any action against him.

At trial, Trapp testified that Bogle made derogatory comments about the victim and that Bogle did not have any apparent injuries on the night of the crime. The prosecution failed to disclose Trapp's record or the fact that he had

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[43]Also, Bogle could have used all of the inconsistencies and information to demonstrate the lack of thoroughness of the investigation. See Kyles, 514 U.S. at 445-46.

admitted to violating his probation with no consequence from the prosecution. Such evidence could have been used to impeach Trapp and demonstrate his true motive for testifying as he did.

The circuit court erroneously held that Bogle had not established that the conditions of probation remained in effect on September 12, 1991 (PC-R. 3131). The conditions outlined in the court file were still in effect. See D-Ex. 22. There was nothing reflecting that the conditions had been changed. Bogle was entitled to the true facts about Trapp and his motive for falsely testifying. See Davis v. Alaska, 415 U.S. 308 (1974).

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING BOGLE'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Due to trial counsel's failure to: use available evidence, investigate, challenge the State's case, and make objections and argument, Bogle's trial counsel rendered ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984).

A. Automobile Accident

Bogle was denied the effective assistance of counsel when trial counsel failed to present evidence to show that he was not physically capable of killing Torres because of a serious automobile accident that occurred just 7 days before the crime. And, trial counsel failed to present evidence that would have rebutted the assertion that the scratches on Bogle's face were caused when he struggled with the victim.

Trial counsel was aware of Bogle's accident. Bogle, his mother, and a friend explained the accident to trial counsel and urged him to investigate (PC-R. 858, D-Exs 48, 49). Had trial

counsel investigated he could have obtained photographs of Bogle taken shortly after the accident which depicted several facial lacerations. See D-Exs. 26, 27. When compared to Bogle's booking photographs it is obvious that the scratches on Bogle's face were the healing lacerations he suffered in the car accident. Compare D-Exs. 26-29 with 30-32; see also PC-T. 857. In addition, witnesses were available to describe the scratches and lacerations that appeared on Bogle's face and forehead after the accident (PC-T. 794, 852).

After reviewing records and photographs, Dr. Willey testified that Bogle's account of the accident was consistent with the description of the injuries noted in the medical records, i.e. injuries to his forehead and right cheek from being thrown into the windshield (PC-T. 884). Based on the photographs from the hospital, Willey would not expect the wounds to Bogle's forehead and face to heal in seven days (PC-T. 886) ("Lacerations usually take somewhat longer than that"). The wounds depicted in the photographs taken after Bogle was arrested do not appear "fresh" and they do not look like wounds that were received within three days of the photographs because they were clean and depressed (PC-T. 886). The wounds in Bogle's post arrest photos also appeared in the same general area as was described in the records from the accident. They did not appear to be "reopened or reinjured" (PC-T. 889).

The prosecution became aware of the accident and obtained the report. The readily available report contained information

that on September 6, 1991, Bogle and George Schrader[44] were riding in a car on their way to work when another car ran a red light and slammed into Schrader's vehicle, sending Schrader's vehicle head-on into a telephone pole (D-Ex. 13).

Bogle, who was not wearing a seat belt, was thrown head first into the windshield of the car and suffered major trauma. He was rushed to Tampa General Hospital by ambulance. Bogle's readily available medical records reflect that he sustained lacerations to the head and face (D-Ex. 33). He received sutures for the laceration over his right eye (Id.). He suffered "traumatic pneumothorax," a collapsed lung caused by fractured or bruised ribs and an injury to his eye (Id.). He complained of pain on his left side. Bogle remained in the hospital for three days with a chest tube inserted to relieve the pneumothorax (Id.).

During the defense investigator's interview with potential mitigation witness Mary Schraeder, she informed him that "Brett had a tremendously difficult time walking, sitting, etc. after the accident. Mary saw Brett on the Tuesday before the murder and said that he needed help getting his shirt off because of his injuries." (D-Ex. 50). Likewise, when Bogle's mother was interviewed for mitigation, she discussed the injuries her son had suffered during the car accident, including the injuries to his head. See D-Ex. 51.

On the night of the crime, Bogle limped and he could only shoot pool with his right hand because to use his left was too

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[44]Schrader was driving while Bogle was seated in the front passenger seat of the vehicle.

painful. Bogle who is left handed could barely use his left arm, yet according to the prosecution he was able to lift a forty pound piece of concrete seven times with sufficient force to drive Torres' head four inches into the ground.

Despite the severity of the accident and injuries Bogle suffered, trial counsel failed to present any evidence of the accident to the jury.[45] Penalty phase counsel attempted to offer the evidence at the penalty phase:

> MR. FIRMANI: Did you go visit Brett in the hospital?
> MS. SCHRADER: Yes, sir, I did.
> Q: Okay. What kind of injures occurred to Brett Bogle as a result of the car accident?
> MR. COX: Objection. May we approach the bench?
> (At the bench)
> MR. COX: Judge, I'm going to object on the same grounds right now because we shouldn't be going to scratches on the forehead if they are trying to explain those.
> THE COURT: **I agree that would have been proper in guilt phase**. If you're talking other injuries, I don't have any problem.
>
> * * *
>
> THE COURT: ... However, if there were any injuries to his forehead - and I don't know whether there were or not, but if there were, then you're not to testify as to that. He's not going to be asking you about that.
> Do you have any questions about what I might have said?
> MS. SCHRADER: Yeah. He had severe face injuries. Can I say that?
> THE COURT: No.
> MS. SCHRADER: No.
> THE COURT: **That should have been presented in the guilt phase, if, in fact there was evidence to that.**
> MR. FIRMANI: Judge, obviously the defense would object to a ruling. Respectfully, we would ask that we be allowed to bring out that evidence, that there were facial injuries that occurred as a result of the car accident and I would like to proffer that question and that answer.
> THE COURT: Sure. Go ahead.
> BY MR. FIRMANI: The injuries that you observed, Miss

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[45]Since trial counsel failed to investigate Bogle's automobile accident or the extent of his injuries, his decision was not strategic. And, it was not Bogle's burden to prove that "it was physically impossible for him to commit the murder" (PC-R. 3102). Trial counsel failed to present evidence that would have injected significant reasonable doubt into the case and would have made a difference.

> Schrader, to Brett Bogle at the hospital, specifically to his face and forehead, what did you see?
>
> MS. SCHRADER: Well, his face really looked like mince meat. The side of his face was - was tore all up - all across here 'cause his face went into the windshield and the glass tore his face up.
>
> * * *
>
> THE COURT: What is this in mitigation of? **I can understand why it could have been presented in guilt phase, to show that the scratches could have occurred in a way other than as in the sexual battery of the violence that occurred,** might have occurred in the sexual battery, but I don't understand why the particular injuries to the face that she's describing are in mitigation of anything.
>
> * * *
>
> THE COURT: Okay. And I would agree that if there are - if there is going to be any testimony regarding scratches to the forehead, **that should have been brought out, if it was going to be brought out, in the guilt phase** if it went to the fact that that's how those scratches occurred.

(T. 678-83)(emphasis added).

The circuit court relied on trial counsel's testimony in finding that his strategy to preserve his final closing argument was more important than presenting evidence on behalf of Bogle (PC-R. 3101). The court also relied on trial counsel's mistaken belief that he had "introduced [the automobile accident] through the use of State witnesses, specifically Mr. and Ms. Alfonso." (PC-R. 3101).

First, trial counsel's post hoc rationalization is belied by the record. Counsel did not ask Philip Alfonso a single question about the automobile accident or injuries to Bogle. See T. 417-9.[46] In his cross examination of Tammy Alfonso, trial counsel asked her if Bogle had told her he had been in a car accident and she agreed, but she categorically denied observing any injuries to him (T. 438, 435). The jury heard nothing else in regard to

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[46]On direct examination, Philip Alfonso testified that Bogle had shown him a scar on his side that he had suffered in an automobile accident, but he saw no other injuries (T. 411).

the timing, circumstances, or injuries that resulted from the automobile accident.

Second, trial counsel failed to review the medical records, obtain the photos that were taken within hours of the accident, speak to anyone who had contact with Bogle in the week between the accident and the crimes and failed to retain an expert. Therefore, any strategic decision was not reasonable because it was not informed. If trial counsel fails to engage in a reasonable investigation, his subsequent decisions do not enjoy deference. Strickland, 466 U.S. at 690-91; Wiggins v. Smith, 539 U.S. 510, 521-2 (2003).

Finally, if trial counsel formed a strategy, it was clearly unreasonable as the evidence of Bogle's automobile accident and the injuries to him, specifically to his face and forehead, were substantial and should have been presented. The State made the scratches on Bogle's face a main feature of its case. Cox asked every State witness who observed Bogle on the evening of Torres' homicide or shortly thereafter about the condition of his face:

> DETECTIVE LARRY LINGO: When I was conducting the interview, he had what appeared to be scratches on his forehead and they appeared to be fresh to me at that point.
>
> * * *
>
> A: They weren't actually bleeding, but they appeared to be recently done. They weren't healed over or anything. They appeared to be - parts of them appeared to be open.

(T. 363). Cox also questioned Trapp:

> MS. COX: Did you notice any - any injuries or scratches to Brett Bogle?
>
> A: No.

(T. 378).

In addition, both Phillip and Tammy Alfonso testified that they noticed no scratches on Bogle's face until after they saw

him leave the bar on September 13, 1991 (T. 411, 437).

Cox argued the significance of the scratches:

> . . . **Consider the struggle, the blood under her figernails and the scratches on his forehead.**

(T. 548-9)(emphasis added). She also linked the scratches again to Ms. Torres' death:

> He [Brett Bogle] seemed like he'd been wrestling or running and he had scratches on his forehead, scratches that no one else who had been with him that evening, people who had talked to him, the man who had seen him at the Red Gables Bar and gave him a ride to Club 41 ever noticed.
>
> For the first time, the people who had seen him all evening noticed he's got scratches on his forehead, fresh scratches. And Margaret is never seen again and they go back to Katie's house looking for Margaret.

(T. 553-4).

Trial counsel could have completely rebutted this false and misleading testimony.

B. Failure To Challenge Forensic Evidence

Trial counsel failed to challenge the forensic witnesses and allowed Cox' proclamation that the FBI was "the greatest crime laboratory in the world" to go unchallenged (T. 556-7).

The circuit court found that Bogle "failed to present any compelling evidence that Agent Malone overstated the results of his testimony" and that Robert's strategy was to elicit testimony from Malone that the "hair could have been transferred at any time" (PC-R. 3110). However, while relying on trial counsel's recollection, the court ignored the fact that the extent of trial counsel's questioning with regard to the validity of hair comparison was to ask:

> MR. ROBERTS: Okay. And it's fair to say that hair comparisons do not constitute a basis for absolute personal identification?
>
> MR. MALONE: That's correct.

(T. 320). The circuit court also ignored the evidence that existed regarding the fallibility of hair comparison that was readily available in 1991:

> The weakness of the field is well established. For instance, hairs pulled from the same head might not match one another. The hair examiners cannot agree on a criteria for comparisons. Some people have "featureless" hair that is hard to distinguish. With all the uncertainty about matching criteria, no one has been able to set up data banks for hairs, like the ones for fingerprints. That's also why no one can plausibly claim to know if the characteristics of a particular hair are rare, common, or somewhere in between.
>
> In the early 1970's, the U.S. Law Enforcement Assistance Administration (LEAA) sponsored a proficiency testing program for 240 laboratories that provided evidence in criminal cases. The labs botched many kinds of tests: paint, glass, rubber, fibers. But, by far, the worst results came from hair analysis.
>
> Out of ninety responses for the hair survey, the proportion of labs submitting "unacceptable" responses on a given sample - either by failing to make a match, or making a false match - range from 27.6 to 67.8 percent.
>
> On five different samples, the error rates were 50.0 percent, 27.6 percent, 54.4 percent, 67.8 percent, and 55.6 percent. **In short, there was little difference between flipping a coin and getting a hair analyst to provide reliable results.**

Actual Innocence, Barry Scheck, Peter Neufeld and Jim Dwyer, Doubleday, 2000, pp 162-3 [relying on Oklahoma v. Durham, CF 91-4922; *Out of the Blue*, Mark Hansen, ABA Journal, February 1996, "*The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories,*" Paul Gianelli, Virginia Journal of Social Policy and Law 4:439 (1997)] (emphasis added).

Thus, the idea that trial counsel's alleged strategy was reasonable is simply not supported by the evidence. Trial counsel failed to investigate the problems with hair comparison. His investigation was unreasonable and any "strategic decisions" that flowed from it were likewise unreasonable.

Here, counsel could have demonstrated that hair comparison

was unreliable and flawed. Trial counsel could have established that hair comparison was little different than "flipping a coin and getting a hair analyst to provide reliable results". Id. In comparison, trial counsel's cross examination was ineffectual and unreasonable in light of what was known about hair analysis in 1992 and the fact that he could have established that the evidence should not been admitted or relied upon in any way.

Also, trial counsel failed to obtain Malone's notes which contained critical, exculpatory information. The bench notes establish that Malone's work product was shoddy and his conclusions were inconsistent with his testimony.

Trial counsel also failed to request a Frye hearing or challenge the DNA evidence that was admitted at trial. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). This Court formally adopted the Frye test in 1989. See Stokes v. State, 548 So. 2d 188 (Fla. 1989). Had trial counsel subjected the DNA evidence to the Frye test, he could have shown that the FBI had not followed accepted testing procedures that met the Frye standard to protect against false readings and contaminations. See Hayes v. State, 660 So. 2d 257 (Fla. 1995). Indeed, in 1992, contrary to the circuit court's belief, RFLP DNA testing was in its infancy and was not generally accepted (PC-T. 1185-6). As Dr. Libby testified, that was the reason that in almost every case a Frye hearing was held.

Furthermore, had trial counsel obtained the bench notes he could have demonstrated that in Bogle's case the analysis and results were flawed. Trial counsel also failed to retain a qualified expert of his own to assist him in deciphering the

highly unreliable results.

At trial, when Deadman explained his results he told the jury that he obtained patterns on two of the three tests on the vaginal swabs. One was a match the other produced an inconclusive result, but for a "technical reason" he could not measure the pieces of DNA. Therefore he said it was inconclusive (T. 465). Trial counsel did not ask any questions about the tests and simply accepted Deadman's explanation. On cross examination, trial counsel asked a mere four questions, none of which challenged the validity of the tests, the gathering of the sample or the statistics upon which Deadman relied.

In Bogle's case, the inexplicable difficulties and inconsistencies in the results of the tests would have been exactly the type of red flags that competent trial counsel would have wanted to subject the evidence to a Frye hearing and move to exclude the evidence altogether. According to the yield gel produced on the Q19-22 sample (the vaginal swabs), there was some degradation of the DNA material, but there appeared to be enough quantity of sample to obtain a result (PC-T. 1191-2). However, that was not what occurred on the first run at three different loci, and varying the exposure time, there was no result (PC-T. 1197-9, see also D-Exs. 20, 43). Yet, there were artifacts in some of the autoradiographs that suggested the possibility that the samples had mixed (PC-T. 1198, see also D-Exs. 20, 43). In any event, the fact that no result was produced demonstrated a problem with the testing (PC-T. 1199-200).

On the second run, without explanation, the analyst failed to run the female fraction of the sample (PC-T. 1202, see also D-

Exs. 20, 43). Of all of the locis tested in the second run, only one produced a result (PC-T. 1205, see also D-Exs. 20, 43). That was the only loci that showed any consistency with Bogle's DNA profile (PC-T. 1206). However, there was no reproducibility of the result (PC-T. 1207), which means that there was a problem with the testing and speaks to the reliability of the testing and conclusions (PC-T. 1211).[47]

The circuit court wholly ignored trial counsel's testimony that the reason he failed to conduct a reasonable investigation into the forensic issues was only that the "whole thing was a lot of mumbo jumbo" and that he did not believe there was any other expert to consult (PC-T. 635). But, of course, the fact that trial counsel did not understand the DNA and hair analysis made it more critical to find an expert with whom to consult.

Also, the circuit court suggests that because the statistical analysis "could only narrow the group that matched DNA to ten to fourteen percent of the of the population", that trial counsel was not deficient in failing to challenge the evidence (PC-R. 3113). But, this was not the reason for trial counsel's failure to retain an expert, conduct research and challenge the evidence. The Court ignored trial counsel's testimony and supplanted this evidence to suggest that a reasonable strategic decision was made. See PC-R. 3113.

The testimony from the hearing establishes that trial counsel did not investigate or challenge the DNA evidence because

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[47]Additionally, in Bogle's case there was no chain of custody documented and no documentation concerning the integrity of the evidence (PC-T. 1232, 5102, see D-Ex. 20). Because of the inconsistencies in the result and the unreliability of the data, it is clear that contamination occurred (PC-T. 5102).

he did not understand it. His investigation was unreasonable. The fact that the statistical analysis only placed Bogle in ten to fourteen percent of the population was undercut, without challenge, by Deadman who testified that the statistics were likely lower due to the overestimates in the database (T. 468).

Further, it is absurd to suggest that the evidence "helped more than it hurt". See PC-R. 3113. The DNA evidence allowed the prosecution to argue that the murder was a first degree felony murder and also allowed the prosecution to argue the aggravator that the murder was committed in the course of a sexual battery. This was so even though sexual battery was not charged and no evidence was presented to establish that any sexual contact was not consensual.[48] Trial counsel's deficient performance prejudiced Bogle.

C. Failure to Present Exculpatory Evidence

1. Everett Smith

Smith was listed as a witness (D-Ex. 4). Shortly, before Bogle's trial, the defense investigator interviewed Smith (D-Ex. 52). What the defense learned was that, contrary to the evidence presented at trial, it was Smith who accompanied Bogle, Alfonso and Torres to Manatee County on September 1, 1991. See D-Ex. 52. Indeed, Smith contradicted almost all of Alfonso's testimony concerning the events on September 1, 1991 (Id.). Smith told the defense investigator: He knew Bogle because they lived at the same motel area in September, 1991 (PC-T. 709). On September 1, 1991, he and Bogle picked up Alfonso and Torres and they drove to

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[48]The circuit court improperly analyzed the evidence in a piecemeal fashion without regard to the other evidence from trial and postconviction. See PC-R. 3114.

Manatee County to purchase beer (PC-T. 712-13). From what Smith could tell Alfonso was happy and excited to see Bogle (PC-T. 714). After they picked up the beer, the foursome drove back to the motel where Smith and Bogle lived (Id.). Other individuals joined the group and socialized with them (Id.). Neither Alfonso nor Torres showed or indicated any fear around Bogle (PC-T. 715). Rather, Bogle and Alfonso acted like a couple enjoying the day (PC-T. 716).

In the afternoon, Bogle asked Smith if he would take the girls home (PC-T. 716). Smith drove, Bogle was the passenger and Alfonso and Torres sat in the backseat (PC-T. 717-8). While in the car, Smith did not hear any arguments or threats (PC-T. 717); he did not hear Bogle call Torres any derogatory names (Id.). When they arrived at Alfonso's trailer, Alfonso, Torres and Bogle walked into the trailer (PC-T. 718). No one was arguing, but rather the three were just talking (Id.). A few minutes later, Smith heard some arguing from inside the trailer (PC-T. 718-9). As Bogle left the trailer he kicked the screen out of the trailer door (PC-T. 719). Then he got in the car and the two men left.

The circuit court dismissed Smith's testimony, characterizing it as only different from Alfonso's testimony as to minute details (PC-R. 3105). However, the court's order is not supported by the record. Alfonso testified that Bogle broke into the trailer. In addition, Smith refuted Alfono's testimony about what occurred on the ride home. Had Smith testified, the jury would have been provided a completely different picture of the events that occurred, and it would have undermined Alfonso's testimony about the relationship Bogle had with her sister and

the prosecution's theory of his motive to kill her.

2. Roger Kelly

In a sworn deposition, Kelly testified that Torres was drinking and dancing with a man - not Bogle (D-Ex. 24). As Kelly was leaving Club 41, he saw Torres outside standing next to the dumpster arguing back and forth (Id.). Kelly maintained that Torres was arguing with Douglas (Id.). Bogle was not present during the argument.[49]

The circuit court held that Kelly's deposition was not admissible, relying on Rodriguez v. State, 609 So. 2d 493 (Fla. 1992)(PC-R. 3104). However, the court failed to address Chambers v. Mississippi, in which the U.S. Supreme Court held:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

410 U.S. 284, 294 (1973). Because Kelly was deceased, as opposed to the situation in Rodriguez where the witness had simply left town at the time of the trial, and because Kelly's information contradicted Phillip and Tammy Alfonso's testimony, it would have denied Bogle's right to due process to exclude the testimony.

Further, the circuit court failed to analyze Bogle's allegation in conjunction with his other allegations and claims. See PC-R. 3104. Thus, the court discounted Kelly's testimony, which fit hand-in-glove with the evidence presented concerning Douglas, while refusing to acknowledge that the evidence

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[49]Though Kelly was deceased at the time of the trial (D-Ex. 14), trial counsel made no attempt to present Kelly's deposition testimony.

presented at the hearing severely weakened and demonstrated the flaws in the prosecution's evidence against Bogle. The court's analysis was in error.

D. Failure To Impeach Prosecution Witnesses

Phillip and Tammy Alfonso and Trapp were the only witnesses to testify about Bogle's movements on the night of the crime. These three witnesses admitted drinking heavily that night. The parking lot outside Club 41 was dark. The noise level of the club was defeaning. Most importantly, these witnesses were either related to the victim or were friends with Douglas.

Phillip was Torres' uncle. He was the only witness to testify that Bogle was "dirty" when he purportedly saw him outside Club 41. In his statement to law enforcement, Alfonso admitted he drank "a few beers" at Starky's Lounge between 9:30 and 10 p.m. with Torres. He and Tammy went to a friend's house and then joined up with Torres again at 11:30 p.m. at Club 41. He said Torres was not drunk.[50] Alfonso said he saw Torres leave the bar between 12 and 12:30 and saw Bogle walking behind her. He went back in the club, had more drinks and then left at closing between 2 and 2:30 a.m. Based on his statement, he and his wife had been drinking for 5 hours when he observed Bogle's appearance. Trial counsel did not impeach the witness with his impaired ability to observe or the inconsistencies between his testimony and his wife's statements.

The circuit court excused trial counsel's deficiencies relying on counsel's testimony and discounting the prior

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[50]The medical examiner testified that Torres' blood alcohol level was .26, more than three times the legal drinking limit (T. 245).

statements and testimony given by the Alfonsos.[51] The circuit court relied on trial counsel's belief that the jury believed that all of the witnesses were "bar people" or had been drinking. While this may be the case it does not excuse trial counsel's failure to establish that the witnesses' observations were likely skewed by their alcohol consumption as well as the conditions in Club 41.

In addition, Trapp was inexplicably not questioned and impeached with his outstanding criminal issues. Trapp testified that he saw Bogle speak to Torres and then comment that she was "trash" (T. 377). However, Trapp's testimony was contradicted by the Alfonsos who testified that Bogle did not speak to Torres at the bar (T. 412). Trapp also testified that Torres was sitting alone at the bar, but Tammy Alfonso testified that Torres was sitting with her at the table (T. 432).

Also, Trapp testified that he had met Douglas and Jeanne Baurle at the Red Gables Bar on the night of the crime (T. 1216-8). But, the police reports refute his account and he gave conflicting accounts of how much he drank the night of the crime.

Furthermore, according to court records, Trapp was not supposed to be drinking or going to bars at all. Specifically, Trapp was supposed to avoid the Red Gables Bar and stop drinking alcohol as special conditions of his probation for the charge of delivery of cocaine. See D-Ex. 22. Trapp's admission to law enforcement established violations of his probation, yet he was

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[51]Furthermore, contrary to the circuit court's order (see PC-R. 3107), Bogle was not required to present the testimony of the Alfonsos when he introduced police reports and prior testimony that was inconsistent with their trial testimony.

allowed to continue to remain on probation and no one reported his violations to his probation officer. Trial counsel failed to make any inquiry into Trapp's criminal record.

The circuit court erroneously held that Bogle had not established that the conditions of probation remained in effect on September 12, 1991 (PC-R. 3107). The court was wrong. The conditions outlined in the court file were still in effect. See D-Ex. 22. There was nothing reflecting that the conditions had been changed.

Additionally, the court's reliance on trial counsel's testimony that Trapp's testimony was "insignificant" is equally erroneous. Trapp was the only witness who testified that he saw Bogle and Torres speak. And, he testified at trial that Bogle commented that Torres was "trash" (T. 377), though at the second penalty phase he clarified that Bogle said she was "real trashed" (T. 1219). He also was one of the three witnesses who said Bogle did not have any injuries to his face which was a feature of the case. In light of Trapp's importance to the prosecution's case, the circuit court erred in relying on trial counsel's testimony that his testimony was minimal (PC-R. 3108). Rather, it was critical that Trapp be adequately impeached and to show that his testimony was false. Trial counsel was deficient in this regard.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING BOGLE'S CLAIM THAT NEWLY DISCOVERED EVIDENCE SHOWS THAT BOGLE'S CONVICTION IS UNCONSTITUTIONALLY UNRELIABLE.

Two requirements must be met for a conviction to be set aside on the basis of newly discovered evidence. First, to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of

trial, and it must appear that defendant or his counsel could not have known [of it] by the use of due diligence." Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-5 (Fla. 1994). Second, the newly-discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911, 915 (1991). To reach this conclusion the court is required to "consider all newly discovered evidence which would be admissible at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id. at 916.

A. YSTR DNA Testing Of Torres' Fingernail Cuttings

1. The Trial

The FBI tested the "fingernail cuttings" from both Torres' right and left hands. The testing produced a positive result on a presumptive blood test, but no DNA analysis was conducted.

Based on the blood evidence, Cox presented evidence and argued that the victim had been attacked by Bogle, a struggle ensued and Bogle's face was scratched during that struggle. Thus, bar patrons only noticed scratches on Bogle's face **after** he was seen leaving the bar on the evening of Torres' death. Cox asked every witness who observed Bogle on the evening of Torres' homicide or shortly thereafter about the condition of his face. See (T. 363, 378, 411, 437). None of the witnesses noticed any injuries. Id.

Cox argued the significance of the scratches in her dramatic closing argument:

> . . . **Consider the struggle, the blood under her figernails and the scratches on his forehead.** There is no doubt that this is both a premeditated killing and a killing in the course of a sexual battery.

(T. 548-9)(emphasis added). She also argued:

> He [Brett Bogle] seemed like he'd been wrestling or running and he had scratches on his forehead, scratches that no one else who had been with him that evening, people who had talked to him, the man who had seen him at the Red Gables Bar and gave him a ride to Club 41 ever noticed.
>
> For the first time, the people who had seen him all evening noticed he's got scratches on his forehead, fresh scratches. And Margaret is never seen again and they go back to Katie's house looking for Margaret.

(T. 553-4). Finally, Cox argued that the blood beneath Torres' fingernails established that the sexual encounter was not consensual (T. 1580).

2. The Postconviction Testing

The results of the YSTR DNA testing of Torres' fingernail cuttings revealed that two male individuals did in fact leave some genetic material beneath Torres' fingernails on the night she was killed - but neither of those individuals was Bogle. See PC-T. 1782, 1837, 1902, 1911-2, 1943,[52] D-Exs. 76, 77.

Obviously, the new DNA test results demonstrated that someone other than Bogle struggled with the victim before her death. Thus, the evidence not only excludes Bogle as the source of the male profiles, but also includes other suspects. The newly discovered DNA evidence corroborates and strengthens Bogle's defense that he did not kill Torres.

Likewise, the DNA evidence alone, and when combined with the evidence of the automobile accident in which Bogle had been involved less than a week before the homicide and received numerous facial lacerations and scratches, demonstrates that Bogle's facial injuries were not inflicted by Torres. It also

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[52]The State's expert testified: "He doesn't match. It is not his DNA." (PC-T. 1943).

demonstrates that the State's witnesses testified falsely at Bogle's capital trial when they maintained that he had no injuries to his face on the evening of the homicide.

Under Jones, Bogle is entitled to a new trial because there is no doubt that the evidence presented would probably produce an acquittal upon retrial. In addition, this Court is also required to review Bogle's Brady and ineffective assistance of counsel claims together with his newly discovered evidence claim. See State v. Gunsby, 670 So. 2d 920, 923-4 (Fla. 1996). Considering the evidence about Douglas, Bowman's testimony that she drove Bogle home, the flawed forensics and lead detective's tampering with evidence, Bogle's facial lacerations and scratches that resulted from the car accident prior to the night of the crimes, Smith's information about the events of September 1st and the impeachment of the prosecution's witnesses, confidence is undermined in Bogle's conviction.

3. The Circuit Court's Order

In analyzing Bogle's claim, the circuit court employed an incorrect standard. The court held that because the newly discovered evidence did not "exonerate" Bogle or prove his "innocence", his claim fails (PC-R. 3123). Further, the court relied on testimony from trial which Bogle has proven to be false or severely weakened. And, the court failed to consider the evidence presented by Bogle at the evidentiary hearing in ruling on his claim.

Bogle need not prove he is innocent or that the evidence exonerates him. Rather, he is simply required to show that the evidence would probably produce an acquittal.

Also, the circuit court determined that the DNA evidence from the vaginal swabs and the panties undercut Bogle's claim. The court stated:

> evidence that Defendant's DNA profile was the sole match to the semen found on the vaginal swabs and on Ms. Torres' underwear is highly relevant and highly prejudicial to Defendant, especially when one considers that Defendant denied to law enforcement having sexual relations of any sort with Ms. Torres on the night of her death."

(PC-R. 3125-6). In making such a conclusion, the court ignores much of the evidence presented at the evidentiary hearing.[53]

First, as to whether Bogle's DNA profile was the sole match to the semen found on the vaginal swab, the State's expert, Tracey, testified that while the data was consistent with two donors, "[y]ou could make the argument that there were three and they were undetected ..." (PC-T. 1939). Tracey also testified that the data was not conclusive evidence that the DNA reflected a male and a female (PC-T. 1940). Thus, it was certainly not conclusive that Bogle's DNA profile was the sole profile.

Second, the new DNA testing was inadmissible. The circuit court admitted the evidence over Bogle's objection and refused Bogle a Frye hearing. The State could not prove chain of custody as to the evidence and could not prove that the evidence had been properly maintained and stored. When the evidence was sent to the FBI in 1991, the FBI maintained no chain of custody log. In addition, the State has never presented the testimony from the analyst who actually conducted the RFLP testing. Thus, this step

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[53]The circuit court failed to acknowledge that the State has lost the wood sticks and packaging that were used in the STR DNA testing. See PC-T. 1864-9. The loss of the evidence would make it difficult if not impossible for the results of the testing to be admissible at a retrial.

in the chain of custody has never been established. In addition, the State presented no evidence that the vaginal swabs and panties were maintained properly since being introduced into evidence at trial.[54]

And, most importantly, the court ignores the fact that Lingo inexplicably checked the evidence out, including the vaginal swabs for several hours along with other evidence on September 17, 1991, for "investigative purposes". However, what the lead detective could be investigating with the vaginal swabs is incomprehensible and provides a legitimate defense that Lingo tampered with the evidence prior to submitting it to the lab.

Further, Libby testified that Bencivenga's results were problematic because no alleles were present in the female fraction of the DNA; this result is unexpected (PC-T. 5289). Thus, the new STR DNA results are inadmissible at a new trial and inadmissible to rebut Bogle's claim in postconviction. And if the results are admissible, Bogle has presented much evidence to show that the results are unreliable.

Third, though Lingo testified at the evidentiary hearing that Bogle denied having sex with Torres (PC-T. 1367), his notes that were taken contemporaneously with his interview with Bogle and what he used to recall significant things includes no reference to Bogle denying he had sex with Torres (PC-T. 1421, D-Ex. 62). And, Lingo's report was not written until nine days after his interview with Bogle (PC-T. 1421), during which Lingo

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[54]In 2001, when Bencivenga received the vaginal swabs they were not sealed (PC-T. 1578-9). She had no idea whether the items that came from Bogle, including buccal swabs, blood and clothes had been stored with the unsealed swabs (PC-T. 1592).

interviewed several people (PC-T. 1422).

And, the State's own expert, Dr. Tracey, testified that the semen could have been present for up to 72 hours prior to its collection (PC-T. 1956). Tracey's testimony is consistent with the DNA and other evidence, i.e., according to the State, the DNA profile from the semen found in the vaginal swabs and the panties matched Bogle's DNA profile. However, Torres was not wearing panties at the time she was killed. Instead, her panties had been removed and were placed in a pile next to her body. Therefore, even if Bogle had vaginal intercourse with Torres, she was alive and dressed after the event. Thus, it was not until later after putting on her panties and having the semen leak into the crotch area did she then undress, engage in anal intercourse and the assault occurred behind the Beverage Barn.[55] Indeed, Deadman testified that there may have been insufficient seminal fluid in Torres' vagina because the semen "could have drained from the vaginal vault (T. 1377). Thus, even if taken as true, the fact that Bogle's DNA profile matched the semen from the panties suggests that he was not the last person to have intercourse with Torres and not the person to kill her.

Additionally, according to the medical examiner, it appeared that Torres had engaged in anal intercourse based on his observations and tests within three hours of her death (T. 247). There was no evidence that the anal intercourse was non-

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[55]The circuit court states that "the evidence presented at trial is very strong that Torres' murder occurred during a sexual assault" (PC-R. 3124). Contrary to the court's statement, there is no physical evidence or any other evidence that Torres was sexually assaulted. Indeed, the physical evidence, as well as the scene itself makes clear that Torres engaged in consensual sex with someone other than Bogle behind the Beverage Barn.

consensual.[56] There was no evidence that Bogle was the individual who had anal intercourse with Torres.

However, there was DNA evidence beneath Torres fingernails of two other male individuals - neither of whom was Bogle. Thus, contrary to the circuit court's analysis, the DNA obtained from the vaginal swabs and panties undercuts the State's theory of Bogle having vaginal intercourse with Torres and then killing her and is not "highly prejudicial".

The circuit court also erroneously relied on evidence presented at Bogle's trial which has now been severely impeached. For example, the court relies on Katie Alfonso's testimony about the events of September 1st to discount the impact of the YSTR DNA testing. However, Smith's testimony disproves much of Alfonso's testimony. Bogle was not "so angry" at Torres that he "busted their screened-in porch" (PC-R. 3123). According to Smith, Bogle calmly entered Alfonso's trailer and there had been no disputes or arguments that he had seen. Instead the threesome simply walked into the trailer (PC-T. 718). Furthermore, Alfonso testified before the grand jury that she had told law enforcement that she was dropping the charges against Bogle because he had agreed to leave them alone (D-Ex. 63). So as far as Bogle knew Alfonso and Torres were not pressing charges (D-Ex. 63).

The circuit court also relied on the testimony of Phillip Alfonso and Trapp that Bogle did not have any scratches on his face when they first saw him on the night of the crime (PC-R.

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[56]Torres clothes had no rips, tears or blood on them (T. 1282). Her clothes were not strewn about, but in a pile next to her body (T. 914; State's 18D - trial). There were no injuries to Torres genitalia that would not have occurred in consensual anal intercourse (T. 1362-3).

3123). However, Bogle introduced his medical records, including the descriptions and diagrams of facial injuries from the car accident a week before the crime and medical testimony from Dr. Willey establishing the opposite (PC-T. 886-7, 889). Yet, the circuit court ignored this testimony when analyzing Bogle's claim.

Further, the newly discovered YSTR DNA evidence in and of itself refutes the circuit court's analysis as to this point. If Torres had scratched Bogle, either causing Bogle's scratches or "re-opening"[57] the scratches, then Bogle's DNA would have been identified from the victim's fingernail cuttings. The State's own expert testified that if there had been a positive test for blood, which there was, then it would indicate that the DNA was developed from a blood source (PC-T. 1954).

Likewise, Lingo's testimony that the scratches on Bogle's face were fresh is refuted by Willey and Schrader's testimony, the medical records and photographs and the YSTR DNA test results. Further, Lingo has admitted to giving false testimony at trial. A review of his testimony before the grand jury also demonstrates that he provided false testimony. The circuit court erred in placing any credibility on Lingo's testimony.

Finally, the circuit court's reliance on Malone's testimony is illogical. Part of the newly discovered evidence asserted by

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[57]If Torres re-opened Bogle's scratches, then logically, they existed earlier in the evening. Therefore, the evidence Bogle presented at the postconviction evidentiary hearing, including Bogle's medical records, photos, Willey's testimony, and the YSTR DNA results undisputably establish the Trapp and Alphonso's trial testimony was untruthful as to the issue of whether Bogle had scratches or injuries to his face when they first saw him on September 12, 1991.

Bogle is that microscopic hair analysis is unreliable. Likewise, Malone has been repeatedly found to have given false testimony, made mistakes and failed to adequately document his analysis. No reasonable jurist would credit any of Malone's testimony, particularly in light of the uncertainty of microscopic hair analysis. In fact at the evidentiary hearing, Robertson testified, contrary to Malone: "We don't know if Q18 is a head hair or pubic hair. We don't know that it matches which known." (PC-T. 5223).

The circuit court's reliance on evidence that has been completely and irreparably undermined and impeached is error. A correct analysis of the admissible evidence makes clear that the unreliability of hair analysis and the YSTR results would probably produce an acquittal.[58] Relief is warranted.

ARGUMENT V

THE CIRCUIT COURT ERRED IN DENYING BOGLE'S CLAIM THAT TRIAL COUNSEL HAD A CONFLICT OF INTEREST WHICH VIOLATED BOGLE'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Rendering effective assistance pursuant to the sixth amendment requires that trial counsel avoid an "actual conflict of interest" that adversely affects his representation. Cuyler v. Sullivan, 466 U.S. 333, 351 (1980). Where an attorney represents

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[58]Additionally, the issue of Bogle's culpability in Torres' murder is critical to whether or not he can be sentenced to death. In Enmund v. Florida, 458 U.S. 782 (1982), the Supreme Court established that the individualized sentencing that is required by the Eighth Amendment before the death penalty may be imposed must include a consideration of a particular defendant's culpability.

Here, the new DNA evidence demonstrates that the State's theory at trial was not true and that the witnesses used to support that theory were untruthful. It is now known that Torres struggled with two male individuals, neither of whom are Bogle, during the homicide. Thus, the new results from the YSTR DNA analysis would probably cause the jury to recommend life.

an interest contrary to his client's interests, prejudice is presumed. Id.[59] Here, trial counsel had multiple undisclosed conflicts, relating to Guy Douglas, Jeffrey Trapp and Margaret Torres that prevented him from rendering effective assistance.

Douglas was a target of investigation of Bogle's defense (PC-T. 594). During the prosecution of Bogle, Douglas was charged with aggravated battery and burglary of Marcia Baurle. See D-Exs. 8, 25. Trial counsel testified that the representation of Douglas presented a significant potential conflict in representing Bogle (PC-T. 612). Indeed, trial counsel believed that he would have been prohibited from interviewing Douglas due to his status as a client of the Office of the Public Defender (PC-T. 612).

At the time of Bogle's trial, Trapp was on probation for possession and delivery of cocaine. See D-Ex. 22. The public defender was representing him. Had the attorneys exposed Trapp's criminal record, it would have hurt Trapp's interests. Trial counsel failed to ask Trapp about his criminal record.

At the evidentiary hearing, trial counsel testified that if the office was representing a witness against another client, he would conflict off of the case (PC-T. 591).

On October 11, 1991, trial counsel was informed that the office had previously represented Torres on two cases in 1986 and 1987 (D-Ex. 53). Trial counsel never informed Bogle of this information. The prejudice of trial counsel's conflict was

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[59]This Court has recognized that "As a general rule, a public defender's office is the functional equivalent of a law firm" and that "[d]ifferent attorneys in the same public defender's office cannot represent defendants with conflicting interests." Bouie v. State, 559 So. 2d 1113, 1115 (Fla. 1990).

evident at the guilt phase of Bogle's trial when he attempted to ask the medical examiner about the victim's blood alcohol level. At a sidebar where the trial court determined whether to admit the evidence, trial counsel stated: "This lady had a reputation in the community for going to bars and getting drunk and going out and having sex with people and we think it's very relevant that she could have done that night" (T. 243-4).

In denying relief, the circuit court relied on Mungin v. State, 932 So. 2d 986 (Fla. 2006), to deny Bogle's claim because trial counsel was unaware of the previous representation (PC-R. 3118).

Initially, the circuit court's analysis is flawed as to Torres because it was uncontested at the evidentiary hearing that trial counsel was aware that his office previously represented her. See D-Ex. 53. As to Torres, Mungin is inapplicable.

Moreover, the trial record establishes that trial counsel was aware of Torres' "reputation", yet failed to pursue or present this information though it would have undoubtedly assisted Bogle's defense. Bogle has established an actual conflict and identified evidence that suggests his interests were compromised. See Herring v. State 730 So. 2d 1264(Fla. 1998).

As to Douglas, Bogle asserts that Mungin is also inapplicable because Douglas was not simply a witness, but a suspect. Yet, trial counsel was prohibited from pursuing Douglas because he was represented by the public defender. Thus, Bogle's right to present a defense was compromised.

As to Trapp, Bogle submits that trial counsel testified that he was unaware that the public defender had represented Trapp.

However, Bogle contends that this Court must reconsider its position that trial counsel's ignorance absolves him and renders the conflict meaningless.

The conflicts that existed in Bogle's case violated his right to present a defense, see Crane v. Kentucky, 476 U.S. 683 (1986), and the right to confront and cross examine witnesses, Davis v. Alaska, 415 U.S. 308 (1974).

ARGUMENT VI

THE CIRCUIT COURT ERRED IN DENYING BOGLE'S CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

To prove an ineffective assistance of counsel claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

In order to meet the first prong, at the time of Bogle's capital trial, trial counsel had an absolute obligation to investigate and prepare mitigation for his client. See Rompilla v. Beard, 545 U.S. 374, 387 (2005). As to the prejudice prong, prejudice is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the deficiencies substantially impair confidence in the outcome of the proceedings. Strickland v. Washington, 466 U.S. at 695 (1984). "In assessing prejudice, [this Court] must reweigh the evidence in aggravation against the totality of mitigating evidence." Wiggins v. Smith, 539 U.S. 510, 538 (2003).

In Bogle's case, trial counsel's performance was deficient. Paul Firmani was assigned as the penalty phase attorney for Bogle (PC-T. 5108). He reviewed discovery, met with Bogle and requested medical records (PC-T. 5113-6). Trial counsel and his investigator also interviewed some witnesses (PC-T. 5119). Trial counsel retained a mental health expert and provided him with some materials (PC-T. 5120-1).[60]

Trial counsel, however, failed to present any evidence to challenge the aggravating factors relating to the events that occurred on September 1st. At the trial, the jury heard that Bogle had violently broken into Alfonso's trailer and assaulted her and her sister. However, trial counsel was well aware of Smith, whocontradicted much of Alfonso's testimony.

Smith accompanied Bogle, Alfonso and Torres to Manatee County on September 1st. See D-Ex. 52. From what Smith could tell Alfonso was happy and excited to see Bogle (PC-T. 714). After they picked up the beer, the foursome drove back to the motel where Smith and Bogle lived (Id.). Neither Alfonso nor Torres indicated any fear around Bogle (PC-T. 715). Bogle and Alfonso acted like a couple enjoying the day (PC-T. 716).

In the afternoon, Bogle asked Smith if he would take the girls home (Id.). Smith drove, Bogle was the passenger and Alfonso and Torres sat in the backseat (PC-T. 717-8). While in the car, Smith did not hear any arguments or threats (PC-T. 717); he did not hear Bogle call Torres any derogatory names (PC-T. 717). When they arrived at Alfonso's trailer, Alfonso, Torres and Bogle walked into the trailer (PC-T. 718). No one was arguing; the three were talking (PC-T. 718-9). A few minutes

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[60]In 1993, when Bogle's second penalty phase was conducted, trial counsel tried seven first degree murder cases (PC-T. 5153-4). Trial counsel candidly offered that there was a time limitation in preparing for Bogle's penalty phase (Id.).

later, Smith heard some arguing from inside the trailer (Id.). As Bogle left the trailer he kicked the screen out of the trailer door (PC-T. 719). Then he got in the car and the two men left.

In sentencing Bogle to death, the trial court relied on Alfonso's testimony about the events on September 1st to establish not only the prior violent felony aggravator, but also the aggravator that the crime was committed to avoid or prevent a lawful arrest (R. 262-3). Trial counsel had evidence at his fingertips to counter these aggravators, yet failed to use it. Trial counsel was ineffective.

Also, trial counsel completely mishandled the mental health mitigation. He failed to provide pertinent records and information to his expert or request that psychological testing be conducted. The State capitalized on Gonzalez' limited evaluation by establishing that he conducted no tests with Bogle, and "just sat down and talked to him for two hours" (T. 1406). The State established that Gonzalez based his diagnosis of Bogle on "just the two hour interview" and pointed out that though there were tests that could demonstrate mental illness, Gonzalez failed to administer any (T. 1409; see also T. 1572).

The State also impeached Gonzalez about what information he had to rely upon to support his conclusion that Bogle was intoxicated at the time of the crime:

> Q. So just so we're clear, you didn't read the deposition of Diane Martin, Keith Gad or Phillip Alfonso?
> A. That is correct.
> ***
> Q. How many depositions were given to you to review?
> A. The ones I have here are the Tammy Alfonso and Roger D. Kelly - Roger Kelly.
> Q. Okay. And that's it?
> A. That's it.

(T. 1413-5). As to this issue, the State also demonstrated that Gonzalez' reliance on Tammy Alfonso's deposition was misplaced:

> Q. And Tammy Alfonso's deposition supports your

position that he was intoxicated at the time of the offense?

A. Yes.

Q. What does she state?

A. She said, "So when he approached our car, he came up to the driver's side and when he walked up, Phillip kept saying to him, 'why are you so dirty.' He just kept repeating, 'why are you so dirty,' and Brett went from saying that he had passed out to he had gotten in a car wreck."

Question: "Was he drunk?"

Answer: "Brett?"

Question: "Yes."

Answer: "I not knowing the guy, you know, how he is when he is drunk or if he is, I don't really know." That's what she said.

Q. She said she didn't know?

A. "I mean he wasn't staggering because we see him walk away and by seeing him walking away, he just looked like any, you know, sober person walking down the street he was not staggering or tripping or anything."

Q. Doctor, based on what you've just read to us, where do you find a basis for your opinion that she supports the proposition that he was intoxicated the night he killed Margaret Torres?

A. Well, the tenor of what she is saying, it gives you a flavor that he - that Brett was drinking or was drinking or had been was intoxicated.

(T. 1415-7).

As to Gonzalez' opinions about Bogle's mental health and background he stated that Bogle was raised in a dysfunctional family where the children were abused and exposed to drugs at a young age (T. 1397-400). It was on cross examination that Gonzalez offered that he diagnosed Bogle with a substance abuse and a personality disorder (T. 1408-9), but he failed to explain the effects these disorders had on Bogle. Further, as to statutory mitigation he stated:

> Well, to a degree, he was under the influence of alcohol and I think you can extrapolate and that would be some type of influence of emotional mental disturbance.

(T. 1403).

The circuit court dismissed Bogle's claim based on the testimony that trial counsel believed that Gonzalez was a

qualified mental health expert and thus, trial counsel was entitled to rely on Gonzalez. See Darling v. State, 966 So. 2d 366, 377 (Fla. 2007) (PC-R. 3139-40).[61] However, the circuit court's analysis is in error.

First, trial counsel had an opportunity to see the weaknesses in Gonzalez' testimony before the second penalty phase since Gonzalez testified at Bogle's first penalty phase. Yet, trial counsel did nothing to strengthen or elicit additional information to establish mitigation. Second, trial counsel failed to provide critical information to his expert. Gonzalez was not provided Bogle's school or medical records and did not have the opportunity to speak to Bogle's friends and family. Even though trial counsel believed that this type of collateral or background information strengthened his expert's opinion (PC-T. 897), he did not supply it to his expert. Third, trial counsel failed to present evidence of Bogle's mental health problems. Gonzalez failed to explain the diagnosis or how a personality disorder and substance abuse were caused, the symptoms or the effects on Bogle. Thus, while trial counsel may rely on a qualified expert's judgement, he may not fail to provide background information or ask questions to elicit evidence necessary to establish statutory and non-statutory mental health mitigation.

In addition, to the mental health testimony, trial counsel failed to obtain the testimony of Bogle's twin brother, Brian. The circuit court dismissed Bogle's claim determining that

[61]The circuit court also believed that trial counsel supplied Gonzalez with background materials (PC-R. 3137-8).

Brian's testimony at the evidentiary hearing was cumulative to that presented at trial (PC-R. 3140). While some of Brian's testimony concerned similar topics as witnesses who testified at trial and Brian's letter, trial counsel admitted that he would have preferred to present live testimony to the jury because it is more effective (PC-T. 5140). Trial counsel could not recall a strategic reason for failing to obtain Brian's testimony (PC-T. 5139). In fact, at trial, counsel commented that he could have subpoenaed Brian had he known the State would object to portions of the letter (T. 1492). And, Brian made clear that he could and would have attended the penalty phase had he been asked (PC-T. 740). Likely, Brian was the most important background mitigation witness. Yet, for no reason, trial counsel failed to obtain his presence to testify before the jury and judge who sentenced his brother to death.

Had trial counsel adequately investigated and presented evidence at the penalty phase he could have presented a compelling picture of mitigation that would have led the jury to recommend that Bogle's life be spared: From an early age Brett had developmental delays. At 18 months, Brett ingested pine oil cleaner and almost died (PC-T. 778). He suffered from chemical pneumonia (Id.). As a child, he was diagnosed as hyperactive and prescribed Ritalin (PC-T. 777, 779). Brian testified that Brett's father was an alcoholic and a drug addict (PC-T. 738, 749). He smoked marijuana and drank alcohol as well as used cocaine and PCP daily (PC-T. 738, 747-8, 749). Money was already short due to his father's drug use (PC-T. 782). The drugs caused Brett's father to become paranoid and abusive (PC-T. 748). He

was incredibly controlling (PC-T. 784-5). Brett's father's abuse was arbitrary and didn't make any sense to the Bogle children (PC-T. 751). The children never knew when it would be their turn for a whipping (PC-T. 770). Brian remembered Brett being whipped with a belt at least a few times a week from when he was five or six (PC-T. 750). As the children got older the abuse became more severe (Id). One time Brett got punched in the face for not picking up his father's cigarette butts (PC-T. 750-1). Brian often witnessed his father punch Brett about the head (PC-T. 755). Brett's father abused his mother, too.

Brett's father's unpredictability caused much anxiety in the Bogle house; "You would have to hide in your room and pretend you were asleep because he was hitting [Brett's] mom and if something didn't get done during the day he was going to drag you out of bed and hit you also" (PC-T. 752). At nine, Brett turned to drugs and alcohol to escape his abusive, unstable reality (PC-T. 760). Brett soon became dependent on drugs and alcohol to cope with the unpredictability of his home life. When Brett and Brian were ten their father moved out for a year. That year was better, but the family didn't have much money (PC-T. 757). When their father came back "he was a lot more unstable. The abuse was more severe and he was more erratic." (PC-T. 760).

In addition, to the background information, trial counsel could have established the existence of mental health mitigation. Dr. Faye Sultan evaluated Bogle in postconviction. Sultan reviewed background material, testing data and interviewed Bogle and several collateral witnesses (PC-T. 933). Bogle's testing demonstrated "deep rooted psychological problems ... and a high

degree of severity of alcohol and drug abuse."[62] (PC-T. 937). Bogle also demonstrated a "high degree of impulsivity and a very, very strong need for acceptance." (Id.).

Dr. Sultan concluded that in 1991 Bogle was very unstable psychologically and was a poly-substance abuser (PC-T. 944). He met the diagnostic criteria for borderline personality disorder:

> This is a fairly significant psychological condition in which the individual actually lacks the ability to regulate his or her emotions so that they are constantly flooded by emotion. They are not able to calm themselves or soother themselves which by the way is a skill that we really learn as a very small child. . . . These are also people who are hypersensitive to the notion of rejection. Crave acceptance and have a great deal of trouble allowing for the possibility that somebody might not want to be in his life. Suicidal gestures are common. There is a high degree of impulsivity in such individuals.

(PC-T. 944-6). Sultan testified that the physical and psychological abuse caused Bogle's brain to develop more slowly and differently (PC-T. 950-1). Those changes also caused Bogle to be more impulsive, emotionally withdrawn, and to experience a sense of emptiness and paranoia (PC-T. 953). Depression, a natural consequence for an abused child was present (Id.).

At the time of the crime Bogle was not able to think clearly or make good decisions and he was abusing substances (PC-T. 948). He was also trying to cope with the car accident that "completely threw him off balance" (PC-T. 959). He was drinking heavily and using marijuana and he was more depressed and paranoid than before (PC-T. 960-1). Sultan concluded that at the time of the crime, Bogle was suffering from an extreme mental or emotional disturbance (PC-T. 962). She went on to state that a thorough

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[62]Sultan explained that there is a very strong genetic component for addiction (PC-T. 939).

explanation of Bogle's psycholgical state in September, 1991, would have "explained all of his behavior including the offense and other events surrounding the offense." (PC-T. 994).

At trial, the court's findings are unclear as to whether the court followed the proper standard in assessing mitigating evidence:

> ...[N]either Dr. Gonzalez nor any other witness who testified stated that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. Dr. Gonzalez testified Brett Bogle had a personality disorder and suffered from some mental disturbance. However, Dr. Gonzalez conducted no tests other than one two-hour interview with Brett Bogle.

(R. 264). The trial court did not consider Bogle's mental or emotional disturbance in the context of non-statutory mitigation.

Had trial counsel investigated and prepared he could have presented much statutory and non-statutory mitigation. Due to the substantial mitigation that was presented, confidence is undermined in Bogle's sentence of death. Relief is warranted.

ARGUMENT VII

THE CIRCUIT COURT ERRED IN DENYING BOGLE'S CLAIM THAT HE WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT AND DEFENSE COUNSEL'S FAILURE TO OBJECT DENIED BOGLE HIS CONSTITUTION RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Cox repeatedly vouched for the credibility of the State witnesses. See T. 599. At one point Cox argued:

> MS. COX: There was a well-connected chain of events that leads to one conclusion and one conclusion alone, but the Hillsborough County Sheriff's Office continued their investigation and enlisted the help of the greatest crime laboratory in the world, the FBI Crime Laboratory and you've heard from many experienced professional forensic experts and all the investigation that they did didn't contradict what was abundantly clear.

(T. 556-7). Cox also ridiculed defense counsel and Bogle:

> You can't judge this man or expect this man to behave within the confines of the ordinary person. You can't expect a person who is capable of doing what he did to Margaret

> Torres to act as you would expect an ordinary human being to act.
>
> Maybe he was governed by his judgment, was governed, was overcome by a sense of euphoria and glee as he looked down and saw the destruction that he had caused a women he despised. More likely, it was just a feeling of invincibility, invincibility, arrogance and total indifference for the evil and vileness of his actions.

(T. 558). Cox concluded by misrepresenting the evidence:

> ... It's not like a pubic hair in the crotch of the pants he was wearing. That's not something that you just pick up in a casual encounter. That's not something he picked up in that several minute long conversation with her in the bar.

(T. 559-60).

Though the circuit court held that Bogle's claim was procedurally barred (PC-R. 2134), the court addressed the claim that trial counsel was ineffective in failing to object to the improper argument. The court denied Bogle's claim (PC-R. 2137).

In a myopic view of the argument, the circuit court held that Cox' bolstering was simply a reference to the palm print that was submitted, and though the reference to the FBI may have been improper, the statement did not rise to the level of depriving Bogle of a fair trial (PC-R. 2135). However, Cox did not confine her argument to the palm print, but made clear that law enforcement "did a very thorough investigation and followed every lead". Thus, the court's conclusion is belied by the record. Cox improperly told the jury that they could trust law enforcement and the FBI because they were "thorough", "the greatest", "experienced" and "professional". And, she then told them that nothing contradicted the fact that Bogle committed the crime which was simply not true.

As in Ruiz v. State, 743 So. 2d 1, 9 (Fla. 1999), Cox "attempted to tilt the playing field and obtain a conviction" by

"invoking the immense power, prestige, and resources of the State". Trial counsel failed to object and Bogle was prejudiced.

The circuit court excused Cox' disparaging remarks of Bogle by suggesting that it was a reasonable inference from the record (PC-R. 2136). However, a review of the arguments demonstrates that Cox disparaged Bogle, characterizing him as abnormal or not an ordinary human being. As in Ruiz, 743 So. 2d at 9, Cox "attempted to tilt the playing field and obtain a conviction" by "demeaning and ridiculing the defendant". Trial counsel failed to object and Bogle was prejudiced.

Cox misrepresented the evidence about the hair. Lingo's testimony was:

> I ... opened the pants up on top of this and as they were laying on the paper looking down at the zipper part opened, I found several what appeared to be pubic hairs inside of the pants and also inside of the legs of the pants.

(T. 366). Further, those were not necessarily the hairs that Malone analyzed. Lingo did not collect the hairs, so there is no evidence that the hair that Malone matched to Torres came from Bogle's crotch. The circuit court's analysis is flawed as there in no evidence about the location of the hair Malone inspected. Trial counsel failed to object and Bogle was prejudiced.

In Bogle's case, Cox violated her ethical and professional obligations and trial counsel failed to object. Bogle was prejudiced because the jury was urged to set aside a logical analysis of the evidence and instead decide the case based on an emotional response to the crime and Bogle. Relief is warranted.

CONCLUSION

Appellant, BRETT BOGLE, urges this Court to grant relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by electronic transmission to Candance Sabella, Assistant Attorney General, on January 22, 2012.

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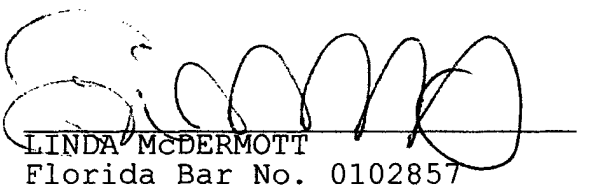
This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.



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