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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2403

LOWER COURT CASE NO. 91-12952

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**

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Reply to Statement of the Case

The State's statement of the case is more appropriately characterized as argument. The State begins by repeatedly citing the circuit court's order and does not refer to the actual testimony and evidence that was presented during Bogle's postconviction proceedings. Thus, the State relies on the conclusions made by the circuit court which Bogle challenges and demonstrated are refuted by clear and convincing evidence. See Answer Brief at 1 (hereinafter "AB at ___").

Furthermore, in addressing the evidence presented at the evidentiary hearing, the State argues that trial counsel's strategy was not consistent with presenting the exculpatory evidence Bogle presented at the evidentiary hearing. First, the State's argument is rebutted by trial counsel's testimony. As to the evidence about Guy Douglas and the statements he made to Marcia Turley, trial counsel testified that he would have considered presenting the evidence on (PC-R. 605-606)("If I had had some evidence [that Guy Douglas could have committed the murder] I would [consider presenting it].").[1]

In addition, the State fails to appreciate that trial counsel was unaware of the evidence Bogle presented in postconviction through both his own deficient performance and the State's failure to disclose evidence. Therefore, relying on trial counsel to suggest that the evidence was inconsistent with his strategy is purely speculative because had trial counsel been

[1]Later, the State concedes that trial counsel testified: "If [trial counsel] had evidence Guy Douglas committed the crime, he would have presented it, but he did not." (AB at 29).

aware of the evidence his strategy may have changed. And, as this Court has recognized, when trial counsel fails to engage in a reasonable investigation, his subsequent decisions do not enjoy deference. Strickland v. Washington, 466 U.S. 668, 690-1 (1984); Wiggins v. Smith, 539 U.S. 510, 521-2 (2003); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003).

In regard to Roger Kelly's deposition, the State argues that it was inadmissible and unreliable (Ab at 61-2). Bogle submits that the evidence was admissible as substantive evidence and to impeach the Alphonsos. And, Gary Turley corroborates Kelly's deposition testimony because he saw Douglas and Torres leaving Club 41 in Douglas' pick-up truck (PC-R. 1013).

In regard to testimony about the STR DNA evidence, the State relies entirely on FDLA Analyst Bencivenga and inexplicably fails to include the fact that the State's expert, Dr. Tracey, testified that it could be argued that the STR DNA data showed that there were three donors and they were undetected (PC-T. 1939). See AB at 5-6. In addition, Tracey testified that the data was not conclusive evidence that the DNA reflected a male and a female (PC-T. 1940).

Furthermore, as to the YSTR testing that was conducted on Torres fingernails, Tracey did not testify that the DNA came from Torres' blood as the State suggests. See AB at 6. Rather, Tracey testified 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). The DNA here included the victim's profile as well as to other male profiles and the State cannot say that those 2 male profiles were not obtained from a blood source. Further, at trial, it was the State that linked the blood beneath Torres

fingernails to the perpetrator of the crime. See T. 548-9 ("Consider the struggle, the blood under her fingernails and the scratches on his forehead" compared to AB at 6 "[The blood beneath the victim's fingernails] is consistent with the evidence presented at trial that the victim was found face down in a pool of her own blood"). Therefore, even if the male DNA profiles obtained from beneath the victim's fingernails were not from a blood source the evidence demonstrates how misleading and improper the State's argument to Bogle's jury was.

The State's failure to include Tracey's testimony in its statement of facts demonstrates that the continued lack of candor that the State has practiced in Bogle's case.

ARGUMENT I: DUE PROCESS WAS DENIED IN POSTCONVICTION

The State maintains that the circuit court's limitation on the cross examination of Michael Malone and presentation of evidence to impeach his credibility was not error (AB at 10-13). At the evidentiary hearing, the State presented Malone to cure the due process violation that occurred when the State failed to disclose the inconsistency between his bench notes and his testimony as to the comparison of the hair that he testified matched the victim's pubic hair and was found on Bogle's pants. There is no doubt that Malone's credibility, motive and bias were relevant and his testimony and was admissible.[2] Thus, the evidence of the criticism of Malone, his previous false testimony, Robertson's review of Malone's case work and Melton's

[2]In fact, the circuit court found Malone's testimony "extremely persuasive" and relied on his speculative testimony that there was simply a scrivener's error in his bench notes (PC-R. 3126), which further emphasizes the error of the circuit court's limitation of Bogle's impeachment of Malone.

review of Malone's improper testimony was relevant and admissible as it was necessary to demonstrate that Malone's speculative testimony was not "extremely persuasive".

Specifically, as to Robertson's testimony about this review of Malone's prior analysis and testimony, contrary to the State's characterization, Bogle was not attempting to present evidence of acts of misconduct. See AB at 12-3. Rather, Bogle sought to establish that Malone was not a competent analyst[3] and repeatedly testified falsely and misleadingly. Unlike in Farinas v. State, 569 So. 2d 425, 429 (Fla. 1990), Bogle was not attempting to introduce misconduct but impeachment evidence of his incompetence and untruthfulness when under oath.

Likewise, the circuit court's limitation on Melton's testimony was erroneous because as a mitochondrial DNA expert she is well versed in the limitations of microscopic hair analysis and should have been permitted to describe the error rates and studies with which she was familiar to establish that hair analysis is simply not a reliable science. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Ramirez v. State, 810 So. 2d 836 (Fla. 2001). Melton's description of the limitations of microscopic hair analysis was not beyond her expertise, as the State argues. See AB at 13.

The State also argues that the impeachment of Cox was inappropriate because it concerned her prior misconduct (AB at 14). But, what the State ignores is that it was the State that

[3]Malone maintained during his examination that he would not confuse a head hair with a pubic hair to explain the discrepancy from his bench notes to his testimony, so his competence was an issue.

elicited evidence of Cox' "standard practice" to rebut Bogle's claims that Cox failed to disclose exculpatory material. Thus, Bogle should have been permitted to impeach Cox' invocation of her standard practice to demonstrate that Cox' true standard practice as a prosecutor involved suppression of evidence and a lack of candor with the tribunal. 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 1 (Fla. 1999); United States v. Sterba, 22 F. Supp 2d 1333 (Fla. M.D. 1998).

Similarly, Bogle was entitled to inquire about the problems FDLE had with contamination because it was relevant to whether the DNA results were reliable. The circuit court's limitation of Bogle's cross examination of Bencivenga was error.

As to the circuit court's limitations on Bogle's presentation of evidence concerning Douglas, the State's argument that the court "did not preclude collateral counsel from eliciting any testimony from Marcia Turley" is belied by the record. See. PC-T. 507-13. The court refused to permit Bogle's counsel from eliciting or proffering testimony from Marcia.

And, as to Gary Turley, contrary to the State's assertion, (AB at 15-6), Bogle presented evidence that Lingo and Cox were aware of Turley and made an effort to have him brought to the state attorney's office (Def. Ex. 15).[4] Gary Turley's testimony regarding hearsay was admissible at the evidentiary hearing. The

[4]The only way that Lingo and Cox could have known of Gary Turley's existence or want to interview him was if Marcia had informed them that she had told Gary about what occurred the morning after Torres was killed.

circuit court erred in excluding it.

Moreover, the State's suggestion that Marcia "did not recall ever observing blood on Douglas or his clothing" is a misrepresentation of the evidence (AB at 17, n.6). At the evidentiary hearing, Marcia candidly admitted that she could not remember if Douglas had blood on him or his clothes. However, she did not testify that he did not, she simply could not remember that detail in 2008. But, in 1991, Marcia told Jeanne Bauerle that the clothes Douglas held as he was leaving the motel were bloody (PC-T. 827).

As to Kelly, the State maintains that the court did not preclude Bogle from arguing how Kelly's deposition testimony was admissible (AB at 17). The transcript of the evidentiary hearing refutes the State's assertion:

> THE COURT: Sustain the objection.
> MR. MCCLAIN: For the record, Your Honor, the case law that I was referring to is Chambers versus Mississippi and also South carolina versus Holcomb. It was a statement from a witness not under oath that was admissible even though it was hearsay because to not allow the defendant to present evidence that was exculpatory would violate the right, the sixth amendment, right to present a defense. Moreover, in this depo the indication --
> THE COURT: Sir, I have ruled.
> MR. MCCLAIN: I am required to make a record for the Florida Supreme Court and --
> THE COURT: That doesn't entitle you to stand here and make a speech after an objection is made and I have ruled on the objection.
>
> ***
>
> MR. MCCLAIN: I know that they require me to tell you --
> THE COURT: Your objection is sustained, sir.
> MR. MCCLAIN: Just for the record you are telling me I cannot make any further argument.
> THE COURT: That's right. I have ruled. You have made your argument. It is sustained.

(PC-T. 597-9).

As to Brian Bogle, the State appears to argue that if the limitation of his testimony was error, it was harmless (AB at 18-

19). However, Brian was one of the most critical penalty phase witnesses who could have been presented at trial. He is Brett's twin brother, shared a room with him as a child and adolescent and was able to explain much about Brett's mental health, alcohol and drug addiction and unstable home life. It would have been compelling mitigation.

As to the discovery requests Bogle made, the State argues that they were irrelevant. See AB at 19-20. However, Bogle's request for information about Malone's competence as a hair analyst and truthfulness was relevant and was necessary to show that Malone's speculative testimony was not reliable and could not be believed. Further, access to the DNA database and the jail phone calls was necessary as the State's experts and witnesses relied on this information to challenge Bogle's claims.

As to the circuit court's denial of Bogle's motion to disqualify, the State argues that Judge Timmerman and his wife were not "material" to the case (AB at 21). However, Bogle believed that they were and materiality must be judged from the moving party's perspective. Here, Judge Timmerman and his wife were relevant to the critical due process violation committed concerning Marcia and the information she provided to the prosecution regarding Douglas. While Judge Timmerman did not recall speaking to Cox or know why he had returned her call, his wife corroborated Marcia's testimony about why she believed that the adoption attorney's name was "Timmerman" and confirmed that she was at the hospital when Marcia's baby was delivered.

The State also argues that this Court has already determined that the Judge Timmerman and his wife were not material witnesses and that there has been no material change. However, this Court

did not deny Bogle's petition with prejudice and the material change to Bogle's claim is that Judge Timmerman completely ignored the testimony of his wife and Elizabeth Hapner – both of whom corroborated Marcia's testimony and could have been called at the trial had the State revealed the information concerning Douglas' statements to Marcia.

The due process errors committed during Bogle's trial require that his case be remanded before an impartial judge and that he will be permitted to obtain the discovery requested and present relevant, admissible evidence in support of his claims.

ARGUMENT II: THE STATE DEPRIVED BOGLE OF DUE PROCESS AT HIS CAPITAL TRIAL.

The State argues that the circuit court identified and applied the correct standard for addressing Bogle's claims (AB at 24). However, the circuit court's analysis was contrary to and an unreasonable application of Brady and its progeny. In Kyles v. Whitley, the United States Supreme Court made clear that as to the materiality of the evidence:

> ... the adjective is important. 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.

514 U.S. 419, 434 (1995). Here, the circuit court failed to consider how the evidence presented at trial had been undermined. See PC-R. 3091-2. The circuit court also should have considered the evidence cumulatively. See Parker v. State, 89 So. 3d 844, 867 (Fla. 2011); Mordenti v. State, 894 So. 2d 161, 174-5 (Fla. 2004); State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996).

The State's attempt to argue that Cox did not know about Marcia's information or speak to her (AB at 26-7; n.17), is

rebutted by clear and convincing evidence. All of the evidence and exhibits demonstrate that Marcia provided the information about Douglas' incriminating statements, i.e, "confession" to the State. See D-Exs. 2, 5, 6, 7, 9, 15, 23. The evidence establishes that Marcia accepted service and was interviewed on multiple occasions in connection with Douglas' aggravated battery of her. Marcia spoke to law enforcement officers as well as a prosecutor. See D-Ex. 23. Marcia provided her new address and phone number to Cox or someone from her office between July 31 and August 11, 1992. See D-Exs. 2, 4, 5, 23. Marcia was not making herself scarce.

Moreover, the State argues that a few of the exhibits supporting Bogle's Giglio claim concerning the information about Douglas should be rejected because the exhibits did not reference the Bogle case (AB at 27, n.17). Specifically, the note regarding the information about Gary Turley and his whereabouts was located in Cox' file on the Bogle case. Both Cox and Lingo identified their handwriting on it. Further, there would be no other explanation as to why Cox would want to speak to Gary Turley other than to confirm that Marcia had confided the information about Douglas to him. Likewise, the phone message from Wayne Timmerman to Cox, days before the Bogle trial and after Marcia had been interviewed in the aggravated battery case was in Cox' file and is explained by the fact that Marcia confused the name of her attorney and believed it was "Timmerman".

In addition, the State, like the circuit court, argues that the State did not have the evidence that Bogle has discovered about Douglas, but simply "noticed the defense that [Marcia] may

have information pertaining to the case" (AB at 28). However, the State's position does not account for the fact that Cox was interested in the aggravated battery, though she was not the prosecutor assigned to the case. Indeed, Cox signed the information against Douglas and issued the state attorney subpoena for Marcia in the aggravated battery case. See D-Exs. 5, 7. It also does not explain Cox' desire to interview Gary Turley and speak to Wayne Timmerman. See D-Ex. 15.

Furthermore, the State's attempt to argue that Bogle's case is like Occhicone v. State, 768 So. 2d 1037 (Fla. 2000), must fail because Marcia's information about Douglas' whereabouts on the night of the crime, i.e., that she was not an alibi for him, and the statements and behavior that occurred the morning after the crime could not have been known to Bogle because he was not present when these things occurred.

Finally, the State argues that the evidence concerning Douglas was not relevant (AB at 30). However, it was this very evidence that caused the court to investigate Douglas:

> 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.
>
> * * *
>
> 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.

(PC-T. 1850-4). The fact that Douglas was seen with Torres on the night she was killed and that Douglas threatened Marcia to provide an alibi for him on the night that Torres was killed and the fact that Marcia told her sister that Douglas had blood on his clothes when he returned to the motel room and the fact that

Douglas violently attacked Marcia the night after he had been with her sister and told her to stop running her mouth demonstrates that the evidence was relevant to the prosecution of Bogle and his defense. Furthermore, the evidence refuted Lingo's testimony regarding his investigation of Douglas.

In Kyles v. Whitley, the United States Supreme Court explained how evidence of another suspect was admissible:

> If the defense had called Beanie as an adverse witness, he could not have said anything of any significance without being trapped by his inconsistencies. A short recapitulation of some of them will make the point. In Beanie's initial meeting with the police, and in his signed statement, he said he bought Dye's LTD and helped Kyles retrieve his car from the Schwegmann's lot on Friday. In his first call to the police, 446*446 he said he bought the LTD on Thursday, and in his conversation with the prosecutor between trials it was again on Thursday that he said he helped Kyles retrieve Kyles's car. Although none of the first three versions of this story mentioned Kevin Black as taking part in the retrieval of the car and transfer of groceries, after Black implicated Beanie by his testimony for the defense at the first trial, Beanie changed his story to include Black as a participant. In Beanie's several accounts, Dye's purse first shows up variously next to a building, in some bushes, in Kyles's car, and at Black's house.
>
> Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.

514 U.S. 419, 445-6 (1995). Likewise, here, the observations of witnesses placing Douglas and Torres together and Marcia's observations of Douglas following the crime were admissible. Contrary to the State's position, this evidence is factual, not speculative. See AB at 30. Also, like Kyles, Bogle could have called Douglas to testify and if he denied his statements to Marcia could have presented the statements for impeachment purposes. The evidence surrounding Douglas was relevant and

admissible at Bogle's trial.

As to the forensic issues, the State argues that the circuit court's failure to rule on the issue of Lingo's false testimony and unorthodox forensic investigation of physical evidence despite not having any training in forensics should be procedurally barred because the court failed to rule on it (AB at 31, n.20). The State's argument makes no sense. And, the case cited to support the State's argument does not stand for the proposition for which the State would like.

In Green v. State, 975 So. 2d 1090, 1004 (Fla. 2008), this Court found that a claim was procedurally barred because: "it was neither raised in Green's 3.851 motion nor addressed by the trial court." Here, Bogle raised the identical claim below but the circuit court did not address it in the order denying relief. Thus, a claim is barred from review if Bogle failed to raise it, not when the circuit court failed to rule upon a claim that was raised below. The State's argument is meritless.

As to whether Lingo's testimony at trial was false, the State ignores the fact that Cashwell had placed the pants in the drying room before Lingo removed them from the property room on September 17, 1991. See AB at 34. There is no doubt that Cashwell collected the pants, placed them in the drying room, removed them from the drying room and placed them with the other evidence before Lingo checked out the pants See D-Ex. 12. The exculpatory evidence for Bogle arose from the fact that Cashwell placed the evidence in the drying room where they were "unable to be separated from [other evidence] and could contaminate each other and the shed was full of other evidence drying." See D-Ex. 12. Thus, Bogle was prevented from establishing that the pants

may have been contaminated by evidence drying in the shed (which may have included the victim's clothes). The State suppressed the evidence from Bogle.[5]

As to whether Deadman's testimony was false and misleading, the State adopts the circuit court's flawed analysis that because Deadman identified himself as a supervisor and used the pronoun "we" in his testimony, Bogle and the jury should have known that he did not analyze the evidence AB at 34). However, the State's argument is refuted by the record. Deadman testified[6]:

> Yes, **there was only a very small amount of DNA obtained from the vaginal swabs of the three tests that I conducted. . 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 just 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 test that produced a result was also determined to be inconclusive, but for a technical reason.

(T. 465)(emphasis added).[7] A review of Deadman's testimony contradicts the State's belief that "the jury and counsel were clearly aware that the testing was done by a team." (AB at 35).

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[5]The State asserts: "Lingo testified at the evidentiary hearing that he had no knowledge of the disciplinary report and other than reading the report itself when questioned by collateral counsel, he could offer no evidence in support of it." (AB at 33-4). This is assertion is ridiculous. In effect, Lingo was the complainant in the disciplinary report. During the investigation, it was Lingo who produced the evidence, i.e., his statement about the evidence being wet on September 17th, that established the violation of Cashwell's duties.

[6]Deadman's testimony was prefaced by his detailing his experience in DNA analysis (T. 459-60). Indeed, he was asked "What training do you have that enables you to conduct DNA analysis?" (T. 459). Deadman did not mention any other analysts' experience or training.

[7]Likewise, the FBI serologist, Robert Grispino, who testified immediately before Deadman told the jury: "it was Deadman who analyzed these stains for DNA" (T. 400).

Because Deadman did not conduct the analysis, he was not in a position to discuss the analysis or inconsistencies with the data. When Deadman was asked: "Can you tell us why you were unable to develop more DNA on these samples?" (T. 469), his response was simply speculative. Bogle was deprived of his right to confrontation and the jury was mislead.

Furthermore, the State argues that Deadman's false testimony was not material (AB at 35). Deadman's testimony was material because Bogle was deprived of his right to confrontation. And, the jury heard that Bogle was included in the one-allele match, but did not hear any of the evidence concerning the inconsistencies with the data.

Also, as to Deadman's testimony at the evidentiary hearing, he was in no position to testify about the controls, contamination or reliability of the RFLP DNA analysis that occurred case because he did not conduct it. Once again, the State failed to produce Alice Hill who conducted the analysis.[8]

Improperly, the State attempts to bolster the flawed RFLP DNA analysis with the STR DNA analysis. The State cannot fix the due process violations with new evidence. However, the State failed to establish the chain of custody for the evidence, no one could testify that the evidence was maintained properly and there was testimony that the packaging of the samples was open when Bencivenga received them (PC-T. 1578-9).[9]

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[8]Hill became known to Bogle in postconviction through his consultation with Dr. Libby.

[9]Bencivenga 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

As to the microscopic hair analysis, the State initially suggests that the evidence was equally accessible to Bogle (AB at 39, n.23). However, knowledge of evidence in possession of all law enforcement agencies is imputed to the prosecutor. Kyles v. Whitley, 514 U.S. 419, 438 (1995)("the prosecutor has the means to discharge the government's Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.").

The State also confuses Steve Robertson's characterization that Malone's testimony was fair as to the "match" language with the idea that Malone's testimony about his transcription error was fair. See AB at 38. Indeed, the State's entire argument to refuting Bogle's due process claim rests on the faulty premise that the transcription error was the number identifying the exhibit (AB at 38-9). However, as Robertson testified: "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).

Finally, in another improper attempt to fix the multiple, prejudicial due process violations committed by the State, the State argues: "[T}he State notes because there is and was no innocent version of events that can explain the unimpeachable presence of Bogle's sperm in the brutally sexually battered homicide victim, the damning evidence, when coupled with the

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items were stored there would be no way to know (PC-T. 1593). STR DNA testing is very sensitive and causes more likelihood that contamination can occur (PC-T. 1593).

other evidence presented at trial ... precludes any contention that Bogle has satisfied the *Brady* materiality standard." (AB at 39). First, there was no evidence that victim was sexually battered. Bogle was not charged with this crime and the medical examiner at trial testified that the injuries to Torres' anus may have resulted from consensual sex that occurred prior to her death (even three hours before)(T. 1362-2).

Furthermore, there were no injuries to Torres' vagina. And, the State's expert testified that the semen from the vaginal swabs could have been present for up to 72 hours prior to its collection (PC-T. 1956).[10]

Even assuming that the DNA profile from the vaginal swabs is reliable, there was also semen in Torres' panties that was consistent with Bogle's DNA profile. Torres was not wearing her panties when her body was found. Thus, the State's theory that the DNA profile from the vaginal swabs links Bogle to a sexual battery and murder – a single event – cannot be true because Torres would not have had semen in her panties.

A review of the crime scene showed 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 the area (T. 1282). The State's argument is refuted by the facts.

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[10]It is important to note that the State has failed to demonstrate the reliability of FDLE's 2002 STR DNA testing. No one knows how the evidence was stored for more than ten years or if it was exposed to other evidence, like Bogle's blood and saliva samples. The package of the vaginal swabs was not sealed when FDLE received it. In addition, Lingo could not explain why he removed the evidence, including the vaginal swabs and Bogle's biological standards for "investigation" in 1991.

As to Bogle's automobile accident, the State maintains that Cox' argument about the scratches on Bogle's face was based on a reasonable inference from the testimony of the Alphonsos and Trapp (AB at 40). However, the prosecutor was aware of the auto accident and so, the reasonable inference is unreasonable in light of what Cox knew. Further, Cox did not have to have actual knowledge of the injuries Bogle sustained in the accident, see AB at 40, her knowledge of the accident required that she fulfill her obligation to learn the truth because her obligation was "not that [the State] shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

Likewise, as to the grand jury testimony, the issue is not whether the indictment is proper. See AB at 43-44. The issue is whether the State was obligated to disclose the witnesses' testimony before the grand jury because it was exculpatory. And, while the defense is not normally entitled to the testimony, see AB at 42, a defendant is always entitled to exculpatory evidence. Here, because the statements to the grand jury were inconsistent with the witnesses' previous statements and trial testimony, Cox was required to disclose it and it was admissible for impeachment of the witnesses.[11]

Moreover, a cumulative review of the grand jury testimony and the witnesses statements and trial testimony demonstrate that there were inconsistencies, conflicts and additions between the testimony; the testimony evolved and became more inculpatory. Bogle had the right to present this to his jury.

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[11]Contrary to the State's argument (AB at 44), the statements to Lingo from witnesses was also admissible as impeachment evidence.

As to the due process violation concerning prosecution witness Jeffrey Trapp[12], the State argues that Bogle has to prove that Trapp received a deal (AB at 47). However, the United States Supreme Court has held that the prosecution must reveal the possibility of a reward in order to comply with Brady. United States v. Bagley, 473 U.S. 667, 683 (1985). Likewise, the Supreme Court has held that a witness' motive for testifying is critical to determining his or her credibility. Davis v. Alaska, 415 U.S. 308, 315 (1974). Here, Trapp's criminal history and conditions of probation were relevant and important to demonstrating that he had motive to curry favor with the State.

The State committed numerous due process violation by presenting false and misleading evidence and argument to the jury and by failing to disclose a plethora of exculpatory evidence that undermined the State's theory of the case and evidence. The evidence undermines confidence in Bogle's conviction. Relief is warranted.

ARGUMENT III: IAC AT THE GUILT PHASE

The State generically argues that trial counsel failed to challenge the State's case and present exculpatory evidence because it was not consistent with his strategy of making the State link Bogle to the crime (AB at 48). However, the State overlooks the fact that this Court has held that trial counsel "ha[s] a professional obligation to investigate any potential impeaching or exculpatory evidence that may have assisted

[12]The State does not inform this Court that it is unclear what Trapp testified Bogle said about Torres. See AB at 46. At one point he said that she was "real trash", then he said that she was "real trashed". See T. 377, 1219.

[Bogle's] defense." State v. Fitzpatrick, __ So. 3d __, 2013 WL 3214438 at 11 (Fla.), citing Bell v. State, 965 So. 2d48, 62 (Fla. 2007). In Fitzpatrick, this Court also emphasized that "an essential prerequisite to counsel's presentation of an intelligent and knowledgeable defense is the requirement that counsel consult, investigate, and prepare for trial." Id.

Furthermore, the State also overlooks the fact that when trial counsel fails to engage in a reasonable investigation, his subsequent decisions do not enjoy deference. Strickland v. Washington, 466 U.S. 668, 690-1 (1984); Wiggins v. Smith, 539 U.S. 510, 521-2 (2003); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003)("A reasonable strategic decision is based on informed judgement."). Here, trial counsel failed to consult with a single expert as to guilt phase issues, conduct any investigation as to the night of the crime, the witnesses who would testify or Bogle's recent automobile accident, or prepare for the trial.

In Bogle's case, the State's case rested largely on forensic evidence: Torres was found naked with injuries to her anus, the vaginal swab tested positive for semen, semen was also detected in Torres' panties that were located in a pile of clothes near her body – a DNA profile of one loci was produced from the analysis of the vaginal swabs and statistical information was used to include Bogle as a possible donor; hairs were found on Bogle's pants – one of which Malone claimed "matched" Torres' pubic hair; scratches were observed on Bogle's face, though witnesses testified that they were not there earlier in the night and blood was located beneath the victim's fingernails. Despite the forensic evidence, trial counsel did not consult with a single forensic expert. When asked about challenging the

forensic evidence, trial counsel responded:

> From that time this whole thing was a lot of mumbo jumbo and ths State didn't have a good understanding of it either. Finding another expert I don't think there was one. I know there was not another lab that we could have used for sure. You were stuck with Malone and their lab ...

(PC-T. 635). Trial counsel also believed that Malone helped the defense (PC-T. 670). As in Fitzpatrick, "[d]espite the scientific evidence that would implicate his client if not refuted, counsel failed to retain any forensic or medical experts." This was inadequate and prevented trial counsel from presenting an intelligent or knowledgeable defense.

As to the automobile accident, trial counsel admitted that he did not 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 or retain an expert about wound healing.[13] The State defends trial counsel's lack of investigation by arguing that he introduced the automobile accident to the jury through cross-examination of witnesses (AB at 52).

However, the State's argument is false. First, at the guilt phase portion of the trial, counsel asked neither Phillip nor Tammy Alphonso about Bogle's injuries or automobile accident. Cox asked Tammy if she saw any injuries to Bogle and she testified that she did not (PC-T. 435). There was no mention of an automobile accident. During his direct examination, Phillip

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[13]The State has incorrectly stated that the booking photos were taken 11 days after the accident (AB at 52, n.28). The automobile accident occurred on September 6th. Torres' body was found on September 13th. The booking photos of Bogle were taken on September 14th, at 2:31 a.m. (T. 339)- less that 24 hours after the approximate time of the victims death and 7 days after the automobile accident.

offered that Bogle had shown him a "scar" on "his right side that he said he had an accident on palm River Road and 41. Said he got a settlement". There was no reference to when the accident allegedly occurred and trial counsel did not ask Phillip a single question about the injury or the accident. See T. 417-9. Moreover, during his closing argument, while discussing the result of the presumptive blood test conducted on Bogle's shoe, trial counsel stated: "We don't know how long the blood had been on there, but we do know that Mr. Bogle is showing Mr. Alphonso up there in the bar his scar from the accident that he had two or three days before; **that Phillip Alphonso didn't believe him, that he had, because Brett was already bragging to him that he was collecting money when he only had the accident two or three days ago.**" (T. 582) (emphasis added). Shortly thereafter, trial counsel briefly referenced the scratches in relation to the automobile accident by suggesting that Phillip just didn't notice them. See 582-3.

Trial counsel's recollection at the evidentiary hearing was clearly faulty. Trial counsel never established that an automobile accident occurred, when it occurred or what Bogle's injuries were. Instead, Phillip Alphonso simply told Cox that Bogle showed him a "scar"[14] and mentioned an accident, but Alphonso did not believe him.[15] Further, trial counsel did not review the accident report, medical records or photos taken at

[14]On the evening of the crime, Bogle's injury to his side was not a scar but a gaping wound from the insertion of a tube into Bogle's collapsed lung. See D-Ex. 33.

[15]Contrary to the State's position, Alphonso did in fact dispute Bogle's assertion that he had been in an automobile accident. See AB at 53.

the hospital, or consult an expert, therefore, he did not make a reasonable strategic decision.

Had trial counsel adequately prepared he could have presented evidence that, based on the medical records and photographs from the hospital, one would not expect the wounds to Bogle's forehead and face to heal in 7 days (PC-T. 886) ("Lacerations usually take somewhat longer than that"). And, 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 a day 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). Trial counsel was deficient in failing to present the evidence of the automobile accident and Bogle's injuries. The evidence would have rebutted the State's argument that the blood beneath Torres' fingernails was from the scratches to Bogle's face and also would have provided the jury with Bogle's physical limitations on the night Torres was killed.

As to the RFLP DNA analysis, even without any expert testimony, the data demonstrates inconsistencies that the jury never heard.[16] The jury did not know that the sample was run twice at three different loci and though there appeared to be enough quantity of sample to obtain a result in the first run, and varying exposure times were used none was obtained. See D-

[16]Contrary to the State's argument, in 1991-2, forensic DNA experts were available to consult with trial counsel (PC-T. 1174).

Exs. 20, 43; PC-T. 1191-2, 1197-9.[17] Likewise, on the second run, the analyst inexplicably failed to run the female fraction of the sample and only a single loci showed consistency with Bogle's DNA profile. See D-Exs. 20, 43; PC-T. 1202). The result was not reproduced. See D-Exs. 20, 43.

And, even the State's expert supports the notion that the DNA analysis could have been challenged and shown to be unreliable or, at a minimum, considerably weakened. At the evidentiary hearing, Deadman discussed possible controls, like running the female fraction, yet, this was not done on the second run (PC-T. 1286). Further, though Deadman attempted to explain away the problem with obtaining a result in the first run as not enough quantity of sample, the initial procedures demonstrated that there was enough sample to obtain a result (PC-T. 1191-2).[18]

In addition, trial counsel failed to establish that the critical fact that the semen detected by the testing of the vaginal swabs could have been present for up to 72 hours prior to its collection (PC-T. 1956). Moreover, semen was detected in the victim's panties which she was not wearing at the time she was killed. This evidence changes the picture of the State's case and provides reasonable doubt that Bogle killed Torres.

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[17]The State's assertion that Deadman testified fully about the testing is false. See AB at 57, n.29. A review of Deadman's testimony reveals that he only testified about the second run (T. 465), and he told the jury that there was no female profile produced but failed to mention that the female fraction was not included in the second run (T. 464). His testimony was misleading about the analysis and the results.

[18]At trial, counsel's cross-examination of Deadman consisted of 28 lines of transcript – just over one page – and was confined to the statistical aspect of Deadman's testimony on direct examination. Trial counsel did not ask single question about the DNA analysis or the data produced by the analysis. See T. 471-2.

And, contrary to the State's argument, Bogle is not required to demonstrate that "the DNA testing admitted at trial was actually incorrect in some material way." (AB at 56). Rather, as in Fitzpatrick, the case against Bogle

> had significant weaknesses, yet counsel's evidentiary hearing testimony and his performance during trial demonstrates that he was not sufficiently prepared to recognize or understand the science involved or those weaknesses. By failing to conduct a reasonable investigation into these issues, counsel inhibited his ability to know or discover whether the State's experts made scientifically correct statements ... If counsel had consulted a qualified expert, he would have been able to provide evidence to refute the State's case through testimony ...

__ So. 3d __ , 2013 WL 3214428 at 12 (Fla.).

As to the microscopic hair comparison, even in 1991, contrary to the State's assertion (AB at 54), forensic examiners were familiar with the limitations of hair comparison. Indeed, the weakness of the field was well established:

> 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 albs 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. The hallmark of scientific process is that results are reproducible; given the same tests, with the same materials, and the same procedures, two labs should come up with identical results. LEAA found that not even the mistakes were consistent. Perhaps most revealing is that these were open tests. That meant the lab directors knew ahead of time that they were being tested, like the chef in a restaurant who knows that an influential food critic has reservations for the evening. A far more rigorous gauge would have replicated real-life conditions by having the samples submitted blindly, slipped into the laboratory as if they were just evidence from another case.

Actual Innocence, Barry Scheck, Peter Neufeld and Jim Dwyer, Doubleday, 2000, pp 162-3 [relying on Oklahoma v. Durham, CF 91-4922. Thus, as early as the 1970's research was being conducted that demonstrated the unreliability of microscopic hair comparison.

Further, even a layman could identify the inconsistency between Malone's bench notes and his testimony. Trial counsel failed to mount any challenge to the microscopic hair comparison, Lingo's collection of the hair (though he was not a qualified evidence technician), or Malone's testimony.[19]

As to the inadequacy of trial counsel's performance relating to the forensic issues, the State once again improperly relies on the STR DNA analysis (AB at 57-8). The State avers that the evidence strengthens the State's case and irrefutably establishes that Bogle killed Torres (AB at 57-8). But, in advancing this argument, the State ignores Tracey's testimony that the STR DNA testing may indicate a second male profile. Furthermore, the State fails to acknowledge that the semen could have been present for at least 72 hours before Torres' was killed and that the semen must have been present long before the crime because of the the semen obtained from Torres' panties. Even if the STR DNA

[19]At trial, counsel's cross-examination of Malone consisted of 49 lines of transcript – just under two pages – and was confined to establishing that the other hairs that were examined from the scene belonged to Torres, other than a mixed-race hair that was collected from Torres' body, and other hairs that were examined from Bogle belonged to him, other than the hair identified as Torres' pubic hair collected from Bogle's pants. Trial counsel did not ask any questions about the reliability of microscopic hair comparison or transfer. See T. 327-8.

analysis is reliable,[20] then contrary to the State's argument, Tracey's testimony in and of itself provides the "innocent explanation" for the DNA evidence.

As to Everett Smith's testimony, the State suggests that his testimony was damaging (AB at 59).[21] Initially, the State does not include a critical fact in suggesting that Smith's testimony is damaging: Smith would have testified that Bogle did not break into the trailer, but kicked the screen out on his way out of the trailer. A review of Smith's testimony makes clear that the State's theory of Bogle's motive and his alleged hostility to Torres is simply not true. Smith's testimony also demonstrates the faulty memory or complete lack of credibility of Katie Alphonso since her version of what occurred on September 1st is a complete fabrication conjured in an effort to convince the jury that Bogle killed her sister. There is no doubt that Alphonso's testimony was prejudicial. She repeatedly told the jury how afraid she was of Bogle and she falsely told them that he entered her home by kicking in a screen. Bogle's trial counsel failed to challenge Alphonso or rebut these "facts" in any way, though he had objective testimony to do just that. Furthermore, Alphonso's testimony and version of what occurred on September 1st was used to support aggravators. Therefore, there is no doubt that the

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[20]The State cannot establish chain of custody as to the evidence or demonstrate that the storage and maintenance of the biological materials did not cause cross contamination. Further, Bencivenga's results demonstrate that the there were problems with the evidence.

[21]The State also seems to suggest that Smith was unavailable because he moved to Ohio (AB at 60, n.31). However, Bogle's investigator interviewed Smith and Smith provided his observations of what occurred on September 1, 1991 (D-Ex. 52).

true facts of the incident undermine confidence in the outcome of Bogle's conviction and sentence.

As to Kelly's deposition, the State argues that it was inadmissible and unreliable (AB at 61-2). Bogle submits that the evidence was admissible as substantive evidence and to impeach the Alphonsos and that Gary Turley corroborates Kelly's deposition testimony because he saw Douglas and Torres leaving Club 41 in Douglas' pick-up truck (PC-R. 1013).

As to the impeachment of Trapp and the Alphonsos, the State maintains that trial counsel impeached the witnesses (AB at 63-4). The State overlooks the fact that the witnesses' prior inconsistent statements are not speculative but certain impeachment. Certainly, the State cannot deny that impeachment of witnesses with their prior inconsistent statements or questioning a witness about previous statements reflecting their bias or ability to remember events is perfectly proper and undermines the credibility of the witness.

Also, it matters not that trial counsel believed Trapp's testimony was "insignificant", clearly the jury did not feel the same. Therefore, the State is incorrect to say that because trial counsel may have challenged the witnesses on some minor detail that Bogle cannot establish deficiency (AB at 64). Based on Patricia Diaz' testimony as well as the other witnesses, Trapp's testimony is utterly unbelievable.[22] Diaz testified that she gave Douglas and Bogle a ride to Club 41 (PC-T. 1143-4). Indeed, Trapp's timeline is inconsistent with the other

[22]In addition, there is nothing in Trapp's criminal history records that reflect that his community control had not been terminated. See D-Ex. 22.

witnesses' testimony.

Trial counsel's failure to investigate and prepare allowed the State to present unreliable, misleading and false evidence to the jury. As the evidence now stands, none of the forensic evidence demonstrates that Bogle killed Torres. Further, the witness testimony from the bar could have been completely undermined. Relief is warranted.

ARGUMENT IV: NEWLY DISCOVERED EVIDENCE

The State argues that the evidence establishing that two unidentified male DNA profiles were obtained from biological materials beneath Torres' fingernails is insignificant (AB at 66). However, in order to advance such an argument, the State must completely ignore the evidence and argument presented at trial, i.e., that the blood under Torres' fingernails came from struggling with her attacker (Bogle). First, in and of itself, the State's dramatic turn around in the theory of what was under the victim's fingernails and how it got there shows that the new evidence would probably produce an acquittal because the State's concession undermines all of the evidence about the scratches on Bogle's face and the inference that it was Bogle's blood under her fingernails.

Further, the State's argument ignores Tracey's testimony. Tracey testified 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). And, Huma Nasir testified that Torres would have had "to come in direct contact with the individual" to have his DNA beneath her fingernails (PC-T. 1802, 1817). She believed Torres would have had to rub her hand against him or scratched him to have his DNA under her fingernails (PC-T. 1802).

She also opined that after the DNA was deposited "not a lot of cleaning [of Torres' hands] took place" (PC-T. 1803). Thus, the DNA beneath Torres' fingernails was relevant to the crime.

Indeed, the DNA beneath Torres' fingernails is more critical and relevant to the identity of the individual who committed the crime than the DNA obtained from the vaginal swabs. This is so because the semen could have been deposited as much as 72 hours before the crime, there were no injuries to Torres' vagina and the semen was present in Torres' panties which she was not wearing when she was killed. Thus, even if the STR DNA results are considered reliable, there is more than a reasonable hypothesis of innocence.

The State attempts to rely on the discredited evidence from trial to rebut the newly discovered evidence (AB at 67-9). But the State fails to realize that much of the evidence upon which the jury relied to convict Bogle has now been completely eviscerated – like the fact that there was no pubic hair on Bogle's pants, but a head hair. And, that if the DNA under Torres' fingernails was not Bogle's then the scratches on Bogle's face were not related to an attack of the victim, but rather, to his automobile accident. Finally, the medical examiner's testimony as to the anal penetration is not illustrative of when Torres engaged in vaginal intercourse, since we now know that the semen may have been present for up to 72 hours before her death and that there was semen on her panties.

The State's reliance on evidence that has now been shown to be untrue is suspect. For example, Katie Alphonso testified under oath to the grand jury that she told Bogle that she and her sister were not pursuing anything that occurred on September 1st.

Thus, there would be no reason for Bogle to make any threats to Torres. Yet, that evidence was never revealed to him and was not heard by the jury that convicted Bogle.

What the State cannot escape in Bogle's case is that he has dismantled all of the evidence and inferences that were made at trial. After the evidentiary hearing, the State's case against Bogle consists of no motive, no opportunity and no evidence that he had anything to do with Torres' death. Relief is warranted.

ARGUMENT V: TRIAL COUNSEL'S CONFLICT

The State does not address Bogle's assertion that Mungin v. State, 932 So. 2d 986 (Fla. 2006), does not apply because Douglas was not a witness against Bogle, but a suspect trial counsel wanted to investigate. Obviously, this situation is different than the situation in Mungin.

And, trial counsel was aware of Torres' criminal history and the fact that the Public Defender represented her. See D-Ex. 53.[23] Trial counsel's failure to present Torres' criminal history as it related to Bogle's case created an actual conflict. Relief is warranted.

ARGUMENT VI: IAC AT THE PENALTY PHASE

Initially, the State points out that trial counsel was experienced in capital work when he represented Bogle (AB at 78). However, this Court recently found an experienced capital trial attorney ineffective. See State v. Fitzpatrick,__ So. 3d __ (Fla. June 27, 2013); see also Florida Supreme Court Case No. SC11-1509, Initial Brief of Appellant, pp. 17-18. The State did not

[23]The trial investigator erred when he checked on the criminal histories of the witnesses and informed trial counsel that Trapp had not been represented by the office. See D-Ex. 53.

include the fact that in 1993, when Bogle's second penalty phase was conducted, trial counsel tried 7 first degree murder cases, one of which was a month before Bogle's (PC-T. 5153-4). Trial counsel candidly offered that there was a time limitation in preparing for Bogle's penalty phase (PC-T. 5153-4).

The State also sets forth a summary of the witnesses' testimony from the penalty phase, but neglects to include any of the testimony from the cross examination of the witnesses.

As to the issue of trial counsel's failure to challenge the prior violent felony, the State argues that Smith's evidentiary hearing testimony did not rebut Katie Alphonso's description of the event (AB at 89, n.40). However, Smith did in fact rebut much of Alphonso's testimony. Alphonso told the jury that Torres and Bogle did not get along that day and were arguing. Bogle called Torres a slut and a whore in the car ride back to Alphonso's trailer and was abusive. Perhaps most importantly, Alphonso testified that she did not let Bogle into the trailer – that he broke into the trailer by kicking in the screen.

Smith's version of event was drastically different. He testified that the foursome got along and that Alphonso seemed happy to spend time with Bogle (PC-T. 716). He also testified that he did not hear Bogle argue with Torres, call her names or verbally abuse her at all during the day and while in the car (PC-T. 717). Smith testified that when they returned to the trailer, Alphonso allowed Bogle to enter the trailer (PC-T. 718). Bogle kicked the screen upon leaving the trailer. So, Smith's version of events differed greatly from Alphonso's.

As to the mental health mitigation, the State argues that the evidence presented at the evidentiary hearing was cumulative

to the evidence presented at the penalty phase (AB at 90).[24]

As to Dr. Gonzalez, at trial the State established that his evaluation of Bogle consisted of him "just ... talking to [Bogle] for two hours" (T. 1406). He reviewed two depositions and was impeached with the lack of background materials he reviewed and tests that were conducted. See T. 1413-7.

Also, the mitigation presented during the postconviction proceeding was not cumulative.[25] The evidence presented at the evidentiary hearing provided a compelling picture of Bogle's life and many reasons to spare it, including a full explanation about the mental health problems Bogle experienced. The Eleventh Circuit Court of Appeals has addressed the notion of cumulative mitigation in Cooper v. Secretary:

> After a thorough review of the evidence presented at Cooper's sentencing and the evidence presented at the postconviction evidentiary hearing, we agree with the district court that the Florida Supreme Court's finding that the mitigation evidence presented at the evidentiary hearing was cumulative to that presented at sentencing was an unreasonable determination of the facts. Specifically, as support for its holding that Cooper was not prejudiced by counsel's performance, the Florida Supreme Court found that "a substantial part of the information regarding Cooper's disadvantaged childhood was presented at Cooper's trial.
>
> During Cooper's penalty phase, Cooper's mother testified that Cooper's father was both violent and emotionally abusive to Cooper during his formative years." *Cooper II,* 856 So. 2d at 976. However, this was not Kokx's testimony. Kokx testified as to the abuse Cooper's father inflicted on her and that Cooper witnessed. According to Kokx, the extent of the abuse inflicted on Cooper was the emotional abuse of his father not being involved in his life and getting whipped by a belt, sometimes leaving marks.

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[24]The State also suggests that Dr. Berland was not called because he was not helpful (AB at 90, n.41). However, the record reflects that Berland was unavailable for the dates of the original penalty phase and trial counsel considered "changing doctors" due to Berland's unavailability. See D-Ex. 58.

[25]Contrary to the State's assertion, (AB at 91), Brian Bogle would have testified at his brother's penalty phase (PC-T. 740).

Kokx's testimony did not begin to describe the horrible abuse testified to by Cooper's brother and sister. Further, Kokx did not testify to any of the abuse suffered by Cooper at the hands of his brother, Donnie. Kokx was also away for periods of Cooper's life when she and Cooper's father were separated and could have missed much of the abuse Cooper suffered. Although Kokx's testimony revealed that Cooper's home life was volatile, to characterize her testimony as revealing a "substantial part" of Cooper's "disadvantaged childhood" is a great exaggeration. Thus, the state court's decision on prejudice was "based on an unreasonable determination of the facts in light of the evidence presented in the State court. . . .

* * *

This case is strikingly similar to this Court's recent decision in *Johnson.* Like the defendant in *Johnson,* "[t]he description, details, and depth of abuse in [Cooper's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told." *Id.* There was a wealth of mitigating evidence that was not presented to Cooper's jury. Cooper asserts this evidence entitles him to both statutory and non-statutory mitigation.

As to statutory mitigation, the unpresented mitigating evidence would support a finding that Cooper is entitled to the mitigator of age of the defendant at the time of the crime, § 921.141(6)(g), Fla. Stat., despite the sentencing judge's explicit rejection of this mitigator. The sentencing judge did not have the full story of Cooper's abusive background. When Cooper committed the crimes at age 18, he was barely removed from being violently abused by his father and brother throughout his childhood. The evidence presented at the evidentiary hearing would support a finding of the statutory mitigator of age at the time of the crime

* * *

The evidence presented at the evidentiary hearing would also support multiple categories of nonstatutory mitigation based on Cooper's childhood and family background. The evidence presented at the evidentiary hearing strongly supports a mitigator that Cooper's father and older brother severely abused him throughout his childhood and teenage years. The evidence also supports a mitigator that Cooper began using drugs and alcohol at age 11 to escape his family and the abuse. This drug use included the use of inhalants, which, according to the psychological expert at the postconviction evidentiary hearing, could have contributed to neurological deficits. Cooper was abandoned by his mother for stretches of time. Further, Cooper had only a seventh-grade education and had learning deficits. Although Cooper's IQ was not made an issue at the penalty phase of his trial, Cooper's IQ was tested by the postconviction expert, Dr. Fisher. This "test data revealed that he functions at a borderline level of intelligence (full scale IQ approximately 75) . . . [which] places him approximately 6 points above the mentally retarded range." Further, although testing did not reveal that Cooper had any psychotic processes, Cooper had a history of depression and suicidal

> gestures. We also credit the mitigating evidence presented at sentencing, specifically that Cooper was willing to confess to the crime.
>
> During the penalty phase, the jury heard very little that would humanize Cooper, see *Porter*, 130 S. Ct. at 454, and the mitigation evidence presented in postconviction proceedings "paints a vastly different picture of his background" than the picture painted at trial, *see Williams v. Allen*, 542 F.3d at 1342. While the jury heard a small sliver of his volatile upbringing, the jury heard nothing of Cooper's life of horrific abuse rendered by both his father and brother, his use of drugs and alcohol beginning at age 11 to escape his family and the abuse, his abandonment by his mother for short stretches of time, his seventh-grade education and learning deficits, and his depression. Further, all of the nonstatutory mitigating evidence strengthens the two categories of statutory mitigation supported by the evidence: age and substantial domination. Cooper was barely removed from this horrific abuse when he committed the crimes at age 18. Likewise, he was barely removed from the domination by his father and brother when he was dominated by Walton.

646 F.3d 1328, 1353-5 (11th Cir. 2011).

Trial counsel failed to conduct an adequate penalty phase investigation. Trial counsel failed to present compelling mitigation. Relief is warranted.

ARGUMENT VII: PROSECUTORIAL MISCONDUCT & TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT

The State argues that the objectionable comments were "fair" and in response to Bogle's defense at trial (AB at 94-5).

Specifically, the State's argument that the prosecutor's comments bolstering the State's case were not improper because the comments were responsive to a defense theory is not an accurate representation of the comments in question. The prosecutor's generalized statements that the Sheriff deputies did "everything they could"; conducted "a very thorough investigation"; and "followed every lead"; and used "the greatest crime laboratory in the world" are not comments that are responsive to the defense theory - they are generalized comments that bolster the State's case to the jury. Comments that would

be "responsive" to Bogle's cross-examination of the State's witnesses would be specific comments about the investigation, for example: "the Sheriff checked the entire wall for prints" or discussion of specific leads that the Sheriff followed up on; or reminding the jury of Malone's training and experience.

The State's argument that the prosecutor's statements to the jury that Bogle was somehow inhumane and indifferent to evil were a proper response to the defense's argument that Bogle would not have asked the Alphonso's for a ride if he had just killed Torres also fails. See AB at 96. The prosecutor's comments were not based on the evidence, they served to paint Bogle as a monster, unworthy of a reasonable weighing of evidence.

Further, it is not outside the realm of what the State calls an "ordinary" person to approach people that they have heated disagreements with, or to approach people that they barely know while in a social setting like a bar (AB at 96). This is not evidence that Bogle did not interact with people in a "normal fashion." (AB at 96).

Finally, the State's attempts to gloss over the fact that Malone did not match the hairs that he analyzed to specific areas of the white pants so there was no way of knowing that the hair that allegedly matched Torres' public hair was found in the crotch of the white pants (AB at 97-98). However, as the prosecution presented the evidence in order to link Bogle to the crime, the prosecutor's position which it established through the misrepresentation of the evidence and by bolstering the witnesses, was devastating. Relief is warranted.

CONCLUSION

Mr. Bogle again urges this Court to grant him relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by electronic mail to Candance M. Sabella, Chief Assistant Attorney General, on July 15, 2013.

CERTIFICATION OF TYPE SIZE AND STYLE

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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