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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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Mr. Boyd submits this Reply to the State's Answer Brief. Mr. Boyd will not reply to every argument raised by the State. However, Mr. Boyd neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply. Mr. Boyd expressly relies on the arguments made in his Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

ARGUMENT IN REPLY

ARGUMENT I

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

At the outset, the State maintains that Mr. Boyd's claim of juror misconduct is procedurally barred as it could have been raised on direct appeal. However, the State provides no explanation of how the issue could have been raised at that time when the underlying facts were unknown until postconviction. In fact, the State while asserting that the misconduct could have been raised on direct appeal in one argument, claims that trial counsel could not have discovered the information during voir dire in another argument (Answer Brief at 32, 49-50) The State cannot have it both ways.

Further, the State's reliance on this Court's recent opinion in *Diaz v. State*, SC11-949, 2013 WL 6170645 (Fla. Nov. 21, 2013) is unavailing. The extent of this Court's analysis of the juror misconduct and/or nondisclosure claim is as follows:

> The postconviction court did not err in denying Diaz's motion to interview jurors, summarily denying his juror misconduct claim, and denying his claim that he was deprived of a trial by an impartial jury due to Williams' failure to disclose. After the verdict was rendered, Diaz could have filed a motion to interview Williams under Florida Rule of Criminal Procedure 3.575. Thus, Diaz could have raised his claims relating to Williams' failure to disclose on direct appeal. Accordingly, each of these claims is now procedurally barred.

Diaz v. State, SC11-949, 2013 WL 6170645 (Fla. Nov. 21, 2013). Without reference to further record evidence indicating that trial counsel either knew, or could have known of the concealed information, it is difficult to determine upon what the Court is relying in finding Diaz's claim procedurally barred.[1] In Mr. Boyd's case, trial counsel did not know that two jurors had failed to disclose their criminal histories and therefore had no cause to request juror interviews. As Mr. Boyd argued in his initial brief, Mr. Boyd was not aware of the criminal histories

[1] Adding confusion to the issue, the lower court, in summarily denying Mr. Diaz's misconduct and/or nondisclosure claim, did not find it to be procedurally barred, but rather addressed it on the merits. *State v. Diaz,* No. 97–CF–3305 (Fla. 20th Cir. Ct. postconviction order filed Apr. 6, 2011) *Diaz v. State*, SC11-949, 2013 WL 6170645 (Fla. Nov. 21, 2013).

of Jurors Striggles and Rebstock until postconviction public records production because both jurors in question concealed critical information at the time of *voir dire*. 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. Mr. Boyd raised the substantive juror misconduct claim at the first opportunity in his initial postconvcition motion. To the extent that the State is arguing Mr. Boyd's trial counsel could have or should have known that Ms. Striggles failed to disclose her felony convictions, and likewise that Mr. Rebstock failed to disclose the misdemeanor, there is no other result but that counsel was ineffective.

Because trial counsel was unaware of both jurors' failures to disclose critical information, trial counsel had no reason to request juror interviews at the close of trial. Florida R. Crim P. 3.575 states in part:

> A party who has **reason to believe that the verdict may be subject to legal challenge** may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. **The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge.**

(emphasis added). The plain language of the rule indicates that a party must have reason to believe the verdict is subject to legal challenge. Certainly, the Court, in

Diaz, was not suggesting that a motion to interview jurors should be filed in every case upon the conclusion of trial regardless of whether counsel was aware of a reason or not. It is well settled that "a motion for juror interview must set forth allegations that are not merely speculative, conclusory, or concern matters that inhere in the verdict itself." *Foster v. State*, SC11-1761, 2013 WL 5659482 (Fla. Oct. 17, 2013), citing *State v. Monserrate-Jacobs*, App. 5 Dist., 89 So.3d 294 (2012).

Adding to the weakness of the State's reliance on *Diaz v. State*, only one month prior to that opinion, this Court addressed a similar juror nondisclosure issue in *Foster v. State,* SC11-1761, 2013 WL 5659482 (Fla. Oct. 17, 2013), without considering whether the claim was procedurally barred. There, Foster alleged that a juror, when asked if he had ever been convicted of a crime or charged with a crime, failed to disclose a DUI conviction. This Court held:

> The claim filed by Foster failed to allege a prima facie basis for concluding that the undisclosed twenty-four-year-old DUI conviction, even if verified, was relevant or material to Juror Q's jury service. Just as we noted in *Johnston,* "nothing about the character and extensiveness of [the juror's] own experience" in being convicted of a nonviolent offense "suggests [the juror] would be biased against a defendant pleading not guilty in a death penalty case." *Johnston,* 63 So.3d at 739.

Foster v. State, SC11-1761, 2013 WL 5659482 (Fla. Oct. 17, 2013). While Foster failed to meet the requirements to obtain relief based on a juror's nondisclosure,

the Court nonetheless addressed the claim on the merits. As Mr. Boyd asserted in his initial brief, this Court has certainly reviewed substantive juror misconduct claims on postconviction review where the underlying facts were unknown at the time of direct appeal. In *Lugo v. State*, 2 So. 3d 1 (Fla. 2008) the Court reviewed Lugo's postconviction claim that a juror had failed to disclose that he had been the victim of a violent crime without consideration of a procedural bar, despite the fact that the State had asserted one. Instead, the Court found that Lugo could not meet the three part test articulated in *De La Rosa v. Zaquiera*, 659 So. 2d 239 (Fla. 1995), nor the actual prejudice requirement of *Carrattelli v. State*, 961 So. 2d 312 (Fla. 2007). To argue that all claims of substantive juror misconduct are procedurally barred, without consideration of the underlying facts, as the State suggests, is contrary to this Court's jurisprudence.

Turning to Mr. Boyd's substantive argument regarding juror misconduct for failing to disclose her criminal history, Mr. Boyd maintains that jurors who are disqualified from service because of felony convictions are inherently biased. Despite all of trial counsel's contradictions during the evidentiary hearing, one response should resonate loudly with respect to Mr. Boyd's claim: "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). This notion hits

at the very core of why a juror who is disqualified from service due to prior felony convictions is inherently biased.

Companioni distinguished statutorily disqualified jurors for reasons other then felony conviction, discussing the "competing speculations" about the motivations of a felon juror which demonstrate an inherent bias. *Companioni v. City of Tampa*, 958 So. 2d 404, 413 (2nd DCA 2007). Because of the "speculations" that exist, the possibility or potential for actual bias or prejudice is inherent in the situation. The perception of actual bias or prejudice is precisely why this Court absolutely disqualified a person who is facing a pending criminal prosecution from jury service, and found that 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 v. State,* 705 So. 2d 1367, 1370 (Fla. 1998).

Assuming the State's position that bias is not inherent, and putting aside the difficulty in the practical application of requiring a defendant to show actual bias,[2]

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[2] Justice Anstead's concurrence in *Lowrey* emphasizes the difficulties of proving actual bias in the absence of an inquiry of the juror who failed to disclose her statutory disqualification:

> In addition, however, I would recede from our prior opinion in *State v. Rodgers,* 347 So.2d 610 (Fla.1977), for the same reasons enumerated in Justice Hatchett's dissent therein. This Court did not explain in *Rodgers,* and has not explained today, the practical implications of its requirement that an innocent litigant demonstrate actual prejudice when an unqualified juror is permitted to decide the case. As Justice Hatchett explained:

the record demonstrates that Ms. Striggles was actually biased. First, the nature of the offenses for which Ms. Striggles had been previously convicted demonstrates

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> I am concerned with the practical application of such a rule. How can the convicted defendant or the state "demonstrate that the juror's condition of nonage affected her ability to render a fair and impartial verdict or that she failed to do so"? Should the moving party be allowed to call all of the jurors before the court for examination? Do we inquire into their discussions or examine their thought processes in arriving at a verdict? Or, should the juror without the statutory qualifications be questioned as to the part she played in reaching the verdict? Do we try to determine what influence she had on the other jurors? Finally, must the showing of prejudice be by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt?
>
> The majority says, "A person who is less than eighteen years of age is not, by reason of age alone, lacking in competence." I agree. But the legislature has determined after full study and debate that it is more likely than not that a person under eighteen years of age is incompetent for purposes of jury service. Lines have always been drawn on the basis of age on the theory that those below a certain age are lacking in either experience, maturity, or wisdom to appreciate the complexities and consequences of specified activities. It is the legislature's job to make the law, and in the absence of a finding that the statute is unconstitutional, it should not be effectively stricken. The court today completes the repeal of Section 40.01(1), Florida Statutes.
>
> *Id.* at 614 (Hatchett, J., dissenting).

> The logic and clarity of Justice Hatchett's opinion is striking. Obviously, and at a minimum, Florida citizens are entitled to a jury composed of persons who are statutorily competent to serve as jurors.

Lowrey v. State, 705 So. 2d 1367, 1370-71 (Fla. 1998). These difficulties ring true in Mr. Boyd's case, where he was denied the opportunity to interview the jurors, specifically Juror Striggles.

her inability to be impartial and fair. Ms. Striggles's clerk files indicate an extensive history with the criminal justice system involving crimes of dishonesty, twice falsely reporting a bomb. The juror disqualification statute itself specifically delineates crimes of dishonesty, mentioning by name bribery, forgery, perjury and larceny. Fla. Stat. Ann. § 40.013 (West).

Second, this was not simply a one time event that was quickly resolved. Ms. Striggles's history is quite extensive involving undergoing psychological evaluation, being admitted to treatment programs and ultimately being sentenced to a prison term. In fact, Ms. Striggles untruthful responses indicated that she could only "guess" that she had been treated fairly (R. 114). Additionally, it was only at the Court's suggestion that she got over it that she merely agreed with that statement answering "Yes, sir" (R. 114).

Further, the record is absent any meaningful indication that Ms. Striggles could be fair and impartial. Beyond the brief background information on the questionnaire, the only information that was 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). 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*. The record at trial is simply void of *any* meaningful dialogue during *voir dire* between Ms. Striggles, defense counsel, the State, and the Court. 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.

With respect to Juror Striggles's nondisclosure of the material underlying facts of her felony convictions, the State claims:

> Even with the new information, Laswell could not say that the 'omission of the information prevented counsel from making an informed judgment – which would in all likelihood have resulted in a peremptory challenge' [citation omitted] or that the omitted information was so substantial and important that he may have been moved to strike Striggles. [citation omitted]

Answer Brief at 31. This is not entirely accurate and oversimplifies trial counsel's responses.

Trial counsel 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, counsel testified "**it would indicate to me that I ought to do some voir dire**" (Id.)(emphasis added) 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." When pressed further as to whether he may have exercised a challenge for cause, 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).

Furthermore, Laswell was not aware of the underlying facts and circumstances of Ms. Striggles' convictions as detailed in her case files (PC-R. 5600-02). Laswell 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)(emphasis added). Even when asked on cross-examination whether he would have changed his thought process and struck Ms. Striggles using a peremptory challenge given her criminal history, Laswell responded:

> I don't know. **But I sure would have conducted some voir dire…I'd want to make some inquiries of my own**

> **to see how she got into it. Got out of it. And everything else.** And if at the end of the day she insisted she hated cops, and she hated courts and she hated the judge, I would have said you are my juror thank you very much.

(PC-R. 5633)(emphasis added). Laswell repeatedly stated 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. The entirety of the record demonstrates that trial counsel was deprived of the opportunity to make an informed decision as to Juror Striggles's impartiality and suitability for service on this case.

In dismissing the materiality of Ms. Striggles's criminal history and the underlying facts of that history, the State, like the lower court, ignores the totality of the circumstances of her convictions. Arguing remoteness in time, the State relies on the timeframe of the convictions, her military service and her vague agreement with the trial court that she had gotten over her troubles. The reasoning that Juror Striggles's military service somehow mitigates the materiality of her nondisclosure ignores that there is no information about her military service

whatsoever.[3] Laswell agreed it would have been helpful to see her military record. (PC-R. 5635)

Additionally, there are more factors to consider besides remoteness in time in determining the impact of a juror's exposure to the legal system including the character and extensiveness of the litigation and the juror's posture in the litigation. *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)). Significantly, 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 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. As Mr. Boyd has repeatedly argued, her involvement with the justice system was quite extensive, undergoing psychological evaluation, being admitted

[3] Mr. Boyd is filing with his reply a motion to supplement the record with documentation attached that Ms. Striggles served in the military from January 31, 1989 through November 30, 1992. While undersigned recognizes that this is non-record information, in an abundance of caution, counsel felt it necessary to correct footnote 4 of the initial brief. While Ms. Striggles's responses in the record were unclear as to whether she was enlisted personnel, it was error to indicate that she did not serve in the military. Mr. Boyd's arguments remain the same with respect to the lack of details regarding Ms. Striggles's status in the Army. Additionally, the circumstances under which a three time convicted felon was permitted to serve in the military remain questionable, particularly given that her service began less than a year after she was sentenced to 30 months in state prison (Def. Ex# 2-Case No. 83-9071; Def. Ex#3-Case No. 86-16293; Def. Ex#4-Case No. 88-3624).

to treatment programs and ultimately being sentenced to a prison term.[4] This was not simply a one time event that was quickly resolved. The nondisclosure here is not equivalent to a 24 year old misdemeanor DUI conviction as the State has asserted in relying on *Foster v. State*, SC11-1761, 2013 WL 5659482 (Fla. Oct. 17, 2013). In fact, the nondisclosure here is not merely the criminal conviction, but the material underlying facts. The nature of the crimes for which she was convicted being ones of dishonesty and the facts attendant to her mental health history as argued in Mr. Boyd's brief are material to Juror Striggles's service on the jury.

[4] The State asserts that Mr. Boyd was unable to obtain Striggles's criminal records before the 2012 evidentiary hearing. This is a misstatement of the record. At the evidentiary hearing, counsel for Mr. Boyd explained that just prior to the hearing she realized that a certified copy of Ms. Striggles's Georgia conviction was necessary to place into evidence. But in fact, counsel was aware of all the convictions and underlying facts, including the Georgia conviction as it was referenced and contained within Ms. Striggles's Broward County files as well as the state attorney's files that were received in postconviction public records production. (PC-R. 5722) The only documents received in 2012 pursuant to the evidentiary hearing were certified copies of records which were already in counsel's possession.

ARGUMENT II

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

The State makes much of the fact that trial counsel relied on the *voir dire* that had already been conducted by the trial court and the State. However, 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. Prior to the start of voir dire, Laswell dismissed the Court's preliminary questioning of the venire as "rogue" and indicated he would rather have the jury be bored by the court. (R. 12). Similarly, the court and trial counsel trivialized the questionnaire as merely a means to identify the jurors for later questioning, indicating it was only "name, rank and serial questionnaire." (R. 12). Dr. Ongley also explained that while the notes he takes during *voir dire*, referencing those he took during the court's questionnaire, help him in his ability to remember jurors, they are not the end point. He agreed that notes indicating Ms. Striggles was a military brat or that she lived many places are not reflective of whether she could be fair and impartial. 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). Trial

counsel in fact did not "already know an awful lot about" the potential jurors and his attempt to justify his failure to conduct further *voir dire* based on that fact is wholly unreasonable.

Next, the State is attempting to impute a strategy upon trial counsel which neither counsel testified to. The State argues that part of counsel's strategy must have been to retain African American jurors because they had raised Neil-Slappey challenges during *voir dire*. The record reflects that trial counsel requested that the State provide race neutral reasons for striking only two jurors. (R. 331; 332-33) This does not demonstrate that trial counsel was employing a strategy of seating African American jurors. The postconviction record further reflects that 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). Both Mr. Laswell and Dr. Ongley were clear that there was no overall strategy or profile for choosing jurors. Their only goal was generally put as obtaining a fair jury. This goal is not a specific strategy.

Finally, the State's steadfast reliance on Laswell's testimony that it was his practice to not challenge jurors with criminal histories, again ignores the entirety of the record. Mr. Laswell acknowledged the equally plausible conclusion that a juror with a felony past may harbor 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). Furthermore, Laswell 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). If trial counsel was content to accept wholesale a juror with a criminal history, there would be no need to ask more questions of that juror. It is clear from the totality of his responses, that such a wholesale approach of this kind regarding a juror with a criminal history is unreasonable in a capital case.

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

Mr. Boyd responds to the State's answer only to clarify the State's misrepresentation of Mr. Boyd's penalty phase statement. The State indicates that the jury was already aware of Mr. Boyd's rape charge and the fact that the police had his semen based on his own statement during the penalty phase. This is incorrect. During his statement, Mr. Boyd only indicated that the police had collected his "DNA" for a case he was arrested for in 1998. He then indicated he was acquitted of that 1998 case. During his statement, Mr. Boyd never references rape charges or collection of sperm. It was the prosecutor who first brought up Mr. Boyd's sperm in his antagonistic cross-examination and the spectator who interjected that his prior case was the rape.

While trial counsel acknowledged during opening statements of the guilt phase that Mr. Boyd had been accused of rape twice, but acquitted for both incidents (R. 466), no further details of these incidents were revealed to the jury. What the State misunderstands is that the statement of trial counsel at the start of the trial is wholly different than an undoubtedly emotional outburst by the actual alleged victim of one of those charges. The jury now knew the alleged victim was

present in the courtroom and heard the victim's accusations. The alleged victim's outburst conveyed a message of guilt in direct contradiction of the acquittals.

Mr. Boyd is not attempting to raise a prosecutorial misconduct claim as the State suggests, but has urged the Court to look at the totality of the circumstances surrounding the spectator's outburst. The State cannot cherry pick its facts to lay blame solely at Mr. Boyd's feet. When looking at the totality of the circumstances, including the fact that a potential rebuttal witness was seated in the front row during her alleged perpetrator's testimony, the antagonistic and contentious cross-examination and the subject matter of that examination, it cannot be said that Mr. Boyd invited the error where he was answering the contentious and provocative questions asked by the State. It likewise cannot be said that the spectator's comment relating to an unproven crime and confirming Mr. Boyd's guilt for a case that was not before the jury, did not affect the outcome at the penalty phase.

CONCLUSION

Based on the foregoing, as well as the argument set forth in his initial brief, Lucious Boyd respectfully requests that this Court vacate his convictions and sentences, including his sentence of death and order a new trial and/or sentencing.

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 10th day of February, 2014.

/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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