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IN THE SUPREME COURT OF FLORIDA

Case No. SC13-244

Lower Court Case No. 99-005809CF10A

LUCIOUS BOYD,
Appellant,

v.
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Boyd's motion for post-conviction relief following an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"Supp. R." -- supplemental record on direct appeal to this Court;

"PC-R" -- record on the first 3.851 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Boyd has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Boyd, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE CASE

The Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida entered the judgments of convictions and death sentence currently at issue.

On January 30, 2002, Mr. Boyd was found guilty of one count of First Degree Murder, one count of Sexual Battery, and one count of Armed Kidnapping (R. 461-463).

The penalty phase of Mr. Boyd's trial began on March 11, 2002. On March 12, 2002, the jury rendered an advisory sentence unanimously recommending the death penalty (R. 499-506). The circuit court sentenced Mr. Boyd to death on June 21, 2002 for the count of First Degree Murder, finding that two (2) statutory aggravators outweighed one (1) statutory mitigator and five (5) non-statutory mitigators (R. 537-555). Further, the circuit court imposed a life sentence for the charge of Armed Kidnapping and a fifteen (15) year sentence for the charge of Sexual Battery (Id.). A formal sentencing order was entered on that date (Id.).

This Court affirmed Mr. Boyd's conviction and sentence on direct appeal. *Boyd v. State*, 910 So. 2d 167 (Fla. 2005); *cert. denied Boyd v. Florida*, 546 U.S. 1179 (2006).

Following this Court's affirmance, Mr. Boyd filed his initial Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to

Amend in the Circuit Court for the Seventeenth Judicial Circuit on February 14, 2007 (PC-R. 328-403). On May 29, 2009, after extensive public records litigation, Mr. Boyd filed his first amendment to his Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to Amend (PC-R. 1257-1457), amending Claims III B and C, claim V, and claim IX and adding claims X and XI.

On March 23, 2012, Mr. Boyd filed a second amendment to his Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to Amend, amending claim XI. (PC-R. 2549-2587).

The circuit court conducted a Case Management Conference on June 5, 2012 (PC-R. 5439-5527). On July 20, 2012, the circuit court entered an order granting an evidentiary hearing on numerous claims including: Claim III(A)(2) ineffective assistance of counsel for failing to adequately conduct voir dire, in part; Claim IV juror misconduct; Claim V subsections (A), (B), (C) ineffective assistance of counsel for failing to investigate and present mitigation at the penalty phase and failure to move for a mistrial during penalty phase; Claim VI denial of right to expert psychiatric assistance under *Ake v. Oklahoma*, 470 U.S. 68 (1985). (PC-R. 2769-2771).

On August 28-31, 2012 an evidentiary hearing was held. Prior to the start of the evidentiary hearing Mr. Boyd, through counsel, waived presentation of several

claims contained in his Florida Rule of Criminal Procedure 3.851 Motion. Specifically, Mr. Boyd waived the presentation of Claim V, A and B relating to mental health mitigation and counsel's alleged failure to investigate and present both general and mental health mitigation. (PC-R. 7). Mr. Boyd also waived Claim VI pertaining to the denial of his right to competent assistance of a mental health expert at trial in violation of *Ake vs. Oklahoma*. The circuit court conducted a colloquy of Mr. Boyd during which he confirmed his intent to waive the above mentioned claims. (PC-R. 7-15).

Based on the waiver of Mr. Boyd's penalty phase claims, the circuit court heard testimony and received evidence related to Mr. Boyd's claims of juror misconduct based on the untruthful responses of jurors Tonja Striggles and Kevin Rebstock regarding their criminal histories, ineffective assistance of counsel for failing to adequately *voir dire* jurors Tonja Striggles and Kevin Rebstock regarding their criminal histories and ineffective assistance of counsel for failing to object or move for a mistrial based on inflammatory and prejudicial comments made by a prior alleged rape victim who was seated in the courtroom during Mr. Boyd's testimony.

Juror Tonja Shalonda Striggles was convicted twice of false report of a bomb, subsequently violated probation and was charged with possession of a firearm by a convicted felon and carrying a concealed firearm. (Def. Ex# 2-Case

No. 83-9071; Def. Ex#3-Case No. 86-16293; Def. Ex#4-Case No. 88-3624) (PC-R. 5564-65). Juror Striggles was also convicted in Georgia for contributing to the delinquency of minors, a misdemeanor (Def. Ex# 10)(PC-R. 4735-36). Juror Striggles's civil rights were not restored until April 4, 2008, six years after Mr. Boyd's trial (Def Ex. #1) (PC-R. 5564). Additionally, juror Kevin James Rebstock had a misdemeanor solicitation charge upon which adjudication was withheld. (Def. Ex#5) (PC-R. 5566). During *voir dire*, neither juror disclosed their criminal history.

The trial court, explaining the meaning and purpose of *voir dire*, told the jury venire "[a]s lawyers we interpret [the term *voir dire*] to mean to speak the truth and that's what we need you folks to be doing during this entire process" (R. 25). The court further explained to the jury that there may be reasons why a juror cannot serve which does not reflect on a potential juror as a bad person, only that the juror may be "better suited to be a juror in another case with a different set of charges, or possibly making [you] better suited to be a civil juror and not on a criminal jury at all" (R. 26). Before the actual *voir dire* began, the court asked the jurors to swear or affirm that each of them would answer all questions truthfully (R. 31). The record indicates that all jurors answered affirmatively (R. 31).

The court then questioned the venire regarding familiarity with the participants and/or witnesses in the trial and then whether any jurors were

unalterably opposed to the death penalty (R. 41). Both parties had an opportunity to question these jurors regarding their feelings about the death penalty. The Court employed the same procedure regarding jurors who believed death was the only appropriate penalty for first degree murder (R. 53). With both groups still in the jury box, the Court then posed to the venire the follow-up question whether the jurors would be able to weigh the aggravating and mitigating circumstances and apply the law as instructed by the Court (R. 55). No member of the venire responded negatively. Finally, the Court inquired whether any jurors had been exposed to media regarding Mr. Boyd's case or were familiar with the name Lucious Boyd in a criminal setting (R. 56). The State questioned the jurors who responded affirmatively in the presence of the entire venire as to their knowledge (R. 58-64). Defense counsel did not ask any questions (R. 64). Subsequently, the Court filled the jury box with the remaining 43 jurors and began the afternoon by reaffirming the importance of being forthcoming (R. 92-94). The court assured the jury panel that if any line of questions was the least bit sensitive to a juror, a juror could request to speak to the court and parties outside the presence of the other panel members (R. 94.).

Each juror, in turn responded to the questionnaire distributed by the trial court. Ms. Striggles responded to the questionnaire and specifically question #11, dealing with friends or family that had prior involvement with the criminal justice

system indicating that she had lived in Broward County on and off for 30 years, she considered herself a "military brat" and her "last job was United States Army" (R. 113). Ms. Striggles responded affirmatively to question # 11 indicating she had friends or family who were previously involved with the court system (R. 113). Despite her extensive criminal history as an adult, Ms. Striggles acknowledged that she herself had only been involved with the system when she was a juvenile and "guess[ed]" that she had been treated fairly (R. 114). Beyond the brief background information on the questionaire, the only information revealed regarding Ms. Striggles was that she had prior knowledge of Mr. Boyd's case (R. 58), she expected the prosecutor "to be honest" (R. 133) and through a one word response she indicated she could recommend death (R. 191).

During *voir dire*, juror Kevin James Rebstock briefly responded to the questionnaire distributed by the court and indicated that he lives in Lauderdale Lakes and has lived in Florida since 1970 (R. 97). Despite his own criminal history, juror Rebstock responded "no" to question #11 (R. 98).

Following the responses to the questionnaire, but still during the first day of jury selection, the State proceeded with *voir dire* continuing until midday the following day following day. Half way through the second day of jury selection, defense counsel began questioning potential jurors. Incredibly, Mr. Boyd's trial counsel, William Laswell, questioned the potential jurors for a mere 20 minutes

(R. 317) Trial counsel then abruptly concluded, stating "I'm hungry. I'm done and they're tired" (R. 316) Trial counsel conducted no additional *voir dire* and indicated on the record that his questioning was only 20 minutes (R. 317). Counsel then noted for the record that he was conducting the abbreviated *voir dire* with the consent of Mr. Boyd (R. 317). Despite these comments, the prosecutor immediately felt compelled to remark on the record "Judge since the record is black and white and [Mr. Laswell] said I'm hungry and I'm tired, I know that was him just being zestful" (R. 318). Given the chance to clarify his previous "zestful" statements, trial counsel instead again reiterated in front of the jury "No. I am hungry and I am tired and so is the jury" (R. 318).

William Laswell was appointed to represent Mr. Boyd at trial along with Dr. James Ongley (PC-R. 5570). Mr. Laswell is currently a member of the Florida bar but no longer in practice (PC-R. 5568). He was admitted to practice in Florida in 1972 and was actively practicing from that time forward, focusing on criminal defense including fifteen years with the Broward County Public Defender's Office (PC-R. 5569). Laswell testified he could not remember how many capital cases he had tried, curtly remarking to defense counsel that it was "more than you" (Id.).

Laswell's theory of defense at trial consisted of "trying to put barriers to a lot of scientific evidence that proved whatever the fact was would be consistent with the State's position" (PC-R. 5572), but he did not have an "overall strategy"

for seating a jury in Mr. Boyd's case that comported with any specific defense strategy (Id.) He did not have a particular type of individual he was looking for, only that he wanted a fair juror (PC-R. 5573). Laswell recalled consulting with Dr. Ongley about voir dire "every day" (Id.) He believed he did not have a chance to conduct any voir dire until the third day of trial[1] and that he felt by the time they had a chance to ask the panel questions, "we knew an awful lot about those people to begin with" (Id.)

After reviewing the record, Laswell confirmed that questionnaires were used and specifically question #11 seemed to deal with jurors' personal experience or any family or friends experiences with the court system (PC-R. 5577). He stated that he had no reason to believe that either the questionnaire utilized by the court or the questions posed by Judge Rothschild were not sufficiently clear to the jurors (PC-R. 5578). He had no recollection of either juror Rebstock or juror Striggles (Id.). Laswell could not recall asking any of his own questions following the State and the Court's follow up questions regarding the jurors' answers to the questionnaire (PC-R. 5580).

[1] When confronted with the fact that voir dire lasted only a day and half, Laswell testified that he did not have any reason to refute the record (Id.). Furthermore, with respect to the length of the defense's portion of voir dire, Laswell testified that he did not dispute that the record on appeal indicated that it lasted merely twenty minutes, stating "I had already listened to a day and a half of voir dire along with everybody else" (Id.).

No follow up questions to juror Striggles were conducted during voir dire (PC-R. 5583). Laswell's reasoning for failing to do so was because it was his "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 in this case, Mr. Loe, ought to be concerned about it before anybody else" (Id.) When asked whether he employed that strategy in Mr. Boyd's case, Laswell tersely retorted to defense counsel that "you try to overthink [sic] things. I don't think I had a strategy with Ms. Striggles, because I never even remembered her until recently. All I know is that if you tell me that she had a juvenile record, and some checks, or whatever, I would not normally generally have followed up on that. I don't consider that to be a problem for a defendant accused of a crime of near the magnitude that it is for the state attorney" (PC-R. 5584).

Laswell's handwritten notes from voir dire only indicated "juvenile record quote, 'got over it' unquote" with respect to juror Striggles (PC-R. 5587). This was not something he testified he would "have followed up on." (Id.) Laswell did not know that juror Striggles had a prior criminal history which included two felony convictions for false bomb reports, one felony conviction for possession of a firearm by a convicted felon, and one conviction in Georgia for contributing to the

delinquency of a minor (Id.)(Def. Ex#2-4, # 10). He was also unaware at the time of trial whether juror Striggles had had her civil rights restored (PC-R. 5588). Had he known such information, Laswell testified "it would indicate to me that I ought to do some voir dire" (Id.)

Laswell attempted to provide explanation for the failure to perform any follow up questioning:

> My understanding is the record is bare of her saying any of the things that you just asked me. That she replied either to Mr. Loe or to Judge Rothschild in answer to the question as I have indicated. Yeah, I had a juvenile records but I got over it. All right. I didn't see any reason to ask any other question.
>
> Number one, her response would indicate she wasn't real happy with the State to begin with. And number two would indicate that after years in the Military and her facing of, I don't know, of, you know, being called before the master or whatever, she was no likely to be sympathetic to law enforcement and the State.

(PC-R. 5588). Laswell confirmed that he did not know for certain whether her bias was in favor of or against the defense (Id.) He acknowledged that the flip side of his logic was equally possible that it may also promote cynicism and bias against those defendants that plea innocence (PC-R. 5589-90). Changing his tune, Laswell conceded: "I don't think you can say anything of a convicted felon would be likely and apply it across the board in the spectrum of American jurisprudence" (Id.).

Laswell understood that a juror who was a convicted felon and had not had their rights restored would be disqualified from service by statute (PC-R. 5591). He confirmed that he understood this would provide the basis for a "cause challenge" (Id.) However, Laswell indicated that he did not know if he would have asserted a cause challenge regarding juror Striggles, stating: "I don't know. Maybe. Maybe not," it would have "depend[ed] on how I was impressed by Ms. Striggles. And I haven't found any questioning of her by me in what you have provided me. So I suspect that what happened was the judge or Tony Loe said you were in trouble. She said yeah I had a little juvenile thing, da, da, da. And that's all she said to the judge and to the prosecutor. I am not going to follow-up on it" (PC-R. 5591-92). When pressed further as to whether he may have exercised a challenge for cause, Laswell flippantly responded "when ifs and buts become can and nuts, what a merry Christmas we will all have. I couldn't possibly answer that question" (PC-R. 5592).

At the time of Mr. Boyd's trial Laswell recalled that Steve Michaelson of the public defender's office was in the practice of obtaining property records and possibly voter registration information for potential jurors (PC-R. 5593-94) (State's Ex. #1-3) (PC-R. 5624, 5645). Laswell testified that this was not something which he cared about (PC-R. 5693-94, 5622). No information was listed beside juror Striggles's section of the voter registration notes (PC-R. 5646). He

was not aware of any practice by the Public Defender's Office at the time of Mr. Boyd's trial where they were conducting criminal background checks of potential jurors.

Laswell agreed that depending on where particular charges may have occurred, he possibly would have been able to access those files in the clerk's office (PC-R. 5595). Altough Ms. Striggles' cases originated from Broward County (PC-R. 5596-97), he wasn't certain that he would have been able to access these files had he gone down to the clerk's office and provided them with the case number. Laswell did not typically investigate: "as a public defender there were investigators to do that…Lawyers are supposed to lawyer. Investigators are supposed to investigate" (PC-R. 5598).

Laswell was not aware of the underlying facts and circumstances of Ms. Striggles' convictions as detailed in her case files including: her evaluation for competency in 1983 (PC-R. 5600); that she was committed to a program for counseling (Id.); that the case file indicated she had made phone calls with false bomb threats or that she was suicidal (PC-R. 5600-01); that she had received a psychological evaluation for drugs and alcohol and that the results of that evaluation indicated a diagnosis of schizoid personality disorder (Id.); and that Striggles had paid someone to take her GED for her and that she was borderline mentally retarded (PC-R. 5602). Laswell then testified that had he known about

these facts they "may have" influenced him to exercise a peremptory challenge but didn't because he wasn't aware of them. (PC-R. 5610).

Laswell did not recall litigating a motion in limine filed to keep out any of Mr. Boyd's prior criminal cases where he was acquitted (PC-R. 5613). Laswell was not sure whether it was important to keep out Mr. Boyd's prior acquittals but thought it was "decent lawyering" (PC-R. 5614). Had Laswell known that the State seated one of Mr. Boyd's alleged prior rape victims, and a rebuttal witness, in the courtroom during Mr. Boyd's testimony, he would have raised an objection (PC-R. 5617). He did not know the alleged victim was in the courtroom until an outburst occurred (Id.). The outburst from the alleged victim occurred during Mr. Boyd's testimony regarding the issue of how they had obtained his DNA sample (PC-R. 5638). Laswell did not raise an objection to the outburst at the time it occurred (PC-R. 5619). The only strategic reason he was able to provide for why this did not occur was that he "probably didn't have a chance" (PC-R. 5620). Laswell likewise did not move for a mistrial, stating that he could not think of a strategy for that other than he wanted to "get it behind me as quick as possible" (PC-R. 5620, 5637). Laswell confirmed that from the transcripts of the penalty phase hearing in the record on appeal the outburst had occurred during Mr. Boyd's testimony regarding the issue of how they had obtained his DNA sample (PC-R. 5638).

When asked during cross examination whether, knowing what he does now regarding juror Striggles history, he would have changed his thought process regarding use of a peremptory challenge, Laswell testified "I don't know. But I sure would have conducted some voir dire" (PC-R. 5633). Laswell noted that he would have wanted to ask more questions about the surrounding circumstances of the crimes in order to reach a determination as to whether he wanted her on the jury or not (Id.) He then noted that in his estimation he was "not a good witness in this case" (PC-R. 5634). That he was now older, retired, and that this was a "bad case" with a "difficult client" and that he was glad to be done with it (Id.)

Dr. James Ongley is currently employed at the Broward Sheriff's crime lab (PC-R. 5651). Dr. Ongley was first licensed to practice law in the State of Florida in 1990 and was employed with the Broward County Public Defender's Office from 1990-2004 (Id). During his time with the Public Defender's Office Dr. Ongley eventually became responsible for handling capital crimes, the first of which was he was assigned to was Mr. Boyd's (Id.) With respect to Mr. Boyd's case, Dr. Ongley stated that Laswell was the "primary attorney" and was handling most of the death penalty aspect of the case, while he was responsible for the expert and technical witnesses at trial (PC-R. 5662).

Dr. Ongley believed that it was Laswell who conducted voir dire (PC-R. 5663). Their strategy for voir dire was "trying to get rid of those people who are

helpful to the State, and who have inclination to support the State" (Id.) Dr. Ongley noted, "you are trying to look for some people who, you know, will be sympathetic to listening to what you have to say and will keep an open mind" (Id.) According to Dr. Ongley, the strategy for actually asking the questions was something which was exclusively Laswell's, and because "he'd done it for so many decades [Ongely] was there really to see how he did it" (Id.) When it came time to do the strikes, Ongley recalled that they would discuss it amongst themselves, Mr. Boyd included, and then a decision would be made that a person would be struck and he would then actually get up and announce the strike (PC-R. 5663-65).

Dr. Ongley's notes reflected that juror Striggles was a 25 yr old black female, military brat, and juvenile delinquent (Def Ex#9) (PC-R. 5666-67). Dr. Ongley remarked that the juror sheet was "a method for me to remember who the juror is when we are discussing them about strikes. It is not the sum total of their opinions. It's a vehicle for you as the attorney to remember okay who is Ms. Striggles. And then these are things that would bring back and you would remember more about the person. Its not a laundry list of all the things and all the opinions held by that person" (PC-R. 5683).

Ongley's notes also indicated that juror Rebstock was a white male, auto technician, and a juror in a civil case (PC-R. 5669). Ongley was did not recall whether any follow up questions were asked of either juror Rebstock or Striggles

(PC-R. 5670). He also did not recall whether any discussions were had between himself and Laswell as to whether any should have been asked (Id.) The final call with regards to challenges to the jurors was a consultation amongst the three of them according (Id.)

Dr. Ongley confirmed that they asserted the statutory mitigator of no significant prior criminal history (PC-R. 5672). To that end, it was important for them to keep out Mr. Boyd's prior acquittals, and attempted to do so in a motion in limine prior to the start of the penalty phase (Id.) The issue was significant because "there was an undercurrent in the trial also. One of the theories of the case was that Mr. Boyd was being selected by the Sheriff's department for this case because of they [sic] hadn't gotten him on the other cases" (PC-R. 5672-73). Because of this undercurrent, "it was a fine line that was trying to be walked" (PC-R. 5673).

During argument on the motion in limine, the defense learned that the State had flown in one of Mr. Boyd's previous alleged rape victims (Id.) The defense was trying to keep out not only the actual previous arrests and eventual acquittals but also the underlying facts of any previous charges (PC-R. 5674). After review of the record, Dr. Ongley confirmed that the judge decided he was going to allow the arrests as well as the underlying facts, only provided that Mr. Boyd first opened the door (PC-R. 5675).

Dr. Ongley did not recall objecting to the alleged victim sitting in the gallery during Mr. Boyd's testimony (PC-R. 5677). The record reflected that prior to Mr. Boyd's testimony the Court had admonished the spectators against any sort of outbursts and that they were to maintain their demeanor (PC-R. 5678). Despite the admonishment, during Mr. Boyd's testimony the alleged victim blurted out "you raped me" (Id.). Ongley agreed that the record did reflect that no objection or motion for mistrial was raised by the defense following this outburst (Id.). He could not think of any strategy reason why they did not move for a mistrial or object (PC-R. 5679).

Dr. Ongley only speculated that they felt the outburst now provided them with a window of opportunity to show why the police were out to get Mr. Boyd (PC-R. 5679-80). Dr. Ongley speculated that the jury could say when the argument was being made that this is why the [police] were out to get Mr. Boyd (Id.). Following Mr. Boyd's testimony and the outburst by the alleged victim the State never presented any rebuttal witnesses and there was no opportunity to cross examine her about her improper statement (PC-R. 5681).

Upon cross examination, Dr. Ongley admitted that while juror Striggles' answer regarding her juvenile history would be an indication of possible bias against law enforcement, he did not know what the extent of her involvement had been (PC-R. 5690). Dr. Ongley again confirmed that he could not even recall

whether she was asked any follow up questions regarding her answer about a prior juvenile history (Id.)

Dr. Ongley believed that juror Striggles's ethnicity was not something which dictated her presence on the jury. Dr. Ongley noted "you don't make your decision just based on what their ethnicity is" (PC-R. 5691). Dr. Ongley also explained that while the notes he takes during *voir dire* help him in his ability remember jurors, they are not the end point. Further questions would need to be asked of someone like juror Striggles based upon the answers she provided on the record during *voir dire* (PC-R. 5694).

The State called one witness, Daphne Bowe, the mother of the victim, over defense objection (PC-R. 5703). Ms. Bowe testified that she was in the courtroom when the outburst occurred (PC-R. 5707). She indicated that during cross examination, while the prosecutor was asking Mr. Boyd a question, Mr. Boyd "stood up and he pointed…" in the direction of the alleged victim in the attempt to indicate from whom the State obtained a sample of his semen (PC-R. 5707-08). The alleged victim was sitting right next to her and she heard her respond, "you raped me" (PC-R. 5708). Ms. Bowe confirmed that the alleged victim was seated, alongside Ms. Bowe, in the front of the courtroom at trial, directly behind the State (PC-R. 5709). She also confirmed that Ms. Monroe also stood and pointed while she yelled out "you raped me" (Id.).

Following the evidentiary hearing, the circuit court denied Mr. Boyd's Motion for Postconviction Relief on January 2, 2013 (PC-R. 4386-4446). A notice of appeal to this Court was timely filed on January 29, 2013 (PC-R. 4448-49). This appeal follows.

SUMMARY OF THE ARGUMENT

ARGUMENT I: Mr. Boyd was denied a fair and impartial jury at trial because of juror misconduct. The failure of two jurors to truthfully disclose information regarding their prior criminal history denied Mr. Boyd a fair and impartial jury.

ARGUMENT II: Mr. Boyd was denied the effective assistance of counsel at *voir dire*. Trial counsel's failure to conduct a meaningful *voir dire* denied Mr. Boyd his right to due process and a fair and impartial jury.

ARGUMENT III: Mr. Boyd was denied the effective assistance of counsel at penalty phase. Trial counsel failed to object or move for a mistrial following highly inflammatory and prejudicial commentary from a spectator. Mr. Boyd was prejudiced as a result.

ARGUMENT IV: The circuit court erred in summarily denying Mr. Boyd's claims of ineffective assistance of counsel at guilt phase for: failure to adequately conduct voir dire of jurors personal knowledge of the case, failure to challenge the admissibility of evidence pursuant to *Frye*, and failure to utilize forensic experts;

and Mr. Boyd's claim that newly discovered evidence establishes that the forensic science used to convict Mr. Boyd is unreliable and not valid.

ARGUMENT I

EVIDENCE OF JUROR MISCONDUCT ESTABLISHES THAT THE OUTCOME OF MR. BOYD'S TRIAL WAS UNRELIABLE AND VIOLATED HIS DUE PROCESS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY UNDER THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

> Maintaining the sanctity of the jury trial is both critical and integral to the preservation of *a fair and honest* judicial system. It is also significant to the trust and confidence our citizens place in the judicial system…Consequently, *a failure to ensure that our jury panels are comprised of only fair and impartial members renders suspect any verdict reached*.

Matarranz v. State, Case No.: SC11-1617, Slip op. at 2 (Fla. October 3, 2013) (emphasis added). Ensuring that jury panels are "comprised of only fair and impartial jurors" is never more crucial than in a capital case. Yet, in Mr. Boyd's capital trial, *voir dire* lasted only one and a half days; counsel for Mr. Boyd questioned the jury for merely twenty minutes during *voir dire*; and two jurors withheld critical criminal history information, one of which was disqualified from service due to her status as a convicted felon. This is not the fair and honest judicial system contemplated by this Court.

At the evidentiary hearing, Mr. Boyd proved that jurors, Tonja Shalonda Striggles and Kevin James Rebstock failed to disclose critical criminal history information during *voir dire* despite being asked to disclose information regarding involvement with the criminal justice system. Both jurors were not forthcoming, despite repeatedly being instructed on the importance of truthfulness during the *voir dire* process and despite their affirmance that they would do so. (R. 25, 26, 31, 94)

On the first day of *voir dire*, the court sat all of the potential jurors in the gallery. Initially, the trial court, explaining the meaning and purpose of *voir dire*, told the jury venire "[a]s lawyers we interpret [the term *voir dire*] to mean to speak the truth and that's what we need you folks to be doing during this entire process" (R. 25). The court further explained to the jury that there may be reasons why a juror cannot serve which does not reflect on a potential juror as a bad person, only that the juror may be "better suited to be a juror in another case with a different set of charges, or possibly making [you] better suited to be a civil juror and not on a criminal jury at all" (R. 26). Before the actual *voir dire* began, the court asked the jurors to swear or affirm that each of them would answer all questions truthfully (R. 31). The record indicates that all jurors answered affirmatively (R. 31).

After emphasizing the importance of candor, the court initiated *voir dire* through use of its own questionnaire. The court assured the jury panel that if any

line of questions was the least bit sensitive to a juror, a juror could request to speak to the court and parties outside the presence of the other panel members (Id.). Importantly, question eleven of the court's questionnaire asked whether a potential juror has any friends or family previously involved in the court system. Each juror, in turn responded to the questions presented on the questionnaire.

When called upon, Kevin James Rebstock briefly responded to the questionnaire and indicated that he lives in Lauderdale Lakes and has lived in Florida since 1970 (R. 97). In response to question # 11, Mr. Rebstock responded "no" (R. 98). In fact, Mr. Rebstock himself was previously involved with the court system in that he was arrested, charged and pled no contest to a charge of soliciting prostitution.

Tonja Shalonda Striggles responded to the questionnaire indicating that she had lived in Broward County on and off for 30 years, she considered herself a "military brat" and her "last job was United States Army." (R. 113). Ms. Striggles responded affirmatively to question # 11 indicating she had friends or family who were previously involved with the court system (R. 113). Ms. Striggles then acknowledged that she herself had been involved with the system when she was a juvenile, but only "guess[ed]" that she had been treated fairly (R. 114).

Ms. Striggles has actually had more extensive involvement with the criminal justice system than she indicated. It is unrefuted that Ms. Striggles was

convicted twice of false report of a bomb and subsequently violated probation and was charged with possession of a firearm by a convicted felon and carrying a concealed firearm. None of which occurred when she was a juvenile. Mr. Boyd moved into evidence certified copies of Juror Striggles clerk of court files detailing her prior conviction and criminal history, including the certified judgments and sentences for each of her convictions in Broward County, Florida as well as a conviction she had in Georgia for contributing to the delinquency of minors, a misdemeanor. (Def. Ex# 2-Case No. 83-9071; Def. Ex#3-Case No. 86-16293; Def. Ex#4-Case No. 88-3624; Def. Ex# 10) (PC-R. 4461-4668; 4735-36). Additionally, Mr. Boyd moved into evidence a certified copy of the certificate of restoration of civil rights for Tonja Sholanda Striggles dated April 4, 2008, six years after her service on Mr. Boyd's jury. (Def Ex. #1) (PC-R. 4460). Finally, Mr. Boyd also moved into evidence a purge report from the Broward County Clerk of Court confirming Juror Rebstock's misdemeanor solicitation charge for which adjudication was withheld in January 1992. (Def Ex#5) (PC-R. 4669-4673). With the exception of Ms. Striggles's Georgia conviction,[2] the State did not refute any of her felony convictions, nor did it refute Mr. Rebstock's misdemeanor charge.

[2] The State objected to the certified judgment and sentence from Georgia on the basis that, according to the Broward County clerk files, a judge in Broward County had declined to violate Ms. Striggles's probation based on that case as he was unsure as to her legal representation in the Georgia proceeding. (PC-R. 5720-21; 5724). The court overruled the objection.

At the outset, the lower court denied Mr. Boyd's claim of juror misconduct as procedurally barred since it should have been raised on direct appeal. The lower court's reliance on *Elledge v. State*, 911 So. 2d 57 (Fla. 2005) is misplaced. In *Elledge*, this Court held that Elledge's "substantive constitutional challenge to the rule governing juror interviews is procedurally barred as it was not raised on direct appeal." *Elledge* at 77. The lower court relies on footnote 27 which indicates that any substantive judicial misconduct claim could have and should have been raised on direct appeal. Here, because both jurors in question concealed critical information, Mr. Boyd was not aware of the criminal histories of Jurors Striggles and Rebstock until postconviction public records production. Until he had the records of these jurors' criminal histories, Mr. Boyd did not know these jurors were untruthful. As such, Mr. Boyd could not have raised the jurors' untruthfulness on direct appeal.[3] Mr. Boyd raised the substantive juror misconduct claim at the first opportunity in his initial postconvcition motion. Furthermore, this Court has certainly reviewed substantive juror misconduct claims on postconviction review where the underlying facts were unknown at the time of direct appeal. *See e.g. Lugo v. State*, 2 So. 3d 1 (Fla. 2008). Because Mr. Boyd's

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[3] In finding that Mr. Boyd could have raised his substantive juror misconduct claim on direct appeal, the lower court is implying a lack of diligence on Mr. Boyd's part. Such a finding would necessarily require a finding that trial counsel and/or direct appeal counsel was deficient for failing to discover the misconduct. See Argument II, infra.

juror misconduct claim is not procedurally barred, Mr. Boyd is entitled to a new trial.

Ms. Striggles misconduct is two-fold: first she concealed her status as a convicted felon; second, she failed to disclose material facts and circumstances regarding her convictions, as well as the convictions themselves, which would affect her ability to serve on Mr. Boyd's jury. Mr. Boyd is entitled to a new trial under analysis of either the concealment of her status as a convicted felon or the non-disclosure of material facts.

First, the concealment of Ms. Striggles's status as a convicted felon whose rights had not been restored statutorily disqualified her from service on a jury:

> No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror.

Fla. Stat. Ann. § 40.013 (West). Mr. Boyd asserts that because convicted felons are prohibited from service pursuant to Fla. Stat. 40.013 prejudice is presumed in a criminal case when a juror has failed to disclose such a conviction during *voir dire*. There is no requirement to show actual bias or prejudice. Unfortunately, in Florida the law is unsettled with respect to a juror disqualified from service due to a prior felony conviction in the context of a criminal case. However, looking to the line of

cases addressing jurors who are disqualified for other reasons, including a juror who is under active prosecution at the time of jury service, there is no other answer but that prejudice is inherent.

Contrary to this reasoning, the lower court determined, if Mr. Boyd's juror misconduct claim was not procedurally barred, he had not shown that either juror were actually biased or prejudiced, citing *Companioni v. City of Tampa*, 958 So. 2d 404 (2nd DCA 2007) (PC-R. 4424-25). In *Companioni v. City of Tampa*, 958 So.2d 404, (2nd DCA 2007) the Court held that in a civil case, absent a showing of actual bias or prejudice a complaining party is not entitled to a new trial based on a juror's concealment of their statutory disqualification due to a felony conviction. Notably, in doing so, the district court of appeal acknowledged that the same might not be required in a criminal context where there exists the general notion that a felon juror possesses inherent bias. The district court distinguished a felon juror's non-disclosure of disqualification for a felony conviction in a criminal case from such a non-disclosure in the civil context and reasoned:

> The notion that felon jurors have an 'inherent bias' has generally been expressed in the context of criminal cases, not civil cases like the one before us. One can make the argument that a convicted felon 'might well harbor a continuing resentment against 'the system' that punished him and an equally unthinking bias in favor of the defendant on trial, who is seen as a fellow underdog caught in its toils.' *Rubio v. Superior Court*, 24 Cal.3d 93, 154 Cal.Rptr. 734, 593 P.2d 595, 600 (1979) (en banc). On the other hand, criminal defendants who have

> gone to trial and have been convicted are the parties who complain about service by felon jurors, not the prosecution. *See, e.g., Humphreys*, 982 F.2d at 260-61. Moreover, it is a relatively easy task to attribute motives to the felon juror that favor the prosecution. One federal judge proposes two hypotheses to explain why the felon juror could be prejudiced towards a guilty verdict. *Boney*, 977 F.2d at 642 (Randolph, J., dissenting). **First, the felon juror 'may have developed a callous cynicism about protestations of innocence, having no doubt heard many such laments while incarcerated.' *Id*. Second, a felon juror's 'desire to show others-and himself-that he is now a good citizen might lead him to display an excess of rectitude, both in his deliberations and in his vote**.' *Id*.

Companioni, 958 So. 2d at 413 (footnotes omitted)(emphasis added). It is clear from the reasoning in *Companioni* that there is a distinction between the concealment of other factors which disqualify a juror from service and concealment of a felony conviction by a juror serving in a criminal case. This distinction is even further realized in the difference between a civil and criminal case. Yet, the lower court completely overlooked and/or misunderstood the *Companioni* court's distinction between a juror's concealment of their statutory disqualification due to a felony conviction in a civil case as compared to a criminal case.

Instead of acknowledging *Companioni's* distinction and reasoning, the lower court holds fast to requiring Mr. Boyd to demonstrate actual prejudice even in the absence of any precedent to that effect. The lower court's conclusion is

unreasonable given that *Companioni* refused to extend its holding to the criminal context.

Contrary to the lower court's belief, Mr. Boyd's reliance on *Lowrey v. State,* 705 So. 2d 1367 (Fla. 1998) is not misplaced. Mr. Boyd relies on *Lowery* as being the most instructive on this issue in the absence of a case, beyond *Companioni*, which addresses the circumstances presented here. In *Lowrey*, this Court was presented with the question whether a convicted defendant seeking a new trial must demonstrate harm from the seating of a juror who was under criminal prosecution when he served but, though asked, failed to reveal this prosecution. The Court answered in the negative, holding that in such a case "there is a clear perception of unfairness, and the integrity and credibility of the justice system is patently affected." *Lowrey*, 705 at 1369-70. This Court found that a juror with pending criminal charges should be "absolutely disqualified" and a defendant convicted by a panel that includes such a juror should be entitled to a new trial without any showing of actual harm. *Lowrey*, 705 So. 2d at 1370. (citing *Thomas v. State*, 796 S. W. 2d 196, 199 (Tex. Crim. App. 1990).

A juror under criminal prosecution at the time of service has an inherent bias which so affects the appearance of fairness that no demonstration of prejudice is required. As discussed in *Companioni*, the same inherent bias is present in a juror who is disqualified for felony convictions. The lower court's distinction between a

juror under pending prosecution and a convicted felon whose "status" disqualifies him from jury service is a distinction without a difference. Fla. Stat. § 40.013 does not make any distinction between a "person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony." Both are disqualified due to their "status" because the general notion remains that either a person pending prosecution, or likewise a felon juror, possesses inherent bias particularly in a criminal context.

Ms. Striggles concealment of her status as a convicted felon alone entitles Mr. Boyd to a new trial based on the inherent bias of a convicted felon. However, even if there were no inherent bias and/or presumed prejudice, Ms. Striggles's three felony convictions and one misdemeanor conviction, are material facts which were not disclosed that may have influenced trial counsel to exercise a peremptory had he been aware of them. Additional material facts underlying the convictions were also not disclosed that may have influenced trial counsel to exercise a peremptory had he been aware of these facts.

A review of Ms. Striggles's clerk files indicates an extensive history with the criminal justice system. She was not only convicted of crimes of dishonesty, twice falsely reporting a bomb, but there were also notations that she paid someone to take her GED, also indicative of dishonesty. The clerk files for her three Broward

County cases also indicate she was evaluated in 1983 for competency; she had made phone calls with false bomb threats because she was suicidal; the 1986 case noted that she had received a psychological evaluation for drugs and alcohol and that the results of that evaluation indicated a diagnosis of schizoid personality disorder; and, she was evaluated as borderline mentally retarded. These facts, as well as Ms. Striggles's convictions, are material to her jury service. *De La Rosa v. Zequeira 659 So. 2d 239 (Fla. 1995).*

De La Rosa outlines the three part test to utilize in determining whether a juror's non-disclosure of information during *voir dire* constitutes grounds for a new trial:

> First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

De La Rosa v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995). In determining materiality, the court must evaluate whether the non-disclosed facts were substantial and important so that if the facts were known, trial counsel "may have been influenced to peremptorily challenge the juror from the jury." *Palm Beach County Health Dept. v. Wilson*, 944 So. 2d 428, 430 (Fla. 2006)(citing *Roberts ex rel. Estate of Roberts v. Tejada,* 814 So. 2d 334 (Fla. 2002)). There are several factors to consider in determining the impact of a juror's exposure to the legal

system including, but not only, remoteness in time, the character and extensiveness of the litigation and the juror's posture in the litigation. *Id*. A juror's litigation history does not have to be similar to the action in which he or she may be required to serve in order to be material. *Id*.

The lower court dismisses Ms. Striggles's convictions as too remote in time to have any impact on her service as a juror in Mr. Boyd's case.[4] In doing so, the lower court ignores the totality of the circumstances of her convictions: remoteness in time is not the only consideration. Despite the fact that Ms. Striggles's last conviction was in 1989, the character and extensiveness of Ms. Striggles's involvement with the criminal justice system is troubling to say the least. First and foremost, Ms. Striggles's crimes are ones of dishonesty. Further, her involvement with the justice system was quite extensive, undergoing psychological evaluation, being admitted to treatment programs and ultimately spending time in prison. This was not simply a one time event that was quickly resolved. In fact, Ms. Striggles

[4] In finding that her convictions were too remote in time, the lower court mentions that the convictions occurred prior to Ms. Striggles "serving" in the military. Order at 4422. Trial counsel also refers to her having been in the military. (PC-R. 5535) Ms. Striggles only indication that she was in the military was referenced in response to the court's questionnaire. Ms. Striggles indicated "I'm a military brat" and "[m]y last job was United States Army." Both responses are vague and offer no details. It is unclear whether her parents served in the military, hence she was a "military brat," or whether she was actually enlisted personnel. It certainly is questionable whether a three time convicted felon whose rights had not been restored was permitted to serve in the Army. There simply is no further information about these statements in the record for anyone to assume what her status for the Army was.

untruthful responses indicated that she could only "guess" that she had been treated fairly (R. 114)

Mr. Laswell agreed that these facts may have influenced him to exercise a peremptory. He was not aware of her felony convictions. He testified that he was not aware that she was evaluated in 1983 for competency (PC-R. 5600). He was not aware that she was committed to a program for counseling (*Id.)*. He was not aware that the case file indicated she had made phone calls with false bomb threats or that she was suicidal (PC-R. 5600-01). He was not aware that notations from the 1986 case noted that she had received a psychological evaluation for drugs and alcohol and that the results of that evaluation indicated a diagnosis of schizoid personality disorder (*Id.)*. He was also not aware that the files indicated that Ms. Striggles had paid someone to take her GED for her and that she was borderline mentally retarded (PC-R. 5602). Mr. Laswell then testified that had he known about these facts they "may have" influenced him to exercise a peremptory challenge but didn't because he wasn't aware of them (PC-R. 5610).

The lower court required Mr. Boyd to demonstrate that counsel "in all likelihood" would have exercised a peremptory challenge citing *Roberts v. Tejada*. However, according to the cases interpreting materiality, there seems to be no difference between "may have" and "in all likelihood." As explained above, in *Palm Beach County Health Dept. v. Wilson*, 944 So. 2d 428, 430 (Fla. 2006), the

court held nondisclosure 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," citing, just as the lower court did, *Roberts v. Tejada,* 814 So.2sd 334 (Fla. 2002)(emphasis added). Similarly, in *Blaylock v. State*, 537 So. 2d 1103, 1106-1107 (Fla. Dist. Ct. App. 1988), the court stated that a response on *voir dire* is only material "if it is so substantial and important that if the facts were known [the moving party] may have been influenced to peremptorily exclude the [juror] from the jury." Furthermore, in *Bolling v. State*, cited by the lower court, that court likewise pointed out:

> [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.

61 So. 3d 419, 424 (Fla. Dist. Ct. App. 2011) review dismissed, 67 So. 3d 198 (Fla. 2011), reinstatement denied (Sept. 2, 2011).

Most importantly, at the heart of the materiality analysis is whether counsel was permitted to make an informed decision as to a juror's impartiality and

suitability for service on a particular case. *De La Rosa*, 659 So. 2d at 242. Mr. Laswell was deprived of making such an informed decision due to the non-disclosure of Ms. Striggles criminal history and the facts of that history as noted in her clerk file. Mr. Laswell's answers on cross-examination emphasize just this point. When asked specifically knowing what he does now regarding Ms. Striggles history, whether he would have changed his thought process regarding use of a peremptory challenge, Mr. Laswell testified "I don't know. But I sure would have conducted some *voir dire*." (PC-R. 5633). Mr. Laswell noted that he would have wanted to ask more questions about the surrounding circumstances of the crimes in order to reach a determination as to whether he wanted her on the jury or not. (PC-R. 5633). While the lower court relies on trial counsel's testimony that if Ms. Striggles's responses to additional *voir dire* would have shown her hatred for police officers, the courts and the judge then he would have wanted her to serve as a juror, it cannot be said that if the opposite were true he would not have likely peremptorily removed her. Trial counsel's responses demonstrate clearly that counsel was deprived of the opportunity to make an informed decision based on Ms. Striggles's nondisclosure.

The second and third prong of the *De La Rosa* test are likewise met with respect to Ms. Striggles non-disclosure of her convictions and their underlying circumstances. At no time during *voir dire* did Ms. Striggles indicate she had an

extensive criminal history and extensive involvement with the court system which ended in her going to prison. Ms. Striggles merely indicated that she had been involved in the criminal justice system as a juvenile, which was not truthful. The lower court believes "[i]t cannot be said that the information regarding juror Striggless's alleged mental health issues, suicidal thoughts, and intelligence deficiencies was 'squarely asked for' and not provided." (PC-R. 4423). The court fails to understand that the nondisclosure of her felony convictions alone satisfied this prong. Ms. Striggles understood the question regarding the involvement of friends and family in the criminal justice system as necessarily including herself. Significantly, Ms. Striggles failed to disclose her accurate criminal history. Furthermore, the trial court did ask whether she had been treated fairly and rather than explaining, she equivocally guessed she had. She was given an opportunity to explain and again simply stated she didn't know and guessed she had been treated fairly. By failing to disclose the three felony convictions and one misdemeanor conviction, she likewise failed to disclose the extent and circumstances of those convictions.

Finally, it was not until the investigation and preparation for Mr. Boyd's Rule 3.851 motion that it was discovered that Ms. Striggles lied regarding her felony convcitions. It is "abundantly clear from the transcript of the *voir dire* proceedings that no person sufficiently perceptive and alert to act as a juror could

have sat through *voir dire* without realizing that it was... [his or] her duty to make known to the parties and the court" that he or she had a criminal history. *Young v. State*, 720 So. 2d 1101, 1103 (Fla. 3rd DCA 1998)(*quoting Mobil Chemical Co. v. Hawkins*, 440 So. 2d 378, 381 (Fla. 1st DCA 1983), review denied, 449 So. 2d 264 (Fla. 1984). It was also sufficiently clear that the potential jurors were obligated to be truthful. Once Ms. Striggles interpreted the questions to necessarily include whether she herself had any involvement with the criminal justice system, she had a duty to be truthful.[5]

During *voir dire*, Juror Rebstock also failed to disclose that he had been previously involved with the court system. Mr. Rebstock was arrested, charged and pled no contest to a charge of soliciting prostitution. Ultimately, adjudication was withheld.

The same test under *De La Rosa* applies to Mr. Rebstock's non disclosure of his criminal history. Mr. Boyd acknowledges, particularly given that the clerk file for Mr. Rebstock's case has been purged, that the materiality prong of the test is more difficult to meet. Mr. Boyd urges the Court, however, to consider that not only one juror, but two jurors lied[6] during *voir dire* in Mr. Boyd's case. Certainly,

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[5] To the extent this material information could have been discovered, trial counsel was ineffective for failing to conduct an adequate voir dire. *See* Argument II, *infra*.

[6] The lower court refused to find that Mr. Rebstock was untruthful to any of the Court's inquiries during trial. Yet he acknowledged that the entire process may

the fact that two jurors lied during *voir dire* calls into question those jurors' veracity with respect to any of the Court's inquiries during trial. [7]

Mr. Boyd had a right to know that jurors Mr. Rebstock and Ms. Striggles had significant criminal histories and should have been entitled to question both on these material facts. *See Mitchell v. State*, 458 So. 2d 819 (Fla. 3rd DCA 1984)(finding that the right of peremptory challenge implies the right to make an intelligent judgment as to whether a juror should be excused. Counsel have the right to truthful information in making that judgment). Mr. Boyd is entitled to a new trial.

ARGUMENT II

TRIAL COUNSEL WAS INEFFECTIVE PRE-TRIAL FOR FAILING TO CONDUCT ADEQUATE *VOIR DIRE*

The United States Supreme Court has explained:

> A fair trial is one which evidence subject to adversarial testing is presented to an **impartial tribunal** for resolution of issues defined in advance of the proceeding.

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define the parameters of the information that must be disclosed and agreed that here other jurors understood question number eleven of the court's preliminary questionaire to include information about their own criminal history. (PC-R. at 4424). Mr. Rebstock squarely answered no despite his prior misdemeanor. This was untruthful.

[7] For example, after the verdict was read, the Court asked the jurors to assure to the Court that they had not discussed the case with any third persons in any context (R. 2395). Both Mr. Rebstock and Ms. Striggles affirmed they had not.

Strickland v. Washington, 466 U.S. 668, 685 (1984)(emphasis added). In order to ensure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 685. Here, trial counsel's deficient performance denied Mr. Boyd a reliable adversarial testing.

Counsel's performance during *voir dire* was deficient for purposes of the Sixth Amendment. The *voir dire* for Mr. Boyd's capital trial lasted only one and a half days. Of those one and a half days, trial counsel questioned the potential jurors for a mere 20 minutes. (R. 317) Counsel failed to conduct meaningful and effective *voir dire* and failed to follow up on answers which would have led a reasonable attorney to make further inquiry. Trial counsel abruptly concluded, stating "I'm hungry. I'm done and they're tired" (R. 316). Trial counsel's comments throughout *voir dire* and particularly in the presence of the jury indicated both a lack of motivation and preparation for conducting the *voir dire* as well as infusing the process with a sense of triviality which served to lessen the prospective jurors' responsibility to meaningfully and truthfully engage in the process. The resulting prejudice is that Mr. Boyd was denied his right to a fair and impartial jury and the effective assistance of counsel in selection of that jury.

The Sixth Amendment right to effective assistance of counsel extends to all phases of trial following the lawyer's appointment. *Cuyler v. Sullivan*, 466 U.S. 335 (1980). As this Court has noted "[v]oir dire is an essential part of any first-degree murder trial in which the death penalty is sought. *Johnson v. State*, 921 So. 2d 490, 503 (Fla. 2005). In the trial of a case, the jury selection and *voir dire* examination are just as critical to the outcome of the case as the presentation of the evidence. The change of a *single juror* in the composition of the jury could change the result. *Ter Keurst v. Miami Elevator Company*, 486 So. 2d 547 (Fla. 1986) (Adkins, J. dissenting).

The role of *voir dire* is critical in assuring a criminal defendant's Sixth Amendment right to an impartial jury: Absent an adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled. *See Connors v. United States,* 158 U.S. 408, 413 (1895); *See also Matarranz v. State,* Case No.: SC11-1617, (Fla. October 3, 2013). Additionally, the lack of adequate *voir dire* also impairs the defendant's right to exercise peremptory challenges where provided by statute or rule. *Rosales-Lopez v. United States,* 451 U.S. 182, 188 (1981) (footnote omitted); *see also Lavado v. State,* 469 So. 2d 917, 919 (Fla. 3d DCA 1985) (Pearson, J., dissenting), *dissent adopted by Lavado v. State,* 492 So. 2d 1322, 1323 (Fla.1986). The purpose of *voir dire* is to

permit trial counsel to question prospective jurors so that counsel can reasonably conclude that the 'juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court.' *Mansfield v. State,* 911 So. 2d 1160, 1172 (Fla.2005) (quoting *Spencer v. State,* 842 So. 2d 52, 68 (Fla.2003). This critical questioning was lacking in Mr. Boyd's trial.

After emphasizing the importance of candor (R. 25, 26, 31, 55), the court conducted its preliminary questioning of the jury (R. 37, 4153). Both parties had an opportunity to question the jurors regarding their feelings about the death penalty. Finally, the court inquired whether any jurors had been exposed to media regarding Mr. Boyd's case or were familiar with the name Lucious Boyd in a criminal setting (R. 56). Jurors Striggles, Nicholls, Williams, Carusi and Berberich indicated they had and the State questioned them in the presence of the entire venire as to their knowledge (R. 58-64). The questions were broad in the sense that the inquiry did not ask for specific details of what each juror had seen or heard. Defense counsel did not ask any questions (R. 64).

Both parties agreed to cause challenges for several jurors due to their views on the death penalty, knowledge of the case or knowledge of the participants and/or witnesses. Juror Striggles, Berberich and Nicholls remained though. Subsequently, the court filled the jury box with the remaining 43 jurors (R. 92-94).

After the jurors responded to the court's questionnaire, the State proceeded with *voir dire* addressing the areas of expectations for the prosecutor; the standard of proof and reasonable doubt; the burden of proof resting with the State not the defendant; the defendant's right not to say anything; moral, religious or personal beliefs that would prevent a jury from rendering a guilty verdict; and whether each juror could recommend a death sentence. The State continued its *voir dire* in the same vein the following day.

Following the State's questions the defense then briefly questioned the jurors again regarding the State's burden of proof and the jurors expectations of the government in conducting an investigation that leads to a criminal charge. Trial counsel then abruptly concluded, stating "I'm hungry. I'm done and they're tired" (R. 316). Trial counsel conducted no additional *voir dire* and indicated on the record that his questioning was only 20 minutes (R. 317). Counsel then noted for the record that he was conducting the abbreviated *voir dire* with the consent of Mr. Boyd (R. 317). Despite these comments, the prosecutor immediately felt compelled to remark on the record "Judge since the record is black and white and [Laswell] said I'm hungry and I'm tired, I know that was him just being zestful" (R. 318). Given the chance to clarify his previous "zestful" statements, Mr. Laswell instead again reiterated in front of the jury "No. I am hungry and I am tired and so is the jury" (R. 318). Mr. Laswell's comments on the record, his

conduct, and his failure to engage in any meaningful questioning and discourse with the prospective jurors were unreasonable. Several jurors provided responses which should have compelled counsel to inquire further. Despite Mr. Boyd's acquiescence to an abbreviated *voir dire*, trial counsel had a duty to preserve Mr. Boyd's right to a fair and impartial jury. Counsel's disregard for the exacting process which is required to guarantee a fair and impartial jury simply cannot be deemed reasonable in a capital murder trial.

Analysis of ineffective assistance of counsel claims for failure to adequately conduct *voir dire* turn upon fact specific inquiry. *See Green v. State* 975 So. 2d 1090 (Fla. 2008) (denying claim alleging counsel's failure to further question and move to have juror excused "for cause" or peremptorily struck because the record established that the trial court inquired whether the murder of the juror's niece would affect his decision in the case, the juror said it would not, and that supported the trial court's finding that the juror met the test for juror competency); *Johnson v. State*, 921 So. 2d 490, 503 (Fla. 2005)(denying claim alleging improper summary denial of claim of ineffective assistance of counsel during *voir dire* for failing to properly question the panel on death qualification because record demonstrated that both trial court and State questioned prospective jurors about their views on the death penalty); *Teffeteller v. Dugger* 734 So. 2d 1009 (Fla. 1999) (denying claim that counsel failed to adequately question prospective jurors about pretrial

knowledge in case where record on *voir dire* established judge and prosecutor questioned jurors about the issue). Similarly, in *Johnston v. State*, 63 So. 3d 730 (Fla. 2011) the issue of whether counsel adequately conducted *voir dire* likewise turned on the Court's fact specific inquiry into the record. Although the lower court relies on *Johnston* in finding that counsel was not deficient, a thorough review of *Johnston* demonstrates how *voir dire* in Mr. Boyd's case was strikingly different.

In *Johnston v. State*, this Court denied relief on a claim that counsel was ineffective during *voir dire* for failing to perform any targeted follow up questioning that would have brought forth additional facts which were not disclosed during initial questioning of a juror. In denying relief the Court relied upon several factors from the record:

> First, in this case, counsel was not ineffective for failing to sufficiently question juror Robinson regarding the capias. *See Ferrell v. State,* 29 So. 3d 959, 976 (Fla.2010) ("Trial counsel cannot be deemed ineffective for failing to raise a meritless argument."). As this Court held on direct appeal, Robinson's civil contempt charge did not disqualify her from service under section 40.013(1), Florida Statutes (1999). *Johnston*, *841 So. 2d at 356*-57. Therefore, even if Robinson was aware of the capias and disclosed it upon questioning, such disclosure would not have provided a reason for Robinson to be removed for cause.
>
> Second, counsel was not deficient because in keeping juror Robinson, defense counsel was following its strategy of seeking a young and minority jury. After

> conducting a mock trial and soliciting pretrial advice from a professional jury consultant, defense counsel decided to pursue a strategy of seating jurors matching the profile shared by juror Robinson. Defense counsel testified at the evidentiary hearing that Robinson's prior misdemeanor and active capias would not have made her any less desirable to the defense. Counsel was not ineffective for pursuing this reasonable strategy. *See Dillbeck v. State,* 964 So.2d 95, 103 (Fla.2007) ("Dillbeck's trial counsel adopted a reasonable trial strategy of avoiding a death sentence by attempting to seat jurors likely to recommend a life sentence.").
>
> Additionally, Johnston has failed to establish prejudice; given that defense counsel would not have moved to strike juror Robinson even if counsel had further questioned Robinson and she had disclosed her criminal history, our confidence in the outcome is not undermined. In fact, after learning of juror Robinson's arrest, the defense verbally objected to her removal, expressing a preference for juror Robinson over the alternate juror.

Johnston v. State, 63 So. 3d 730, 737-38 (Fla. 2011), reh'g denied (June 3, 2011).

Unlike the record relied upon by this Court to deny relief in *Johnston*, the record in Mr. Boyd's case, both at trial and in postconviction, establishes that counsel was deficient in failing to conduct further inquiry during *voir dire*. First, the record in postconviction establishes Ms. Striggles's prior felony convictions for false report of a bomb, possession of a firearm by a convicted felon, and carrying a concealed firearm statutorily disqualified her from jury service. Fla. Stat. 40.013(1). Evidence from the postconviction hearing also established that she had not had her civil rights restored until April 4, 2008, six years after her service on

Mr. Boyd's jury (Def Ex.#1) (PC-R. Vol. 5563). Had counsel conducted further inquiry following Ms. Striggles's answer during *voir dire* that she "she herself had been involved with the system when she was a juvenile", but only "guess[ed]" that she had been treated fairly (R. 114), counsel would have learned of the information supporting grounds for her disqualification and removal for cause.

Second, both the record at trial and in postconviction fail to support the argument that keeping Ms. Striggles was consistent with any theory of defense or reasonable trial strategy. Unlike the scenario in *Johnston*, this is not a case where trial counsel consulted with a jury selection expert and had a concrete and specific strategy in seating the jury. In Johnston's case, the trial attorney testified in postconviction that they employed a strategy of seating a young and minority jury. This is a very specific strategy. Conversely, at the evidentiary hearing in postconviction in Mr. Boyd's case Mr. Laswell testified that he did not have a profile for seating a jury that comported with any specific defense strategy (PC-R. 5572). Mr. Laswell repeatedly answered no to whether there was a specific strategy to seating a juror which was consistent with their defense or whether there was a specific juror profile. Dr. Ongley likewise testified that he did not recall any specific strategy for *voir dire* but that if there was one, it would have been up to Mr. Laswell because he was the one who devised the questions and carried on the *voir dire*. (PC-R. 5664). According to Dr. Ongley, the strategy for actually asking

the questions was something which was exclusively Mr. Laswell's because of his extensive experience and he was only there to see how [Laswell] did it (PC-R. 5664). Both counsel merely stated the goal was to seat a fair and open-minded jury (PC-R. 5572-73; 5663-64). Arguably, this must be the strategy in every case.

Third, in *Johnston* counsel testified that he would not have moved to strike the juror even if counsel had further questioned her and she had disclosed her criminal history. Unlike the record in *Johnston*, testimony from trial counsel at the evidentiary hearing here establishes that any argument that knowledge of Ms. Striggles's prior criminal history would not have motivated trial counsel to remove her from the panel is unreasonable and unsupported by the record. Mr. Laswell's answers in this regard were knee-jerk, flippant and most importantly contradictory.

At the evidentiary hearing, Mr. Laswell initially testified that regardless of Ms. Striggles testifying to having a prior history with law enforcement when she was a juvenile he would not have followed up on that information (PC-R. 5587). Mr. Laswell reasoned that it was his "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" (PC-R. 5583). Despite his initial knee-jerk response that he would not have followed up on Ms. Striggles's responses, nor would he have sought to remove her, Mr.

Laswell had to respond to the unreasonableness of his position. Mr. Laswell acknowledged that had he known that Ms. Striggles had two felony convictions for false bomb reports, one felony conviction for possession of a firearm by a convicted felon, and one conviction in Georgia for contributing to the delinquency of a minor and had not had her civil rights restored at the time of trial, it would have indicated to him that he "ought to do some *voir dire*" (PC-R. 5588). Dr. Ongley echoed this sentiment (PC-R. 5694).

Still trying to explain his position, Mr. Laswell testified:

> My understanding is the record is bare of her saying any of the things that you just asked me. That she replied either to Mr. Loe or to Judge Rothschild in answer to the question as I have indicated. Yeah, I had a juvenile records but I got over it. All right. I didn't see any reason to ask any other question.
>
> Number one, her response would indicate she wasn't real happy with the State to begin with. And number two would indicate that after years in the Military and her facing of, I don't know, of, you know, being called before the master or whatever, she was not likely to be sympathetic to law enforcement and the State"

(PC-R. 5588). However, immediately following these comments, when asked by defense counsel, Mr. Laswell confirmed that he did not know for certain whether in fact her bias was in favor for or against the defense (Id.). Despite Mr. Laswell's statements to the contrary, the record does not reflect that "she wasn't real happy with the State to begin with." Upon further questioning, Mr. Laswell then

equivocated in his answers regarding the proposition that while such run-ins with the law may promote a bias in some people against the State and law enforcement, the flip side of that logic was equally possible that it may also promote cynicism and bias against those defendants that plea innocence. In a most telling contradiction to his initial position that he would keep a juror who had "run-ins with law enforcement" due to their likelihood to be favorable to the defense, Mr. Laswell stated: "I don't think you can say anything of a convicted felon would be likely and apply it across the board in the spectrum of American jurisprudence" (PC-R. 5590). The lower court ignored these contradictory positions, choosing instead to accept Mr. Laswell's initial response without assessing it for reasonableness in the circumstances. Further questioning of Ms. Striggles was necessary and any reasonable attorney would have done so.

Additionally, Mr. Laswell stated that he understood that a juror who was a convicted felon that had not had their rights restored would be disqualified from service by statute and that statutory disqualification would serve as the basis for a "cause" challenge (PC-R. 5591). Yet, he testified he wasn't sure whether this would have caused him to move to strike her "for cause," stating "Maybe. Maybe not" (PC-R. 5591). When pressed further for whether he would have exercised a cause challenge, Mr. Laswell flippantly responded "when ifs and buts become candy and nuts, what a merry Christmas we will all have. I couldn't possibly

answer that question" (PC-R. 5592). Mr. Laswell testified that any determination about whether to strike her "for cause" would have been based upon how he felt about Ms. Striggles from answers she had given, but he then conceded that he was not able to find any questioning of her by him in the record (PC-R. 5591). Mr. Laswell ultimately conceded that had he known about the underlying facts of Ms. Striggles's convictions these facts "may have" influenced him to exercise a peremptory challenge (PC-R. 5610). On cross examination he again confirmed that he "sure would have liked to conduct further *voir dire*" and ask more questions about the circumstances of the crimes in order to determine whether he wanted her on the jury or not (PC-R. 5633).

Mr. Laswell's testimony at the evidentiary hearing is contradictory and it establishes that it was unreasonable for him to fail to conduct any follow up questioning of Ms. Striggles following her answers on *voir dire*. The fact that Mr. Laswell would have liked to conduct further questioning of Ms. Striggles had he known of her convictions and that she did not have her civil rights restored at the time of trial establishes that information regarding her prior criminal history was something he contemplated when considering who to seat on the jury. If information about a potential juror's criminal history was not something he considered, and if convicted felon jurors were something Mr. Laswell considered to be advantageous, then specific information about a prospective juror's

convictions and information about a prospective juror's lack of restoration of civil rights, shouldn't have necessitated the need for follow up questioning. If Mr. Laswell truly felt convicted felons were advantageous, then why would he also testify that he would have liked to conduct further *voir dire* to learn more about the circumstances of the crimes in order to determine how he exercised his peremptory strikes? This testimony is wildly conflicting and smacks of post-hoc rationalization to justify less than reasonable strategic decision making.

While there is argument which supports the proposition favoring keeping convicted felons on a jury because they may be more defense friendly, that argument is not availing here. The strategy aimed at keeping convicted felons on a jury can cut both ways. Mr. Laswell testified at the evidentiary hearing that he routinely employed a strategy at trial during *voir dire* which sought to include convicted felons because of his belief that they were most often defense friendly and untrusting of the State as a result of their negative experiences with law enforcement. However, as the district court noted in *Companioni v. City of Tampa*, this belief is not always accurate. 958 So. 2d at 413 (Fla. Dist. Ct. App. 2007). Without further questioning, trial counsel could not have known on which side Ms. Striggles fell.

Given the nature of the offenses for which Ms. Striggles had been previously convicted and the circumstances surrounding those convictions, there can be no

argument that this was a reasonable trial strategy. Ms. Striggles had a history of mental health issues that were related to her convictions for false reports of a bomb (Def. Ex# 2-Case No. 83-9071; Def. Ex#3-Case No. 86-16293; Def. Ex#4-Case No. 88-3624) (PC-R. Vo. I p. 21-22). Those records directly question her capacity to serve as a juror on Mr. Boyd's case. Further, because the nature of her prior convictions dealt with crimes of dishonesty it is also suspect as to whether she was capable of being entirely forthcoming or that she could properly follow and apply the instructions of the Court. Ms. Striggles had an extensive history of documented mental health issues as well as a history of crimes of dishonesty, with records indicating that she even attempted to pay someone to take her GED exam for her. Mr. Laswell was not aware of any of these issues and therefore could not make an informed decision to keep Ms. Striggles on the jury or not.

Likewise, Mr. Laswell's testimony regarding the reasoning behind conducting such a brief and non-probing *voir dire* is also unreasonable in light of the record. Mr. Laswell testified in postconviction that "you have to understand, we never had a chance to conduct any *voir dire* until the third day[8] of this trial. We had to sit and listen to Judge Rothschild. And we had to sit and listen to Tony Loe. So by the time that we had a chance to ask a few questions, we knew an awful lot about these people to begin with" (PC-R. 5573). When confronted with the fact

[8] In fact, voir dire only lasted one and a half days (PC-R. 5585)

that the record reflected his *voir dire* lasted only twenty minutes, Mr. Laswell testified "I had already listened to a day and a half of *voir dire* along with everybody else" (PC-R. 5585).

The record at trial fails to support Mr. Laswell's testimony regarding his reasoning for abbreviating his questioning of the prospective jurors. Subsequent to Ms. Striggles's brief responses to the court as it pertained to the preliminary questionnaire, no further questioning was conducted of Ms. Striggles regarding her involvement with the criminal justice system either by defense counsel, the State, or the Court. The record at trial also reflects the absence of *any* meaningful dialogue during *voir dire* between Ms. Striggles, defense counsel, the State, and the Court. Mr. Laswell's testimony in postconviction that no further questioning of the prospective jurors was necessary after the State's portion of *voir dire* because he already "knew an awful lot about those people to begin with" is not credible. The only information Mr. Laswell had regarding Ms. Striggles was that she had prior knowledge of Mr. Boyd's case (R. 58), she expected the prosecutor "to be honest" (R. 133) and through a one word response she indicated she could recommend death (R. 191).

After her response to the questionnaire which included an incomplete and inaccurate explanation of her involvement with the criminal justice system and her explanation regarding her knowledge of the case, Ms. Striggles spoke four words

during *voir dire*. Mr. Laswell acknowledged that he was never aware of Ms. Striggles's extensive criminal background and attendant psychological issues until postconviction counsel presented them to him. Mr. Laswell in fact did not "already know an awful lot about" Ms. Striggles and his attempt to justify his failure to conduct further *voir dire* based on that fact is wholly unreasonable.

Similarly, the lower court claims that Ms. Striggles's "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" (PC-R. 4404). With the exception of her responses to the trial court's preliminary questions, some of which were directed at the entire venire and required simply affirmation or no response at all (R. 41-55), Ms. Striggles barely spoke during *voir dire*. The lower court's reliance on Ms. Striggles's generic responses to preliminary venire questions fails to consider her lack of veracity with respect to her criminal history. It is unreasonable to think that "an awful lot" was known about Ms. Striggles and her ability to be fair and impartial. This Court has very recently reemphasized its commitment to juror impartiality noting that 'jurors should if possible be not only impartial, but beyond even the suspicion of partiality.'" *Matarranz v. State,* Case No.: SC11-1617, Slip op., (Fla. October 3, 2013), citing *O'Connor v. State* 9 Fla. 215, 222 (Fla. 1860). Ms. Striggles

untruthful and abbreviated responses do not provide confidence beyond the suspicion of partiality.

Rather, the record establishes that defense counsel failed to provide any follow up questioning to assist him in reaching a reasonable conclusion that Ms. Striggles was capable of laying aside any bias or prejudice and rendering a verdict solely on the evidence presented and the instructions on the law given by the court. *Mansfield v. State*, 911 So. 2d 1160, 1172 (Fla. 2005)(quoting *Spencer v. State* , 842 So. 2d 52, 68 (Fla. 2003)). This is not a case where the record demonstrates that Mr. Boyd's claim of ineffective assistance can be conclusively refuted by a record demonstrating that the court or the State conducted sufficient questioning to ensure Mr. Boyd's right to a fair trial and impartial jury thus rectifying defense counsel's failure to adequately conduct *voir dire* or rendering additional questioning by defense counsel redundant. *See Mansfield*, 911 So. 2d at 1172; *Cole v. State*, 841 So. 2d 409, 415 (Fla. 2003); *Teffeteller*, 734 So. 2d at 1020-21. *Johnson*, 921 So. 2d at 503; *Green,* 975 So. 2d at 1090.

Furthermore, aside from conducting additional questioning, the records on Ms. Striggles's convictions and the underlying circumstances, at least for the Broward County cases, were readily available from the clerk's office. The lower court refused to extend to counsel the "high duty" of obtaining such information from the Broward County Clerk's office. Mr. Boyd is cognizant that this Court has

likewise refused to require counsel to conduct an investigation of the venire during trial as it would create "an unacceptable burden that cannot have uniform application" *Roberts v. Tejada*, 814 So. 2d 334, 344 (Fla. 2002). Yet, here, the issue is with respect to only one juror who acknowledged, albeit incorrect, a juvenile criminal history. The additional step of pulling the clerk record or searching the clerk's docket would not have been such a high burden in a capital case. In fact, at the time of Mr. Boyd's trial, the public defender's office did take the additional step of searching property records and voter registration records of potential jurors. Of course, trial counsel dismissed such records as of no use. (PC-R. 5594; 5622).

Counsel's failure to conduct any additional *voir dire* of Ms. Striggles rendered his performance deficient for purposes of the Sixth Amendment. *Cole v State*, 841 So. 2d 409, 415 (Fla. 2003); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1020 (Fla. 1999). Trial counsel's failure to engage in any meaningful and probing questioning during *voir dire* prejudiced Mr. Boyd by denying him his constitutional right to a fair trial before an impartial jury. To establish prejudice under *Strickland* Mr. Boyd must demonstrate how the outcome of the proceeding would have been different. In order to do so it is necessary to consider what trial counsel could have done with the information regarding Ms. Striggles prior

criminal history had he effectively conducted *voir dire* and obtained the information.

Fla. Stat. § 40.013 prohibits convicted felons from serving on a jury unless they have had their civil rights restored. Statutory disqualification on the basis that a prospective juror is a convicted felon is grounds for a cause challenge. Had counsel moved to have Ms. Striggles removed from the *voir dire* panel by asserting a cause challenge on the basis of her prior felony conviction the court would have had no other recourse but to grant the challenge. Beyond removal for cause, Ms. Striggles prior criminal history would also have satisfied removal through use of a preemptory strike as the convictions themselves as well as the underlying facts and circumstances of her convictions were material to her service on the jury. That background information, along with the convictions themselves, raise grave concerns over her ability to be entirely forthcoming with the court, her ability to evaluate the evidence and follow the instructions of the court, and her general competency and impartiality to serve.

The lower court's reliance on *Caratelli v. State*, 961 So. 2d 312 (Fla. 2007) is misplaced. *Caratelli* addresses the prejudice required in a case alleging ineffective assistance of counsel for failing to raise or preserve a cause challenge, not a situation alleging ineffective assistance of counsel for failing to conduct any reasonable *voir dire*. Therefore, requiring Mr. Boyd to prove actual prejudice on

the face of the record is incorrect. A more analogous case in terms of the appropriate prejudice standard is *Johnston v. State*, in which the defendant claimed that counsel was ineffective for failing to sufficiently question a juror at *voir dire*. There, the Court reiterated that the appropriate prejudice standard to apply is that enunciated in *Strickland v. Washington,* 466 U.S. 668 (1984). Prejudice is established where 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." *Strickland*, 466 U.S. at 694. Here, trial counsel acknowledged that Ms. Striggles's felony convictions would have been grounds to remove her for cause and he may have exercised a peremptory challenge, but certainly would have conducted some *voir dire*.

To the extent the lower court found that Mr. Boyd did not establish prejudice, Mr. Boyd was denied the opportunity to fully do so due to the lower court's denial of his request to interview jurors. In his motion to interview jurors, Mr. Boyd alleged, among other things the misconduct on behalf of Ms. Striggles and Mr. Rebstock. Mr. Boyd argued that the only way to find out to what extent the jurors' bias and untruthfulness affected the jury is to interview the jurors. At the hearing on the motion, Mr. Boyd again explained that with respect to the ineffective assistance of counsel claim for failing to conduct adequate *voir dire*,

Mr. Boyd was required to show not only deficiency but also prejudice. (PC-R. 5378). Specific to Ms. Striggles's and Mr. Rebstock's failure to disclose their involvement with the criminal justice system, the lower court denied the motion "since the subject of the jurors' non-disclosure is already known to the Defendant through the postconviction discovery process" (PC-R. 2767) This finding ignores the inquiry into prejudice under *Strickland*.

Counsel's failure to follow up on Ms. Striggles's answers during *voir dire* confirming prior experiences with law enforcement denied Mr. Boyd the opportunity to discover relevant information that would have supported grounds for her removal from his jury. The prejudice prong of *Strickland* has been met and confidence in the outcome is undermined. Mr. Boyd is entitled to a new trial.

ARGUMENT III

MR. BOYD WAS DENIED THE EFFECTIVE ASSSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS TRIAL WHEN TRIAL COUNSEL FAILED TO OBJECT OR MOVE FOR A MISTRIAL BASED ON INFLAMMATORY AND PREJUDICIAL COMMENTS

During trial counsel's opening statement, counsel argued that Mr. Boyd had been the target of law enforcement for several years (R. 465). To this end, counsel acknowledged that Mr. Boyd had been accused of rape twice, but acquitted for both incidents (R. 466). Despite this acknowledgment, no further details of these incidents were revealed to the jury. Prior to the penalty phase, trial counsel indicated his intent to present the mitigator of no prior criminal history and moved

in limine to exclude the State from presenting evidence of his prior acquittals. (PC-R. 5672). The evidence the State could use in rebuttal to this mitigator became the subject of much debate before the penalty phase began (R. 2148). Specifically, the State argued that it can rebut with direct evidence of criminal activity for which convictions were not obtained and informed the Court it was prepared to present the "victim of one of his rapes" (R. 2150) and had flown her in to testify if necessary. The defense responded that prior acquittals were not contemplated by the case law offered by the State (R. 2151). After further argument, the Court concluded that the acquittal would be inappropriate rebuttal but the fact that Mr. Boyd may have been arrested for the substantive offense would be appropriate rebuttal if the Court found it significant (R. 2172). At the evidentiary hearing, Mr. Laswell did not recall specifically litigating a motion in limine in order to foreclose the State from bringing in any of Mr. Boyd's prior criminal cases where he was acquitted (PC-R. 5613) and while Mr. Laswell testified he was not sure whether it was important to keep out Mr. Boyd's prior acquittals, he acknowledged it was "decent lawyering" to do so. (PC-R. 5614).

Dr. Ongley, on the other hand, confirmed that it was important for them to attempt to keep out Mr. Boyd's prior acquittals given their intention to rely upon the no significant criminal history mitigator at the penalty phase. (PC-R. 5672). Dr. Ongley noted the significance of this issue given that "there was an

undercurrent in the trial also. One of the theories of the case was that Mr. Boyd was being selected by the Sheriff's department for this case because of they [sic] hadn't gotten him on the other cases." (PC-R. 5672-73). Dr. Ongley noted that because of this undercurrent, "it was a fine line that was trying to be walked." (PC-R. 5673). The record from that hearing also reflected that the defense was trying to keep out not only the actual previous arrests and eventual acquittals but also the underlying facts of any previous charges. (PC-R. 5674). After review of the record Dr. Ongley confirmed the outcome of the hearing on the motion in limine was that the judge decided he was going to allow the arrests as well as the underlying facts, only provided that Mr. Boyd first opened the door. (PC-R. 5675).

Recognizing the potential for an emotionally charged courtroom, the trial court admonished the spectators against such emotional outbursts prior to the start of the penalty phase, explaining that they should maintain their demeanor throughout the testimony (R. 2193-95)(PC-R. 5677-78). During the State's cross-examination of Mr. Boyd, the State questioned Mr. Boyd regarding his theory that law enforcement had framed him. The State specifically asked if he had his own sperm in his mouth when they swabbed him in 1998. Mr Boyd responded that the police got his sperm from "that young lady right there" (R. 2279). In response, the young lady, Jada Monroe, sitting in the gallery blurted out "**You raped me**" (R. 2279)(emphasis added). The fact that this outburst was no doubt emotional was

confirmed at the evidentiary hearing. Daphne Bowe, the victim's mother testified that during cross examination, Mr. Boyd "stood up and he pointed…" in the direction of Ms. Monroe in an attempt to indicate from whom the State obtained a sample of his semen. (PC-R. 5707-8). Ms. Monroe then also stood and pointed at Mr. Boyd while she *yelled* "you raped me." (PC-R. 5707-8). Ms. Bowe explained that Ms. Monroe had been seated, directly next to Ms. Bowe, in the front row of the courtroom at trial, directly behind the State. (PC-R. 5709). Mr. Laswell did not know the alleged prior rape victim was in the courtroom until the outburst occurred. (PC-R. 5617).

Despite the emotional outburst, the questioning continued with out any mention of the highly prejudicial comment. Defense counsel did not object or move for mistrial, nor did the trial court instruct the jury. Although trial counsel argued extensively before the start of the penalty phase to keep this information from reaching the jury, counsel did nothing. Based on the extensive argument prior to Mr. Boyd's testimony regarding what the State could or could not use as rebuttal as the result of Mr. Boyd's testimony, the fact that Mr. Boyd was on the witness stand being cross examined by the State and that trial counsel was on notice that the State had flown the prior alleged rape victim in from out of town, it cannot be said that any reasonable counsel would not have been hyper vigilant in protecting a defendant's constitutional rights. Reasonable counsel would have been

on the edge of his seat anticipating any error. "Moreover, possible prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the court." *Vathis v. State*, 859 So. 2d 517, 520 (Fla. Dist. Ct. App. 2003)(ERVIN, J., concurring and dissenting.)(citing *Beasley v. State,* 774 So. 2d 649, 669 (Fla. 2000); *Burns v. State,* 609 So. 2d 600, 604-05 (Fla.1992). Trial counsel ignored their obligations.

Trial counsel testified at the evidentiary hearing that because he didn't have any recollection of the outburst, the only reason he was able to provide for why he failed to object was that he "probably didn't have a chance." (PC-R. 5620). Although trial counsel could have moved for a mistrial, Mr. Laswell stated that he could not think of a reason for not doing so other than he wanted to "get it behind me as quick as possible." (PC-R. 5620). Likewise, Dr. Ongley had no recollection of discussing the issue with co-counsel. Dr. Ongley merely speculated as to the reasons no objections were made, but could not articulate a specific strategy for not doing so.

Contrary to the lower court's belief, this was not a decision predicated on strategy, let alone a reasonable one. Dr. Ongley merely speculated as to the reasons no objections were made, but could not articulate a specific strategy for not doing so. Mr. Laswell's speculation that he simply wanted to move past what amounts to

constitutional error in a capital trial only demonstrates yet again his lack of motivation, preparation and his trivialization of the process that was due Mr. Boyd.

Mr. Boyd was denied a fair penalty phase as a result of Ms. Monroe's improper, emotional and prejudicial outburst and trial counsel's deficiency in failing to object or move for a mistrial. The lower court's denial of prejudice based on its conclusion that the jury had no new information based on the outburst is oversimplified. Despite the jury having heard that Mr. Boyd was previously acquitted of the rape, the jury had no information or details concerning the incident. The jury no doubt heard and saw the victim's emotional declaration. The jury now knew the victim was present in the courtroom and heard the victim's accusations. Ms. Monroe's outburst conveyed a message of guilt and was not subject to the constitutional safeguards of confrontation and cross examination. In fact, the State never called Ms. Monore as a rebuttal witness. Of course, her unsworn statement was already part of the record, unchallenged.

In order to establish prejudice as a result of trial counsel's deficiency, Mr. Boyd must show that counsel's error was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984) Where inappropriate outbursts have been made by witnesses, the Eleventh Circuit Court of Appeals has held that "[t]he voicing of potentially prejudicial remarks by a witness is common, and any prejudice is generally cured

efficiently by cautionary instructions from the bench." *United States v. Evers*, 569 F.2d 876, 879 (5th Cir.1978). This is evident in cases where a reviewing court did not find that an emotional outburst was prejudicial, relying on factors such as the presiding judge's control of the courtroom before, during or after such comments, admonishments to the parties, questioning of the jury as to the influence the comments had and instructions to the jury to disregard inappropriate comments. *See Arbelaez v. State*, 626 So. 2d 169, 174 (Fla. 1993); *Messer v. Kemp*, 760 F.2d 1080 (11th Cir. 1985). *See also*, *Evans v. State*, 995 So. 2d 933, 945-46 (Fla. 2008)(finding no deficient performance on the part of trial counsel, nor any prejudice where trial court admonished individual juror for interjecting testimony into the trial) . No such attempts were made by the trial court here. No admonishments of the parties or the spectator were made, nor were curative instructions given to the jury. The lower fails to take these factors into consideration.

In *Rodriguez v. State*, 433 So. 2d 1273 (Fla. Dist. Ct. App. 1983), the court granted relief based on a witness' prejudicial comments and reasoned:

> Turning to the final challenge we agree that Mrs. Izquierdo's emotional outbursts, while understandable, were extremely prejudicial and created an atmosphere in which appellant could not receive a fair trial. Mrs. Izquierdo shouted epithets and interspersed her testimony with impassioned statements evidencing her hostility toward Rodriguez. Her conduct necessarily engendered

> sympathy for her plight, and antagonism for Rodriguez, depriving him of a fair trial.

Rodriguez, 433 So. 2d at 1276. The same can be said here: Ms. Monroe's conduct in accusing Mr. Boyd of raping her in an unsworn emotional outburst so "engendered sympathy for her plight and antagonism for [Mr. Boyd]" so as to deprive him of a fair penalty phase. *Id*.

The lower court also rejected Mr. Boyd's claim based on invited error doctrine finding that Mr. Boyd provoked Ms. Monroe's outburst by pointing to her and explaining that the police had obtained his semen from her. (PC-R. 4428). However, the lower court has failed to consider the totality of the circumstances of the outburst should be considered. The outburst occurred during cross examination by the prosecutor of the defendant. The entire questioning during which the outburst occurred was contentious, drawing objection from the defense because the prosecutor would not allow Mr. Boyd to finish his answers. In fact, in postconviction, Mr. Laswell indicated that the prosecutor was "beating up [Mr. Boyd] pretty good" (PC-R. 5637). The subject matter itself was provocative. In the course of the State questioning Mr. Boyd about his theory that law enforcement framed him, the State specifically asked if he had his own sperm in his mouth when they swabbed him in 1998:

> Q. Remember when I stood here and said, Mr. Boyd, I'm sorry I have to ask this of you, but did you have your own sperm in your mouth when they

swabbed your mouth with the Q-tip and you said no.

A. But they – you're right.

Q. Right. I know I'm right.

A. But they –

Q. Now, you said you'd never do nothing like that –

MR. LASWELL: Objection, your honor. Mr. Boyd has a right to finish his answer.

THE COURT: Mr. Loe, I'm going to give Mr. Boyd –

BY MR. LOE:

Q. I said –

A.

THE COURT: Excuse me, gentlemen. Excuse me. Mr. Boyd, finish your answer and then Mr. Loe may proceed with his next question.

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. MONROE: You raped me.

THE WITNESS: Yes, sir. Not out of my mouth.

BY MR. LOE:
Q. My question was –

A. Yes, sir.

Q. -- did you have your sperm in your mouth when they swabbed you in 1998, your answer was no?

A. No, sir.

Q. That was my question, wasn't it? Your answer was no?

A. The answer is no.

(R. 2278-80). This cross examination cannot be described as anything but argumentative and contentious. An important consideration is likewise, the seating of Ms. Monroe in the front row of the gallery. The fact that the alleged prior rape victim was flown in from out of town in anticipation of rebuttal testimony, yet was seated in the front row next to the victim's mother without defense counsel's knowledge, begs the question of some illicit intent on behalf of the State. It simply cannot be said that Mr. Boyd invited the error where he was answering the contentious and provocative questions asked by the State. There is no justification for a spectator to emotionally inject herself into a trial and accuse the defendant of rape. Neither *Norton v. State*, 709 So. 2d 87 (Fla. 1997), nor *Walls v. State*, 926 So. 2d 1156 (Fla. 2006), cited as examples of the invited error doctrine by the lower court, contemplate a situation where an emotional spectator injects herself into the trial based on the testimony of a witness.

The resulting prejudice from this emotional outburst is that it interjected irrelevant and inadmissible commentary to the jury that was not subject to

confrontation. Furthermore, in reviewing for prejudice the court must consider the totality of the circumstances. The State's conduct in seating Ms. Monroe in the front row of the gallery and baiting Mr. Boyd with argumentative and antagonistic questions on cross examination was both deceitful and calculating. Given the egregious outburst and the lack of any curative instruction by the Court, Mr. Boyd was denied a fair penalty phase. It cannot be said that Ms. Monroe's comments relating to an unproven crime and confirming his guilt for a case that was not before the jury, did not affect the outcome at the penalty phase.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SEVERAL OF MR. BOYD'S MERITORIOUS POSTCONVICTION CLAIMS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Boyd sought an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851 for all claims requiring a factual determination. Pursuant to Fla. R. Crim. P. 3.851(f)(5)(A)(i), an evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *See also* Amendments to Fla. R. Crim. P. 3.851, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"). *See also Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question as to

whether the movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

"Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). A court's decision whether to grant an evidentiary hearing is subject to de novo review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

As set forth below, Mr. Boyd's rule 3.851 motion and its amendments pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively refute Mr. Boyd's claims and that an evidentiary hearing is required.

I. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF TRIAL

A. Failure to adequately conduct *voir dire* regarding jurors personal knowledge of case

In Mr. Boyd's motion for postconviction relief he alleged that trial counsel's failure to adequately conduct *voir dire* regarding juror's personal knowledge of the case and their prior history with the criminal justice system prejudiced him by denying him his right to a fair and impartial jury and his right to due process under the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution (PC-R. 339-43). The circuit court erred in summarily denying Mr. Boyd's claim as the records and files did not conclusively refute the claim. Because Mr. Boyd pled a facially sufficient claim that required a factual determination, he was entitled to evidentiary development.

During the course of the first day of *voir dire* the court questioned the jurors, among other things, about their familiarity with the participants and/or witnesses in the trial, their exposure to media regarding the case, and their personal knowledge of Mr. Boyd's criminal history (R. 37, 56). Jurors Striggles, Nicholls, Williams, Carusi and Berberich indicated that they had previously heard of the case and were questioned by the State in the presence of the entire venire. (R. 58-64). The state posed broad questions, not asking for specific details of what each juror had seen or heard. Defense counsel conducted no follow up (R. 64).

Both the State and the court continued *voir dire* of the jurors for a day and a half, covering basic legal issues (PC-R. 341). Following the questions from the \the State, defense counsel briefly questioned the jurors regarding the State's burden of

proof and the jurors' expectations of the government in conducting an investigation that leads to a criminal charge. After approximately twenty minutes defense counsel abruptly concluded, stating "I'm hungry. I'm done and they're tired" (R. 316). No additional *voir dire* was conducted by defense counsel.[9] Responses provided by several jurors should have compelled counsel to conduct further inquiry.

The record reflects that at least two empaneled jurors knew of Mr. Boyd's case through the media or other sources, and were not questioned regarding the extent of their knowledge or its effect. Juror Berberich stated that she had read about the case in the newspaper and that she remembered Mr. Boyd's name and "some things" (R. 63). Although she stated she could put this aside, there was no individual *voir dire* of her specific knowledge of the case or its effect on her. Juror Striggles likewise indicated she was familiar with the case and the Boyd Funeral Home because her family discussed it (R. 58). She too was not questioned individually regarding her specific knowledge of the case.

Trial counsel's failure to conduct follow up questions to those posed by the State and the court rendered counsel's performance during *voir dire* ineffective. *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Boyd was prejudiced when a jury was empaneled who had not been thoroughly questioned regarding outside

[9] As noted previously, the State expressed concerns over defense counsel's comments and asked the court to clarify (R. 317).

influences and bias. Mr. Boyd was denied the opportunity to empanel a fair and impartial jury. As such, a new trial with an unbiased jury is warranted. Relief is proper.

B. Failure to challenge the admissibility of evidence pursuant to *Frye*.

Mr. Boyd alleged in his motion for postconviction relief that trial counsel was deficient in failing to request a *Frye*[10] hearing challenging the admissibility of bitemark and fiber analysis at trial (PC-R. 343-46; 1265-71). Had defense counsel requested a *Frye* hearing, he could have proved that bitemark and fiber analysis are unreliable and subjective fields of forensic science with no industry standards. Additionally, a *Frye* hearing would have enabled counsel to effectively challenge the DNA evidence analyzed by Bode Technology Group (PC-R. 346-47; 1271-72). But for counsel's error in failing to request a *Frye* hearing to challenge these pieces of forensic evidence, the outcome of Mr. Boyd's trial would have been different. The circuit court summarily denied this claim finding that the use of fiber analysis, bite mark evidence, and DNA analysis were not new or novel scientific fields of evidence at the time of Mr. Boyd's trial such that they required a *Frye* hearing for purposes of establishing admissibility. (PC-R. 4408). Additionally, the court determined that trial counsel could not be deemed ineffective for failing to use the

[10] *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also Stokes v. State*, 548 So. 2d 188 (Fla. 1989) (applying *Frye* standard in Florida case); *Ramirez v. State*, 651 So. 2d 1164, 1166-7 (Fla. 1995).

conclusions of the NAS report[11] to challenge the admissibility of the fiber analysis, bite mark comparison, and the DNA analysis, since that report was not yet published at the time of Defendant's trial. (PC-R. 4408) Moreover, the court further reasoned that notwithstanding the arguments as to the NAS Report and the general acceptability within the field of forensic science, Mr. Boyd was incapable of establishing prejudice under *Strickland* because of the "plethora of incriminating evidence" in the case (PC-R. 4408) Based upon these findings, the circuit court summarily denied Mr. Boyd a hearing on this sub-claim. This was error.

Although hearings were held as to the admissibility of some evidence, counsel failed to request a *Frye* hearing on the admissibility of fiber match evidence, bite mark comparisons, and the DNA evidence analyzed by Bode Technologies Group (hereinafter "Bode"). With no murder weapon, no witnesses, and no confession, forensic evidence was the only evidence linking Mr. Boyd to the scene where the victim's body was discovered. Had counsel raised proper objections and challenged the admissibility of this evidence, the State's case against Mr. Boyd would have been substantially compromised. Trial counsel utterly failed to effectively challenge or impeach the qualifications, analysis, and

[11] Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (Pre-publication copy).

conclusions of the law enforcement technicians who analyzed the fiber, bite mark, fingerprint and DNA evidence – all key elements of the State's case.

While these fields were not new or novel at the time of Mr. Boyd's trial, the practices, standards, and methodologies employed with respect to each category of evidence should have been vigorously challenged (PC-R. 3468). All three categories of evidence: the fiber analysis, the bite mark comparison, and the specific method of DNA testing utilized, were entirely dependent upon the specific methodologies, standards, and practices employed to obtain the results that were acquired. The record at trial establishes that there were indeed deficiencies with practices, standards, and methodologies with respect to each category of evidence which if subject to a *Frye* hearing would have been inadmissible.

Similarly, the circuit court's reliance upon the timing of the NAS Report to determine that Mr. Boyd is incapable of establishing deficient performance is unavailing. The fact that the NAS Report was not published at the time of Mr. Boyd's trial is not dispositive of the claim. The NAS Report was a collection of widely accepted practices, information, studies, and data within the field of forensic science that was in existence much prior to its publication in July 2009. The NAS Report was the culmination of efforts within the field to amass this information and provide an extensive reference resource. Contrary to the circuit court's order, this information itself, although not the report, was readily available

at the time of Mr. Boyd's trial. Given the fact that Mr. Boyd's defense counsel Dr. Ongley had a background in forensic sciences, this information should have been relied upon and utilized to challenge the methodology, procedures, and analysis for purposes of admissibility at a *Frye* hearing.

Furthermore, contrary to the circuit court's order, the fact that there existed significant amounts of additional incriminating forensic evidence in the case does not absolve counsel's failure to challenge the evidence in question. The circuit court's order improperly focuses upon the extent of the additional incriminating evidence rather than appropriately considering the effect which challenges to these areas of forensic evidence would have had *on the jury*. Challenges to these areas of forensic evidence may have had a substantial effect on the jury's consideration of the rest of the forensic evidence entered at trial. *Porter v. McCollum*, 558 U.S. 38 (2009); *Sears v. Upton*, 130 S. Ct. 2359 (2010). As *Porter* and *Sears* establish, the proper focus in reviewing an underlying conviction and sentence for constitutional infirmity is to speculate as to the effect which the evidence in question may have had on the jury. *See also, Smith v. Cain*, 132 S. Ct. 627, 630 (2012). Proper review of Mr. Boyd's conviction and sentence of death requires inquiry into the effect that counsel's failure to request a *Frye* hearing to challenge the admissibility of the fiber analysis, bite mark comparison, and DNA methodology from Bode Technology Group may have had on the jury. As

demonstrated below, because the files and records do not conclusively refute this claim, Mr. Boyd was entitled to evidentiary development.

1. Fiber Analysis

The State presented fiber analysis evidence in an attempt to link the victim to Mr. Boyd's apartment (R. 1164-1700). Fibers from the bed sheets covering the victim's body (R. 1675-76) were compared to a burgundy bath mat collected from Mr. Boyd's apartment (R. 1085). According to Detective Bruce Ayala, one of the burgundy fibers from the bath mat "matched" a fiber found on the yellow sheet surrounding the victim's body (R. 1676, 1690-96, 1700, 1702).

A proper *Frye* objection would have prevented this evidence from being admitted or at least exposed it as being extremely tenuous and weak. An expert criminalist would have established that the State was overreaching with this evidence and established that more was needed to declare a "fiber match" than the fiber having the same color, blend and dye make-up as the State contended (R. 1690-1700).[12] This is particularly so when examining only *one fiber*. A defense expert would have revealed the State's flawed analysis and improper methodology and provided the opportunity to establish the proper methodology.

[12] NAS Report at 5-27 (indicating that there are "no set standards for the number and quality of characteristics that must correspond in order to conclude that two fibers came from the same manufacturing batch.")

Indeed, given the dearth of scientific rigor surrounding fiber evidence, the State could not have met its burden under *Frye*. Because counsel failed to challenge the admissibility of the fiber match evidence, neither this Court nor the jury learned of the tenuous nature of this evidence.

2. Bite-Mark Analysis

The State presented evidence at trial that bite marks found on the victim's skin matched the marks made by casts of Mr. Boyd's teeth (R. 1580). The State's expert opined that the distance between Mr. Boyd's canine teeth was "somewhat unique," as compared with the dental records of his own patients, despite the fact that only ten percent were of African-American descent as is Mr. Boyd (R. 1579, 1582). Dr. Rifkin concluded that within a reasonable degree of scientific certainty, "the marks made by those casts which are of Mr. Boyd's teeth made those marks on [the victim's] skin" (R. 1580).

The underlying theory for bite mark comparisons is based on three assertions: 1) that the dental characteristics of the teeth involved in biting are unique among individuals; 2) that such uniqueness is transferred and recorded in the bite mark injury; and 3) that human skin maintains the accuracy of these unique marks over time and after the death of the victim. None of these assertions has been scientifically tested. There has been no thorough study of large populations to establish the uniqueness of bite marks. Uniqueness of bite marks cannot be reliably

predicted, making it impossible to single out one person to the exclusion of all others that could have made the bite mark in question. NAS Report at 5-36.

There are additional problems with the methodology used to compare bite marks to biters. While the American Board of Forensic Odontology (hereinafter "ABFO") has approved guidelines for the analysis of evidence from bite mark victims and suspected biters, the Forensic Science Committee found that "[t]he guidelines, however, do not indicate the criteria necessary for using each method to determine whether the bite mark can be related to a person's dentition and with what degree of probability." *Id*. at 5-35. Moreover, "[t]here is no science on the reproducibility of the different methods of analysis that lead to conclusions about the probability of a match." *Id*. at 5-36. The Committee found that even when experts follow the ABFO guidelines, different experts reach "widely differing results" and "a high percentage of false positive matches of bite marks using controlled comparison studies." *Id*. Finally, most comparisons are made between the bite mark and dental cast of an individual or individuals of interests; rarely are bite marks compared to dental casts of a number of individuals, leading to the potential for bias. A *Frye* hearing would have alerted the trial court to the fact that bite mark comparison is an unreliable, subjective field which has no commonly accepted practices or standards and no scientific basis for the conclusion that bite mark comparisons can result in a conclusive match.

Furthermore, trial counsel should have requested a *Frye* hearing because Dr. Rifkin's opinion that certain characteristics of Mr. Boyd's teeth were unique was based on a comparison to a "database" that is not generally accepted in the scientific community. Dr. Rifkin compared characteristics of Mr. Boyd's teeth to those of the patients in his North Miami Beach practice and concluded that Mr. Boyd's teeth were "somewhat unique" (R. 1579). Such testimony is comparable to population frequency statistics used in DNA evidence. In *Brim v. State*, . the Florida Supreme Court recognized that "DNA testing is a two-step process" and "[t]he fact that a match is found in the first step of the DNA testing process may be 'meaningless' without qualitative or quantitative estimates demonstrating the significance of the match" 695 So. 2d 268, 271 (Fla. 1997). Similarly, Dr. Rifkin's bite mark comparison testimony involved a two step process: he testified that the bite marks on the victim's skin matched the marks made by dental casts of Mr. Boyd's teeth, and he testified that certain characteristics of Mr. Boyd's teeth were unique, based solely on a comparison of Mr. Boyd's teeth to those of the patients in his North Miami Beach practice. In order to satisfy *Frye*, the State must demonstrate that the "database" of Dr. Rifkin's patients is generally accepted in the scientific community. *See Bevil v. State*, 875 So. 2d 1265 (Fla. 1st DCA 2004) (holding that it was incumbent on State to demonstrate that the Florida Department of Law Enforcement database used was generally accepted in scientific

community, and since State failed to make this showing, trial court erred when it admitted population frequency statistics derived from the database).

Had counsel sought a *Frye* hearing on the admissibility of bite mark comparisons, this prejudicial evidence never would have reached the jury and there is a reasonable probability that the result of the proceeding would have been different. Without the testimony on bite marks the State's case against Mr. Boyd would have been weakened. Further, the aggravation against Mr. Boyd would have been weakened. As noted above, regardless of the fact that bite mark comparison was generally accepted in the field of forensic science at the time of Mr. Boyd's trial, it was still critical to challenge the methodology, practices, and procedures employed by Dr. Rifkin in this case. Because the files and records do not conclusively rebut this claim, Mr. Boyd is entitled to evidentiary development.

3. DNA Analysis

The State relied on DNA evidence in its case against Mr. Boyd. Although counsel sought a *Frye* hearing on the admissibility of DNA evidence analyzed by BSO and FDLE, counsel inexplicably failed to challenge the admissibility of DNA evidence analyzed by Bode. Counsel likewise failed to seek laboratory protocols, validation studies, accreditation studies, equipment maintenance logs and operations manuals, contamination logs and laboratory error rates from any of the

three DNA labs involved.[13] Substantial questions about DNA reliability and the methods of DNA testing exist. Under *Frye,* "the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts at hand." *Ramirez v. State*, 651 So. 2d 1164, 1168 (Fla. 1995).

Contrary to the circuit court's order, Mr. Boyd is capable of demonstrating prejudice from counsel's failure to challenge the admissibility of the DNA testing performed by Bode. Counsel failed to hold the State to its burden of establishing that Bode's methods, procedures, and analysis in testing the DNA were reliable and generally accepted within the field of forensic science. Despite requesting *Frye* hearings for BSO and FDLE, and subsequently learning that issues had arisen as to the reliability of their testing, counsel then inexplicably failed to challenge Bode's work. Counsel's failure to request a *Frye* hearing was especially damaging with respect to Bode's testing where, as argued *infra*, the State relied upon their work to help minimize the issues that had occurred with the DNA testing from FDLE and BSO and to further validate their findings. As the files and records did not refute this claim, Mr. Boyd was entitled to evidentiary development where he would have

[13] Mr. Boyd was denied and/or was limited access to these records during postconviction public records litigation (PC-R. 1259, 5462-63). Without access to these records, Mr. Boyd cannot adequately challenge the forensic science used to convict him.

the opportunity to present evidence to further establish the prejudicial effect that counsel's omission had on the outcome of his trial.

C. Failure to utilize forensic experts

Challenging the validity of the State's evidence regarding tire marks, fiber analysis, dental impressions, tool and knife marks, and DNA was a central issue in trial counsel's opening statement (R. 464-65). Trial counsel's theory of defense revolved entirely around impeaching the State's forensic evidence. Yet, defense counsel presented no forensic experts, although this was common practice for defense counsel in 2002. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.2(B). Because trial counsel failed to hire any experts pertaining to the crime scene, DNA and/or bite marks, the state's experts went virtually unchallenged.

The lower court found Mr. Boyd's claim insufficiently pled because he did not specify how the outcome of the trial would have been different but for defense counsel's alleged deficient performance (PC-R. 4412) Further, the lower court determined that Mr. Boyd was incapable of demonstrating deficient performance because the record conclusively demonstrated 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 guilt phase (PC-R. 4413). The lower court's findings are in error.

1. DNA Analysis

Contrary to the circuit court's order, it was not a reasonable strategic decision to forgo presentation of expert evidence in exchange for preservation of a closing argument "sandwich." The record establishes that serious issues surrounded the handling, collection, and processing of forensic DNA evidenced in Mr. Boyd's case. The credibility of those who collected and analyzed the DNA evidence which was later discovered to be contaminated was also a substantial area of challenge. Mr. Boyd's trial counsel failed to avail themselves of an expert to provide testimony regarding the State's failings and to assist counsel in adequately preparing to cross-examine these witnesses.

The lower court's reliance upon *Evans v. State,* 995 So. 2d 933, 945 n.16 (Fla. 2008) is misplaced. In *Evans*, counsel's failure to call three potential alibi witnesses was reasonable because the witnesses were either unable to add anything to help establish the alibi defense or were only capable of providing vague, unreliable, and irrelevant testimony. *Id*. at 945-946. Because of the issues with the potential witnesses' lack of personal knowledge and/or credibility, this Court determined that counsel's strategy to forgo presentation of them in favor of

keeping the closing argument 'sandwich' was an informed strategic decision falling well within the range of professionally acceptable conduct.

The record in Mr. Boyd's case does not support the same conclusion as in *Evans*. Counsel's decision to forgo challenging this evidence so as to maintain the benefit of presenting a 'sandwich' argument at closing cannot be deemed a reasonable strategic decision. Unlike *Evans*, the witness testimony counsel chose to forgo here did not come as the result of issues with credibility, lack of personal knowledge, or irrelevance. Trial counsel had the option of retaining expert witnesses to challenge each and every area of concern with the State's DNA evidence. This is not a scenario where defense counsel was restricted in what he could present to challenge the State's DNA evidence as a result of witness limitations. Defense counsel had to merely retain expert DNA witnesses, prepare them, and present their testimony to Mr. Boyd's jury. Despite the fact that there were numerous issues with the three agencies that performed DNA analysis in Mr. Boyd's case, defense counsel opted to let this evidence go virtually unchallenged. This was not a reasonable strategic decision in light of the evidence presented at Mr. Boyd's trial.

Moreover, the circuit court's conclusion that defense counsel's strategy was especially reasonable in light of the defense theory that police had planted the evidence against Mr. Boyd and that "[c]ertainly if the State planted evidence

against the Defendant they would ensure that it is the right evidence" is entirely without justification (PC-R. 4414) First, there is absolutely nothing to suggest or otherwise substantiate the lower court's rationale that should the police intend on framing someone it must logically follow that they would make no mistakes. The record in Mr. Boyd's case alone establishes that errors and mistakes are rampant throughout the course of police investigations. The cavalier attitude expressed by the lower court in making this determination begs one to question the sincerity with which the lower court has reviewed Mr. Boyd's claims in postconviction regarding the deficiencies and inconsistencies in the forensic evidence used to convict and sentence him to death.

Second, Mr. Boyd contends that it is precisely because his strategy was to argue that police had planted the evidence in an attempt to have him convicted that failing to present expert testimony at trial was unreasonable. In light of the defense strategy at trial the strongest argument centered upon Mr. Boyd's ability to effectively challenge and discredit the forensic evidence at trial. With respect to the DNA evidence in this case, this was especially important given the fact there were issues with contamination, collection, sampling, and analysis. A DNA expert could have assisted in providing testimony regarding the issues with the contaminated blood draw from the victim (R. 1368-69); the issues with DNA testing on carpet samples (R. 1382); BSO serologist Lynn Baird's documentation

of DNA under the fingernails (R. 1378-79); and Bode's report (R. 1625-35). There is simply no basis from which to argue that presentation of two closing arguments, without the benefit of evidence presented by Mr. Boyd, is decisively more favorable than challenging the DNA through expert testimony. Expert testimony challenging these various deficiencies in the DNA evidence was critical information to present for the jury's consideration.

Last, contrary to the lower court's order, Mr. Boyd is capable of establishing prejudice under *Strickland*. The lower court attempts to explain away various inconsistencies and deficiencies in the DNA evidence, or to provide alternatives which mitigate the significance of the errors, but fails to address Mr. Boyd's claim that counsel's failure to utilize a DNA expert denied him the opportunity to challenge the procedures, methodologies, and analysis employed in obtaining the DNA results. The court's rationale is to essentially overlook counsel's failure to effectively draw out these areas of deficiency in front of Mr. Boyd's jury because there are either alternative sources of information or some possible explanation that mitigates the errors. The concerns with the contaminated blood draw (R. 989, 1403), the improper control test results on the carpet sample (R. 1381-83), the documentation of the fingernail scrapings (R. 1378-79), and the accuracy and validity of the Bode report (R. 1373-74) were all issues for the jury's consideration. The circuit court's order simply discounts them to irrelevance.

Regardless of Dr. Ongley's experience in this field of forensic science, Ongley was not an expert witness. Nor did Mr. Boyd accept that he was an expert in all fields of forensic science (PC-R. 5471). Mr. Boyd was entitled to presentation of evidence effectively challenging these areas of the DNA beyond something more than mere cross-examination. The circuit court's rationale that challenging this evidence would have in no way advanced Mr. Boyd's theory of the case is entirely without merit.

As the records and files in this case do not positively refute Mr. Boyd's claim, he was entitled to evidentiary development. The circuit court's order summarily denying this claim is in error.

2. Bite Mark Evidence

In summarily denying this sub-claim the circuit court found that the record showed that Dr. Ongley used his forensic expertise to thoroughly cross examine the expert witnesses called by the State (PC-R. 4414) The circuit court determined that counsel was effective in revealing the shortcomings of the expert's analysis and stressing the fact that the incriminating evidence against Mr. Boyd could have been planted by law enforcement (Id.). These findings are not supported by the record.

The utilization of an expert in forensic odontology would have enabled counsel to not only challenge the State's expert, Dr. Rifkin's credibility, but

challenge his conclusion. Expert testimony is available that could explain that Mr. Boyd's six lower front teeth (numbers 22 through 27) do not fit simultaneously into the injury pattern on the victim's skin and therefore Mr. Boyd's teeth are not consistent with the bite marks left on the victim. Additionally, an expert can testify that the upper teeth (numbers 8 and 9) of Mr. Boyd, which Dr. Rifkin identified as having made two faint marks on the victim's arm, are actually much wider than the two faint marks made on the victim's skin. An expert could also testify that the gap in Mr. Boyd's teeth is not, as Dr. Rifkin testified, unique. Most significantly, an expert in forensic odontology would have been able to assist counsel in presenting testimony establishing that bite mark comparison is far from an exact science. No across-the-board standards exist for making bite mark comparisons. Positive identifications or 'matches' cannot be made with any degree of reasonable certainty.

Contrary to the lower court's finding in postconviction, Ongley was not effective in utilizing his expertise to undermine Rifkin's findings to the jury. Ongley's cross examination consisted of a mere four pages of inquiry. Ongley questioned Rifkin about: whether he laid out the curved surface on to a flat projection to review the bite markings, the validity of his population statistics regarding distances between lower and back teeth, and whether he was a board certified forensic odontologist. (R. 1581-85). While Ongley did inquire as to

whether the bruising that was evident on the victim could have occurred pre or post mortem (R. 1584), this mere question alone could not be sufficient to establish that the police planted evidence of bite mark trauma in this case. Ongley failed to inquire into anything regarding the validity of the forensic science of bite mark comparisons and its accuracy and validity within the field of forensic science. Further, Ongley also failed to effectively challenge the procedures and protocols Rifkin employed in this case. The record simply does not support the circuit court's finding that Ongley 'thoroughly" cross examined Rifkin.

The records and files do not conclusively refute this claim, particularly the exculpatory testimony available to show that Mr. Boyd's teeth are not consistent with the bite marks left on the victim. Evidentiary development is warranted.

II. NEWLY DISCOVERED EVDIENCE ESTABLISHES THE FORENSIC SCIENCE USED TO CONVICT AND SENTENCE MR. BOYD WAS NEITHER RELIABLE NOR VALID

In 2006, the National Academy of Sciences formed a committee to study issues regarding the varied disciplines that form the field of "forensic science." Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (Pre-publication copy) (hereinafter "NAS Report"). The Committee's final report constitutes newly discovered evidence that the "scientific" evidence used to convict Mr. Boyd was the result of methods with

questionable and untested underlying scientific principles, in violation of Mr. Boyd's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Testimony provided at Mr. Boyd's trial regarding bite mark comparison, fiber analysis, and DNA analysis used terms that misled the jury about the conclusiveness and accuracy of their testimony. Trial counsel failed to effectively question the accuracy, reliability, and validity of the testimony the State offered regarding these areas of evidence.

Testimony dealing with forensic evidence at Mr. Boyd's trial was fraught with subjective terms that varied in degree of conclusiveness. BSO DNA Analyst Lynn Baird testified that a DNA profile obtained from one of the thigh swabs from the victim "matched" Lucious Boyd's DNA profile (R. 1378); blood from an armoire in Mr. Boyd's apartment was "consistent with" the victim's (R. 1384); and that a sample from the living room floor of Mr. Boyd's apartment "could have come" from the victim or that the victim "cannot be eliminated as having contributed that sample" (R. 1389). Baird also testified that a DNA profile from a hair found on the victim's chest "could not eliminate Lucious Boyd as being a possible contributor" of the hair (R. 1391).

The use of the terms "match," "cannot be excluded," "consistent with," and other similar phrases which are criticized in the Forensic Science Committee's

report, NAS Report at S-15, caused the trial court and the jury to believe the State presented something more than circumstantial evidence against Mr. Boyd during the guilt phase of the trial. The variation in language used by the experts and other police witnesses affected the trial judge and jury's perception of the reliability of the science presented. *Id*. at S-15

The forensic evidence presented by the State was questionable in its accuracy, reliability, degree of certainty, and its capacity to consistently reproduce reliable results connecting evidence with a specific source. Testimony from forensic odontologist Dr. Rifkin compared alleged bite marks on the victim's skin and marks made by dental casts of Mr. Boyd's teeth (R. 1569-80). Dr. Rifkin noted that "[s]kin is not a terrific medium for bites but that's all we have in this particular case" (R. 1577). Dr. Rifkin measured an arch distance of 40 millimeters on both the bite mark on the victim's skin and the wax pattern made by the dental casts of Mr. Boyd's teeth. (R. 1578-79). Dr. Rifkin testified that 40 millimeters "is a very large distance" and that having compared that measurement to the measurements of "almost everyone" he could back at his office, he "never came close to 40 on any of them, so [40] is somewhat unique in terms of what we normally see" (R. 1579). Dr. Rifkin also testified that only ten percent of his patients were African-American, as Mr. Boyd is (R. 1582). Dr. Rifkin concluded that within a reasonable degree of scientific certainty, "the marks made by those casts which are of Mr.

Boyd's teeth made those marks on [the victim's] skin" (R. 1580).

The forensic "science" of bite mark comparison is highly subjective and questionable at best. The underlying theory for bite mark comparisons is based on three assertions: 1) that the dental characteristics of the teeth involved in biting are unique among individuals; 2) that such uniqueness is transferred and recorded in the bite mark injury; and 3) that human skin maintains the accuracy of these unique marks over time and after the death of the victim. None of these assertions has been scientifically tested. There has been no thorough study of large populations to establish the uniqueness of bite marks. Uniqueness of bite marks cannot be reliably predicted, making it impossible to single out one person to the exclusion of all others that could have made the bite mark in question. The Forensic Science Committee concluded in its final report that "**[m]ore research is needed to confirm the fundamental basis for the science of bite mark comparison**." NAS Report at 5-36 (emphasis added).

The fiber analysis evidence relied upon by the State was also questionable and unreliable. The State relied upon fiber analysis in its case-in-chief in an attempt to link the victim to Mr. Boyd's apartment (R. 1164-1700). Detective Bruce Ayala collected fibers from bed sheets which were covering the victim's body when it was discovered (R. 1675-76). During the search of Mr. Boyd's apartment, Detective Addison Singh collected a burgundy bath mat from a

bedroom closet (R. 1085). Detective Ayala analyzed the fibers collected and eventually matched a burgundy fiber from the bath mat with a fiber found on the yellow sheet surrounding the victim's body (R. 1676, 1690-96, 1700). Ayala testified that, within a reasonable degree of scientific certainty, a fiber taken from the burgundy bath mat matched the fiber recovered from a yellow sheet surrounding the victim's body (R. 1702).

There are "no set standards for the number and quality of characteristics that must correspond in order to conclude that two fibers came from the same manufacturing batch." NAS Report at 5-27. The field of fiber analysis lacks studies of fibers (e.g., the variability of their characteristics during and after manufacturing) on which to base such standards, to inform judgments about whether environmentally related changes discerned in particular fibers are distinctive enough to reliably individualize their source, and to characterize reliability or error rates in procedures. *Id.* "Because the analysis of fibers is made largely through well-characterized methods of chemistry, it would be possible in principle to develop an understanding of the uncertainties associated with those analyses," but pointed out that "**to date, that has not been done**." *Id.* (emphasis added).

Bite mark and fiber analysis evidence are highly subjective fields of forensic science that are subject to challenge. Notwithstanding the fact that courts have

routinely admitted such evidence, the NAS Report is newly discovered evidence establishing the vast limitations of pattern evidence.

Independent examination of evidence was absent here. Independent evaluation is essential so that the laboratory would be able to "set its own priorities with respect to cases, expenditures and other issues" Id. at 6-1. This independence was absent in Mr. Boyd's case as the Broward County Sheriff's Office was responsible for the majority of the forensic testing. Here, the NAS Report recommendations are particularly relevant where the problems that have occurred in Broward County have been well documented. See, e.g., Paula McMahan, *Crime Lab Botches Murder Inquiry Prosecutors Must Drop Charges After DNA Evidence is Contaminated*, South Florida Sun-Sentinel, June 24, 2003. One of the primary theories of defense was that the BSO had focused upon Mr. Boyd at the onset of its investigation to the exclusion of all other potential leads. Investigators and law enforcement analysts who worked on Mr. Boyd's case worked to uncover evidence to support their theory that Mr. Boyd was responsible. Under these biased circumstances, investigators and analysts found evidence to support their theories or down play and ignore the significance of evidence that was inconsistent.

The bias and predisposition to a preconceived theory of the crime to the exclusion of all others was documented. In Mr. Boyd's case, the State sent swabs taken from various parts of the victim's body to a private DNA lab for analysis,

along with four standards, including the victim, the victim's mother, Mr. Boyd, and Earl Lloyd, Jr. The State's letter to the lab identified Mr. Boyd as the "suspect" and Lloyd as the "strawman," and directed that "Secondly I would like to have STR typing done on the 3 forensic samples . . . . I anticipate that the defense will attempt to divert the jury's attention from the Defendant by creating a 'smoke screen'. I think the defense will suggest that Earl Lloyd, Jr. committed the murder." In this example, the editorial commentary accompanying the various samples submitted for analysis undoubtedly increased the potential for cognitive bias on the part of the forensic examiner. It cannot be argued that the independence necessary for objective examination was present here.

Issues were also present with the BSO's certification, protocols, and quality control procedures. NAS Report at S-19. In 2003, after BSO discovered that DNA evidence had been mishandled by DNA Analyst Lynn Baird,[14] the analyst who conducted all the DNA analysis for BSO in Mr. Boyd's case, BSO launched an internal investigation and also arranged for two external audits to be conducted. The first external audit was conducted by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (hereinafter

[14] This mishandling of evidence resulted in the State Attorney's Office having to drop first-degree murder charges. *See* Wanda J. DeMarzo, *Murder charge tossed as BSO mixes DNA*, Miami Herald, June 24, 2003. As we now know, the cross contamination which resulted in the dismissal of this first-degree murder charge was not the first time Baird had contaminated samples. According to Mr. Boyd's expert, Baird was responsible for the contamination of the victim's blood in this case.

"ASCLD/LAB"). The ASCLD/LAB is a voluntary program in which crime laboratories may participate to demonstrate that their management, personnel, operational and technical procedures, equipment and physical facilities meet established standards. As an accredited laboratory, the BSO Crime Lab was required to be in compliance with all ASCLD/LAB essential standards and criteria. The ASCLD/LAB conducted "a focused review of [BSO Crime Lab's] evidence handling procedures, quality system and DNA analytical practices and procedures" in July 2003 and concluded that the lab was in violation of various accreditation standards and criteria.

The second external audit was conducted in July 2003 by the Alexandria Group of MPRI Audit Response. The Alexandria Group identified five issues of concern, and suggested that 1) ". . . the authority and responsibilities of the Laboratory QA [Quality Assurance] Coordinator and the DNA Technical Analyst . . . need to be better defined within the laboratory"; 2) "the system for the creation and review of Laboratory reports could use some improvement" in the DNA Unit; 3) "the laboratory may wish to consider" the use of certain additional equipment; 4) the lab should conduct sample retesting of Analyst Lynn Baird's cases; and 5) the QA Coordinator was not informed of the cross contamination incident in a timely manner.

The Forensic Science Committee's recommendation elaborates that no

person "should be permitted to practice in a forensic science discipline or testify as a forensic professional without certification." NAS Report at 7-18. "Certification requirements should include, at a minimum, written examinations, supervised practice, proficiency testing, continuing education, recertification procedures, adherence to a code of ethics, and effective disciplinary procedures." *Id.* The State's forensic professionals that testified at Mr. Boyd's trial were not certified. Lynn Baird, BSO DNA analyst, testified that she holds a master's degree in forensic science with a specialty in serology and a bachelor's degree in biology. She received in-house DNA training when she was hired by BSO as well as taking classes at the FBI training center (R. 1360). She never testified that she holds any certifications. Thomas Messick, BSO latent print examiner, testified regarding fingerprints found on the materials in which the victim's body was wrapped. According to Messick, he had been a latent print examiner for 15 years. Messick testified that he had attended the FBI classification course and advanced latent technique course, a fingerprint course at Palm Ridge Junior College, and an advanced fragility course taught by Pat Worten (R. 1510). He never testified that he holds any certifications. Bruce Ayala, manager of the analytical section of the BSO Crime Lab, testified regarding his analysis of fiber evidence. Ayala testified that he received a bachelor's degree in chemistry and 16 years of trace analysis experience (R. 1674). He provided no testimony that he holds any certifications.

Finally, Dr. Rifkin, the forensic odontologist, was not certified by the American Board of Forensic Odontology. No evidence has ever been presented that these analysts/examiners held any certification related to their respective specialties, or that the analysts had passed written examinations or completed proficiency testing or continuing education. The NAS Report calls into question whether the witnesses in Mr. Boyd's case were properly trained in the most up-to-date methods in the forensic science community.

The use of questionable "scientific" evidence, coupled with the lack of standardized reporting and terminology in forensic disciplines, renders both Mr. Boyd's conviction and death sentence unreliable. Under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972)(per curiam). As the NAS report demonstrates, differences in terminology could mean the difference between life and death: two experts in the same field of forensic science may testify in two different cases and use different terminology to describe the same results so that one defendant is convicted or sentenced to death on the basis of that evidence and the other is not. The imposition and carrying out of the death penalty in cases in which untested and unreliable "scientific" evidence is used to convict defendants also constitutes cruel and unusual punishment. When the myriad problems with so-called "scientific" evidence are considered together in

analyzing its ability to deliver and/or produce a reliable result,"it smacks of little more than a lottery system." *Furman*, 408 U.S. at 293 (Brennan, J., concurring).

The use of "scientific" evidence produced by methods of questionable and untested underlying scientific principles cannot "assure consistency, fairness, and rationality" and it cannot "assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976). Mr. Boyd was prejudiced by the use of questionable "scientific" evidence and bias in the law enforcement agency that investigated the case and the forensic science analysts who analyzed the evidence. Mr. Boyd's jury was unable to appropriately evaluate the credibility of experts and the reliability of the science behind bite mark evidence, fiber analysis evidence, and DNA evidence. There is no question that errors went unchallenged and uncorrected before Mr. Boyd's jury. Mr. Boyd is entitled to relief from both the conviction and death sentence.

Here, where no *Frye* hearing was held to challenge the admissibility of the bite mark evidence, fiber analysis, and Bode Technology Group DNA evidence, the significance of the NAS Report's recommendations and findings carries even greater weight. Had defense counsel effectively challenged this evidence, along with drawing out the deficiencies and issues with the entirety of all the forensic evidence entered at trial as noted above, the State's case against Mr. Boyd could have been substantially limited. No adversarial testing could occur in these

circumstances. *Smith v. Wainwright*, 799 F.2d 1442 (11th Cir. 1986). At an evidentiary hearing, Mr. Boyd would have shown through experts that the State's evidence was flawed, unreliable, and lacking in scientific objectivity and rigor. Mr. Boyd was prejudiced by the bias in the law enforcement and their predisposition to focus upon him in their investigation and by the questionable "scientific" evidence relied upon to convict him. As the files and records do not conclusively refute this claim, an evidentiary hearing is warranted.

CONCLUSION

For the reasons argued in Mr. Boyd's Motion to Vacate Judgments of Convictions and Sentence, the amendments thereto, the arguments and evidence presented at the evidentiary hearing, and the arguments herein, Mr. Boyd is entitled to relief in the form new trial and/or a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Leslie Campbell, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401, via email this 16th day of October, 2013.

/s/ Suzanne Keffer
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

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