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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-244

LUCIOUS BOYD

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

CORRECTED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Lucious Boyd, Defendant below, will be referred to as "Boyd" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record will be by "R", to the postconviction record will be "PCR", and supplemental materials will be designated by the symbol "S" preceding the type of record referenced, Boyd's initial brief will be notated as "IB" followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE

On April 14, 1999, Boyd was indicted for first-degree murder, armed kidnapping, and sexual battery of DD ("DD").[1] *Voir dire* commenced December 3, 2001 and a jury was seated the next day. Opening statements were given January 7, 2002, and on January 30, 2003, guilty verdicts were returned on each count. (R.1 6-7; R.3 461-63; R.5 2; R.7 378; R.8 457; R.20 1758-76, 2088-89). Following the March 11-12, 2002 penalty phase, the jury unanimously recommended death for the murder. (R.29 2388-91) The *Spencer v. State*, 615 So. 2d 688 (Fla. 1993) hearing was held on March 27, April 10, April 30, and May 29, 2002. During the June 21, 2002 sentencing, the court imposed death for the murder of DD, 15 years for the armed kidnapping, and life for

[1] The State will use the initials of the victim as she was the victim of a sexual battery.

the sexual battery. (R.3 498, 546-55; R.30 2494-2503).

On direct appeal, Boyd raised 15 issues[2] which were rejected in the February 10, 2005 opinion. On February 24, 2005, Boyd moved for rehearing which was denied on June 16, 2005, in light of this Court's revised opinion. *See Boyd v. State*, 910 So.2d 167 (Fla. 2005). Mandate issued on September 9, 2005.

On November 18, 2005, Boyd filed, in the United States Supreme Court, a Petition for Writ of Certiorari. Following the State's Brief in Opposition, the Supreme Court, on February 21, 2006, denied certiorari. *Boyd v. Florida*, 126 S.Ct. 1350 (2006).

Subsequently, on February 14, 2007, Boyd filed his motion

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[2] Boyd's issues were: (1) error in refusing to make inquiry and denying mistrial upon hearing testimony that jurors had discussed extrajudicial information; (2) error in overruling defense request under *Brady v. Maryland*, 373 U.S. 83 (1963), denying motion to strike fingerprint examiner's testimony, and in not holding *Richardson v. State*, 246 So.2d 771 (Fla. 1971) hearing; (3) evidence was insufficient to support convictions for sexual battery, first-degree murder, and armed kidnapping; (4) error to overrule objection to evidence Boyd had received a citation for failure to pay a train fare, and to the use of the citation in Boyd's cross-examination; (5) error in overruling objections in Boyd's cross-examination; (6) error in not considering experts' reports and testimony on Boyd's competency; (7) competency hearing should have been ordered during sentencing; (8) Boyd's waiver of mitigation did not comply with *Koon v. Dugger*, 619 So.2d 246 (Fla. 1993); (9) error to give great weight to death recommendation; (10) mitigation presentation was invalid as decision of whether to present witnesses/evidence is for counsel; (11) HAC and felony murder aggravators were not proven; death sentence cannot rest on one aggravator; (12) error to admit victims photo in penalty phase; (13) error in assessment of mitigation; (14) proportionality; and (15) error not to follow *Muhammad v. State*, 782 So.2d 343 (Fla. 2001). *See Boyd v. State*, 910 So.2d 167, n.4 (Fla. 2005).

for postconviction relief. (PCR.3 328-403) Public records litigation continued, and on May 29, 2009, Boyd filed an amended motion (PCR.8 1257 – PCR.12 2188). On March 23, 2012, Boyd amended his motion for a second motion (PCR.14 2545-87). The Case management Conference was held on June 5, 2012 (PCR.30 5437-5528) and an evidentiary hearing was granted.[2] That hearing was held on August 28, 29, and 31, 2013 (PCR.30). The parties submitted Post-hearing Memoranda, and on January 7, 2013, collateral relief was denied. This appeal along with a Petition for Writ of Habeas Corpus in case number SC13-1959 followed.

STATEMENT OF THE FACTS

On appeal, this Court set out the case facts.

> The evidence presented at trial revealed the following facts. In the early morning hours of December 5, 1998, {DD's][3] car ran out of gas while she was on her way to her home in Deerfield Beach, Florida, from a midnight church service. She had just exited from Interstate 95 (I-95) onto Hillsboro Beach Boulevard and pulled onto the shoulder. She then took a red gas can she kept in her car, walked about a block east to a nearby Texaco gas station, and bought a gallon of gas. At approximately 2 a.m., during the

[2] Following a Case Management Conference, this Court granted Boyd an evidentiary hearing on Claim III-A2, Claim IV regarding counsel's effectiveness in questioning jurors Tonja Striggles and Kevin Rebstock and the fairness of Boyd's trial given those jurors' alleged misconduct and Amended Claim V, sections A-C, and Claim VI related to the effectiveness of counsel during the penalty phase. (PCR.15 2769-71) On August, 28, 2012, at the commencement of the evidentiary hearing, Boyd **waived and abandoned Amended Claim V sections A and B, and Claim VI** (PCR.31 5549-57)

[3] The Victim's name has been redacted.

time she was at the gas station, [DD] spoke with two other customers, Lisa Bell and Johnnie Mae Harris. She asked Bell for a ride back to her car, but Bell had walked to the station and so could not give DD a ride. Bell and Harris then watched [DD] speak with a black male in a van in the station's parking lot. Harris asked the man if he was going to help [DD], and the man nodded, indicating yes. Bell later told the police that the van she saw was greenish-blue in color, while Harris said that she thought the van was burgundy. Though somewhat unsure about the van's color, Harris was certain that she saw the word "Hope" on its side. In a photo lineup and at trial, Harris identified the man she saw in the van that night as Lucious Boyd.

Boyd spent the evening of December 4 with Geneva Lewis, his girlfriend, at her mother's home. Boyd left the house around 10 or 11 p.m., and Lewis did not see him again until the morning of December 5, at around 9 or 10 a.m. Lewis testified that on December 4 and 5, Boyd was driving a green church van with writing on its side and that the van belonged to Reverend Frank Lloyd of the Hope Outreach Ministry Church, for whom Boyd performed occasional maintenance work.

[DD]'s family began searching for her after she did not return home on December 5. They found her car at an I-95 exit and began circulating fliers with [DD]'s photograph, indicating that she was missing, throughout the area. Bell and Harris saw the fliers, recognized [DD] as the woman with the gas can at the Texaco station on December 5, and contacted the police with their information.

On December 7, [DD]'s body was discovered in an alley behind a warehouse on 42nd Street in Deerfield Beach. The body was wrapped in a shower curtain liner, a brown, flat bed sheet, and a yellow, flat bed sheet. A purple duffel bag and two large black trash bags covered her head. It was determined that she had been dead for between thirty-six and seventy-two hours.

At trial, it was stipulated that [DD] died due to a penetrating head wound and that the bruising on her head was consistent with but not exclusive to the face plate of a reciprocating saw. Wounds to her chest, arms, and head were consistent with but not exclusive

to a Torx brand torque screwdriver, and she had defensive wounds on her arms and hands. There was bruising to her vagina that was consistent with sexual intercourse, although the medical examiner could not determine whether the intercourse was consensual or nonconsensual. [DD] had thirty-six superficial wounds on her chest, four on the right side of her head, and twelve on her right hand, some being consistent with defensive wounds and some being consistent with bite marks. One fatal wound to the head perforated the skull and penetrated [DD]'s brain.

On March 17, 1999, while Detectives Bukata and Kaminsky of the Broward County Sheriff's Office were investigating another crime unrelated to [DD]'s death, they saw a green van in the Hope Outreach Ministry Church parking lot. The van had burgundy writing on it that read "Here's Hope." Bell would later identify the church's van as the same van she had seen on the morning of December 5 at the Texaco station. The detectives decided to investigate, and their inquiries as to the owner of the van led them to Reverend Lloyd. When the detectives questioned Lloyd about the location of the van on the night of December 4, Lloyd's secretary, who was present at the questioning, remarked that Lucious Boyd had driven the van on that weekend. On December 4, Boyd had taken Reverend Lloyd to pick up a rental car in the church's green 1994 Ford van. Reverend Lloyd further testified that he instructed Boyd to take the van back to the church but that Boyd did not return the van until Monday, December 7. Reverend Lloyd also stated that when he left the van with Boyd, various tools owned by the church, including a set of Torx brand screwdrivers and a reciprocating saw, were in the van, as well as a purple laundry bag that the pastor used to deliver his laundry to the cleaners. When Reverend Lloyd returned on December 15, he discovered that the screwdrivers, the saw, and the laundry bag were missing.

Boyd was arrested for [DD]'s murder on March 26, 1999. Seminal fluid taken from [DD]'s inner thigh matched the DNA profile of Boyd. Tests also did not eliminate Boyd as a match for a hair found on [DD]'s chest. A DNA profile consistent with Boyd's was found in material taken from under [DD]'s fingernails. In addition, fingerprints taken from the trash bag found

around the victim's head matched fingerprints of Boyd's girlfriend, Geneva Lewis, and her son, Zeffrey Lewis. Tire marks on a sheet covering the victim's body were consistent with the tires on the church van, although trial expert Terrell Kingery, a senior crime laboratory analyst for the Orlando Regional Crime Laboratory, testified that he could not say for certain that the van's tires made the marks because over 1.5 million tires could have made the tracks on the sheet. Dr. Steven Rifkin, a private dentist and a forensic odontologist with the Broward County Medical Examiner's Office, testified that bite marks on [DD]'s arm were, within a reasonable degree of certainty, made by Boyd's teeth.

On April 1, Detective Bukata obtained a warrant to search the apartment of Boyd and Lewis, which was a block east of the Texaco station. Detective Bukata arrived at the apartment and told Lewis to leave with her children for a few days so that the officers could fully search the apartment. The investigators found blood at various locations throughout the apartment. Blood found on the underside of the carpet and on the armoire matched [DD]'s DNA profile. The shower curtain rings were unsnapped, and there was no liner to the shower curtain. Carpet fibers taken from the yellow sheet in which [DD]'s body was wrapped matched characteristics of carpet samples taken from Boyd's apartment.

Lewis had previously lived with Boyd at his apartment but had moved out in October of 1998. While living with Boyd, Lewis had purchased a queen-size bed, which she left at the apartment when she moved. Lewis and her three children moved back in with Boyd in February of 1999 and discovered that the bed was no longer at Boyd's apartment. When she asked about it, Boyd told her that he had given it away but would get it back. When she inquired about it again, Boyd told her that she would not want that bed and that he would get her another one. Lewis also identified the flat bed sheets, one brown and one a “loud yellow,” that were found around [DD]'s body as similar to ones she had owned while living at Boyd's apartment but that she no longer knew where they were or if they were at Boyd's apartment or at her mother's home.

> A jury convicted Boyd of first-degree murder, sexual battery, and armed kidnapping. The trial court subsequently conducted a penalty phase proceeding, during which both sides presented evidence. The jury unanimously recommended that Boyd be sentenced to death. The trial court followed the jury's recommendation and imposed a death sentence, finding and weighing two aggravating factors,FN1 one statutory mitigating factor,FN2 and five nonstatutory mitigating factors.FN3 State v. Boyd, No. 99-5809 (Fla. 17th Cir. Ct. order filed June 21, 2002) (sentencing order). The trial court also sentenced Boyd to fifteen years' imprisonment for the sexual battery and to life imprisonment for the armed kidnapping charges.
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> FN1. The aggravating factors were that the crime (1) was especially heinous, atrocious, or cruel (HAC) (accorded great weight), and (2) was committed while the defendant was committing or attempting to commit kidnapping and sexual battery (accorded moderate weight).
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> FN2. The statutory mitigating factor was that the defendant had no significant prior criminal history, to which the court accorded medium weight.
>
> FN3. The nonstatutory mitigating factors were all accorded minimum weight and were that the defendant (1) is religious, (2) has a good jail record, (3) has family and friends who care for and love him, (4) came from a good family, and (5) expressed remorse for the victim and her family.

Boyd, 910 So.2d at 174-77. This Court affirmed. *Id.* at 174.

During the August 2012 evidentiary hearing on the postconviction motions, Boyd withdrew/waived his claim of ineffective assistance of penalty phase counsel. (PCR.31 5549-57; SPCR.1 42-43) In support of the remaining evidentiary hearing claims, Boyd presented his trial counsel, William Laswell, Esq. ("Laswell") and James Ongley, Esq., MD, ("Ongley")

and the State called Daphne Bowe, ("Bowe") mother of the deceased victim, DD. (PCR.31).

At the evidentiary hearing, Laswell and Ongley admitted they jointly defended Boyd in the instant capital case. Laswell, who had over 40 years experience practicing criminal law and selecting juries, explained that it has been his practice not to challenge jurors who have indicated they had had prior difficulties with the criminal justice system. Laswell noted "it is my general position that in a serious criminal case when a juror says to me or to anybody on *voir dire* that they've had a run-in with law enforcement and have been prosecuted, I don't follow-up on that because I figure they are going to be more favorable to me than they are to the State. And I figured that the state attorney . . . ought to be concerned about it before anybody else." (PCR.31 5583-84). Also, Laswell noted that he learns a lot about the jurors from the *voir dire* conducted by the trial court as well as the prosecutor, both of which question the jurors before the defense has the opportunity. (PCR.31 5626-27, 5636). While Laswell had no specific recollection of Jurors Tonja Shalondra Striggles ("Striggles") and Kevin Rebstock ("Rebstock"), or making a strategy decision respecting either juror, it was his general practice to retain similarly situated jurors; those with prior criminal histories. (PCR.31 5584-85). It too was Ongley's

philosophy that jurors with criminal histories would question the State and police and that Striggles would qualify as one with a criminal history. This was recognized in light of Boyd's defense based in part on accusing the police of planting evidence. (PCR.31 5570-71, 5577, 5683-84, 5690).

Both Laswell and Ongley noted that all decisions made respecting jury selection were joint decisions made after consultation with Boyd. No decision was made without Boyd's input and Boyd never complained about the jury selection. Boyd accepted Striggles and Rebstock. (PCR.31 5627-28, 5663, 5565, 5670, 5684) Ongley testified that the general strategy for jury selection was to retain jurors thought to be open-minded and sympathetic to the defense while eliminating those thought to be helpful to the State. (PCR.31 5663-64).

Laswell also put into context the situation trial counsel faced during *voir dire*. He explained that he did not have unlimited access to investigators nor did he have unlimited time to investigate potential jurors and he did not have access to NCIC or FCIC reports. Ongley agreed that they had some access to Public Defender investigators. (PCR.31 5621-22, 5631, 5687) The realities of *voir dire* did not permit a stoppage of court so that each potential juror could be investigated. That being said, Laswell admitted he had information on the jurors' voting and property appraiser's records to assist in *voir dire*. (PCR.31

5621-31) Neither Ongley nor Laswell testified to seeing anything that would indicate Striggles could not be a fair juror. Ongley stated that had they noted anything indicating Striggles could not be fair, they would have stricken her. (PCR.31 5686)

The trial and subsequent evidentiary hearing records reflected that Striggles was an African-American woman who had not had any criminal difficulties for some 13-18 years before Boyd's trial. (PCR.31 5554, 5569). Ongley admitted that several *Neil-Slappy*[4] challenges were made when the State sought to strike African-American jurors. (PCR.31 5684-85) Laswell recognized that the record reflected that Striggles admitted to having a juvenile history, although her criminal history dated from the time she was in her 20's. Following that, she served in the Army. Laswell reiterated that he did not question Striggles or Rebstock about their criminal histories because he believed that they would be biased against the state based on that history. This decision was based on his 40 years of legal experience. (PCR.31 5628-32). In fact, Laswell admitted that he would take his chances with a convicted felon on the jury. (PCR.31 5682). While Laswell admitted that had he known of Striggles' felony record he would have questioned her, he noted she had "gotten

[4] *See State v. Slappy*, 522 So.2d 18 (Fla. 1988); *State v. Neil*, 457 So.2d 481 (Fla. 1984).

over it" and would have kept her on the jury recognizing people change over time. (PCR.31 5633).

Over the State's hearsay objection, Striggles' case files from her Florida and Georgia charges were admitted into evidence. (PCR.24 4461–PCR.25 4668; Defense Exs 2-4) Laswell admitted he was unaware of the materials contained in Striggles' case files requesting a mental health evaluation, possible suicidal thoughts, and possible intelligence deficiencies. (PCR.31 5595-5602). No records were presented for Striggles indicating any criminal troubles in Florida after 1988, some 13 years before Boyd's trial. The Broward records indicated the Georgia charge was rejected as a basis for revoking Florida probation as Striggles did not have counsel for the Georgia charge. (PCR.24 4461-PCR.25 4668). Even after being confronted with this new, Laswell was unwilling to say he would have stricken Striggles. He saw no documents to date to change his mind about Striggles or Rebstock. (PCR.31 5629, 5650)

With respect to Rebstock, records were introduced indicating that in 1991, ten years prior to Boyd's trial, Rebstock had been arrested, pled *nolo contendre* to one **misdemeanor** count of Soliciting Prostitution, had adjudication withheld, and paid court costs. (PCR.25 4669-73; Defense Ex 5; PCR.31 5567, 5639). Laswell testified he was unconcerned about Rebstock's misdemeanor charge, especially given that it was ten

years before trial. (PCR.31 5640-41). Laswell and Ongley noted their preference for jurors with criminal histories and their general practice of letting the State question/strike such jurors. (PCR.31 5570-71, 5577, 5628-32, 5683-84, 5690).

Laswell and Ongley were questioned regarding their response to Boyd's exchange with the prosecutor which led to spectator JM[5] speaking out at trial. In cross-examination of Boyd regarding how the police came to obtain his sperm, Boyd stood and pointed out JM in the gallery as the source. According to Daphne Bowe, Boyd partially stood to make his point twice as he informed the jury the police obtained his semen from that "young lady right there" and used it to plant it on DD. (R.29 2279; PCR.31 5636-39; 5707-09). It was at that point JM responded that Boyd had raped her. (PCR.31 5707-09). Counsel for Boyd offered that it happened so fast, they did not want to call more attention to it by objecting/moving for a mistrial; they wanted the matter behind them. (PCR.31 5618-20, 5636-39, 5677-79, 5688-89, 5696).

The parties submitted written closing arguments (PCR.23 4316-38; 4348-85) and the trial court denied postconviction relief. (PCR.23 4386-4446) This appeal followed. Simultaneous with the filing of his initial brief here, Boyd filed a Petition for Writ of Habeas Corpus under case number SC13-1959.

[5] As sexual battery was alleged, initials are used.

SUMMARY OF THE ARGUMENT

Issue I – Boyd's claim of juror misconduct is procedurally barred and meritless. He failed to show materiality under *De La Rosa* or that an "actually biased" juror sat under *Carratelli* as counsel testified his practice is not to remove jurors with criminal histories and nothing presented has changed his mind.

Issue II – Deficient performance and prejudice under *Strickland* and *Carratelli* were not proven as it was counsel's strategy is not to challenge jurors with criminal histories and Boyd failed to show that an "actually biased" juror was seated.

Issue III – Counsel made the reasonable strategic decision not to object to or seek a mistrial where Boyd goaded a spectator to respond to Boyd pointing her out to the jury.

Issue IV – The summary denial of the ineffectiveness claim of not conducting a more thorough *voir dire* is refuted by the record as counsel reasonably relied on the *voir dire* questions posed by the judge and State. Counsel was not ineffective in not seeking a *Frye* hearing on the admissibility of fiber, bite mark and DNA evidence nor was counsel ineffective for not utilizing a forensic expert as those disciplines are not new or novel and counsel, who was also a medical doctor, used his expertise to cross-examine the State's experts thoroughly. Given the remaining evidence, prejudice was not shown. The 2009 NAS Report is not newly discovered evidence.

ARGUMENT

ISSUE I

BOYD'S CLAIM THAT JUROR MISCONDUCT RESULTED IN A UNRELIABLE TRIAL AND A DENIAL OF DUE PROCESS BY A FAIR AND IMPARTIAL JURY IS PROCEDURALLY BARRED OR IN THE ALTERNATIVE MERITLESS (restated)

It is Boyd's position that Striggles and Rebstock, by failing to disclose their felony and misdemeanor convictions respectively, violated his due process rights and rendered his trial unreliable. The trial court held an evidentiary hearing on this claim, but found it procedurally barred and alternately meritless. This ruling should be affirmed as juror misconduct allegations are issues which could have been raised on direct appeal. Moreover, Boyd did not meet the dictates of *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995) or *Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007) for either juror and Rebstock's misdemeanor convictions did not disqualify him under the statute. Relief was denied properly and should be affirmed.

A. **STANDARD OF REVIEW**

This Court employs different standards of review depending on whether there was a summary denial of postconviction relief or a denial of relief following an evidentiary hearing.

> This Court accords deference to the postconviction court's factual findings following its denial of a claim after an evidentiary hearing. . . . "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions

> of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" . . . The postconviction court's legal conclusions, however, are reviewed *de novo*. . . . When evaluating claims that were summarily denied without a hearing, this Court will affirm "only when the claim is 'legally insufficient, should have been brought on direct appeal, or [is] positively refuted by the record.'"

Jackson v. State, --- So.3d ----, 2013 WL 5269865 at *10 (Fla. Sept. 19, 2013) (citations omitted).

B. SUBSTANTIVE CLAIMS OF JUROR MISCONDUCT RAISED ON COLLATERAL REVIEW ARE PROCEDURALLY BARRED

Although an evidentiary hearing was held on the instant claim, the trial court determined the matter was procedurally barred. Boyd asserts this was error.

In denying postconviction relief, the trial court reasoned the claim was procedurally barred as it could have been raised on direct appeal under *Elledge v. State*, 911 So.2d 57, 77 n.27 (Fla. 2005) and *Troy v. State*, 57 So. 3d 828 (2011). (PCR.23 4420). Boyd asserts that this was error as the trial court misapplied *Elledge*. However, recently this Court again found a substantive claim of juror misconduct raised on collateral review was procedurally barred. *See Diaz v. State*, --- So.3d ---, 2013 WL 6170645 (Fla. Nov. 21, 2013).

In *Diaz*, on collateral review, this Court found no error in summarily denying the defendant's "motion to interview jurors, summarily denying his juror misconduct claim, and denying his

claim that he was deprived of a trial by an impartial jury due to Williams' failure to disclose" finding Diaz could have sought juror interviews after trial and raised the issue on appeal, hence the claims were procedurally barred in postconviction litigation. *Diaz*, 2013 WL 6170645 at *6. *See Troy v. State*, 57 So.3d 828, 838 (Fla. 2011) (finding substantive claim of juror misconduct were procedurally barred as they "could have and should have been raised on direct appeal"); *Elledge v. State*, 911 So.2d 57, 78, n.27 (Fla. 2005) (same); *Happ v. Moore*, 784 So.2d 1091, 1094 n.3 (Fla. 2001); *Brown v. State*, 755 So.2d 616, 637 (Fla. 2000). The claim is procedurally barred.[6]

Boyd points to *Lugo v. State*, 2 So.3d 1 (Fla. 2008) for support. However, in *Lugo*, this Court analyzed the issue under both *in De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995) and *Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007) concluding that under either standard, Lugo was not entitled to relief. In *Diaz*, this Court's most recent review of the issue clearly states that such claims are procedurally barred. *Diaz*, 2013 WL

[6] Fla.R.Crim.P. 3.851(e)(1) states it "does not authorize relief based upon claims that could have and should have been raised at trial and, if properly preserved, on direct appeal." *Johnson v. State*, 921 So. 2d 490, 508 n.13 (Fla. 2005); *see Thomas v. State*, 838 So. 2d 535, 539 (Fla. 2003) (noting this provision requires the defendant to raise claims pretrial and not "blindside" the State years later on postconviction review). In fact, this Court stated in *Elledge* that "any substantive claim of juror misconduct" was barred even though the defendant was claiming the facts were outside the record and needed to be developed. *Elledge*, 911 So. 2d at 77 & n.27.

6170645 at *6. Relief should be denied.

C. BOYD'S CLAIM IS MERITLESS AS HE FAILED TO SHOW AN "ACTUALLY BIASED" JUROR WAS SEATED UNDER *CARRATELLI* OR THAT MATERIALITY WAS SHOWN UNDER *DE LA ROSA*

Even though the trial court found the claim procedurally barred, it also reviewed the matter under *De La Rosa* and found Boyd's evidentiary hearing presentation wanting as neither materiality nor actual bias was proven. Boyd takes issue with the trial court's findings that materiality and "actual bias" were not shown. He asserts that, in the criminal context, there should be no distinction between a juror with an undisclosed criminal history and one under active prosecution. Both, he claims, should establish materiality and entitle him to relief. Additionally, Boyd maintains that he should not have had to prove actual bias and that under C*ompanioni v. City of Tampa*, 958 So.2d 404 (2nd DCA 2007) there is "inherent bias." Boyd disagrees with the trial court ruling that he did not meet his burden under *De La Rosa.* He claims he established materiality and that had the facts been known counsel "may have been influenced peremptorily" strike the jurors. Contrary to Boyd's assertions, the trial court's factual findings were supported by the record and its legal conclusions proper.

The record indicates that Question 11 of Judge Rothschild's jury questionnaire was "Friend or family previously in the court system?" (PCR.31 5577). In response to Judge Rothschild's

questions, Striggles indicated that she had been involved with the criminal justice system in Broward County when she was a juvenile and that she guessed she was treated fairly by the system and that she agreed with the Court that she had gotten over it. (R.6 113-14). Rebstock answered in the negative to Question 11 regarding whether friends or family were involved with the criminal justice system. (R.6 98). Both Striggles and Rebstock responded "no" to Judge Rothchild's Question 13. (R.6 98; 113-14). "Yes" answers by other jurors prompted follow-up questions regarding impartiality and bias. (R.6 125-31) Striggles acknowledged she could be fair and impartial regarding the death penalty. (TR.5 58-59)

During the evidentiary hearing, Boyd placed in evidence records from Striggles' case files from her Florida and Georgia felony charges. However, the Broward County criminal records indicated the Georgia charge was rejected as a basis for revoking Striggles' probation because she did not have counsel in Georgia. (PCR.24 4461-68) With respect to Rebstock, records were introduced at the evidentiary hearing indicating that in 1991, 10 years before Boyd's trial, Rebstock had been arrested, pled no contest to a **misdemeanor** count, had adjudication withheld, and paid court costs. (PCR.25 4669-73).

Laswell, with over 40 years experience practicing criminal law and selecting juries, explained it has been his practice not

to challenge jurors who have indicated they had had prior difficulties with the criminal justice system. In fact, it was his general practice to retain those jurors with prior criminal histories. He revealed "it is my general position that in a serious criminal case when a juror says to me or to anybody on *voir dire* that they've had a run-in with law enforcement and have been prosecuted, I don't follow-up on that because I figure they are going to be more favorable to me than they are to the State." And that it was the prosecutor who needed to be concerned, before the defense. (PCR.31 5583-85). Laswell also testified he learns a lot about the jurors from the *voir dire* conducted by the trial court and prosecutor, who are able to question the jury before the defense. (PCR.31 5626-27, 5636). Like Laswell, Ongley's philosophy/belief was that jurors with criminal histories would question the State/police and such was useful in light of Boyd's defense based in part on accusing the police of planting evidence. (PCR.31 5683-84, 5690).

Both Laswell and Ongley averred that all jury selection decisions were made jointly after consultation with Boyd; no decision was made without Boyd's input and Boyd never complained about the jury selection. Boyd accepted Striggles and Rebstock. (PCR.31 5627-28, 5663, 5665, 5684) Ongley testified that the general defense strategy for jury selection was to retain those jurors thought to be open-minded and sympathetic to the defense

while eliminating those thought to help the State. (PCR.2 7-8).

The trial and subsequent evidentiary hearing records also reflect that Striggles was an African-American woman who had not had any criminal difficulties for some 13-20 years before Boyd's trial. (PCR.31 5667, 5682).[7] During *voir dire* Striggles admitted to having a juvenile criminal history, although her criminal history dated from the time she was in her twenty's. She also reported her last employment was serving in the United States Army. Laswell reiterated he did not question Striggles or Rebstock about their criminal histories because he believed, based on his 40 years of legal experience, those criminal histories would mean Striggles and Rebstock would be **biased against the prosecution**. (PCR.31 5628-29). Laswell testified that he would take "his chances" with a convicted felon on the jury. (PCR.31 5629). While Laswell admitted that had he known of Striggles' felony record he would have questioned her. However, in his notes from the *voir dire*, Laswell had jotted down the phrase "got over it" with respect to Striggles referring to her criminal troubles and that a significant amount of tame as passed and knowing people change over time. Laswell could not say that he would have stricken Striggles had he known of her criminal history. (R.31 5628-34).

[7] No records were presented for Striggles indicating there were any criminal troubles in Florida after 1988, some 13 years before Boyd's trial.

Laswell admitted he was unaware of the materials contained in Striggles' case files requesting a mental health evaluation, possible suicidal thoughts, and possible intelligence deficiencies. PCR.24 4461-68; PCR.31 5595-5602). Nonetheless, even with this new information, Laswell was not willing to say he would have stricken Striggles. Laswell saw no documents to date that would change his mind about either Striggles or Rebstock. (PCR.31 5629, 5650)

After setting out the *De La Rosa* three-prong standard, the trial court determined that with respect to both jurors, Boyd could not meet the materiality prong of *De La Rosa*. (PCR.23 4421). It also relied upon its analysis of the ineffectiveness allegation under Claim IIIA.2 of the postconviction motion where it found that actual bias was not shown under *Carratelli* which the State addresses in Issue II below and incorporates here. With respect to Striggles' failure to disclose the full extent of her criminal history, the trial court found materiality under *De La Rosa* was unproven because her last conviction was in 1989, some 12 years before Boyd's trial, there was no evidence she had legal problems since then, and she had served in the U.S. Army. (PCR.23 4421-22). More important to the court, the evidence showed "defense counsel would not have exercised a peremptory challenge to exclude Striggles" merely because she was statutorily disqualified given her felony convictions. The

court found: "Mr. Laswell's testimony was that he would have taken his chances with a convicted felon on the jury, because it was his belief that jurors who had a run-in with the criminal justice system would be more favorable to the defense than to the State. It was his practice to let the prosecutor exclude prospective jurors with criminal convictions." (PCR.23 4422). The trial court concluded that under Johnston v. State, 63 So.2d 730 (Fla. 2011), because Boyd "did not show that the non-disclosed [criminal history] information prevented counsel from making an informed judgment that would have most likely resulted in a peremptory challenge, he cannot meet the materiality prong." (PCR.23 4422).

Those findings and conclusions are supported by Laswell's testimony as he reiterated that he did not question Striggles or Rebstock about their criminal histories because he believed that they would be biased against the state based on that history. (PCR.31 5628). This decision was based on his 40 years of legal experience. In fact, Laswell admitted that he would take his chances with a convicted felon on the jury. (PCR.31 5629). While Laswell admitted that had he known of Striggles' felony record he would have questioned her further, but recognized that he had noted that had she "gotten over it," Laswell would have kept her on the jury recognizing that people change over time. (PCR.31 5630). As the trial court concluded, the *De La Rosa*

"materiality" was unproven as Striggles criminal difficulties were more than a decade in the past and Laswell would have retained a convicted felon on the jury leaving it to the prosecution to use its peremptory challenge. The trial court's factual findings are supported by the record and legal conclusion comports with this Court's decisions in *Johnston v. State*, 63 So.2d 730 (Fla. 2011) and *Diaz*, 2013 WL 6170645 at *6 (rejecting claim in part because defense counsel would have kept juror irrespective of undisclosed information).

Boyd takes issue with the trial court's finding Striggles' status as a conviction felon was insufficient to warrant relief. He cites to *Companioni,* for support and equates a non-disclosure of an active prosecution with a decades old felony conviction. That argument should be rejected. In *State v. Rodgers*, 347 So.2d 610 (Fla. 1977), this Court considered and rejected a claim that a juror's incorrect answer during *voir dire* was sufficient to overturn a criminal conviction. It held "in the absence of evidence that the defendant was not accorded a fair and impartial jury or that his substantive rights were prejudiced by the participation and misconduct of the unqualified juror, he is not entitled to a new trial." *Id.* at 613.

In *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998), this Court recognized an exception to *Rodgers* for those cases where a juror was **under prosecution** by the same prosecutor's office at the

time of his jury service. However, this Court made clear that it did "not overrule *Rodgers;* [it was] simply carving out an exception based on the unique circumstances presented." *Id.* at 1370; *see also Coleman v. State*, 718 So.2d 827, 830 (Fla. 4th DCA 1998). In *Lowery* this Court agreed with the District Court's perception of:

> a difference between seating a juror who is unqualified due to being a few months short of majority and seating a juror who is disqualified due to a pending criminal prosecution. Unlike jurors with deficiencies in qualifications such as age, residence, voter registration, **or even past criminal activity**, a juror with a pending criminal prosecution casts doubt upon the fairness of the defendant's trial....

Lowery, 705 So.2d at 1369 (emphasis supplied) (*quoting Lowrey v. State*, 682 So.2d 610, 611-12 (Fla. 1st DCA 1996)). This Court found "there is a clear perception of unfairness, and the integrity and credibility of the justice system is patently affected" and "the very foundation of our criminal justice process is compromised when a juror who is under criminal prosecution serves on a case that is being prosecuted by the same state attorney's office that is prosecuting the juror" and relieving the defendant of his burden to prove actual bias.

In *Companioni*, 958 So.2d at 411-14, the Second District Court of Appeals, determined that age, like other statutory disqualifying factors other than for a juror under active prosecution by the State Attorney, was not a basis to grant a

new trial. The non-disclosure of an old felony conviction, like age, should not be equated to a present/ongoing prosecution where the jurors fate is yet to be settled and where it is recognized the juror may be biased in favor of the State in hopes of currying favor for a better outcome of his case. This was the implicit finding in *Lowery* as noted above. Such is not the same when it comes to past convictions as Laswell himself has found over his 40 years of practice. While Boyd points to *Companioni* and the discussion of convicted felons on juries, the rationale of *Lowery* shows that a nondisclosure of an ongoing prosecution over which that prosecution still holds sway to impact a juror favorably is different than an old conviction where the juror is no longer in jeopardy. An old conviction is more akin to age than an ongoing prosecution as there is nothing one party can do to influence the juror's situation. The trial court properly saw this and found materiality and "actual bias" were not established as required by *Rodgers*, 347 So.2d at 610.

In denying postconviction relief, the trial court reasoned Boyd could not show entitlement to relief based on Striggles mental health issues even though it may be relevant to jury service because he did not show materiality. :

> These facts happened fifteen (15) and eighteen (18) years prior to Ms. Striggles serving on Defendant's jury and prior to her serving in the U.S. Army. Furthermore, on direct examination, Mr. Laswell stated that had he known about juror Striggle's mental

problems he would have consulted with Dr. Ongley and the Defendant might have exercised a peremptory challenge. (EH Vol. 1 at 67). ***On cross-examination, he stated that he did not know whether he would have exercised a peremptory challenge, but he would have certainly conducted additional voir dire. (EH Vol. 1 at 90). If such additional voir dire would have revealed that juror Striggles hated police officers, the courts, and the judge, he would have still wanted her to serve as a juror in Defendant's case***. (EH Vol. 1 at 90).

The fact that Mr. Laswell might have exercised a peremptory challenge had he known all these facts about juror Striggles, is not sufficient to meet the materiality test since the correct standard is the "would in all likelihood" standard enunciated in Roberts. See, e.g., Bolling v. State, 61 So. 3d 419 (Fla. 1st DCA 2011) (finding that the defense did not adequately allege and prove that a juror's non-disclosure of the fact that he knew the defendant's mother was material to the jury service in the case, where the defense argued merely that it could have struck that particular juror not that it would in all likelihood have exercised a challenge).

Defendant cannot meet the second prong of the De La Rosa test either. It cannot be said that the information regarding juror Striggle's alleged mental health issues, suicidal thoughts, and intelligence deficiencies was "squarely asked for" and not provided. The question that was asked of juror Striggles is whether she had family and friends involved in the criminal justice system. When she responded that she had been involved herself, the trial judge asked her how long ago that was, whether her involvement was in the Broward County, and whether she was treated fairly. (ROA at 113-14). None of these questions were meant to elicit the type of information that Defendant claims was concealed. Thus, for the reasons set forth herein, Defendant cannot meet the *De La Rosa* test and he is not entitled to a new trial based on juror Striggle's misconduct.

As to juror Rebstock's alleged misconduct, . . . Mr. Laswell specifically testified that he was not concerned about juror Rebstock's misdemeanor charge,

especially since it was not a basis for statutory disqualification and it occurred ten (10) years prior to him serving as a juror in Defendant's case.

Although an argument could be made that juror Rebstock did not conceal information, since the question asked by the trial court was whether the prospective juror had any family or friends who had a run-in with the law, juror Rebstock did in fact conceal his prior involvement with the criminal justice system. . . . However, this Court refuses to infer, as urged by the Defendant, that juror Rebstock was not truthful with respect to any of the Court's inquiries during trial. Such is mere speculation and conjuncture not supported by any facts.

Finally, this Court finds that Defendant did not show that either juror Striggles or juror Rebstock were actually biased or prejudiced. In cases like the instant one where the juror's non-disclosure pertains to statutory disqualification "actual bias or prejudice to the complaining party must be shown to warrant granting a new trial." Companioni v. City of Tampa, 958 So.2d 404, 416 (Fla. 2007). Defendant attempts to circumvent the requirement to show actual bias or prejudice by arguing that where a juror is statutorily disqualified from service on a jury, the prejudice is inherent. In support of this argument, Defendant relies on Lowrey v. State, 705 So.2d 1367 (Fla. 1998). This Court finds Defendant's reliance on Lowrey misplaced. The Lowrey court held that where a juror does not reveal to the defendant that she is under active prosecution by the same office that prosecutes the defendant's case, "inherent prejudice to the defendant is presumed and the defendant is entitled to a new trial." Lowrey, 705 So.2d at 1368.

The rationale behind disqualifying a person under active prosecution "is to avoid the possibility that that person might vote to convict in the hope of getting more favorable treatment from the prosecution in his own case." Thompson v. State, 300 So. 2d 301, 303 (Fla. 2d DCA 1974). Thus, a person under pending criminal prosecution is disqualified not based on status, but based on the "clear perception of unfairness" that affects the integrity and credibility of the justice system. Lowrey, 705 So. 2d 1369-70. The

> court in Lowrey made it clear that this rule was "merely an exception based on the unique circumstances presented." Id. at 1370. As such, this Court refuses to extend this exception to the circumstances of this case where neither Ms. Striggles nor Mr. Rebstock were under active prosecution by the same office as Defendant. As already discussed above in subclaim III.A.2., Defendant cannot show actual bias on the part of jurors Striggles and Rebstock.[8]
>
> [8] *See supra* at pp. 19-20, 21-22

(PCR.23 4420-25)

Pointing to *Palm Beach County Health Dept. v. Wilson*, 944 So.2d 428, 430 (Fla. 2006); *Robert v. Tejada*, 814 So.2d 334 (Fla. 2002); *Blaylock v. State*, 537 So.2d 1103, 1106-07 (Fla. Dist. Ct. App. 1988), Boyd asserts that in assessing materiality the "in all likelihood" standard is interchangeable with the "may have been influenced" standard for determining whether a peremptory strike would have been exercised. (P at 32-33) However, this Court's latest discussion of the standard reveals:

> But "materiality is only shown 'where the omission of the information prevented counsel from making an informed judgment—which would in all likelihood have resulted in a peremptory challenge.'" Levine, 837 So.2d at 365 (internal quotation marks omitted) (*quoting Roberts*, 814 So.2d at 340). In other words, "[a] juror's nondisclosure ... is considered material if it is so substantial that, if the facts were known, the defense likely would peremptorily exclude the juror from the jury." *Murray*, 3 So.3d at 1121–22 (*quoting McCauslin v. O'Conner*, 985 So.2d 558, 561 (Fla. 5th DCA 2008)).

Johnston, 63 So.3d at 738-39. Also, the First District Court of Appeal's discussion is instructive.

In this context, we apply a "would in all likelihood" standard in determining materiality:

> [T]he supreme court in *Tejada* cited *Birch ex rel. Birch v. Albert*, 761 So.2d 355 (Fla. 3d DCA 2000), for the proposition that materiality is only shown where the "'omission of the information prevented counsel from making an informed judgment-which would in all likelihood have resulted in a peremptory challenge.'" 814 So.2d at 340. However, the supreme court also cited *Garnett v. McClellan*, 767 So.2d 1229 (Fla. 5th DCA 2000), for the proposition that "'[n]ondisclosure is considered material if it is substantial and important so that if the facts were known, the defense may have been influenced to peremptorily challenge the juror from the jury.'" 814 So.2d at 341. While Appellant relies upon the "may have been influenced" standard, the supreme court in *State Farm Fire and Casualty Co. v. Levine*, 837 So.2d 363, 365 (Fla. 2002), cited *Tejada* for the proposition that materiality is only shown "where the 'omission of the information prevented counsel from making an informed judgment-which would in all likelihood have resulted in a peremptory challenge.'" As such, the "would in all likelihood" standard should be applied on remand.
>
> *Fine v. Shands Teaching Hosp. & Clinics, Inc.*, 994 So.2d 426, 428 n.* (Fla. 1st DCA 2008). More recently, the supreme court used the "likely would peremptorily exclude" standard in *Murray*, 3 So.3d at 1121–22 (*quoting McCauslin v. O'Conner*, 985 So.2d 558, 561 (Fla. 5th DCA 2008)).

Bolling v. State, 61 So.3d 419, 424, n.5 (Fla. 1st DCA 2011).

It would appear that the standard the trial court used, "in all likelihood" counsel would have stricken the juror is proper. However, even if the "may have" stricken standard is utilized

Boyd still has not carried his burden. The "may have" standard requires that the non-disclosed information also have been "so substantial and important" that it "may have influenced" counsel to remove the juror. *See Blaylock*, 537 So.2d at 1106-1107. Yet here, Laswell testified he was not willing to say he would have stricken Striggles and he saw no documents to date that would change his mind[8] about her. (PCR.31 5629, 5650). Further, Laswell was willing to take his chances with Striggles. (PCR.31 5629) Such does not call into question the trial court's ruling or satisfy Boyd's burden. *See Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) (recognizing "strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel" and "[t]he more experienced an attorney in, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense" is reasonable). Even with the new information, Laswell could not say that the "omission of the information prevented counsel from making an informed judgment-which would in all likelihood have resulted in a peremptory

[8] Hence, even with the new information presented to him, Laswell could not say that the "omission of the information prevented counsel from making an informed judgment-which would in all likelihood have resulted in a peremptory challenge." De La Rosa v. Zequeira, 659 So.2d at 242 or that the omitted information was so substantial and important" that he may have been moved to strike Striggles. *Blaylock*, 537 So.2d at 1106-1107.

challenge." *De La Rosa*, 659 So.2d at 242 or that the omitted information was so substantial and important" that he may have been moved to strike Striggles. *Blaylock*, 537 So.2d at 1106-1107. Postconviction relief was denied properly.

Boyd points to Laswell's testimony that he would have conducted additional *voir dire* to support materiality for her criminal history and alleged mental health issues. However, as the trial court found, the criminal history was more than a decade old, some closer to 20 years, Striggles had been in the military,[9] and that she had gotten over her troubles. *Foster v. State*, --- So.3d ---, 2013 WL 5659482 *15 (Fla. 2013) (rejecting claim juror's failure to disclose a 24 year old "DUI conviction, even if verified, was relevant or material to" juror's service and reiterating "'nothing about the character and extensiveness of [the juror's] own experience' in being convicted of a nonviolent offense 'suggests [juror] would be biased against a defendant pleading not guilty in a death penalty case.' *Johnston*, 63 So.3d at 739." *Rodgers v. After School Programs, Inc.*, 78 So.3d 42, 45 (Fla. 4th DCA 2012) (characterizing 10-year old misdemeanor convictions as "stale"). The court's findings are reasonable and supported by the record.

Moreover, given the fact that Striggles was not asked

[9] Boyd questions Striggles military service, but he presented nothing to refute her claim of service.

directly about any mental health issues, Boyd has not shown that that information was material under *De La Rosa*. Boyd maintains Striggles' failure to disclose the extent of her criminal history somehow throws open the door to using her mental health history contained in her criminal case files which was not uncovered until requested years later.[10] However, Boyd fails to establish that counsel could have found the criminal files during *voir dire* or that had the criminal history been disclosed it would have prompted Laswell to inquiry further and delve into mental health issues. This is especially true as Laswell testified that there was noting that he saw that would have changed his mind about Striggles. (PCR.31 5650).

Turning to Rebstock, Boyd seeks to have Striggles' *voir dire* responses taint Rebstock's *voir dire*. However, as the trial court noted that Rebstock was not asked directly about his criminal history, which was a misdemeanor conviction from ten years before trial and that Laswell would not have stricken the juror for such prior criminal contact. (PCR.23 4424; PCR.31 5640, 5650). Such is reasoned strategy. *See Coleman v. State*, 718 So.2d 827, 830 (Fla. 4th DCA 1998) (noting juror's arrest record "might have prejudiced him against law enforcement officers" and suggesting there would be reasoned strategy not to

[10] As the record reveals, Boyd was unable to obtain criminal records for Striggles before the **2012** evidentiary hearing.

strike juror). Boyd has failed to show that the trial court's findings are not supported by competent substantial evidence or that the conclusion to seat Rebstock, who was not statutorily disqualified, necessitated a new trial under *De La Rosa*.

Moreover, under the standard announced in *Carratelli*, discussed in more detail in Issue II incorporated here, Boyd has failed to show that either Striggles or Rebstock were actually biased. From the foregoing and the analysis in Issue II, it is clear that Boyd has failed to show that either juror was actually biased. Relief was denied properly.

ISSUE II

BOYD HAS FAILED TO ESTABLISH THAT COUNSEL RENDERED INEFFECTIVE ASSISTNACE DURING *VOIR DIRE* AS REQUIRED BY *STRICKLAND* AND *CARRATELLI* (restated)

Boyd asserts that defense counsel, Williams Laswell, rendered ineffective assistance during *voir dire.* It is Boyd's position Laswell failed to conduct a sufficient questioning of the venire to uncover Striggles' prior criminal history and that his strategy to keep those with criminal histories was not a reasoned strategy. (IB 44-45) Boyd also argues that in relying upon *Carratelli*, the trial court employed the incorrect legal standard and that it also erred by denying his request to interview Striggles. Contrary to Boyd's suggestion, *Carratelli* is the proper standard to review claim of ineffective assistance in *voir dire*. Additionally, an adequate *voir dire* was

conducted, counsel testified that even with the evidence produced regarding Striggles' criminal history he would not have changed his mind about her; counsel's strategy developed over his 40 years of criminal practice is to retain jurors with criminal histories. The trial court's factual findings are supported by competent substantial evidence and its legal conclusions are supported by *Strickland* and *Carratelli*. This Court should affirm the denial of postconviction relief following an evidentiary hearing.

A. STANDARD OF REVIEW

Rimmer v. State, 59 So.2d 763, 775 (Fla. 2010), provides:

> Because an analysis of a claim of ineffective assistance of counsel presents mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the court's legal conclusions de novo. *See Sochor v. State*, 883 So.2d 766, 771-72 (Fla. 2004).

See Pagan v. State, 29 So.3d 938, 949 (Fla. 2009); *Arbelaez v. State*, 889 So.2d 25, 32 (Fla. 2005); *Davis v. State*, 875 So.2d 359 (Fla. 2003); *Freeman v. State*, 858 So.2d 319 (Fla. 2003).

To establish ineffective assistance of counsel, a defendant must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 687-94. *See Davis*, 875 So.2d at 365 (noting under *Strickland* "the deficiency in counsel's performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined."). This Court has stated that "[u]nless a defendant makes both showings [of deficiency and prejudice], it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Valle v. State*, 778 So.2d 960, 965 (Fla. 2001) This was echoed in *Arbelaez*:

> In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternate courses of action have been considered and rejected. Moreover, "[t]o establish prejudice, [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

[*Valle*, 778 So.2d] at 965-66 (citations omitted) (*quoting Brown v. State*, 755 So.2d 616, 628 (Fla. 2000), and *Williams v. Taylor*, 529 U.S. 362, 391

(2000)).

Arbelaez, 889 So.2d at 31-32. *See Orme v. State*, 896 So.2d 725, 731 (Fla. 2005) (Fla. 2005); *Gamble v. State*, 877 So.2d 706, 711 (Fla. 2004). When considering a claim of ineffectiveness of counsel, a court "need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla.), *cert. denied*, 479 U.S. 972 (1986).

With respect to the performance prong of *Strickland*, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Davis*, 875 So.2d 365; *Chandler v. United States*, 218 F.3d 1305, 1313 n.12 (11th Cir. 2000). "The test for ineffectiveness is not whether counsel could have done more; perfection is not required." *Id.*, at 1313 n. 12. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The ability to create a more favorable strategy years later does not prove deficiency. *See Patton v. State*, 784 So.2d 380 (Fla. 2000); *Cherry v. State*, 659 So.2d 1069 (Fla. 1995). From *Williams v. Taylor*, 529 U.S. 362 (2000), it is clear the focus

is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. As, as noted in *Chandler*, 218 F.3d at 1318, "counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. *See Strickland*, [466 U.S. 690-91] (opining "[s]Strategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.")".

In the context of ineffectiveness claims for counsel not questioning a juror or failing to uncover information during *voir dire* that may supply a reason for a challenge, this Court has determined the *Strickland* prejudice standard "**can be shown only** where one who was actually biased against the defendant sat as a juror." *Carratelli*, 961 So.2d at 324 (emphasis supplied). Thus, to prove ineffective assistance, "the defendant must demonstrate that a juror was actually biased." *Id.*

B. DEFENSE COUNSEL REASONABLY RELIED ON THE EXTENSIVE VOIR DIRE CONDUCTED BY THE STATE AND TRIAL COURT AND MADE THE REASONABLE STRATEGIC CHOICE BASED ON 40 YEARS OF CRIMINAL TRIAL EXPERIENCE TO NOT QUESTION OR CHALLENGE A JUROR REPORTING CRIMINAL HISTORY

As noted above, the direct appeal record along with the evidence presented at the evidentiary hearing reveal that

Striggles reported that she had a criminal history from Broward County when she was a juvenile, that she guessed she was treated fairly, and that she had gotten over his criminal troubles. (R.6 113-14; PCR.31 5577) Also, Striggles reported she could be fair and impartial. (R.5 58-59; R.6 98; 113-14, 125-31). The trial record also reveals that Laswell and Boyd informed the trial court as follows:

> MR. LASWELL: We are here at the midpoint of the second day of voir dire, and the Court and the State I compliment, did an excellent job of voir dire, but I want the record to reflect that even though, what did I take 20 minutes or so, that it was with the consent of Mr. Boyd that and with the agreement of Mr. Boyd that I conduct an abbreviated voir dire. If that's not the case, I'd be glad to go on for a couple of other days.
>
> But I think we have all the information that we want and need and we're ready to go.
>
> Is that right, Mr. Boyd?
>
> THE DEFENDANT: Yes, sir, that's correct.

(R.7 317-18). The defense used five peremptory challenges in seating the 12-member panel. (T.7 323-27, 336, 345-46, 348)

Again, as set forth above, defense counsel Laswell, with 40 years of experience picking juries for criminal cases, said that it was his practice not to challenge jurors who have indicated they had had prior difficulties with the criminal justice system. He elucidated that "it is my general position that in a serious criminal case when a juror says to me or to anybody on

voir dire that they've had a run-in with law enforcement and have been prosecuted, I don't follow-up on that because I figure they are going to be more favorable to me than they are to the State. And I figured that the state attorney . . . ought to be concerned about it before anybody else." (PCR.31 5583-84). Additionally, Laswell explained that gains insight into the jurors from the *voir dire* conducted by the trial court prosecutor, as both question the jurors before the defense has the opportunity. (PCR.31 5626-27, 5636) It was Laswell's general practice to retain jurors with criminal histories. (PCR.31 5584-85). This was echoed by Ongley whose philosophy was that jurors with criminal histories, like Striggles "would be questioning the State" and law enforcement. Ongley looked at this through the prism of the defense being offered, namely that Boyd was asserting the police planted evidence. (PCR.31 5683-84, 5690). The overall strategy for jury selection was to find jurors with open minds and sympathetic to the defense, while rejecting those thought to be helpful to the State. (PCR.31 5663-64) Laswell and Ongley averred that all juror decisions were made jointly after consultation with Boyd. No decision was made without Boyd's input, he never complained about the jury selection, and he accepted Striggles. (PCR.31 5627-28, 5663, 5665, 5670, 5684)

With respect to defense counsel's ability to conduct investigations of juror during *voir dire*, Laswell explained that

he did not have unlimited access to investigators nor unlimited time to investigate potential jurors. He did not have access to NCIC or FCIC reports. The realities of *voir dire* did not permit a stoppage of court so that each potential juror could be investigated. However, the defense had the jurors' voting and property appraiser's records to assist in *voir dire*. (PCR.31 5621-25). Neither Ongley nor Laswell testified to seeing anything indicating Striggles could not be a fair juror and had they, she would have been stricken. (PCR.31 5686)

As Ongley recognized the records indicated that Striggles was an African-American woman who had not had any criminal difficulties for at least a dozen years before Boyd's trial and several *Neil-Slappy*[11] challenges were made when the State sought to strike African-American jurors. (PCR.31 5668, 5682, 5685) During *voir dire*, Striggles admitted to having a juvenile history, although her criminal history dated from the time she was in her twenty's. Following that, she served in the Army. Laswell reiterated that he did not question Striggles about her criminal histories because, based on his 40 years of experience, he believed her criminal history would tend to make her biased against the state and he would take his chances with a convicted felon on the jury (PCR.31 5628-29). While Laswell stated that

[11] *State v. Neil*, 457 So.2d 481, 486-87 (Fla. 1984); *State v. Slappy*, 522 So.2d 18, 20-21 (Fla. 1988)

had he known of Striggles' felony record he would have questioned her, but he testified that he had in his notes that she had "gotten over it," meaning her legal difficulties, and would have kept her on the jury recognizing that people change over time. (PCR.31 5633). Laswell admitted he was unaware of the materials contained in Striggles' case files regarding mental health issues and possible intelligence deficits, but he was unwilling to say he would have stricken her. In fact, Laswell saw nothing that would change his mind about either Striggles or Rebstock. (PCR.31 5596-5602, 5629, 5650).

Based on this testimony, the trial court rejected the ineffectiveness claim (Claim III.A.2 below). The trial court found the criminal records for Striggles showed she was 19 years old at the time of her first conviction in 1983 and in her 20's when conviction in two other cases." (PCR.23 4400) The trial court found that the records also showed Striggles "was convicted twice of false report of a bombing, violated probation and was charged with possession of a firearm by a convicted felon and carrying a concealed firearm" and she had a Georgia misdemeanor conviction. Striggles' civil rights were not restored until April 4, 2008. (PCR.23 4400). Rebstock's criminal records were found to show he "had a withhold of adjudication for a misdemeanor solicitation charge." The trial court reasoned:

As related to juror Striggle's failure to disclose her prior criminal history, this Court finds that Defendant's ineffective assistance of counsel claim fails. Although Mr. Laswell stated during the evidentiary hearing that he did not have an overall strategy for seating a jury or a particular juror profile in mind during the voir dire, he represented that the goal was to empanel fair jurors. (EH Vol. 1 at 29-30, 83). His testimony established that it has been his general practice for approximately forty (40) years not to ask follow-up questions of prospective jurors with a criminal history. (EH Vol. 1 at 40). He explained that it is his assumption that such jurors would be more favorable to the defense than the State and it is the prosecutor's problem to exclude them. (EH Vol. 1 at 40; 46-47; 50; 85-6). He admitted that he had no specific recollection of juror Striggles, but he was confident that he would not have asked any follow-up question regarding her juvenile record because he would have wanted to keep her. (EH Vol. 1 at 41-42; 44-45; 50). Mr. Laswell further admitted that he was not aware of any of juror Striggle's prior felony convictions in Broward County or of her Georgia conviction. (EH Vol. 1 at 44). Similarly, he was not aware that her civil rights had not been restored at the time of Defendant's trial. (EH Vol. 1 at 44). However, he testified that her prior felony convictions did not make her less desirable to the defense. In fact he stated that he would have taken his chances with a convicted felon on the jury. (EH Vol. 1 at 86).

Dr. Ongley testified that although Mr. Laswell conducted the voir dire, the two of them and the Defendant consulted before making the strikes and picking the jurors. (EH Vol. 11 at 7-9; 14; 28-30) The general strategy for selecting a jury was to eliminate those individuals who would support the State and keep those who would be open minded and listen to the facts and to the defense theory of the case. (EH Vol. 11 at 7-8) Dr. Ongley agreed that the fact that juror Striggles was involved with the criminal justice system as a juvenile was a good thing for the defense, because she would tend to question the State and the law enforcement. This would be especially helpful given the defense theory that the law enforcement planted evidence to convict the Defendant. (EH Vol. 11

at 27-28) Although Dr. Ongley did not have a specific recollection of juror Striggles, he testified that if there would have been any reasons to believe she could not be fair and impartial the defense team would have moved to strike her. (EH Vol. 11 at 30) Furthermore, Defendant, who was taking active part in the jury selection process, had no objections to juror Striggles. (EH Vol. 11 at 30)

Based on the testimony adduced during the evidentiary hearing, this Court finds that counsel was not deficient for failing to ask follow-up questions of juror Striggles, but rather made a strategic decision not to do so. He exercised reasonable professional judgment by leaving it up to the prosecutor to excuse her. See, e.g., Johnston v. State, 63 So. 3d 730 (Fla. 2011) (finding that counsel was not ineffective for failing to question a particular juror regarding a prior misdemeanor and an active capias, where that juror would not have been disqualified from service and the defense counsel testified at the evidentiary hearing that neither the misdemeanor nor the active capias would have made the juror less desirable to the defense).

As to the Defendant's argument that trial counsel was ineffective for failing to ask follow-up questions to discover that juror Striggles had a history of mental health problems associated with her felony convictions, this Court finds that claim equally without merit. Mr. Laswell stated that he was not aware that juror Striggles: (i) was evaluated for competency in her 1983 case; (ii) was committed to a counseling program in the 1983 case; (iii) had suicidal tendencies when she was convicted in 1986 of a false bomb threat; (iv) was diagnosed with schizoid personality disorder; (v) paid someone to take the GED for her; and (vi) was borderline mentally retarded. (EH Vol. 1 at 55-59). However, Defendant did not identify any follow-up questions that would have elicited such detailed information from juror Striggles. Instead, collateral counsel's questioning during the evidentiary hearing seemed to imply that Mr. Laswell should have obtained such information during voir dire from court files that were available in the Broward County Clerk's Office. This Court declines to impose such a high duty on trial counsel.

As explained by the Supreme Court of Florida in Roberts ex rel. Estate of Roberts v. Tejada, 814 So. 2d 334, 344-45 (Fla. 2002), the idea of requiring a trial counsel to conduct an investigation of the venire during trial might work in a perfect world, where access to information about the potential jurors "would be immediately available in all courtrooms or actually provided as jury pool information." However, the reality of voir dire does not allow for such extensive investigation and imposing such a requirement would create "an unacceptable burden that cannot have uniform application." Id. at 344.

Mr. Laswell testified that the nature of voir dire, especially in first degree murder cases, like the instant case, where the venire pool comprises fifty (50) individuals, is such that counsel cannot stop to conduct a thorough investigation of each and every prospective juror. (EH Vol. 1 at 88, 92-93). Mr. Laswell testified that as an attorney with the Public Defender's Office, he did not have access to the NCIC or the FCIC databases and he could not access the criminal history of the venire panel. (EH Vol. 1 at 51; 54; 88). Although he admitted that an investigator with the Public Defender's Office was able to access property records and voter's registration information for the prospective jurors, he found that information of little use given the time limitations of the voir dire process. (EH Vol. 1 at 51; 79; 93; 99-105).

Even if Defendant could show deficient performance, he cannot show prejudice. The prejudice prong in a case where a defendant alleges that counsel failed to raise or preserve a challenge for cause requires the defendant to show "actual bias" on the part of the seated juror. Carratelli v. State, 961 So. 2d 312, 317, 324 (Fla. 2007) (noting that the test for prejudicial error on direct appeal is very different from the test of prejudice on collateral appeal and holding that "where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased"). The Carratelli Court further explained that under the actual bias standard a defendant must show that the seated juror "was biased against the defendant, and

> the evidence of bias must be plain on the face of the record." Id. at 324. The test of impartiality is a juror's ability to "lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Id. (internal citations and quotations omitted).
>
> In this case, Defendant failed to show any bias on the part of juror Striggles, and the record does not support a finding of "actual bias". In fact, her answers throughout voir dire demonstrate that she could render a verdict based solely on the evidence adduced at trial and that she could set aside any prior knowledge of the case. (ROA at 58-59). The record reflects that juror Striggles was not part of the group that believed the death penalty was the only appropriate penalty for first degree murder. (ROA at 41-55). In addition, the record indicates that if the jury found Defendant guilty of first degree murder, juror Striggles could and would weigh the aggravating and mitigating circumstances, listen to the attorneys' arguments, and apply the law as instructed by the court. (ROA at 55).
>
> The fact that Ms. Striggles committed some crimes eighteen, fifteen, and thirteen years prior to serving as a juror in Defendant's case does not prove bias against the Defendant. Similarly, Defendant cannot show actual bias based on the mental health problems that Ms. Striggles allegedly had thirteen, fifteen, or eighteen years prior to Defendant's trial. More important, both trial attorneys testified during the evidentiary hearing that they did not see anything indicating that Ms. Striggles would have been biased against the Defendant, otherwise they would have struck her from the panel. To the contrary, they thought she would be biased in Defendant's favor since she had previously been a defendant herself.

(PCR.23 4400-05)

Boyd cites *Johnson v. State*, 63 So.2d 730 (Fla. 2011) in an attempt to show the trial court erred in its analysis and that Laswell's *voir dire* was inadequate as he failed to ask any

follow-up questions. He claims that had Laswell asked follow-up questions, Striggles eventually she would have admitted to the felony convictions, the fact that her civil rights had yet to be restored, and her mental health history. Such a claim is speculative at best as this Court concluded in *Green v. State*, 975 So.2d 1090, 1105 (Fla. 2008). See also *Reaves v. State*, 826 So.2d 932, 939 (Fla. 2002) (finding claim follow-up questions may have led to a basis for a cause challenge to be mere conjecture). Also, in *Johnson*, 921 So.2d at 896 this Court, relying upon *Teffeteller v. Dugger*, 734 So.2d 1009, 1020-21 (Fla. 1999) recognized that it is not deficient performance for counsel to rely on the *voir dire* conducted by the trial court and prosecution to develop the defense jury selection strategy or to select jurors.

However, Boyd does not put forward what specific questions Laswell should have asked to get Striggles to admit to her criminal history or alleged mental health issues. He merely suggests additional questions would have revealed a basis to disqualify Striggles, namely, that she was a convicted felon. However, as analyzed in Issue I, reincorporated here, a juror's non-disclosure of a prior felony conviction is not the same as failure to disclose an ongoing criminal prosecution. *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998); *State v. Rodgers*, 347 So.2d 610 (Fla. 1977); *Companioni v. City of Tampa*, 958 So.2d 404 (2nd

DCA 2007); *Coleman v. State*, 718 So.2d 827, 830 (Fla. 4th DCA 1998). Unlike where a juror under an active prosecution is seated on a case out of the same State Attorney's office, there is no recognized, assumed bias arising from a juror who years before was convicted of felonies.

Johnson, 63 So.3d at 737-38 instructs that counsel is not ineffective where he is following a strategy in seating jurors and that had the non-disclosed information come to light, it would not have changed counsel decision with respect to the juror neither deficiency nor prejudice are shown. Here, Laswell and Ongley admitted that they were raising *Neil-Slappy* challenges when the prosecutor attempted to strike an Africa-American juror and the record reveals that Striggles was African-American.[12] Also, defense counsel agreed that jurors with criminal histories would not be challenged as they were viewed as more favorable to the defense. Laswell admitted he would "take his chances" with a convicted felon and that he was not shown anything in the postconviction litigation which would have changed his mind about Striggles. Taken together, the

[12] Boyd points to testimony where Laswell and Ongley spoke of general jury selection strategy, however, it is clear from the record, given the *Neil-Slappy* challenges raised that retaining African-American jurors was also part of their jury selection process in addition to retaining jurors with criminal histories as they may be more skeptical of the prosecution and law enforcement and might be open to the defense theory of planting evidence.

trial court's reliance on *Johnson*, 63 So.3d at 737-38 and denial of relief was reasoned and should be affirmed.

It is Boyd's position Laswell made contradictory statements when questioned on his *voir dire* performance and the trial court ignored such evidence. (IB at 48). However, as the fact finder, the trial court was in the best position to assess the inflection and demeanor the witnesses exhibited and to sort through the testimony to determine what the witnesses were explaining. It is up to the trier of fact to resolve conflicts in the testimony and as long as those factual findings are supported by the evidence, this Court will not substitute its judgment for that of the trial court. Furthermore, while Boyd takes issue with how Laswell responded to questioning (IB 48-49), the fact remains that Boyd has failed to show that Laswell would have in all likelihood stricken Striggles had all of the now available evidence been revealed during *voir dire*. Laswell could not say that he would have stricken Striggles, but he averred he would take his chances with a convicted felon and that he saw nothing to change his mind regarding Striggles.

Boyd made no attempt to show that he was not accorded a fair and impartial jury or that his substantive rights were prejudiced by Striggles service on his jury beyond the fact a convicted felon with possible mental health issues, Striggles, was seated and that Rebstock had a misdemeanor conviction.

However, whatever may have prompted Striggles to commit those felonies occurred some 13 to 20 years before and she had been in the Army since then. To the extent Boyd may allege mental deficiency, the records, admitted over the State's hearsay objection, do not confirm mental retardation nor do they prove psychological problems at the time of Boyd's trial. Moreover, a juror's psychological history is not a statutory basis for disqualification. More important, Striggles was not asked about her intelligence or mental status. As this Court will recall, Striggles was inducted in the Army after her criminal charges were resolved. Moreover, after hearing all of Boyd's allegations against Striggles, and in light of Laswell's practice not to challenge jurors with criminal histories, Laswell testified that he has seen no documents to change his mind about Striggles. (PCR.31 5650). Boyd has not carried his burden of proving ineffectiveness under *Strickland* nor that an "actually biased" juror sat on his jury under *Carratelli*.

Furthermore, as Laswell pointed out while he had access to some investigative material (voting roles and property appraiser roles) on the jurors, he did not have access to NCIC or FCIC reports. Likewise, he did not have the luxury to stop in the middle of *voir dire* to conduct lengthy investigations of the numerous jurors on a death penalty venire. It is also important to recall that Boyd, some ten years after trial and after years

of postconviction investigation, was unable to produce all of Striggles criminal history records at the time the evidentiary hearing was set. Yet he complains that trial counsel should have discovered such records before the jury was selected. Boyd should not be permitted to label his counsel ineffective under these circumstances. *Cf. Roberts ex rel. Estate of Roberts v. Tejada*, 814 So.2d 334, 345 (Fla. 2002) (noting counsel cannot be expected to be in the courtroom and in other locations investigation jurors nor should *voir dire* lead to "teams of investigative lawyers [becoming] involved as a necessary ancillary activity to the trial process"). Postconviction relief should be denied under *Carratelli* and *Strickland*.

It is Boyd's position that *Carratelli* is the improper standard to be applied here and that *Strickland* alone controls given this Court's discussion in *Johnston*, 63 So.3d at 737-38 where only *Strickland* was discussed when analyzing an ineffectiveness claim addressed to the adequacy of voir dire for a juror who placement on the jury was addressed on direct appeal. *Id.* However, later in the opinion where this Court addressed the adequacy of *voir dire* with respect to pretrial publicity, this Court provided:

> Johnston claims that trial counsel was ineffective for failing to sufficiently question members of the venire regarding their exposure to pretrial publicity. Because Johnston has not shown that the jurors were actually biased, our confidence in the outcome is not

undermined. *See Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007).

During voir dire, two eventual jurors indicated that they had heard about the case on the news. Trial counsel asked one of those jurors directly whether, given exposure to media reports, he could be fair and impartial. That juror responded that he could. While counsel did not directly question the other juror, the second juror gave no indication as to what he had heard on the news or whether he was at all influenced by the news report, even after defense counsel invited jurors to respond to his repeated explanation of the requirement that jurors must be fair and impartial.

In *Carratelli*, we explained:

> [W]here a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased.
>
> A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Therefore, actual bias means bias-in-fact that would prevent service as an impartial juror. Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial—i.e., that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record.

961 So.2d at 324 (citations omitted) (emphasis supplied) (*quoting Lusk v. State*, 446 So.2d 1038, 1041 (Fla. 1984)). To be entitled to relief, the defendant must show that the juror "was actually biased, not merely that there was doubt about her impartiality." *Owen v. State*, 986 So.2d 534, 550 (Fla. 2008).

Johnston, 63 So.3d at 744. As such, *Carratelli* applies here.

However, even if Boyd needs to prove only that the result

of the proceeding would be different, he has not carried his burden. Laswell explained that he would not have stricken Striggles even with a felony conviction; he would have taken his chances and that he saw no evidence to change his decision regarding Striggles. As noted above, Boyd has not shown that additional questioning would have caused Striggles to disclose her criminal history or her alleged mental health issues. Hence, Boyd has not shown that the result of the jury selection would have been different had Striggles been questioned more closely.[13]

Boyd's also asserts that he was denied a fair opportunity to prove prejudice as he was denied an opportunity to interview

[13] Moreover, given the overwhelming evidence of Boyd's guilt and the fact the jury recommended death unanimously, he cannot show that Cf. *Diaz v. State*, --- So.3d --- 2013 WL 6170645 *6 (Fla. Nov. 21, 2013) (recognizing overwhelming evidence of guilt is further basis for rejecting postconviction claims arising out of jurors' failure to disclose prior arrest). As this Court will recall, the evidence against Boyd included the fact that his DNA was found under DD's nails, in her vagina, on her thighs, and in a hair found on her chest. Boyd's bite marks were found on her body. DD's blood was found in Boyd's apartment #2 and a fiber found on her was the same as those from a rug in apartment #2. Boyd discarded his girlfriend's bed, although she was continuing to make payments on it. Tools similar to those to which Boyd had access were missing from Rev. Lloyd's van and were consistent with the instruments used to inflict DD's injuries. Also, the laundry bag owned by the church which had been in the church van when Boyd drove it was found on DD's head. Boyd was identified in the van picking up DD at the Texaco station. A tire tread mark found on the sheet covering her body was left by a tire consistent with those on the church van Boyd had at the time of DD's abductions and killing. See *Boyd*, 910 So.2d at 174-76 (R.9 518-22, 525, 528, 549-55, 565-66, 569-71; R.10 683-85687-91, 710-12, 718, 764-65; R.11 809-16; R.12 833-36, 846-47; R.14 1081-97; R.17 1378-79, 1383-85; R.18 1511-16, 1552-57; R.19 1580, 1588-93, 1610, 1629-31, 1638-39; R.20 1690-1703; 1729-36).

Striggles. However, juror interviews were denied properly. *See Diaz*, 2013 WL 6170645 *6 (affirming denial of juror interviews in rule 3.851 litigation). The trial record establishes the questions asked on *voir dire* and the jurors' responses. Ineffectiveness issues focus on defense counsel's actions/knowledge at the time of trial rendering a juror's motivation for not disclosing all information requested of no moment. Here the trial court made findings of fact supported by competent substantial evidence, and the correct law was applied to those facts. The denial of relief should be affirmed.

ISSUE III

INEFFECTIVE ASSISTANCE OF COUNSEL WAS NOT ESTABLISHED AS TRIAL COUNSEL MADE THE REASONED STRATEGIC DECISION NOT TO CALL ATTENTION TO BOYD'S INSTIGATING A SPECTATOR TO RESPOND TO HIS POINTING HER OUT TO THE JURY (restated)

Boyd was granted an evidentiary hearing on his Amended Claim V.C below wherein he asserted that defense counsel was ineffective for not moving for a mistrial after Boyd twice pointed to a spectator, JM, as the source of the DNA the police allegedly used to plant on DD and she replied that "You raped me." The trial court determined Boyd incited JM's response and that counsel made a reasoned decision not to seek a mistrial. Boyd takes issue with the finding of a strategic decision. He also attempts to lay blame for his addressing JM on the State for the questions asked on cross-examination and the alleged

placing of JM in the front row. Additionally, he maintains that JM was in the wrong when she accused him of raping her after he twice pointed her out to the jury. These issues have been resolved against Boyd and this Court should affirm.

A. STANDARD OF REVIEW

Claims of ineffective assistance of counsel present mixed question of law and fact, this, a mixed standard of review is applied. *Rimmer*, 59 So.2d t 775. This Court will defer to the trial court's "factual that are supported by competent, substantial evidence, but reviewing the court's legal conclusions de novo." *Id*. *See Pagan*, 29 So.3d at 949. To establish ineffective assistance of counsel, a defendant must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 687-94.

B. BOYD GOADED SPECTATOR INTO RESPONDING AND HAS FAILED TO SHOW COUNSEL WAS INEFFECTIVE IN NOT SEEKING A MISTRIAL

The trial record establishes that the jury was informed by the defense as well as Boyd during his examination that Boyd had been charged with other crimes, but was acquitted. During Boyd's penalty phase testimony, presented in the form of a

statement, he stressed his innocence and his allegation of planted evidence saying such things as:

> As I stand before you today ... I still have no reason to ask for forgiveness or beg for the mercy of this court. **I am innocent** and I have the faith in knowing that my God is just and merciful. He is too wise to make a mistake and too just to do any wrong.
>
> ...
>
> When DNA first hit the scene, for many of us it was thought to be the answer to several unsolved mysteries. To this day a number of us has (sic) witnesses a positive affect of the procedure. How wonderful the use of DNA testing can be when it is used in a truthful way. **But because of the inappropriate measure the Broward County Sheriff's Office used it in tampering with my DNA, I am now seeing the negative side of the testing as they have succeeded in framing me in the murder of [DD]**.
>
> **This is not the first time that I have been falsely accused and arrested by BSO**. I was incarcerated on December 29th, 1998. However, February the 24th, 1999, I was released from jail after being founded (sic) not guilty of all previous charges.
>
> **It was during that time in '98 that a sample of my DNA was taken by BSO**. Then on the morning of March 26th, 1999, just 30 days after being released, I noticed a group of men on the property of my family's business and I approached them and they said to me that they were looking for Lucious Boyd and I said that I am he.
>
> **They told me that I was under arrest for the rape of Geneva Lewis**. ... I was shocked to learn of the false charge they accused me of.
>
> ... I will say again to you that **I did not commit the murder, rape and kidnapping of [DD]**.
>
> ...
>
> After being incarcerated for the past three years I ask why. I question why was the DNA allegedly taken

for [DD]'s body on December 7th, 1998, but not turned in (sic) into the lab until Friday, December 10th, 1998.

...

The answer to these questions lies within the Broward State Attorney's Office and the Broward County Sheriff's Office. BSO cannot falsely accuse anyone without the help of the State Prosecutor's Office.

There have been many others accused and falsely convicted only to be exonerated when the truth come (sic) out years later.

I say to my family I did not do this here....

There is still more good cops that evil ones and some how, some way the truth will be revealed and I'll say it again the answer lies within the Broward Sheriff's Office.

When I was arrested in '98, they had a sample of my DNA then and to me that's the only logical explanation that I have for my DNA being put in this case here. That when they took my DNA in '98, and they didn't arrest me then until 1999 after I was acquitted for these charges I was faced with, then **they put forth and planted this here case against me**.

I was told by Detective Al Stone of the Fort Lauderdale Police Department when I was arrested December the 29th, 1998, they took me to the Fort Lauderdale Police Department and Detective Al Stone then told me that he had nine years before he retired and that would be the last thing that he would do, he would get me, and he took me from there and brought me to the Broward County Sheriff's Office.

It is my understanding that Detective Al Stone was the one you called Detective Bukata on December 9th and gave him my name. ...

...

Someone went into my apartment after I was arrested on December the 29th, 1998....

> I believe that they went into my apartment and they planted that young lady's blood in my apartment. I have no doubt about it in my mind. I don't know her, never met her before, never seen her before.
>
> ...
>
> ... But I knew that I had did (sic) nothing wrong. I knew that I did not murder, rape, or kidnap [DD]. I knew Broward Sheriff's Office was out to get Lucious Boyd. Detective Bukata told me that.

(R.29 2265-74)(emphasis supplied).

Continuing his theme of claiming planted evidence, Boyd suggested on cross-examination that his bite marks were placed on DD's arms after he was arrested and gave a dental impression (R.29 2278). In response to the prosecutors question as to how the police came to have Boyd's sperm and the collection of a DNA sample, the following occurred:

> THE WITNESS: I didn't have my sperm in my mouth, but **my sperm was in this young lady right here that they took from me in 1998**. That's where they got my sperm from, out of me. **That young lady right there**. That's where my sperm came from.
>
> MS. "JM": You raped me.
>
> THE WITNESS: Yes, sir. Not out of my mouth.

(R.29 2279)(emphasis supplied).

Daphne Bowe, DD's mother, testified at the evidentiary hearing and according to her, Boyd, while being cross-examined, partially stood to make his point twice, as he informed the jury that the police obtained his semen from that "**young lady right**

there" and used it to plant his semen on DD, the victim in this case. (R.29 2279; PCR.31 5707-09). It was at this point, and having been goaded by Boyd, that JM responded that Boyd had raped her. (PCR.31 5707-09). Laswell and Ongley reported that 11 years after the fact and refreshing their recollection with the transcript, they offered that the exchange between Boyd and JM happened very fast. Also, they did not want to call more attention to the incident by objecting or moving for a mistrial; they wanted the matter behind and not call the jury's attention to it. (PCR.31 5618-20, 5636-39, 5677-79, 5688-89, 5696). Ongley also offered that one of the defense themes was that the police were looking at Boyd for the instant murder because they "hadn't gotten him on other cases." (PCR.31 5673) Because some 11 years had passed between the trial and postconviction hearing, Ongley was having some difficulty recalling all that transpired, he offered that allowing JM's response to stand "allowed a window of opportunity now to show why the police were out to get Mr. Boyd." (PCR.31 5679-80)

In denying relief, the trial court found the claim failed under the invited error doctrine discussed in *Norton v. State*, 709 So.2d 87, 94 (Fla. 1997) and *Walls v. State*, 926 So.2d 1156, 1166-67 (Fla. 2006) and reasoned:

> At the evidentiary hearing, Ms. Bowe testified that during the Defendant's trial she was seated in the first row of the gallery, and the alleged rape victim

was sitting next to her (EH Vol. II at 53). She recounted that when Defendant responded to the prosecutor's question about how the police had his sperm in the instant case, Defendant stood up and "physically pointed" to the alleged rape victim as the source of his sperm. (EH Vol. II at 51-22) (sic) Thus, it was the Defendant who invited the error in this case, by antagonizing the alleged victim in the 1998 case and identifying her for the jury by pointing in her direction. Defendant should not be allowed to take advantage of an error that he created during trial.

Even assuming that counsel performed deficiently by not moving for a mistrial, Defendant cannot prove prejudice. In a claim of ineffective assistance of penalty phase counsel, to prove prejudice a defendant "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." Porter v. McCollum, 13 S.Ct. 447, 453 (2009). The reasonable probability is assessed by considering the totality of available mitigation evidence adduced at trial and during the penalty phase proceedings and reweighing it against the aggravators. *Id.* at 453-54 (quoting Williams v. Taylor, 529 U.S. 362, 397-08 (2000)).

In this case, the alleged victim's comment could not have had any impact on Defendant's sentence. The jury was aware from Defendant's testimony during the penalty phase that he had been falsely accused of another crime and arrested in 1998 by the Broward Sheriff's Office, but found not guilty and released. (ROA at 2266). The jury also knew from Defendant's testimony that the police had his sperm from the 1998 case. (ROA at 2279). Even more important, Defendant himself pointed out to the jury who the victim in the 1998 case was. (ROA at 2279). The only new information that reached the jury through the outburst was the nature of the charges in Defendant's 1998 case. This could hardly have made any difference in the jury's deliberations.[14] The jury unanimously found

[14] The trial court's rationale is reasonable as the jury knew sperm collection was involved, thus, it was not much a leap for the jury to surmise that sexual battery was at issue in the 1998 even without JM confirming it at Boyd's invitation.

> Defendant guilty of kidnapping and sexual battery, which was a sufficient basis to support the felony murder aggravator found by the trial court. Furthermore, the trial court found the "no significant prior criminal history" statutory mitigator and accorded it medium weight. Defendant did not show how the outburst would have changed the balance of the aggravators and mitigators in this case. Thus, there is no reasonable probability that Defendant would have received another sentence. For the reasons set forth herein, Defendant's instant subclaim is hereby denied.

(PCR.23 4428-29)

Boyd takes issue with the finding that defense counsel made a strategy decision not to object or seek a mistrial. However, as the trial court found, and as the record supports, while counsel did not recall having a discussion about was action to take,[15] their review of the record allowed them to report their thought process. Further, having reviewed the record, counsel was able to offer how not objecting would inure to the benefit of the defense either by not calling more attention to JM or by giving the jury insight into why the police had focused on Boyd and may have had evidence to plant on the deceased victim. *Howell v. State*, 877 So.2d 697, 705 (Fla. 2004) (recognizing "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at

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[15] Such is reasonable given the unexpected and brief exchange. He does not explain how should have objected to his client's actions which of course would have been called into question as part of the motion for mistrial.

the time." (*quoting Strickland*, 466 U.S. at 689)).

Moreover, such findings by the trial court comport with the *Strickland* admonishment that court must "indulge [the] strong presumption" that counsel's performance was reasonable and that he "made all significant decision in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90. *See also Darden v. Wainwright*, 477 U.S. 168 (1986) (noting that "there are several reasons why counsel reasonably could have chosen to rely on" the chosen action); *United States v. Fortson*, 194 F.3d 730, 736 (6th Cir. 1999) (concluding, on trial record alone – no postconviction evidentiary hearing, that the defendant had failed to overcome that presumption counsel provided effective assistance as "the court "[could] conceive of numerous reasonable strategic motives" for counsel's trial actions). Hence, the trial court properly relied on counsel's testimony refreshed from the trial transcript reporting reasons for the non-action taken in this case and the benefits derived there from to make findings of a reasoned trial strategy.

Equally important to the trial court was the fact that the JM's outburst was in direct response to Boyd's instigation. Boyd blames JM for the comment she made and tries to excuse Boyd's behavior because it occurred during cross-examination. (IB at 63, 65) However, as the trial court found, Boyd should be permitted to claim error by counsel for not objecting or

moving for a mistrial, when it was Boyd who antagonized his former victim by standing and pointing in her direction as the source of his sperm collected by the police. (PCR.31 5707-09) Any error in permitting the jury to learn of JM's identity, or that she was the person who had accused him of rape, rests squarely at Boyd's feet. Boyd pointed her out, not once, but twice to the jury; partially standing to make his point.

Likewise, the cross-examination questions were relevant to Boyd's testimony, namely, his innocence and the planting of evidence. The State did not incite Boyd's actions; the prosecutor merely sought an explanation as to how the police obtained his sperm sample when they had taken a swab of his mouth. Boyd claims he had to point out JM because the prosecutor would not let his finish his answer. (IB at 65-67; R.29 2278-80) However, the answer Boyd wanted to finish was that he did not have his sperm in his mouth, but that it "was in this young lady right here that they took from me in 1998. That's where they got my sperm from, out of me. That young lady right there." (R.29 2279). Clearly, that was Boyd's intended answer when arguably he was cut off by the prosecutor just moments before. That exchange reasonable cannot be found to be the impetus for Boyd's decision to point to his former victim nor can it relieve Boyd part in the goading of JM.

Similarly, Boyd's attempt to deflect responsibility for his

actions, namely, that JM was seated in the first row, should be rejected. Moreover, any suggestion of some nefarious intent by the State is specious and was not established at the evidentiary hearing. Furthermore, Any proposal that JM should have been removed or barred from an open courtroom before anything happened even in light of the trial court's admonition to maintain decorum, would have required the court, prosecutor and defense counsel[16] to be clairvoyant and anticipate Boyd's decision to use her to make his case for the planting of evidence. The prosecutor's question did not call for Boyd to react by standing and pointing out JM; that he did on his own. There is no evidence that JM was being at all disruptive until Boyd's made JM's presence known and her connection to him as the woman who had accused him of rape, and that he was able to win an acquittal at trial.

To claim ineffectiveness now is akin to creating an error at trial and blaming such on the trial court during the direct appeal. Such "gotcha tactics" have been decried by appellate courts noting that a defendant should not be encouraged to invite an error and then take advantage of it on direct appeal or collateral review. *See generally, Norton v. State*, 709 So.2d 87, 94 (Fla. 1997); *Terry v. State*, 668 So.2d 954, 962 (Fla.

[16] As *Strickland*, 466 U.S. at 689 provides, "every effort [should] be made to eliminate the distorting effects of hindsight." Counsel could not have anticipated Boyd's actions.

1996); *Czubak v. State*, 570 So.2d 925, 928 (Fla. 1990); *McCrae v. State*, 395 So.2d 1145 (Fla.), *cert. denied*, 454 U.S. 1041 (1980); *McPhee v. State*, 254 So.2d 406 (Fla. 1st DCA 1971). It was Boyd who goaded JM into responding as she did. Counsel was not deficient in letting the comment pass without objection, especially given Boyd's courtroom antics and statement-testimony suggesting planted evidence and overzealous police tactics.

In challenging the finding of no prejudice, Boyd points to *United States v. Evers*, 569 F.2d 876, 879 (5th Cir. 1978) (finding counsel was surprised by answer of government witness and court erred in declaring mistrial over defense objection); *Arbelaez v. State*, 626 So.2d 169, 174 (Fla. 1993) (noting challenged incident was victim's mother crying as she took the witness stand and calling defendant "'murderer' and a 'son of a b****" in Spanish); *Messer v. Kemp*, 760 F.2d 1080, 1086 (11th Cir. 1985) (challenging denial of mistrial where victim's father lunged toward defendant screaming and shouting as he listened to FBI Agent repeat defendant's "first-hand account of the gruesome murder"); *Evans v. State*, 995 So.2d 933, 945-46 (Fl. 2008) (involving alternate juror *sua sponte* answering for witness as to location of a traffic light at issue in case); *Rodriguez v. State*, 433 So.2d 1273 (Fla. DCA. Ct. App. 1983) (noting victim's wife made emotional outbursts). However, none of these cases involve a situation where it was the defendant who goaded,

incited the outburst of which he now complains and asserts counsel should have sought a mistrial. Such placed this case in a different posture than those referenced by Boyd, namely, that it was Boyd who created the situation and that he should not benefit from the error he inserted into the trial. While *Tribue v. State*, 106 So.2d 630, 633 (Fla. App. 1958) provides "[i] It is the duty of a trial judge carefully and zealously to protect an accused, so that he shall receive a fair and impartial trial, from improper or harmful statements or conduct by a witness or by a prosecuting attorney during the course of a trial" the trial court should not be required to protect Boyd from himself.

Contrary to Boyd position (IB at 67-68) is unable to prove prejudice; i.e. how the result of his penalty phase would have been different. JM's comment did not go to Boyd's guilt or an aggravating factor; the unanimous jury had found Boyd guilty of kidnapping and sexual battery which later formed support for the felony murder aggravator. More important, JM's comment did not impact the findings of the "lack of criminal history" statutory mitigator; the trial court gave the mitigator medium weight. *Boyd*, 910 So.2d at 177 n.2. Equally important, the jury was well aware, based in part on Boyd's penalty phase testimony, that he had been charged and acquitted of a prior rape. That was the basis of his argument that the police had semen to plant in the instant murder case; the police got his semen from the

JM. The only information the jury learned from Boyd's actions was that his prior victim was sitting in the courtroom. The jury already knew that JM's allegations were not believed by another jury as Boyd was acquitted of her rape.

Even if the jury heard JM make her remark, the only information new to them was her face, which Boyd, himself, pointed out to them. Such would hardly make a difference in the sentencing deliberations of this unanimous jury. This is especially true in light of the jury's conviction of Boyd for not only the murder, but the kidnapping and sexual battery of DD, and their prior rejection of his defense that the police planted the evidence. Likewise, Boyd is unable to show that his sentence would be different where both the felony murder and heinous atrocious and cruel aggravators were found. Boyd has not carried his burden of showing both deficiency and prejudice under *Strickland* where counsel elected not to object to a comment by a spectator[17] Boyd stood and physically pointed to her twice, thus, goading her into a response. This Court should affirm the denial of postconviction relief.

[17] To the extent Boyd sets forth facts surrounding JM's presence in the courtroom even though the State may have been able to call her as a witness should Boyd have opened the door to her testimony, Boyd may not alleged ineffective assistance or prosecutorial misconduct arising from JM's mere presence in the courtroom. Those matters were not plead in his postconviction motion below and may have been deemed procedurally barred. Furthermore, the State may have been precluded from calling her as a rebuttal witness.

ISSUE IV

THE SUMMARY DENIAL OF RELIEF ON CLAIMS INEFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL AND NEWLY DISCOVERED EVIDENCE WERE PROPER (restated)

The trial court denied relief summarily on several of Boyd's claims. Here, he challenges those rulings on his claims (1) that guilt phase counsel rendered ineffective assistance related to the adequacy of voir dire, failure to challenge the admissibility of evidence under *Frye*, and failure to utilize a forensic expert; and (2) that newly discovered evidence in the form of the 2009 National Academy of Sciences report ("NAS Report") called into question the forensic evidence used to convict him.

A. STANDARD OF REVIEW

In *Lucas v. State*, 841 So. 2d 380, 388 (Fla. 2003), this Court stated:

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.

See also, State v. Coney, 845 So. 2d 120, 134-35 (Fla. 2003); *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). Also, "[t]o support summary denial without a hearing, a court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the

motion." *McLin v. State*, 827 So.2d 948, 954 (Fla. 2002) (*quoting Anderson v. State*, 627 So.2d 1170, 1171 (Fla. 1993)). Additionally, a defendant is not entitled to relief on a claim of ineffective assistance of counsel where there has been an earlier appellate court finding that an unpreserved error did not rise to the level of fundamental error. *See White v. State*, 559 So. 2d 1097, 1099-1100 (Fla. 1990) (rejecting ineffective assistance of counsel claim regarding counsel's failure to preserve issues for appeal in postconviction appeal based upon earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error).

To establish ineffective assistance of counsel, a defendant must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 687-94. *See Davis*, 875 So.2d at 365 (noting under *Strickland* "the deficiency in counsel's performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined."). This Court has stated that "[u]nless a defendant makes both showings [of deficiency and prejudice], it cannot be said that the conviction or death sentence resulted from a breakdown in

the adversary process that renders the result unreliable. *Valle v. State*, 778 So.2d 960, 965 (Fla. 2001)

B. GUILT PHASE COUNSEL RENDERED EFFECTIVE ASSISTANCE WITH RESPECT TO CONDUCTING *VOIR DIRE*, CHALLENGING THE FORENSIC EVIDENCE, AND IN NOT UTILIZING A FORENSIC EXPERT

1. *VOIR DIRE* ON JURORS' KNOWLEDGE OF THE CASE

Body challenges the trial court's summary denial of relief claiming that counsel rendered ineffective assistance during voir dire when defense counsel did not question Jurors Striggles and Berberich ("Berberich") individually. The trial court rejected this claim finding defense counsel reasonably relied on the *voir dire* conducted by the trial court and prosecutor and that the record showed that the jurors averred they could set aside their knowledge of the case and be fair. Other than disagreeing with the trial court's conclusion, Boyd offers nothing calling that decision into question.

Here, the trial court rejected Boyd's claim (Claim III.A.1 below) that counsel was ineffective for "failing to question jurors Berberich and Striggles individually regarding the extent of their prior knowledge of Defendant's case or its effect on them." Relying upon *Teffeteller v. Dugger*, 734 So. 2d 1009, 1028 (Fla. 1999) and *Castro v. State*, 644 So. 2d 987, 990 (Fla. 1994), the trial court reasoned:

> As in *Teffeteller*, in this case the record reflects that the trial court asked the venire pool if they have heard, seen, or read anything about the Defendant

in the media. (ROA at 56). Five prospective jurors indicated they had some knowledge about the case and they were individually questioned by the prosecutor. (ROA at 56-57). Of those five, only Ms. Striggles and Ms. Berberich served on the jury. The prosecutor inquired extensively of both jurors whether they could set aside any knowledge regarding the case and render a verdict based on the evidence adduced at trial. The following exchange took place between the prosecutor and the two jurors:

> MR. LOE [the prosecutor]: -- when was it that you felt that you've either seen or heard something in the media regarding the case?
> MS. STRIGGLES: I have heard my family talk about it. I don't know if it's the same gentleman, if it was related to the Boyd Funeral Home, but my family has spoken about it.
> MR. LOE: Okay. And I'm going to try to narrowly ask questions so that if you've heard something, since the rest of the people in the room haven't, we'd like the trial to take place here in the courtroom as opposed to in the media. So, I'm going to try to narrowly draft my questions to you. Having heard discussions with your family regarding Mr. Boyd and hearing about the Boyd Funeral Home chain, is that going to affect you one way or the other with respect to your deliberations if you are chosen as a juror?
> MS. STRIGGLES: No, because I don't know.
> MR. LOE: Okay. And that's fair. You don't believe everything you read in the paper, do you?
> MS. STRIGGLES: No, sir.
> MR. LOE: Is there anything that might happen once you're back in the jury room because you have had some media exposure?
> MS. STRIGGLES: No, sir.
> MR. LOE: Okay. You could put it out of your mind and not let it affect you in any way, shape or form?
> MS. STRIGGLES: Yes, sir.

(ROA at 58-59).

. . .

In addition, as reflected by the record, Defendant consented to an abbreviated voir dire:

MR. LASWELL: We are here at the midpoint of the second day of voir dire, and the Court and the State I compliment, did an excellent job of voir dire, but I want the record to reflect that even though, what did I take 20 minutes or so, that it was with the consent of Mr. Boyd that [sic] and with the agreement of Mr. Boyd that I conduct an abbreviated voir dire. If that's not the case I'd be glad to go on for a couple of other days. But I think we have all the information we want and need and we are ready to go.

Is that right, Mr. Boyd?

THE DEFENDANT: Yes, sir, that's correct.

(ROA at 317-318). Given the extensive inquiry by the prosecutor of the two jurors and the Defendant's consent to an abbreviated *voir dire* by the defense counsel, trial counsel cannot be deemed deficient for failing to repeat the same questions already asked by the prosecutor. In addition, both jurors met the impartiality test since they stated on the record that they could set aside any knowledge of the case and reach a verdict based on the evidence presented during trial. The Defendant cannot prove prejudice and cannot meet the Strickland test as to this portion of this claim.

(PCR.23 4396-99)

It must be noted that Laswell's shortened *voir dire* was with Boyd's approval:

MR. LASWELL: We are here at the midpoint of the second day of voir dire, and the Court and the State I compliment, did an excellent job of voir dire, but I want the record to reflect that even though, what did

> I take 20 minutes or so, that it was with the consent of Mr. Boyd that and with the agreement of Mr. Boyd that I conduct an abbreviated voir dire. IF that's not the case, I'd be glad to go on for a couple of other days.
>
> But I think we have all the information that we want and need and we're ready to go.
>
> Is that right, Mr. Boyd?
>
> THE DEFENDANT: Yes, sir, that's correct.

(R.7 317-18). Also, the defense used five peremptory challenges in seating the 12-member panel and again those decisions were with Boyd's input. (T.7 323-27, 336, 345-46, 348; PCR.31 5627-28, 5663, 5565, 5670, 5684).

The trial court properly relied upon *Teffeteller*, 734 So.2d at 1020 (opining "The mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness."); *Castro*, 644 So.2d at 990. While selecting an impartial jury is accomplished through *voir dire*, it is not necessary for defense counsel to question the jurors as long as the court and prosecutor have questioned them, i.e., defense counsel does not need to repeat prior questions in order to be deemed effective. Such is supported by *Cole v. State*, 841 So.2d 409, 415 (Fla. 2003), where this Court reasoned that neither deficient performance nor prejudice could be shown merely from the fact counsel did not question jurors individually.

> Cole first argues that trial counsel should have questioned each prospective juror individually, and

> counsel's failure to do so constitutes deficient performance. Cole maintains that he was prejudiced because two of the five non-individually questioned venire members ultimately became members of the jury that convicted Cole. The trial court found that every prospective juror was questioned individually by the trial court, by the State, or by trial counsel, and that trial counsel was an active participant throughout voir dire, even though trial counsel did not question each juror individually. There is competent, substantial evidence to support the trial court's findings.

As stated in *Teffeteller*, 734 So.2d at 1020, "[t]he relevant inquiry is whether the jurors can lay aside any opinion or impressions and render a verdict based on the evidence presented in court." This Court found counsel was not ineffective where the trial court's and prosecutor's *voir dire* established that the retained jurors could disregard the information they knew of the case and "render an impartial verdict based solely on the evidence" presented in court. *Teffeteller*, 734 So.2d at 1020 (emphasis supplied).

Here, Striggles reported having heard of the case and when questioned by the state, she agreed she could put aside what she had heard and not let it "affect [her] in any way, shape, or form." (R.5 58-59). Likewise, Juror Berberich reported that she did not "remember very many details" about what she had read/seen on Boyd's case. However, like Striggles, Berberich averred she could exclude the information she had heard from her deliberations. She agreed it would be improper to allow the

news accounts affect her deliberations. (T.5 63). The record refutes completely Boyd's claim that counsel was ineffective by not questioning these jurors further. *See Van Poyke v. Singletary*, 715 So. 2d 930, 932-34 n.4-5 (Fla. 1998) (citing from *voir dire* showing jurors' responses established each could render decision based upon evidence and court instructions). The summary denial of relief should be affirmed.

2. FAILURE TO SEEK *FRYE* HEARINGS

It is Boyd's position that counsel was ineffective for not seeking *Frye*[18] hearings challenging the admissibility of the bite mark and fiber evidence to show those sciences are unreliable fields without industry standards. For support below, Boyd pointed to the 2009 pre-publication copy of Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009) ("NAS Report"). Here, he asserts counsel should have requested *Frye* hearings to challenge the DNA evidence (Short tandem repeat "STR" testing) done by Bode Technology Group. Boyd asserts that had *Frye* hearings been requested, the forensic case against him would have been compromised. The trial court denied relief summarily finding that bite mark, fiber, and DNA evidence was not new or novel, therefore, counsel was not deficient in failing to seek *Frey* hearings. The trial

[18] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

court also determined that even if counsel were deficient in not seeking *Frye* hearings, Boyd's conclusory pleading did not establish *Strickland* prejudice given the "plethora of incriminating evidence in this case." (PCR.23 22-23) Relief was denied properly.

Boyd admits that the fields of bite mark comparison, fiber analysis, and DNA testing are "not new or novel," but that counsel should have "vigorously challenged" the evidence. The fact that these are not new or novel areas undercuts completely Boyd's complaint that counsel should have asked for Frye hearings. As provided in *Rodgers v. State*, 948 So.2d 655, 666 (Fla. 2006), "[t]he *Frye* test is used to determine the admissibility of expert scientific opinion by ascertaining whether new or novel scientific principles on which an expert's opinion is based 'have gained general acceptance in the particular field in which it belongs.' *Frye*, 293 F. at 1014; *see also Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So.2d 1264, 1268 (Fla. 2003)." *Frye* is utilized in Florida only when the science at issue is new or novel. *See Overton v. State*, 976 So. 2d 536, 550 (Fla. 2007); *Branch v. State*, 952 So. 2d 470, 483 (Fla. 2006); *Spann v. State*, 857 So.2d 845 (Fla. 2003); *Brim v. State*, 695 So.2d 268, 271-72 (Fla. 1997); *Hadden v. State*, 690 So.2d 573, (Fla. 1997).

The trial court recognized that *Frye* hearings are held "'in

Florida only when the science at issue is new or novel.' Overton v. State, 976 So. 2d 536, 550 (Fla. 2007) (quoting Branch v. State, 952 So. 2d 470, 483 (Fla. 2006))." (PCR.23 4407) It also found that fiber analysis was not new or novel at the time of Boyd's trial citing *Long v. State*, 610 So.2d 1276 (Fla. 1992); *Waterhouse v. State*, 429 So.2d 301 (Fla. 1983); *Jackson v. State,* 132 So.2d 596 (Fla. 1961). With respect to the bite mark evidence, the trial court relied on *Bundy v. State*, 455 So.2d 330 (Fla. 1984), *abrogated on other grounds Fenelon v. State*, 594 So.2d 292 (Fla. 1992); and *Mitchell v. State*, 527 So.2d 179 (Fla. 1988) to find that this science is not new or novel. Also, the trial court also determined that STR DNA testing likewise is no longer new or novel as found in "*Overton*, 976 So.2d at 553 (finding that STR DNA testing was generally accepted at the time of defendant's 1999 trial and concluding that the STR DNA testing completed at the Bode Lab met the requirements of the Frye test)."[19] (PCR.23 4408). Given that case law, the trial court reasoned:

> trial counsel cannot be deemed deficient for failing to request a Frye hearing to challenge the admissibility of fiber analysis, bite mark evidence, and STR DNA testing, given that these forensic sciences were generally accepted within the scientific community at the time of Defendant's trial. See, e.g., McDonald v. State, 952 So. 2d 484, 495-96 (Fla. 2006)

[19] *See Zack v. State*, 911 So.2d 1190, 1198, n.3 (Fla. 2005) (acknowledging DNA testing is now generally accepted by the scientific community and is not subjected to Frye testing)

> (holding that counsel was not ineffective for failing to request a Frye hearing to challenge the forensic science relied on by the State because there was general acceptance in the scientific community of that particular science at the time of defendant's 1995 trial).

(PCR.23 4408)

The trial court also rejected Boyd's reliance on the NAS Report to support the claim of deficiency finding: "trial counsel cannot be deemed ineffective for not using the conclusions of the NAS Report to challenge the admissibility of the fiber analysis, bite mark comparison, and the DNA analysis, since the report that was not yet published at the time of Defendant's trial." (PCR.23 4408) Boyd counters this by asserting counsel could have used the publications referenced in the NAS report which were in existence at the time of trial.(IB 74).[20] However, as will be addressed below, Boyd has not shown that the science employed for these forensic areas was new or novel. The pith of his challenge goes to the weight which should be accorded to the evidence, not its admissibility. As such, *Frye* is not implicated. Nonetheless, defense counsel did challenge the experts' findings to the extent necessary given the defense at trial which was that the police planted evidence.

a. FIBER EVIDENCE

[20] This admission that the NAS Report is a compilation of publications in existence at the time of trial refutes completely Boyd's argument that the NAS Report is newly discovered evidence. See Issue IV below.

Boyd boldly asserts that had a *Frye* hearing been requested on the methods used to compare fiber samples, the evidence would have been excluded or "at least exposed" as "extremely tenuous and weak." (IB at 76) The State's expert explained his methods of making visual/microscopic comparisons as well as employing an infrared spectrometer. (R.20 1678-84) Boyd has not shown that such methods are new or novel science. He merely objects to using only a single sample for comparison. However, the expert did not testify that the fiber came from that exact mat only that its colors matched. As noted above, fiber analysis has been found to pass the Frye test. *Long*, 610 So.2d at 1276; *Waterhouse*, 429 So.2d at 301; *Jackson,* 132 So.2d at 596; *Trimble v. State*, 102 So.2d 738, 739-40 (Fla. App. 1958) (noting reliance upon fiber, grease, hair, and other trace evidence to support manslaughter conviction).

Moreover, defense counsel followed up on the expert's testimony that he could not say that the fiber came from the rug in Boyd's apartment (R.20 1703) by eliciting the fact that out of the 55 pieces of trace evidence collected, only one match was found. The expert's results were not sent to an outside lab for additional testing. (R.20 1712-13). Given the state of the law at the time of trial and counsel's challenging of the evidence Strickland deficiency has not been shown. Likewise, as explained below, prejudice has not been established.

b. BITE MARK ANALYSIS

Here, Boyd continues to point to the conclusions reached in the 2009 NAS Report released some seven years after his trial. However, he admits that the same report acknowledges that the American Board of Forensic Odontology "has approved guidelines for the analysis of evidence from bite mark victims and suspect biters." (IB at 78). This Court reasoned in Bundy:

> As the trial court found, the basis for the comparison testimony—that the science of odontology makes such comparison possible due to the significant uniqueness of individual dental characteristics—has been adequately established. Appellant does not contest this supposition. Forensic odontological identification techniques are merely an application of this established science to a particular problem. *People v. Marx*. The technique is similar to hair comparison evidence, which is admissible even though it does not result in identifications of absolute certainty as fingerprints do.

Bundy, 455 So.2d at 349. *See also Ex parte Dolvin*, 391 So. 2d 677 (Ala. 1980) (holding *Frye* test was inapplicable to testimony of forensic odontologist comparing skeletal remains with inter vivos photographs because testimony was in the nature of physical comparisons as opposed to scientific tests or experiments). Boyd has not shown that Dr. Rifkin, the dental expert, strayed from the accepted science.

To the extent that Dr. Rifkin characterized the gap in Boyd's teeth as significant as compared to what he has seen in his practice, that is his opinion and should not be subject to

Frye. *See Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007) (holding that *Frye* applies to opinions based on new or novel scientific techniques and does not apply to pure opinion testimony based on training and experience). While, Dr. Rifkin testified that he had measured all his patients' teeth, the "measuring" of teeth is not new or novel and the jury could give the opinion based on Dr. Rifkin's sampling the weight it felt necessary. Defense counsel competently cross-examined Dr. Rifkin pointing out the limited database with only ten percent African-Americans represented, the differences between a dental comparison on a flat two-dimensional surface versus the curved three-dimensional surface of a person's arm, and that Dr. Rifkin is not Board-certified. (R.19 1581-85)

Additionally, Boyd's likening the dental testimony regarding measuring of Dr. Rifkin's patients to the two-step process in DNA testing is unreasonable. As this Court noted in *Bundy*, dental comparisons are akin to fingerprint analysis. Moreover, the measuring of Dr. Rifkin's patients was his own "experience, observation, and research" and as the district court has explained:

> . . . "pure opinion" testimony "refers to expert opinion developed from inductive reasoning **based on the experts' own experience, observation, or research**, whereas the *Frye* test applies when an expert witness reaches a conclusion by deduction, from applying new and novel scientific principle, formula, or procedure

> developed by others." *See Holy Cross Hosp., Inc. v. Marrone*, 816 So.2d 1113, 1117 (Fla. 4th DCA 2001).

Hood v. Matrixx Initiatives, Inc., 50 So.3d 1166, 1173 (Fla. 4th DCA 2010) (emphasis supplied). The fact that Dr. Rifkin's research revealed the gap found in Boyd's teeth to be significant is not the same as the two-step process in DNA testing discussed in *Brim v. State*, 695 So2d 268 (Fla. 1997)[21] There, two scientific methods were needed to render an opinion, namely, the biochemical and statistical sciences. Here, Dr. Rifkin used the well recognized method of comparing the bite marks observed with the dental impressions make of Boyd's teeth. The jury was informed of Dr. Rifkin's findings and his "pure opinion" given his experience in his clinical practice. Counsel was not deficient in his handling of this expert testimony.

c. STR DNA TESTING BY BODE TECHNOLOGY GROUP

[21] However, in *Branch v. State*, 952 So.2d 470 (Fla. 2006), this Court noted that: "under Florida law, the [DNA] expert need not be a statistician himself to testify as to the statistical results. *See Darling v. State*, 808 So.2d 145, 158 (Fla. 2002). Furthermore, admissibility is not contingent upon the expert having compiled the database himself. *See id.* at 158 (citing *Lomax v. State*, 727 So.2d 376 (Fla. 5th DCA 1999)). Instead, "a sufficient knowledge of the authorities pertinent to the database is an adequate basis on which to render an opinion." *Butler v. State*, 842 So.2d 817, 828 (Fla. 2003)." Counsel may not be deemed deficient merely because the trial court ruled against him. *Cf. Mendyk v. State*, 592 So. 2d 1076, 1080 (Fla. 1992) (holding "[w]hen jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is measurably below the standard of competent counsel."), *receded from on other grounds, Hoffman v. State*, 613 So. 2d 405 (Fla. 1992).

Boyd asserts he is capable of proving prejudice arising from counsel's failure to seek a *Frye* hearing on Bode's DNA testing. He seems to rely on his prejudice argument presented under his claim that counsel was ineffective for not utilizing forensic experts. Nonetheless, the State will present its analysis here and reincorporate same in the next section as Body did not make a prejudice argument below when asserting ineffectiveness for not hiring a forensic expert, which the trial court found rendered the claim legally insufficient. (PCR.23 4413)

As noted above, even though the trial court found no *Strickland* deficiency, it addressed the Strickland prejudice prong and found Boyd did not carry his burden for two reasons. First the trial court found that Boyd's prejudice argument was pled in conclusory terms, and second, because of the "plethora of incriminating evidence" remaining. (PCR.23 4408-09) Boyd does not discuss any of the evidence the trial court relied upon in determining *Strickland* prejudice was not established. The evidence referenced by the trial court includes the DNA testing done by the Broward Sheriff's Office Crime Lab ("BSO Lab") and Florida Department of Law Enforcement ("FDLE") which used different DNA testing methods, but reached the same result. (PCR.23 4409) The BSO Lab results were: (1) the seminal fluid found on DD's **right thigh** "matched" Boyd's DNA; (2) Boyd could

not be excluded as the contributor of the foreign found under DD's fingernails; (3) the DNA profile developed from the blood swabs taken from Boyd's armoire were consistent with DD's DNA; (4) DD could not be eliminated as contributing to the blood sample found on Boyd's living room floor; and (5) Boyd could not be eliminated as the contributor of the DNA profile developed from a hair found on DD. (PCR.23 4409; R.17 1376-79, 1384, 1389, 1391). FDLE's DNA testing established: (1) Boyd's DNA in the seminal fluid found on DD's **left thigh**. (PCR.23 4409-10; R.19 1606-10).

The trial court also recognized the record evidence included the eye witness testimony of Linda Bell and Johnnie Mae Harris who saw DD alive at a Texaco station in the early morning hours of December 5, 1998 where DD was talking with a black man in a van, Bell recalled the van was "greenish-blue" and Harris recalled it had the word "Hope" on it. Harris identified the man as Boyd and noted that he indicated he would help DD. (PCR.23 4410; R.9 519-22; 528; 538; 548-55, 561).

Geneva Lewis, Boyd's girlfriend at the time, testified Boyd left her home between 10:00 and 11:00 PM on December 4th and she did not see him until the following morning between 9:00 and 10:00 AM. Boyd was driving Reverend Lloyd's green church van which had writing on it. Lewis also testified that a queen size bed she had left in Boyd's apartment and on which she was still

making payments was missing when she moved back in with Boyd. When she confronted Boyd about the bed he said he gave it away and later said she would not want the bed. Lewis also reported that when living with Boyd she had a brown and "loud yellow" sheet which were similar to those found on DD's body, although Lewis could not recall if she had taken those sheets to her mother's home or left them with Boyd. Yet, she could no longer find the sheets. (PCR.23 4410-11; R.11 808-11, 813-18, 823-24).

Reverend Lloyd, the pastor of the Hope Outreach Ministry Church, testified Boyd occasionally did maintenance work for the church. On December 4, 1998, Boyd had the green church van which had "Here's Hope" written on the side in burgundy letters. Boyd did not return the van until December 7th and when returned, the reciprocating saw, Torx screwdrivers, large claw hammer, and purple laundry bag were missing from the van. The purple laundry bag was similar to the one wrapped around DD's head. (PCR.23 4411; R.10 682-85, 689-90, 700-02, 706, 711-13). The parties stipulated DD's cause of death was a penetrating head wound and the bruising to her head was "consistent but not exclusive of a face plate of a reciprocating saw" and the wounds on DD's chest, hands, arms and head were "consistent with but not exclusive of a Torx [screw]driver." (PCR.23 4411; R.10 764-65).

The trial court also noted that the State had presented other forensic evidence "that tire impressions on the brown

sheet covering the victim's body were consistent with the tires on the church van driven by Defendant. (ROA at 1555-56)." (PCR.23 4412) It was the testimony of Terrell Kingery, of the Orlando Regional Crime Laboratory, that conclusively that markings on the brown were "made by a General Ameri 550 TR tire, but he could not say for sure that the tire on the church van made the marks. (ROA at 1556, 1564)." (PCR.23 4412) The State also presented testimony establishing the shower curtain rings in Boyd's bathroom "were unsnapped and there was no shower curtain liner." (PCR.23 4412) The trial court noted this as "relevant because the victim's body was found wrapped, among other things, in a shower curtain." Based on this "overwhelming evidence of guilt," the trial court found "that confidence in the outcome would not be undermined by excluding the bite mark evidence, the fiber matches, or the DNA results obtained by Bode Technology." (PCR.23 4412). The trial court's findings are established by the record and establish Boyd kidnapped, sexually assaulted, and killed DD. This Court should agree that even if counsel should have requested Frye hearings to exclude the bite mark, fiber, and Bode DNA results, the result of the proceeding would not have been different. Relief was denied properly.

3. FAILURE TO UTILIZE FORENSIC EXPERTS

Here, Boyd asserts that counsel should have hired a forensic expert to challenge the DNA and bite mark testimony as

the entire defense revolved around impeaching the forensic evidence.[22] Boyd takes issue with: (1) the finding of legal insufficiency for not pleading *Strickland* prejudice and (2) rejecting *Strickland* deficiency based on the strategy decision to preserve two closing arguments. The record supports the trial court's findings and analysis and the denial of relief should be affirmed.

Boyd's argument below was that consulting with a forensic expert "could have alerted" counsel to problems with the State's DNA evidence to allege cross-contamination, poor controls, poor documentation, lack of follow-up, and that Bode's report was conclusory. (PCR.8 1273-75) With respect to the bite mark evidence, Boyd claimed below counsel was ineffective for not hiring an expert to help prepare for cross-examination and challenge Dr. Rifkin's findings and credibility. Besides these suggestions, Boyd did not address the balance of the evidence the State had presented against him nor did he set forth how the result of the trial would have been different as far as his conviction and sentence had a forensic expert been utilized.

[22] Contrary to Boyd's implication here that he disputed the forensics, the record shows that the defense was that the "tremendous quantity of forensic evidence" as best shows mere consistency with the tires, fibers, tools, and dental impressions, but the State has not shown they are Boyd's. However, where there are tests showing "matches," that evidence was planted.

Below, the State asserted the claim was insufficiently pled[23] both in its written response and during the case management conference (PCR.12 2210-11; PCR.30 5475-79). Now for the first time on appeal, Boyd attempts to make a showing of prejudice, but the trial court cannot be faulted for finding the claim insufficiently pled. However, the trial court also addressed the prejudice prong and its factual findings and legal conclusion are supported by the record and should be affirmed.

Even with the noted pleading deficiency, the trial court addressed the merits finding: "The record conclusively demonstrates that trial counsel made a strategic decision not to present any evidence during trial in order to preserve the closing argument 'sandwich' and benefit from the opportunity to give two closing arguments during the guilt phase." (PCR.23 4413) Citing to *Anthony v. State*, 660 So. 2d 374, 376 (Fla. 4th DCA 1995) the trial court recognized generally a finding of strategy in inappropriate without an evidentiary hearing, however, "when it is so obvious from the face of the record that the trial counsel's action or inaction 'is very clearly a

[23] *See Freeman*, 761 So. 2d at 1061 (opining "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); *Ragsdale v. State*, 720 So.2d 203, 207 (Fla. 2003) (stating that although courts are encouraged to conduct evidentiary hearings, a summary/conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record").

tactical decision well within the discretion of counsel, no evidentiary hearing is necessary.' *Hannon v. State*, 941 So. 2d 1109, 1138, (Fla. 2006)." (PCR.23 4413). The court pointed to (R.15 1149-50; R.17 1326-27; R.18 1478-79; R.20 1662; R.21 1905-06) and found the defense strategy was to preserve the dual closing argument "sandwich" which was reasonable in light of *See Evans v. State*, 995 So. 2d 933, 945 n.16 (Fla. 2008) as well as in light of the defense that the police planted evidence. "[C]challenging the State's DNA through the testimony of expert witnesses would not have advanced in any way Defendant's theory of the case, but it would have deprived the defense of the opportunity to present two closing arguments." (PCR.23 4414).

Boyd takes issue with those findings and attempts to distinguish *Evans*. He asserts that the evidence in *Evans* was found to be "vague, unreliable and irrelevant," thus, it was a reasonable strategy to preserve the "sandwich." While *Evans* addressed an ineffectiveness claim for not presenting alibi witnesses, the same principle applies here. The DNA testing done by Lynn Baird included challenges to her results as unreliable and irrelevant. The presentation of an expert would not have advanced the defense of planted evidence and the challenges to the reliability of the DNA was brought forth effectively on cross-examination or explained by Lynn Baird on direct. Hence, *Evans* does support the trial court's conclusion

of no *Strickland* deficiency.

a. DNA EXPERT

Likewise the record, as cited in the trial court order, supports the factual finds, refutes completely Boyd's factual allegations, and establishes the fact that Strickland prejudice was not proven by Boyd. The trial court reasoned that all challenges to Baird's DNA testing noted in the postconviction motion were addressed "either by Dr. Ongley[24] during the cross-examination of Ms. Baird or during her direct and re-direct examination" (PCR.23 4414).

With respect to allegation of contamination the trial court found four reasons to reject the allegations. First, it found Boyd's "speculations" were "conclusively refuted by the record" and pointed to Detective Suchomel's testimony establishing that the medical examiner used the same syringe to draw more than one person's blood other than the victim's. Ongley on cross-examination had Baird explain that this was the first and last case of cross contamination and that such was brought to light and corrected as a result of the use of the more sensitive PCR DNA testing recently instituted. (PCR.23 4414-4415 (page 30 of order) record page unnumbered) These findings are supported by

[24] The court also found "the defense team had the benefit of Dr. Ongley, a former medical examiner with the Broward County Medical Examiner's Office, a forensic expert, and an attorney. Dr. Ongley used his forensic expertise to vigorously challenge the State's forensic evidence." (PCR.23 4414)

the record (R. 989, 1403-04). The court also found Boyd's motion misstated the evidence.[25]

Second, with respect to the claim the DNA results obtained from the carpet indicated contamination, the court pointed to (R.17 1381-83). It found the lack of results from a stained area was the result of the glue used on the carpet and positive results from an unstained that Baird's ability "to retrieve a DNA profile from the negative control area does not indicate that there was anything wrong with her testing procedures." (PCR.23 4415-16) Third, the trial court also rejected the complaint Boyd raised with respect to Baird's documenting the DNA profile developed from under DD's fingernails finding the record established Baird used the same PCR DNA method as she did with the other samples. Boyd could not be excludes as a contributor to the mixed sample, however, she located the Y chromosome indicating male and six of the nine probes matched Boyd's DNA. (PCR.23 4416-17). Again these findings are found in the record. (R.17 1378-79, 1412).

Fourth, the court rejected Boyd's complaint with Bode's DNA

[25] Finding: "Contrary to Defendant's allegations, Ms. Baird did not test the same contaminated blood sample twice obtaining different results. Ms. Baird testified that once she tested the victim's blood sample from the Medical Examiner's Office and noticed DNA profiles from at least two individuals, she determined that she could not use that sample as the standard. (ROA 1368-70). Nevertheless, she was able to obtain the victim's standard DNA profile from the known hair standards and the oral swabs taken from the victim. (ROA at 1373)." (PCR.23 4415)

lab report was conclusory and that an expert could have assisted counsel in obtained necessary data and assisting with the cross-examination of Bode's expert to show Bode relied on the Broward Lab's results. The court found Boyd's argument "speculative" and was based on an "unfounded assumption" that the Broward Lab's findings were flawed. The trial court found that there was nothing in the record or in Boyd's postconviction motion to undermine the testimony that sperm was found on the swabs from DD's right and left thighs. The court took the analysis to the next step, namely, even if no sperm were present it did not undermine Bode's DNA testing as "[t]here was no evidence or argument presented by Defendant that the reliability of the DNA testing is dependent upon the correct identification of the bodily fluid examined." (PCR.14 4417) Here again, those findings are supported by the record. (R.17 1373-74; PCR.8 1272-79).

The record shows that these alleged "problems" cited by Boyd were brought to the jury's attention. Moreover Dr. Ongley, Boyd's counsel, was a medical doctor who had been a practicing medical examiner[26] (R.4 610). Without question, as the trial

[26] This Court may take judicial notice of the fact that Dr. Ongley was a former medical examiner with the Broward County Medical Examiner's Office, had testified as an expert witness numerous times in Broward Circuit Court, and is now in fact the head of BSO's crime lab. This Court certainly may take judicial notice of Dr. Ongley's forensic expertise and his unique value as one of Boyd's counsel. It is not often that a defendant has

court concluded, the record shows that the evidence was challenged thoroughly and the defense team had an expert in the form of Dr. Ongley to assist in interpreting and challenging the medical and forensic evidence. The trial transcript shows that this claim is refuted from the record. Dr. Ongley clearly would lend his expertise to the defense, thus, a separate forensic expert was not required. Moreover, Baird's account and actions were thoroughly challenged on cross-examination. On direct examination, Baird admitted that DD's blood drawn by the medical examiner yielded DNA profiles from **at least two** individuals and that this was caused by contamination due to the procedure of using the same syringe to extract blood samples from different individuals. On cross-examination she explained that Boyd's case was the first to note contamination following this procedure due to the new PCR-DNA testing BSO was doing - such was much more sensitive than the RFLP done previously. Nonetheless, Baird had a DNA standard for DD from her hair and oral swabs. (R.17 1368-69, 1372-73, 1403-06). Given this, there is no possibility of showing prejudice as required by *Strickland*; the State had clean DNA standards from DD separate and apart from the medical examiner's blood draw. The result of

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a medical doctor, forensic expert, and lawyer all wrapped up in one package as his trial counsel.

the trial would not have been different had this contamination been stressed further by the defense.

With respect to the inconsistent findings when testing the back of the carpet sample, Baird explained she seldom obtained results from the back of carpeting due to the glue used. However, when the carpet fibers were tested, DD's DNA profile was found. (R.17 1380-83). Baird also was challenged as to the small amount of human DNA tested; she looked at 10 probes from trillions of possibilities. She then had to admit that not every sample tested for each probe and that she could not date the samples. (R.17 1399-1403, 1406-07). Baird also admitted she combined the fingernail scrapings from DD's fingers. As such, the jury knew this was a combined result, thus, Boyd has not shown deficiency or prejudice. A counsel does not render ineffective assistance automatically by failing to impeach a witness with a report, if cross-examination is used to bring out the weaknesses in the witness's testimony. *See Card v. Dugger*, 911 F. 2d 1494, 1507 (11th Cir. 1990); *Adams v. Dugger*, 816 F. 2d 1493 (11th Cir. 1987) (holding counsel was not ineffective for failing to obtain expert pathologist where counsel cross-examined State expert and argued weaknesses in testimony to jury in closing argument). Also, failing to present cumulative impeachment evidence does not rise to the level of ineffective

assistance. *See Valle v. State*, 705 So.2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So.2d 541, 545-46 (Fla. 1990).

The defense at trial was that blood/semen evidence was planted by the police. Thus, there was no great need to challenge the DNA results, for surely if the police were going to plant evidence against Boyd, they would plant the right evidence. Also, some of Baird's collections were sent to other labs, i.e., FDLE and Bode where consistent result were obtained. Boyd has not pointed to any testing error or inconsistent results which would show innocence or the possibility of a different guilt or penalty phase result. Any contamination, processing documentation, or faulty results due to the surfaces tested does not undermine the other DNA results or any of the other forensic and eye-witness testimony proving Boyd's guilt. As the trial court determined, Boyd has not established the need for a forensic expert in this area or prejudice from the decision not to hire one. The state reincorporates the prejudice argument from the preceding sub-claim as further support that the relief was denied properly.

b. BITE MARK EXPERT

In rejecting Boyd's claim that counsel was ineffective for not securing an expert in odontology, the trial court reasoned that relief is not warranted merely because on collateral review, the defendant has found a more favorable expert. (PCR.23

4418). The trial court found that Dr. Ongley utilized his medical experience and cross examined Dr. Rifkin thoroughly on his bite mark findings and opinion. (PCR.23 4419) Boyd refutes that finding. (IB at 87-89)

While Boyd claims he has another dental expert to refute the findings of the State's Dr. Rifkin, he admits that dental comparisons is not an exact science. However, he holds out his expert's alleged finding as more reliable than Dr. Rifkin's findings to suggest counsel was ineffective in not securing such an expert. The mere fact that the defense is able to find an expert years later to offer an opinion more favorable to the defense does not establish either deficient performance nor prejudice. *See Assay v. State*, 769 So.2d 974, 986 (Fla. 2000) (reasoning that first expert's evaluation is not less competent merely upon the production of conflicting evaluation by another expert); *Gaskin v. State*, 822 So.2d 1243, 1250 (Fla. 2002); *Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir.) (opining "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort"), *modified on other grounds*, 833 F.2d 250 (11th Cir. 1987).

Nonetheless, as the trial court found, defense counsel thoroughly challenged Dr. Rifkin's opinion by pointing out that DD's arm is a curved surface, while Dr. Rifkin did his analysis in just two dimensions, except for the canine teeth, which were done in three dimensions. Counsel also pointed out that only 10 percent of his practice involved African-American patients and that he was not board certified by the American Board of Forensic Odontology. (R.19 1581-85). Given counsel's cross-examination, it cannot be said he rendered deficient performance. *See Card*, 911 F. 2d at 1507; *Adams*, 816 F. 2d 1493 (holding counsel was not ineffective for failing to obtain expert pathologist where counsel cross-examined State expert and argued weaknesses in testimony to jury in closing argument).

Furthermore, there is no possibility of prejudice arising from the defense handling of the bite mark evidence. As the State pointed out above in its prejudice argument, reincorporated here, even absent the bite mark, fiber, and DNA evidence from Bode Labs, there was overwhelming evidence of guilt, both forensic as well as eye-witness testimony, that the result of the trial would not be different. Relief was denied properly and should be affirmed.

C. BOYD'S CLAIM THAT THE 2009 NAS REPORT WAS "NEWLY DISCOVERED EVIDENCE" CALLING INTO QUESTION THE FORENSICS USED TO CONVICTION AND SENTENCE HIM WAS DENIED PROPERLY

Here, Boyd points to the 2009 pre-publication copy of

Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009) ("NAS Report") as newly discovered evidence tending to show that the forensic evidence utilized in convicting and sentencing him was the result of testing methods of "questionable and untested underlying scientific principles." In particular, Boyd challenges the bite mark, fiber analysis, and DNA testing results and asserts counsel was ineffective in the manner these test results were challenged. Pointing to the NAS Report, Boyd maintains that the terminology used to describe DNA findings, such as "match" and "could not be excluded" tend to effect the jury's perception of the reliability of the science. Likewise, he claims the NAS Report calls for more research on the basis for bite mark comparisons and that the NAS Report announced that there are "no set standards" for evaluating and concluding two fibers came from the same manufacturing batch. (IB at 90-93) For added support, Boyd points to a mishandling of DNA evidence by a Broward Crime Lab. This Court has determined that the 2009 NAS Report is not "newly discovered evidence," Boyd claim here fails. With respect to his reliance on any mishandling of DNA evidence by the Broward Crime Lab,[27] the State relies upon and

[27] Additionally, at trial Boyd challenged the admissibility of DNA testing and received a standing objection to its

reincorporates here its response to the previous two sub-claims wherein Boyd challenges counsel's failure to seek *Frye* hearings and to utilize forensic experts.

The trial court rejected the "newly discovered evidence claim finding that the NAS Report did not constitute "newly discovered evidence. After citing to *Schwab v. State*, 969 So.2d 318, 325 (Fla. 2007) and *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998) for the guidance, the court concluded Boyd had not carried his burden given *Johnston v. State*, 27 So.3d 11, 21 (Fla. 2010). The court noted that in *Johnston*, this Court found the same NAS report was not newly discovered evidence as the report citied to publications published before the defendant's trial, some of which were printed during the postconviction litigation. (PCR.23 4440-41). The trial court also recognized that this Court found the NAS Report "lacked the 'specificity that would justify a conclusion that it provides a basis to find the forensic evidence admitted at [Johnston's] trial to be infirm or faulty.'" (PCR.23 4440-41). Like this Court in

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admissibility (R.17 1371-72). To the extent counsel argued against the admissibility of DNA samples/results collected by Lynn Baird of the Broward Lab the matter should be found procedurally barred. This issue could have been raised on direct appeal, and Boyd is barred now from cloaking the claim as one of ineffective assistance to overcome the bar. *Rivera v. State*, 717 So.2d 477, 480 n.2 (Fla. 1998) (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffective assistance to overcome procedural bar or to re-litigate direct appeal issue).

Johnston, the trial court quoted from the NAS Report that "the committee decided early in its work that it would not be feasible to develop a detailed evaluation of each discipline in terms of its scientific underpinning, level of development, and ability to provide evidence to address the major types of questions raised in criminal prosecutions and civil litigation" (PCR.23 4440-41)

In denying relief, the trial court recognized that Boyd was pointing to section of the NAS Report which referenced published articles from 1892 to 1998 all of which were in existence before Boyd's trial and some which were published during the trial, appellate process, or postconviction litigation. The court followed *Johnston*, 27 So.3d at 23 and *Dennis v. State*, 109 So.3d 680, 700 (Fla. 2012) in determining the NAS report was not "newly discovered" evidence.[28] (PCR.23 4441)

[28] This Court has held that inadmissible information does not constitute newly discovered evidence. *Williamson v. State*, 961 So.2d 229, 234 (Fla. 2007); *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998) and has declined to recognize new opinions or new research studies as newly discovered evidence. *Schwab v. State*, 969 So.2d 318 (Fla. 2007). It has rejected claims that governmental studies, such as this instant one, constitute evidence at all, much less newly discovered evidence. *Power v. State*, 992 So.2d 218, 220-23 (Fla. 2008); *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008); *Diaz v. State*, 945 So.2d 1136 (Fla. 2006); *Rolling v. State*, 944 So.2d 176 (Fla. 2006); *Rutherford v. State*, 940 So.2d 1112 (Fla. 2006). This Court has characterized such reports as "a compilation of previously available information ... consist[ing] of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches." *Rutherford*, 940 So.2d at

This ruling conforms with *Foster v. State*, -- So.3d -- WL 5659482, *24-25 (Fla. 2013); *Dennis*, 109 So.3d at 700; *Johnston*, 27 So.3d at 21-23. See also *Diaz*, 945 So.2d at 1144 (finding newly published letter not newly discovered when information underlying letter available since 1950); *Glock v. State*, 776 So.2d 243, 251 (Fla. 2001). Boyd should not be heard to complain of the finding that the NAS Report is not newly discovered evidence[29] and the denial of relief should be affirmed.[30]

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

1117. In determining whether the report is newly discovered evidence, the Court has looked at when the report information could have been discovered through due diligence.

[29] He maintains in his "Argument IV-I-B," page 74, that counsel was ineffective for not seeking *Frye* hearings as supporting information was available, but identifies the report as a "collection of widely accepted practices, information, studies, and data within the field of forensic science that was in existence much (sic) prior to its publication in July 2009." Essentially, Boyd admits the NAS Report is not newly discovered, only newly compiled.

[30] Also, the summary denial is proper especially in light of the fact that in his postconviction relief motion Boyd did not point to any evidence discussed in the report that he could not have learned of years ago. Instead he relied upon the conclusions reached by the NAS Report's authors concerning their theories of what should be required to admit forensic evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Suzanne Meyers Keffer, Esq. and Scott Gavin, Esq. of the Office of the Capital Collateral Counsel-South, One East Broward Boulevard, Suite 444, Fort Lauderdale, FL 33301 by electronic mail to KefferS@ccsr.state.fl.us and GavinS@ccsr.state.fl.us this 6th day of January, 2014.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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