IN THE SUPREME COURT OF FLORIDA

GEORGE JAMES TREPAL,

Appellant,

vs. **CASE NO. SC89,710**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT, IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

On April 5, 1990, Appellant George Trepal was indicted for the first-degree murder of Peggy Carr; six counts of attempted first-degree murder (other members of the Carr household); seven counts of poisoning food or water; and one count of tampering with a consumer product (Coca-Cola) (DA-R. V18/4415-23). The offenses stemmed from the poisoning of Trepal's neighbors in October, 1988, which resulted in Peggy Carr's death on April 3, 1989. Following a four-week jury trial, Trepal was convicted as charged.

The jury later reconvened and ultimately recommended the death penalty by a vote of nine to three, and the trial judge imposed a death sentence on March 6, 1991 (DA-R. V24/5475, 5549-56). The judge found three statutory aggravating factors: previously convicted of a another capital felony or of a felony involving the use or threat of violence (the contemporaneous attempted murder convictions); great risk of death to many persons (introducing poisoned Coca-Cola into the multiple-children Carr household); and committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (carefully removing the cola bottle caps, dissolving the poison in solution, adding the solution to the bottles, carefully replacing the caps, and then secreting the

cola into the Carr household). The judge found one statutory mitigating factor (no significant history of prior criminal activity--only one conviction for illegal manufacture of amphetamines); and several nonstatutory mitigating factors (happy childhood and marriage; high intelligence; above-average adjustment to prison life; and kind and generous). The court imposed, concurrent to the death penalty, a ninety-year sentence for the remaining offenses.

On appeal, this Court affirmed the judgments and sentences. Trepal v. State, 621 So. 2d 1361 (Fla. 1993), cert. denied, 510 U.S. 1077 (1994). The facts of the case are recited in this Court's discussion regarding the sufficiency of the evidence:

> We find the evidence sufficient to support a verdict of premeditated murder. There is substantial, competent evidence that prior to the death of Peggy Carr, the Carrs and Trepals, neighbors in Alturas, Florida, had had numerous altercations. Trepal once threatened one of the Carr children by saying, "I'm going to kill you." Shortly before Peggy Carr, her son, Duane, and her stepson, Travis, were hospitalized for thallium poisoning in October 1988, the Carrs received a note threatening: "two weeks to move out of Florida forever or else you will all die." Thallium-laced Coca-Colas were found in the Carr household, after weeks of searching, by state and federal environmental agencies. (The Carrs had vacated the house during the week of the hospitalizations and never had moved back.) When their next-door neighbor, Trepal, was asked why anyone would want to poison the family, he said, "to get them to move out, like they did."

Trepal had researched and written a pamphlet about voodoo for a Mensa murder weekend, which read, in part:

> Few voodooists believe they can be killed by psychic means, but no one doubts that he can be poisoned. When a death threat appears on the doorstep, prudent people throw out all their food and watch what they eat. Hardly anyone dies from magic. Most items on the doorstep are just a neighbor's way of saying, "I don't like you. Move or else!"

The themes (move or else) in the threatening note and in the voodoo pamphlet were similar.

Trepal told Goreck, an undercover agent, that the poisonings were "just a personal vendetta." Contrary to Trepal's assertion that he went to his wife's office every day, in fact he stayed at home or went to his own office each day. There was a window of time when the Carr household was unoccupied and it was undisputed that Trepal was able to surveil the household. There was testimony that the Carr house often was left unlocked. The Trepals and Carrs shared a water supply; Trepal's presence on the Carr property thus would not have been unusual.

The evidence at trial showed that Trepal is extremely intelligent, and has a highly developed knowledge of chemistry. Evidence also was presented that thallium is a by-product of amphetamine production and Trepal was the chemist for an amphetamine laboratory in the 1970s. Thallium is a poison so toxic that it has been banned by the Food and Drug Administration since 1982. Because of its toxicity, its sale and distribution are controlled and recorded, and it is not available to the general public, but only to universities and research centers. A bottle of thallium was found in Trepal's garage in Alturas. A

> hand-assembled journal, bearing Trepal's prints and containing information on poisons, including thallium, and data on the autopsy detection of poisons, was found in Trepal's Sebring home. A great many chemicals were found there, along with chemical equipment. The Agatha Christie novel, Pale Horse, dealing with murder by introducing thallium into a household, also was found there.
>
> Evidence was presented that of the chemical forms of thallium that exist, only one form can be introduced into Coca-Cola without producing noticeable changes in the drink. Evidence was presented that the bottle caps had been pried off the Coca-Cola bottles. Evidence was introduced that worldwide, Coca-Cola found no other incidences of tampering with the product, and received no ransom note after the poisoning. Evidence also was presented that a bottle-capping machine was seen among the items in the Trepals' garage when they moved into their Alturas home.
>
> The evidence thus showed that Trepal had motive; opportunity; means, including knowledge, poison, and equipment; and had made statements tying him to the crime. We find this evidence sufficient to support the jury's verdict.

621 So. 2d at 1363-5 (footnotes omitted).

Trepal filed an amended motion for postconviction relief in 1996, and an evidentiary hearing was held in October, 1996, on several of Trepal's claims (PC-R. V7/1107; V13-V20). The testimony from that hearing is discussed as relevant in the argument portion of this brief. Relief was ultimately denied and an appeal taken to this Court (PC-R. V20/3337-3377). Trepal

thereafter moved to relinquish jurisdiction to the circuit court in order to conduct further postconviction litigation involving allegations pertaining to the scientific testing conducted by the FBI laboratory during the investigation in this case. Trepal filed a motion for postconviction relief, and evidentiary hearings were held in February, 1999 and July, 2000 (2PC-R. SV8/1187-1249; SV18/2828-SV21/3456; SV22/3505-3644). Again, the relevant testimony from that hearing is discussed in the argument portion of this brief. In October, 2000, all relief was denied (2PC-R. V17/2657-2692). Over the course of the postconviction proceedings, two interlocutory appeals were taken to this Court. Trepal v. State, 704 So. 2d 498 (Fla. 1997); Trepal v. State, 754 So. 2d 702 (2000). This appeal follows.

SUMMARY OF THE ARGUMENT

1. Trepal's guilt phase trial was conducted in accordance with all legal and constitutional principles. The court below properly denied Trepal's claim regarding the validity of the scientific evidence presented at trial, determining the erroneous testimony did not affect the jury verdict. The court also properly rejected Trepal's claim that counsel was ineffective with regard to the scientific issues at trial. The other alleged exculpatory evidence argued by Trepal offered no reasonable basis for postconviction relief. The trial court's conclusion that confidence in the result of the trial was not undermined by the claims presented in this issue is supported by the record.

2. Trepal failed to establish any conflict of interest by law enforcement warranting postconviction relief. The allegation that the Polk County Sheriff's Office was motivated by fame and fortune, evidenced by its negotiation of a movie deal subsequent to Trepal's trial, presents no constitutional infirmity in his convictions and sentences. Trepal has not identified any improper actions taken by law enforcement as a result of the alleged improper motivation, and the court below properly denied this claim.

3. Trepal's claim of juror misconduct was properly denied

by the court below. The substantive claim of juror misconduct was properly found to be procedurally barred, and Trepal failed to meet his burden of establishing ineffective assistance of counsel where inquiry by the trial judge demonstrated that no juror misconduct had occurred.

4. Trepal failed to establish any attorney conflict of interest warranting postconviction relief. Trepal has not shown any actual conflict which affected his counsel's performance.

5. The court below properly denied Trepal's claim of ineffective assistance of counsel during penalty phase. Following the evidentiary hearing, the court below properly found that Trepal's attorneys made a reasonable strategic decision against presenting mitigating evidence.

6. The trial court's rulings with regard to Trepal's postconviction public records requests were correct. A review of the record establishes that the court below complied with all applicable law in denying Trepal's requests for additional records to be disclosed.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN DENYING TREPAL'S CLAIM THAT HIS TRIAL DID NOT PROVIDE AN ADEQUATE ADVERSARIAL TESTING OF GUILT.

Trepal initially asserts that the lower court erred in denying his claim that his capital trial was constitutionally deficient. Trepal has alleged three complaints about his trial: that inadmissible scientific evidence was presented; that counsel was ineffective with regard to scientific issues; and that other exculpatory evidence was not presented to the jury. Each of his allegations will be addressed in turn; as will be seen, the lower court's rulings involved the proper application of law to factual findings which are supported by the record.[1] Therefore, Trepal is not entitled to a new trial on this issue.

Most of the allegations within this claim were subjected to an evidentiary hearing. The denial of this claim involved the application of legal principles to the facts as found below; this Court must review the factual findings for competent, substantial evidence, paying deference to the trial court's findings, and review of the legal conclusions is de novo.

[1]The State has some concerns with a few of the findings and conclusions entered below, which will be developed as relevant in this brief; however, these concerns do not affect the ultimate resolution of the issues presented.

Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998). To the extent that claims were summarily denied, this Court must affirm where the trial court properly applied the law and competent substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998), cert. denied, 526 U.S. 1100 (1999). This Court must accept the factual allegations in the motion to the extent they are not refuted by the record, and the summary denial must be upheld if the claims are facially invalid or conclusively refuted by the record. Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000); Peede v. State, 748 So. 2d 253, 257 (Fla. 1999).

A. FALSE AND INADMISSIBLE SCIENTIFIC EVIDENCE

Trepal's first sub-issue challenges the admission of trial testimony from FBI Special Agent Roger Martz. It is important at the outset to place the dispute with regard to Martz's testimony in context. There is no question that Peggy Carr and the other victims were poisoned with thallium; that it was not possible to detect the particular form of thallium in the victims' systems; that thallium was discovered in three full, capped bottles of Coca-Cola found in the victims' house (Q1, Q2, and Q3); and that thallium was found in a brown bottle (Q206) found in Trepal's garage -- all of this testimony was presented

through other witnesses. Agent Martz was responsible for determining the particular ion associated with the thallium found in the Coke bottles as well as the brown bottle from the garage; that is, whether the salt form by which the thallium was placed in the Coke was nitrate, sulfate, or chlorine (DA-R. V14/3553, V16/4061-62).

At trial, Martz testified that, in his opinion, thallium nitrate had been added to the Coca-Cola (DA-R. V14/3557, 3559). He also testified that the brown bottle contained thallium I nitrate (DA-R. V14/3562, 3565). There was no real issue presented below with regard to Martz's conclusion as to the substance in the brown bottle; the only controversy involves Martz's testing and conclusion regarding the thallium contained in the Coke bottles taken from the Carrs' house (2PC-R. SV17/2658-59).

Martz testified at trial that upon being asked to identify the form of thallium found in the Coke bottles, he first conducted a chemical test, diphenylamine ("DP"), in which a chemical solution reacts to nitrate with a blue color (DA-R. V14/3556). He performed the test and got a blue color, indicating the presence of the nitrate ion (DA-R. V14/3556). He ran this test with all three samples, and also with known, unadulterated Coke; all three samples indicated the presence of

nitrate, but no nitrates were found in the known Coke samples (DA-R. V14/3557, 3569). Martz noted that sulfate would not react with a blue color, but it will react to other chemical tests which he ran, and that none of his tests indicated the presence of sulfate in the samples (DA-R. V14/3557-58).

Martz then conducted another test called ion chromatography ("IC") (DA-R. V14/3558). This test uses equipment; the sample liquid is passed through a solid phase and different ions are separated out (DA-R. V14/3558). The different ions come out at different times, and there is a detector and recorder which measures the response times from which a particular ion can be identified (DA-R. V14/3558). Martz stated that he tested the samples and that all three samples contained nitrate ions (DA-R. V14/3558-59). From these two tests, Martz concluded that the three Coca-Cola samples contained thallium nitrate (DA-R. V14/3559).

On cross-examination, he was asked if his tests revealed any different isotopes of thallium that might affect the atomic weight, and he indicated that he had conducted another test which he had not mentioned because it wasn't used for identification, but when he ran the mass spectrometry, he was able to identify the major isotopes of thallium present (DA-R. V14/3568). Martz did not attempt to quantitate the amount of

nitrate present or determine if the amount of nitrate matched up with the amount of thallium that had been detected (DA-R. V14/3560, 3568). However, he stated that in his opinion, the nitrate did not come from anywhere other than the thallium because nothing else he found in the Coke indicated anything else was present; he acknowledged that he could not exclude the possibility that the nitrate may have come from somewhere else (DA-R. V14/3568).

At the postconviction evidentiary hearing, Martz testified extensively about all of the tests which were conducted on the Coke samples, not only to identify the nitrate but also to exclude the possibility of sulfate and chlorine. He recognized that his prior testimony was inaccurate in several respects. He noted that his statement that his conclusion on the presence of thallium nitrate was "based on that test," after discussing the DP test was misleading, because his conclusion was actually premised on both the DP and IC tests; the DP test was a presumptive screening for oxidizing agents and a blue color meant only that it could have been a nitrate that was added to the Coke (2PC-R. SV18/2899, 2921, 2925). He admitted that, contrary to his testimony, he had not actually performed the IC test on the third Coke bottle, Q3; he did not believe this test was necessary because he felt that Q1 and Q2 offered a

representative sample, and his results on both of these specimens were consistent (2PC-R. SV18/2927-28). He also acknowledged that his lab notes were, in some respects, incomplete and mislabeled (2PC-R. SV18/3035).

Martz maintained, however, that his opinion today would be the same as his trial testimony. He stated that no other substances besides nitrate would yield positive results on both the DP and IC tests (2PC-R. SV19/2977-78, 2982, 3043). Prior to the hearing, he had successfully quantified the nitrate found in the samples, and determined that the nitrate and thallium were present in a one-to-one relationship; the stoichiometry was equal (2PC-R. SV19/2990-93, 3031). Two other witnesses at the hearing (Jourdan and Burmeister) agreed that, to a reasonable degree of scientific certainty, Martz's testing and quantitative analysis demonstrated that thallium nitrate had been added to the Coke (2PC-R. SV20/3147, 3195). However, other witnesses (Whitehurst and Dulaney) at the hearing criticized Martz for running the known standard of nitrate for the IC test in water rather than unadulterated Coke, and opined that this invalidated Martz's IC tests and consequently his quantification results. These witnesses concluded that Martz's testing established only that the Coke samples were "consistent with" thallium nitrate having been added.

The court below concluded that Martz's testimony was false and misleading, agreeing that Martz should have limited his testimony to an opinion that the results of his testing were consistent with thallium nitrate having been added to the Coke. However, the court denied relief upon finding that this testimony could not have affected the jury verdicts and that confidence in the result of Trepal's trial was not undermined (2PC-R. SV17/2678-79). The court found that Martz's testimony was false because Martz only ran the Q1 and Q2 samples through the IC test, although he testified that the IC test was run on all three samples. The judge also characterized the testimony as false for affirmatively stating that thallium nitrate was added, rather than stating that the results were consistent with thallium nitrate being added. The court found that Martz provided misleading testimony when he stated that the unadulterated Coke did not contain nitrates, because Martz did not reveal that when the known Coke samples were run through the IC test, the retention peaks indicated that nitrate was present, notwithstanding the fact that the DP test did not confirm the presence of nitrate (2PC-R. SV17/2678-79).

The court below also concluded that Martz's testimony was false because Martz had failed to reveal the additional testing which had been conducted (2PC-R. SV17/2679). The court cited

Giglio for the proposition that withholding information can constitute a falsity. The State respectfully takes issue with the court's conclusion in this regard. While Giglio acknowledged that the nondisclosure of evidence affecting credibility was included in the general rule of that decision, the fact that the Coke samples in this case were subjected to further testing did not impugn Martz's credibility. Martz was not asked about additional testing, and in fact when asked about the isotopes of thallium, he revealed that he had conducted a mass spectrometry test which he had not discussed previously since it did not affect his identification of nitrate (DA-R. V14/3568). He explained at the evidentiary hearing that the additional testing was conducted, not because he did not have confidence in the DP and IC test results, but because thallium was an uncommon substance, there were no protocols to govern his testing, and he tried a number of different tests -- some of them experimental in nature -- in an attempt to find out as much as he could (2PC-R. SV19/3024-27). Ultimately, he determined that only the DP and IC tests provided any useful information.

On these facts, the court's conclusion that the information that Martz had conducted additional tests may have been useful to the defense to suggest that Martz was not satisfied with his initial tests results does not support the court's finding that

Martz testified "falsely" in failing to reveal the other tests. Martz should not be criticized for failing to reveal something that no one asked about just so that the defense could argue an implication to the jury which did not exist. Although this does not affect the lower court's ultimate conclusion that Martz's false testimony did not affect the jury verdict, it suggests that the court below was unfairly critical of Martz and therefore the lower court's factual findings may reasonably be questioned.

Trepal offers three bases for the granting of a new trial due to the trial court's finding that Martz's testimony was false and misleading: that such testimony violated the standard for reliability of scientific testimony under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); that such testimony violated the prohibition against the knowing use of false testimony in Giglio v. United States, 405 U.S. 150 (1972); and that information revealing the deficiencies in Martz's testing should have been disclosed to the defense prior to trial pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Each of these arguments will be addressed in turn; as will be seen, the facts of this case do not compel a new trial under the application of any relevant legal principles.

1. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)

Trepal initially alleges that, because Martz's testimony would not meet the standards for admission under Frye, he is entitled to a new trial. Trepal suggests that, if the deficiencies in Martz's testing had been disclosed prior to trial, the defense could have interposed a Frye challenge and successfully excluded this testimony. The problem with Trepal's Frye claim is that the question of whether scientific evidence is reliable enough to be admitted under that standard is an issue which must be litigated at the time of trial, and a Frye challenge must be presented on the record and asserted on direct appeal. Even if the testimony below did not satisfy the Frye standard,[2] this argument is procedurally barred and not available to Trepal in these postconviction proceedings.

The fallacy with Trepal's argument is that, had Martz's testing been subject to further scrutiny prior to being admitted at trial, any deficiencies could have been corrected with new, more reliable testing and data. The challenged testimony would not have been excluded but would have been corrected and in fact strengthened. There is no allegation that the nature of the

[2]The court below did not make any findings with regard to the Frye question. Three witnesses testified at the hearing that Martz's conclusion that thallium nitrate was added to the Coke samples was proven within a reasonable degree of scientific certainty (2PC-R. V19/3043, 3147, 3195.

testing itself is such that, when properly conducted, the results would not be generally accepted within the scientific community. The fact that any deficiencies could be cured demonstrates the reason a Frye challenge must be timely presented, and establishes that Trepal cannot obtain any relief on his Frye claim in these postconviction proceedings.

Finding this claim to be barred clearly does not preclude Trepal from offering a reasonable argument with regard to this evidence, it simply changes the appropriate legal analysis to be conducted. Even if a pretrial Frye challenge would have limited Martz's testimony to that accepted below, it would not have excluded his testimony but only have restricted it to an opinion that the tainted Coca-Cola was consistent with having thallium nitrate added to the Coke. Trepal's current claim that "the contents of the Coke samples and Q206 were not even what Martz said they were" (Appellant's Initial Brief, p. 47), is a total misrepresentation; there has never been any evidence presented that the Coke samples did not, in fact, contain thallium nitrate. The only criticism of Martz's work goes directly to the certainty with which Martz presented his conclusions. The court below specifically found that Martz could have properly testified "that test results were consistent with the presence of nitrate" in the samples (2PC-R. SV17/2679).

Trepal further asserts that the erroneous admission of Martz's testimony also affected the testimony of Broughton and Warren as to Trepal's involvement in the methamphetamine lab in the 1970s because, without the conclusion that the tainted Coke contained thallium nitrate, the testimony relating thallium nitrate to methamphetamine production would not have been relevant. This argument is without merit because, as the court below found, even if Martz could not identify thallium nitrate as having been "added" to the Coke, he could have properly testified that the test results on the tainted Coke were consistent with thallium nitrate having been added (2PC-R. SV17/2679). Such testimony would have been a sufficient predicate for the relevance of Trepal's knowledge of and access to thallium nitrate as part of his participation in the methamphetamine lab, and therefore the Broughton/Warren testimony still could have been admitted.

This Court should expressly find Trepal's substantive Frye claim to be procedurally barred, and restrict the legal analysis of Trepal's issue regarding the admissibility of Martz's testimony to proper postconviction principles.

2. Giglio v. United States, 405 U.S. 150 (1972)

Judge Bentley concluded that the proper analysis of this

issue is governed by Giglio's proscription against the prosecution's knowing use of false testimony. As noted above, the court identified portions of Roger Martz's trial testimony as false and misleading. Trepal claims that the court's Giglio analysis was erroneous because he believes that the court used an incorrect legal standard for the determination of materiality. The analysis of materiality with regard to the problems presented by Martz's trial testimony is the core issue presented by Trepal's challenge to Martz's testimony.

A review of the court's order establishes that the court below applied the correct legal standard in considering the materiality of Martz's testimony. The court noted the relevant inquiry of whether "there is a reasonable likelihood that it could have effected [sic] the jury verdict," and concluded that confidence in the verdict had not been undermined (2PC-R. SV17/2689). See Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001). Trepal does not suggest a different standard, he merely disagrees with the lower court's reliance on other evidence at trial and with the ultimate conclusion that Martz's testimony was not materially erroneous. Trepal cites no authority for the suggestion that the court cannot consider other evidence as part of a proper materiality analysis.

The State respectfully submits that the court's materiality

analysis was in fact improperly beneficial to Trepal. Although the court applied the materiality standard for a Giglio claim, the facts of this case are more appropriately analyzed as a straight newly discovered evidence issue. This entire claim was presented to the court below as one of newly discovered evidence. See also Davis v. State, 736 So. 2d 1156 (Fla. 1999) (issue claiming Whitehurst's allegations against FBI lab presented as newly discovered evidence). The difference between a newly discovered evidence claim and a Giglio claim involves the degree to which the prosecutor is aware of, and responsible for, the erroneous evidence. Compare Ventura, 794 So. 2d at 562 (Giglio requires showing that 1) the prosecutor or witness gave false testimony; 2) the prosecutor knew the testimony was false; and 3) the statement was material) with Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (newly discovered evidence requires showing 1) information was unknown to the trial court, the party, and counsel at the time of trial; 2) information was undiscoverable by due diligence; and 3) information would probably produce an acquittal at trial). Although Trepal will obviously assert that the prosecutor must be charged with knowledge of Martz's improprieties under the theory that, for Brady and Giglio purposes, actions of law enforcement are imputed to the prosecutor, this principle may not be applied

mechanistically.

In similar situations, federal courts have declined to impute the knowledge of improper testimony from state expert witnesses to the prosecutor. In Smith v. Massey, 235 F.3d 1259 (10th Cir. 2000), the court considered a Napue v. Illinois, 360 U.S. 264 (1959), claim of false testimony with regard to a chemist from the Oklahoma State Bureau of Investigation. The defendant had argued that, because the witness was an OSBI agent, his knowing decision to provide inaccurate testimony should be imputed to the prosecution. The circuit court refused to do so, noting that the United States Supreme Court had not directly addressed the issue, but that in Briscoe v. LaHue, 460 U.S. 325, 326 n.1 (1983), the Court stated that "[t]he Court has held that the prosecutor's knowing use of perjured testimony violates due process, but has not held that the false testimony of a police officer in itself violates constitutional rights." The Smith v. Massey court also acknowledged that federal circuit courts appeared to be split on the issue of imputing a Napue violation by law enforcement officers to the prosecution. 235 F.3d at 1272.

On the facts of this case, Martz's overstated testimony should not be imputed to the prosecutor, who may be skilled in the law but not an expert in complex scientific matters.

Without a showing that the prosecutor in this case knowingly presented false testimony from Agent Martz, this claim is properly analyzed as a newly discovered evidence claim, requiring Trepal to demonstrate that, absent Martz's overstatements, he would probably have been acquitted. Although rejecting the suggestion below that Trepal's allegations constituted newly discovered evidence, the lower court did alternatively rule that the material challenging Martz's testimony could not meet the standard of probably producing an acquittal or life sentence (2PC-R. SV17/2686).

Trepal has failed to demonstrate that he is entitled to a new trial due to the prosecutor's knowing use of false testimony at his trial. The court below properly denied the materiality element of this claim, and no relief is warranted.

3. Brady v. Maryland, 373 U.S. 83 (1963)

Trepal's Brady claim was also rejected by the court below, which held that Martz's lab notes could not be considered to be Brady material because they were not exculpatory prior to trial, but could only be regarded as possibly exculpatory after Martz testified. This analysis was proper and consistent with prior cases where this Court has considered the FBI lab issue. See

Buenoano v. State, 708 So. 2d 941, 953, n.5 (Fla. 1998) ("Clearly, none of Whitehurst's recently obtained opinions about the techniques Martz used in reaching his conclusions concerning the capsules can be considered favorable evidence that was withheld by the State, under Brady").

Moreover, even if the court below was incorrect with regard to the applicability of Brady, no relief is warranted because the court's conclusion that Trepal cannot establish the materiality standard from Giglio would still defeat his claim. As this Court has recognized, the Brady standard is actually more difficult for the defendant to meet than the Giglio standard applied below. Ventura, 794 So. 2d at 563. Given the other strong circumstantial evidence presented at trial, and the fact that Martz's testimony may have been weakened by impeachment through his lab notes but would still be highly incriminating, no reasonable likelihood of an acquittal exists. Thus, no relief is warranted on Trepal's Brady claim.

B. INEFFECTIVE ASSISTANCE OF COUNSEL: FAILURE TO OBTAIN TOXICOLOGY EXPERT AND PRESENT EVIDENCE REGARDING OTHER SCIENTIFIC ISSUES

Trepal's second sub-issue in his claim that the guilt phase of his trial did not provide an adversarial testing of his guilt asserts that his trial counsel was ineffective for failing to

obtain an expert in toxicology to adequately challenge the State's evidence with regard to the scientific testimony. The court below concluded, following evidentiary hearing on this claim, that neither deficiency nor prejudice had been shown. The denial of this claim involved the application of legal principles to the factual findings made below; this Court must review the factual findings for competent, substantial evidence, paying great deference to the trial court's findings, and review of the legal conclusions is de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998).

Of course, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the

'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

Proper analysis of this claim requires that courts make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. Strickland, 466 U.S. at 689.

Trepal identifies three issues which allegedly reflect the need for a toxicology expert at trial. Each of these will be explored; however, once again, no basis for relief has been offered.

1. Arsenic

Trepal first asserts that the postconviction evidence

suggesting that Peggy Carr, Duane Dubberly, and Travis Carr all had elevated levels of arsenic in their systems while in the hospital established that they had been poisoned with arsenic in addition to thallium, and that this testimony would have exculpated Trepal since he was never alleged to have possessed arsenic or to have been in contact with the victims while they were in the hospital.

The court below considered all of the evidence about the arsenic levels in the victims' systems over the relevant time period, and concluded that counsel was not deficient:

> 7. The court allowed the defendant to inquire as to trial counsel's alleged failure to address the elevated amounts of arsenic in the urine of Peggy Carr, Duane Dubberly and Travis Carr. (*See*, rule 3.850 motion, p. 100-2.) The court believes that this issue was one of the most important claims raised in the rule 3.850 motion.
>
> The evidence available at the time of trial was that Peggy Carr, Duane Dubberly and Travis Carr all had been exposed to arsenic. Dr. Marland Dulaney testified as an expert in toxicology for the defendant at the evidentiary hearing. Dr. Dulaney's opinion was that there were two separate poisoning attempts. The first was a chronic (small doses over time) exposure to arsenic. The second was an acute (high dose at one time) exposure to thallium. The doctor agreed, however, that the cause of Peggy Carr's death was the exposure to thallium.
>
> An important piece of information that Dr. Dulaney relied upon in formulating his opinion was a test performed on Peggy Carr on October 31, 1988. The results of that test revealed that Mrs. Carr had 616 micrograms of arsenic in her urine. A

normal level of arsenic is 25 micrograms. However, there is evidence that the 616 microgram result may have been unreliable. Dr. Robert VanHook, who treated Mrs. Carr at the Winter Haven hospital, testified in a deposition given on September 5, 1990, that "one test came back suggesting that arsenic level was elevated but apparently this was never confirmed." (R. 7956). Based on the initial lab report of 616 micrograms, Dr. VanHook began BAL (British Anti-Lewisite) therapy to combat the perceived high arsenic levels. Dr. VanHook testified that "[h]owever, the following day we got a call from the state lab indicating that their tests for arsenic were conflicting. So as I remember no further therapy specific for arsenic was done." (R. 7958). The doctor further testified that Mrs. Carr's hospital progress reports stated that the hospital received a "[c]all from state last night indicates conflicting results on the arsenic tests. BAL stopped." (R. 7960). In response to a question about why the BAL treatment was discontinued, Dr. VanHook said "[b]ecause of information from the state lab that they had conflicting reports regarding the analysis [of arsenic in the urine sample]." (R. 7967). During the state's examination, the following discussion occurred:

> State Attorney: Are you or do you have an opinion with regard to the elevated level being at 625 [sic] and apparently the lab at CDC not finding any arsenic in this person's body? What I'm trying to get it is would you expect to see arsenic in a decreasing level if it really was at 625 [sic] or could it have been at 625 [sic] and be zero the next day and that be a rational thing?
>
> Dr. VanHook: I would not expect that but I'm not an arsenic expert.

(R. 7974).

Dr. T. Richard Hostler, Peggy Carr's primary physician at Winter Haven Hospital, testified in a deposition on August 24, 1990, that he remembered "one report in which arsenic was found in trace amounts." (R. 7392). Dr. Hostler was referring to a report which stated that on November 15, 1988, Peggy Carr had 36 micrograms in her urine over a 24 hour period. Dr. Hostler stated that because the normal level was 25 micrograms in a 24 hour specimen he "personally [did] not consider 36 micrograms to be a clinically relevant or significant elevation therefrom." (R. 7394).

Dr. Michael Wilder, who at the time of the poisoning was the State Epidemiologist, testified in a deposition given on August 7, 1990, that "there was arsenic found in one of the urine samples. There was, when it was first reported from the laboratory in California there was some uncertainty as to the level of importance that that [level of] arsenic might have. In other words, after some discussion with the folks at CDC it was discerned that the level of arsenic was not incompatible with the [level] normal[ly found] from eating oysters, and so forth." (R. 6521-22)(additions in brackets added from the errata sheet submitted by Dr. Michael Wilder on September 5, 1990.)

Another important piece of evidence Dr. Dulaney relied upon was the pattern of Peggy Carr's symptoms. Evidence revealed that Peggy Carr went to Bartow Hospital feeling sick on October 24, 1988. She was discharged on October 27, 1998 [sic], when she felt better. On October 30, 1988, Peggy was feeling very sick and Pye Carr brought her to Winter Haven Hospital. Dr. Dulaney's theory is that Peggy Carr was being poisoned with a low dose of arsenic when she became sick on October 27. Once in the hospital, the source of arsenic was removed and her condition improved. She then returned home, and was exposed to arsenic and thallium. Her condition worsened and she was admitted to the hospital three days later. This theory comports with Dr. Dulaney's opinion

that there were two separate poisoning attempts.

However, other doctors have different opinions on why Peggy Carr became sick, improved and became sick again. A section of a CDC article titled "A Cluster of Acute Thallium Poisoning in Florida, 1988," stated that:

> [patient A [Peggy Carr] reportedly drank half of a bottle on October 22, put the bottle in the refrigerator and drank the remaining soft drink the next day. On October 23, patient B [Travis Carr] drank at least 4 ounces from another bottle while Patient A's husband had a 'Bourbon' mixed with 1/4 of a glass from the same bottle; on that occasion the 2-year old granddaughter drank 'a small amount' from the same bottle. When Patient A came back home from her first hospitalization 5 days after her first onset she shared another bottle of soft drink with her son (patient C) [Duane Dubberly], who consumed about 4 ounces of it. The time interval between soft drink consumption and occurrence of first neurologic symptoms ranged from 1 to 3 days for the 3 symptomatic cases, the shortest being for patient A who reportedly drank the largest amount of soft drink.

(R. 6447).

Dr. Karl Klontz, the Medical Executive Director of the Department of Health and Rehabilitative Services Epidemiology Program of the Disease Control Office, authored a memorandum on January 3, 1989, titled "A Thallium Poisoning Cluster In A Single Family, Polk County, Florida. October-November 1988." The memorandum stated that:

> [t]he clinical history of Mrs. P.C. [Peggy Carr], with an acute phase, followed by apparent improvement, and a

> secondary worsening phase suggest 2 successive exposures consistent with her history of Coke consumption.... The severity of illness and the concentration of urinary thallium correspond to the amount of Coke ingested by each poisoned case. Furthermore the clinical history of Mrs. P.C. is consistent with her 2 successive exposures to the contaminated Coke.

(R. 6565-66). Therefore, doctors both at the CDC and HRS believed that Peggy Carr's illness and symptoms were consistent with her consumption of the Coca-Colas laced with thallium. Neither doctor hypothesized that the first signs of illness were due to chronic exposure to arsenic, as Dr. Dulaney believes.

Thus, the defense team was faced with the knowledge that thallium caused Peggy Carr's death, but that the three victims also had arsenic present in their urine. Additionally, counsel knew that the initial arsenic test result on Peggy Carr, which showed an extremely high concentration of arsenic, was suspect. Counsel also knew that the state was not prosecuting the defendant for arsenic poisoning. It is not unreasonable for defense counsel to have focused their time and energy on refuting the allegation that Mr. Trepal killed Peggy Carr by thallium poisoning. Looking at the big picture of the trial, the presence of arsenic raised some questions, but counsel had to focus their efforts on what they knew (Peggy Carr died of thallotoxicosis). Furthermore, the evidence and arguments presented at the evidentiary hearing concerning the exposure to arsenic do not exclude the defendant as the guilty party in that poisoning as well. Based upon the uncertainty of the meaning of the arsenic levels, the uncertainty of the test result and counsel's own knowledge and strategy, the court finds that the defendant has failed to establish deficient performance

> and any resulting prejudice in the "failure" to present to the jury the evidence relating to arsenic.

(PC-R. V20/3362-66). Thus, the court rejected the contention that counsel should have more thoroughly explored the arsenic evidence during the trial.

This finding was correct. Without question, Peggy Carr died of thallium poisoning, and any attempt by the defense to side-step that issue and address only facts which did not contribute to Peggy's death would not have had an exculpatory effect. The court's factual finding below that "[t]he presence of arsenic in the urine of the victims has also been adequately explained" (PC-R. V20/3340), is entitled to deference, and clearly defeats Trepal's claim on this issue.

As part of this issue, Trepal comments that, with regard to the FBI lab issue, the court below found counsel to have been deficient for the failure to retain an expert to assist the defense. The court's finding in this regard deserves scrutiny. Jonathan Stidham and Dabney Conner testified at the evidentiary hearing that, prior to trial, the defense retained an expert from Georgia Tech and secured independent testing on the Coke samples which Roger Martz had found to contain thallium nitrate (2PC-R. SV22/3521-22, 3545-53). The fact that Conner stated that he was "never really happy with the results of the Georgia Tech lab" does not establish that counsel were deficient in

failing to secure yet another expert.

On these facts, no basis for a finding of ineffective assistance of counsel has been presented, and the court below properly denied relief on this issue.

2. Thallium Increase in Hospital

Trepal also asserts that counsel were deficient in failing to investigate and develop evidence regarding the medical records which showed Travis Carr's thallium levels increased during the time that he was in the hospital. Trepal relies on the admission of the records below, and asserts that these records clearly establish his innocence.

The court below concluded that Trepal failed to offer any evidence on this claim. The court may have been referring to the fact that Trepal presented no testimony at the hearing with regard to the medical records or any possible medical significance of the thallium readings. Although granted an evidentiary hearing on this claim, Trepal failed to offer any basis for a finding that the information reflected in Travis Carr's medical records established that Travis continued to receive poison while in the hospital. His bare reliance on the alleged "obvious significance" of the medical records is plainly insufficient. The court below found that the medical records did not have any significance by themselves, and thus Trepal's

allegation of ineffective assistance of counsel was factually deficient. This factual finding is entitled to deference in this Court and refutes Trepal's argument on this issue. No relief is warranted.

3. Thallium on Pye Carr's Property

Trepal's final reason for seeking a toxicology expert involved the evidence that thallium had been discovered under the sink in an apartment on the Carr property. At the evidentiary hearing, Trepal presented testimony suggesting that the amount of thallium discovered was significant. The court below concluded, however, that trial counsel had appropriately addressed this issue with the jury:

> 6. The court allowed the defendant to inquire as to trial counsel's alleged failure to address the trace amount of thallium (sample 88120536) discovered under the sink in the apartment of the Carr property. (*See*, rule 3.850 motion, p. 98-100.) Trial counsel testified that the thallium under the sink was an important issue for them to explore. Wofford Stidham testified that he attempted to highlight the discovery of thallium in the garage apartment for the jury. The discovery was important because there was no evidence that the defendant had access to the garage apartment, and therefore, improved the chance of successfully pointing the finger at Pye Carr as the poisoner. However, several of the state witnesses testified that the level discovered in the apartment was a trace amount which was insignificant. Also, Dr. William Coopenger, the administrator of the chemistry section of

> the Florida Department of Environmental Regulation, annotated a report authored by the Center for Disease Control by writing "[r]insings from one swab collected from the apartment kitchen contained thallium at a concentration of 9.916 mg/9. Swabs collected subsequently from the same area and analyzed at the FBI Laboratory failed to confirm this result." (R. 6448).
>
> Even faced with evidence that the amount of thallium under the sink was negligible and that the FBI could not confirm the presence of thallium, counsel did continue to argue the issue, and the state had to attempt to rebut the argument during closing arguments (R. 4188-90). A review of the record indicates that defense counsel raised the issue and argued the inferences to the jury. Simply because counsel were not successful does not mean that they were ineffective.

(PCR. V20/3361-62).

Once again, the lower court's analysis was proper. The mere fact that collateral counsel would choose a different method of addressing this evidence does not establish that Trepal's trial attorneys were constitutionally deficient. A review of this issue indicates only that current counsel would have handled the scientific issues at trial differently; this is not the test for ineffectiveness. Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial"); Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Stano v. State, 520 So. 2d 278, 281, n. 5 (Fla. 1988) (noting

fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness). On these facts, no error has been presented with regard to the trial court's rejection of Trepal's claim that his attorneys were ineffective for failing to secure a toxicology expert at trial.

C. OTHER EXCULPATORY EVIDENCE

Trepal's last contention with regard to the adversarial testing provided by his guilt phase trial claims that other exculpatory evidence existed which should have been presented to the jury to establish reasonable doubt. None of his sub-issues in this regard compel the granting of any relief.

1. Brady v. Maryland, 373 U.S. 83 (1963)

Trepal presents an additional Brady claim with regard to (1) a letter which had been written from Peggy Carr to her husband, Pye, and (2) intelligence reports written by Detective Goreck. He asserts that Peggy's letter was exculpatory because it demonstrated that the marriage was in trouble and would have bolstered the defense theory that Pye Carr committed these crimes, and that the police reports would have revealed the true nature of the investigation against Trepal for these crimes. The court below properly rejected relief on the facts presented.

With regard to the letter, the court commented below:

> The state's failure to disclose the note is troubling, but ultimately harmless. Wofford Stidham said that he was unsure whether the defense team would have even used the note had they known of it. The material may have lead to other evidence, but the actual meaning of the note is nebulous. It would not have helped to implicate Pye Carr in the murder. The fact that the marriage was in trouble was brought out at trial. The meaning of the note is vague, and it arguably would have been inadmissible at trial.

(PC-R. V20/3340). The letter was not exculpatory to Trepal. It would not have been admissible due to its hearsay nature, and it did not provide any information which the defense did not already know.

There was evidence presented at Trepal's trial to establish that Peggy and Pye were having marital problems prior to the poisonings. Trepal was permitted to elicit testimony from Rita Tacker that Peggy Carr had taken the children and stayed with Tacker for a few days because Peggy and Pye were having marital problems (DA-R. V8/1537); testimony from Peggy's daughter, Sissy, that Sissy believed Pye should have taken Peggy to the hospital sooner (DA-R. V9/1646); testimony from Pye acknowledging that there had been marital trouble (DA-R. V14/3667); testimony from law enforcement that Pye was a prime suspect but ultimately excluded as the perpetrator (DA-R.

V11/3006; V12/3173, 3178); and testimony from the Carrs' pastor, Robert Grant, and from Peggy's son, Duane Dubberly, that Pye and Peggy were separated just before Peggy got sick (DA-R. V14/3616, 3666). Given this testimony, the note did not offer any material exculpatory evidence, and no Brady error is shown by the State's failure to disclose this note to the defense.

The claim regarding Goreck's intelligence reports is similarly without merit. Trepal asserts that the reports would have assisted the defense by suggesting that Goreck knew that the brown bottle found in Trepal's garage contained thallium before the bottle had actually been tested by the FBI. The court below rejected this factually:

> (4) The allegation raised in Claim #7 on page 175, paragraph 32, caused some concern. The court permitted a hearing to determine if the allegations that Polk County Sheriff's Office Lt. Susan Goreck knew the contents of the bottle "Q206" prior to receiving the test results were true. The implication is that Lt. Goreck knew the type of thallium in Q206 prior to receiving the test results because law enforcement planted the bottle in the defendant's garage.
>
> At the evidentiary hearing, Susan Goreck testified that she received a telephone call from FBI Agent Brad Brekke on March 5, 1990. During the call, Agent Brekke told Lt. Goreck that the FBI laboratory found thallium I nitrate in bottle Q206. On March 6, 1990, Lt. Goreck called the lab and the lab confirmed that the substance in Q206 was in fact thallium I nitrate. On March 15, 1990, Lt. Goreck prepared an intelligence report documenting the two telephone conversations. On April 24, 1990, the FBI lab sent a written report to the Polk County

> Sheriff's Office. However, the written report merely stated that the substance found in Q206 was "thallium." The report did not state the exact type of thallium. Lt. Goreck testified that she then called the FBI lab and requested a more specific report. On July 9, 1990, the FBI lab sent a detailed report to Lt. Goreck which stated that the substance in Q206 was thallium I nitrate. Lt. Goreck also testified that she had no knowledge that Q206 contained thallium prior to the March 5, 1990, telephone conversation with Agent Brekke. The evidence presented at the evidentiary hearing is sufficient to refute this claim.

(PC-R. V20/3372-73). Given these findings, which are clearly supported by the testimony below, the reports did not contain any material, exculpatory evidence. Trepal's Brady claim on this basis was properly denied.

2. Ineffective Assistance of Counsel

Trepal next asserts that exculpatory evidence existed in the nature of information incriminating other suspects, information that Trepal suffered from a speech impediment, and information that other people were aware of the threatening note which the Carr family had received prior to the poisonings; he claims that counsel was ineffective for failing to present all of this evidence to the jury. It should be noted that the record reflects that the jury did hear evidence about the existence of other suspects as well as evidence about Trepal's speech impediment (DA-R. V11/2096, V12/3177-80; V14/3580). A review of the record and the findings of the court below demonstrates that

Trepal's claim of ineffective assistance of counsel with regard to this evidence is without merit.

The court below properly rejected this claim with regard to the evidence about other suspects, finding:

> One portion of Claim #3 alleged that trial counsel were ineffective for failure to present evidence of the 'other suspects' to the jury. The focus of this portion of Claim #3 is that the jury should have known that Pye Carr (husband of the victim) and Diana Carr (wife of the defendant) were both suspects in the murder.
>
> Wofford Stidham testified that the defense team wanted to show the jury that Pye Carr could have committed this crime. However, the lawyers were concerned because they did not have any substantive evidence that suggested Pye Carr was the poisoner. Wofford Stidham further testified that in order to point the finger at the man whose wife had just been poisoned and died, they needed stronger evidence than they did have. Additionally, many of Judge Maloney's rulings, which were affirmed on appeal, precluded counsel from presenting much of the evidence they believed to be favorable to Mr. Trepal, and inculpatory of Pye Carr. Jonathan Stidham testified that a tactical decision was made that it would be better strategy for the defense to argue that the state could not prove its case, rather than saying Pye Carr committed the crime. Jonathan Stidham stated that he believed that if the defense tried to allege Pye committed the crime, the jury would undertake a "Pye versus Trepal" analysis, and in such an analysis Jonathan Stidham believed that Mr. Trepal "lost that race every time." The defense theory that developed was to raise reasonable doubt without actually pointing the finger at specific suspects.
>
> As to Diana Carr, trial counsel testified that the defendant gave them

specific instructions not to attempt to implicate his wife in any manner. This testimony was not contradicted by any witness. Therefore, it is undisputed that trial counsel were restricted by the express instructions of their client. Jonathan Stidham testified that the attorneys decided to try to raise the question of Diana Carr as a suspect in the closing argument of the guilt phase (R. 4246). Jonathan Stidham stated that Mr. Trepal did not know about this strategy and after the arguments were completed, Mr. Trepal was "very upset." Further, counsel felt that to try to implicate Diana Carr would have given credibility to the state's case. In order to argue the circumstantial evidence pointed to Diana Carr, the defense would necessarily have to argue that the circumstantial evidence was in fact evidence that the jury should consider, when the defense theory was to attempt to discredit the state's entire circumstantial evidence case. Another concern was that more of the circumstantial evidence pointed to the defendant rather than to Diana Carr.

A sub-issue as to Diana Carr has to do with the fact that defense counsel did not elicit the fact that she was testifying under immunity. Jonathan Stidham testified that he felt that Diana Carr's testimony was not helpful to the state so he saw no need to attempt to impeach her. This was clearly a tactical decision, which when considered along with the desires of Mr. Trepal not to implicate his wife, was reasonable and did not constitute ineffective assistance of counsel.

The defendant also claims that Carolyn Dixon (sister of Pye Carr) was suspect and this information should have been presented to the jury. A specific claim raised in paragraph #58, page 56 of the 3.850 motion concerned the court. The defendant claims that Carolyn Dixon told Laura Ervins that Peggy Carr had been poisoned with thallium some three days before the hospital knew thallium was involved. Testimony at the

> evidentiary hearing indicates that Carolyn Dixon did not know what the poison was prior to the announcement by the hospital. It does appear that there is some confusion over the actual date of the conversation between Carolyn Dixon and Laura Ervins. However, Jonathan Stidham testified that he knew about the conversation and wanted to raise the same argument that collateral counsel raised in the rule 3.850 motion. Jonathan Stidham testified that after investigating the issue, the dates did not check out and that he abandoned the issue. The defendant has failed to establish deficient performance or any prejudice regarding this issue.

(PCR. V20/3356-58).

Thus, the testimony at the evidentiary hearing below established that Trepal's counsel investigated and considered the facts now alleged, and employed reasonable trial strategy in addressing or declining to address these issues. As previously noted, the fact that current counsel would handle the facts involving other possible suspects differently does not offer a basis for finding trial counsel to have been ineffective. No error is presented with regard to the denial of this claim.

The claim regarding counsel's failure to present evidence of Trepal's speech impediment to the jury is similarly without merit. In fact, Diana Carr testified that Trepal had a speech impediment (DA-R. V14/3580). Although the State's objection to this testimony was sustained, the witness answered the question before the objection was made and therefore the jury heard this information. Counsel can hardly be deemed ineffective simply

because the trial judge sustained the objection. In addition, as the court below noted, such evidence was only marginally relevant and would provide little, if any, exculpatory value. It is clear that the jury did not convict Trepal simply because he acted suspiciously when first interviewed by the police. Although his speech was one of several factors arising from that initial interview which caused the police to focus on Trepal as a suspect, it had little significance by itself.

Finally, the suggestion that Trepal's attorneys were ineffective for failing to present a neighbor, Thomas Blair, to establish that the Carrs' receipt of the threatening note was common knowledge, was also properly rejected below. The court's factual findings with regard to this claim are important:

> At trial it was shown that Pye Carr received a threatening note in June, 1988, approximately four months prior to the poisonings. The note stated that [y]ou and all your so-called family have two weeks to move out of Florida forever or else you will all die. This is no joke." (R. 1595). The defendant claims that the state focused upon the fact that when Mr. Trepal spoke to law enforcement, he used very similar language as that contained in the note and that Mr. Trepal's use of similar language led law enforcement to consider him a suspect.
>
> The defendant alleged that several people knew about the note. Specifically, Tony Blair knew about the contents of the threatening note received by the Carr family. The allegation that Tony Blair knew about the language of the letter is potentially contradictory to the state's argument at trial. However, at the evidentiary hearing, Tony Blair stated that

> he never knew the exact words of the note, but just knew that the family had received a "threatening note." Further, at trial, both Detective Mincey and FBI Agent Brekke testified that they considered Mr. Trepal a suspect because he was the only person they had interviewed who, in response to the question "why would someone want to poison the Parearlyn Carr family?", answered that somebody wanted them to move out of their residence, like they did. (R. 2077; 3176-77). The defendant has failed to demonstrate any deficient performance of counsel or resulting prejudice. Any claim for relief based on this issue is denied.

PCR. V20/3359).

In conclusion, no basis for a new trial is offered in Trepal's claim that his trial was constitutionally deficient and failed to provide an adversarial testing of his guilt. These claims were properly denied by the court below, and no error has been presented with regard to the findings and conclusions supporting the court's rejection of these claims. No postconviction relief is warranted.

ISSUE II

WHETHER THE LOWER COURT ERRED IN DENYING TREPAL'S CLAIM REGARDING LAW ENFORCEMENT'S ALLEGED CONFLICT OF INTEREST.

Trepal's second issue contests the trial court's denial of his allegation that law enforcement harbored a conflict of interest which affected the criminal investigation in this case. The trial court ruled that Trepal could present evidence on this claim at the hearing, but that such evidence would only be relevant to the extent that it could establish that law enforcement operated under a conflict of interest prior to Trepal's trial. Since no such evidence was submitted, the court denied Trepal's claim as meritless:

> The defendant also alleges that the state was hampered by a fundamental conflict of interest because it was motivated by ulterior motives of fame and fortune. ...
>
> Claim #7 contains numerous conclusions and speculates that law enforcement were obsessed with this case and the possibility of a potential motion picture deal. There has been no evidence presented to substantiate these claims even though the defendant received all of the documents related to the initial movie negotiations and has taken numerous depositions. The defendant raises allegations with no factual basis. The court permitted the defendant to address this claim at the evidentiary hearing if the defendant had any direct evidence that there were any movie negotiations or any financial offers made to the Polk County Sheriff's Office prior to the defendant's trial and conviction. Without this evidence, there is no meritorious claim because the court finds that any negotiations after the trial and

> sentencing do not undermine confidence in the finding of guilt and sentence of death. The defendant did not present any evidence as to this allegation at the hearing and the court finds that the claim is facially insufficient to merit relief.

(PCR. V20/3346-47).

Trepal now asserts that the court's ruling was incorrect. To the extent that this claim is considered summarily denied by the court's limitation on what Trepal could present at the hearing, this Court must accept the factual allegations in the motion to the extent they are not refuted by the record, and the summary denial must be upheld if the claims are facially invalid or conclusively refuted by the record. Freeman, 761 So. 2d at 1061; Peede, 748 So. 2d at 257.

Although Trepal provides a number of allegations to suggest that the Polk County Sheriff's Office was interested in and contemplating a potential movie deal during this investigation, he fails to attach any significance to such a deal because he does not explain any actual influence or affect that this alleged motivation may have had on the investigation. He identifies the underlying constitutional violation as "law enforcement had an agenda to arrest Mr. Trepal based on improper motivations, i.e., the expectation of fame and fortune, and thus were just as biased as a snitch who expects a reward in exchange for his testimony" (Appellant's Initial Brief, p. 82). He does not offer any authority for finding a constitutional violation

on this basis.

The fact that there was "pressure" to solve the case, from whatever source, does not demonstrate any constitutional deficiency in the actions of the sheriff's office. Trepal does not identify any particular action taken which may have violated any of his rights or affected the fairness of his trial. As the court characterized this claim below, Trepal's complaint "appears to be that law enforcement did its job and ultimately solved the case" (PC-R. V20/3347). Such a claim does not provide any reasonable basis for disturbing the convictions and sentences in this case.

Trepal's reliance on Buenoano v. Singletary, 963 F.2d 1433 (11th Cir. 1992), and U.S. v. Hearst, 638 F.2d 1190 (9th Cir. 1980), to suggest that the actions of law enforcement may have been affected by the motivation of a possible movie deal, is clearly misplaced. In those cases, the trial defense attorneys were attacked as having been influenced by improper motives during the trial. Given the obvious differences in the roles of trial counsel and law enforcement in the criminal justice system, these cases are not relevant to the issue presented below.

This claim was alleged below as a violation of Brady v. Maryland, 373 U.S. 83 (1963), based on the state's alleged failure to disclose "the true extent of the investigation" (PC-

R. V8/1261-1307). Trepal claims that knowledge that the sheriff's office was discussing the possibility of a movie deal could have been used to impeach law enforcement witnesses and to support the defense that the sheriff's office was in a "rush to judgment" and may have planted the incriminating brown bottle in Mr. Trepal's garage. Clearly, the allegation that law enforcement were aware of a possible movie deal is neither exculpatory or material to Trepal's case where, as here, there are facts suggesting that any of the evidence against Trepal was compromised. The improper influence, as alleged, does not cast any doubt on Trepal's convictions. Thus, no Brady violation can be discerned on these facts.

Trepal has failed to identify any impropriety in the investigation conducted by the Polk County Sheriff's Office. On these facts, he is not entitled to any relief in this issue.

ISSUE III

WHETHER THE LOWER COURT ERRED IN DENYING TREPAL'S CLAIM OF JUROR MISCONDUCT.

Trepal also asserts that the court below should have granted relief on his claim of juror misconduct. The court permitted Trepal to explore any allegation of ineffective assistance of counsel at the evidentiary hearing, but properly denied the underlying substantive claim as procedurally barred. The denial of this claim involved the application of legal principles to the factual findings made below; this Court must review the factual findings for competent, substantial evidence, paying great deference to the trial court's findings, and review of the legal conclusions is de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998).

With regard to this claim, the lower court found:

> (5) Claim #8 deals with the alleged jury misconduct. A portion of the claim was denied without a hearing. The court permitted a hearing on the issue of possible ineffective assistance of counsel for failing to object to the alleged misconduct because the record is not clear as to what actually occurred. The motion for postconviction relief makes several leaps in logic, unsupported by any evidence, which concern the court.
>
> At the evidentiary hearing, Wofford and Jonathan Stidham, and circuit court judge Dennis Maloney all testified that they had no recollection of the facts surrounding the incident. It is impossible for the court to determine if trial counsel was ineffective

> if the lawyers and trial judge do not even remember the event occurring. The defendant has failed to satisfy his burden of proof as to this issue. The defendant could have subpoenaed the newspaper editor to testify. More importantly, counsel could have obtained a copy of the photograph referred to on the record and used the photograph to attempt to refresh the memories of the trial attorneys and Judge Maloney.

(PCR. V20/3373). This ruling was correct. Where the record is incomplete or unclear about counsel's actions, counsel must be afforded the presumption that he performed competently. Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); Chandler v. United States, 218 F.3d 1305, 1361 n.15 (11th Cir. 2000).

The trial record reflects that, at one point during the trial, the judge advised the jury that he had received a call from the news editor, and the editor was happy to supply copies of the photo that appeared in the paper "recently" (DA-R. V12/3201). The court asked the jury to refrain from visiting the newspaper office and questioned jurors to insure that they had not read news articles (DA-R. V12/3201).

Trepal asserts that these facts warrant relief. To the extent that his claim is premised entirely on the trial transcript, he is procedurally barred as this issue could have been raised on direct appeal. No error is apparent, however, since the court explored the facts and failed to uncover any indication of juror misconduct. Rather, the record reflects that the issue was explored to everyone's satisfaction. The

fact that no jurors indicated that they had read the paper refutes Trepal's claim that the jury was improperly subjected to outside influences. Trepal's assertion that, "a number of sitting jurors ... on an unidentified number of occasions" went to the newspaper office is unfounded speculation which is not supported by the record.

To the extent that Trepal alleges that he was denied a full and fair hearing on this issue by the court's refusal to permit him to subpoena the trial jurors, his claim is without merit. The court below properly found the substantive juror misconduct claim to be procedurally barred. The judge acknowledged that, should Trepal prevail in establishing that counsel's performance with regard to this incident was deficient, it might be necessary for jurors to testify in order to discern the potential prejudice. However, there was no basis for a finding of deficient performance, and therefore any additional information which the jurors could have provided on this issue would not be relevant.

On these facts, no error has been demonstrated, and Trepal is not entitled to any relief.

ISSUE IV

WHETHER THE LOWER COURT ERRED IN DENYING TREPAL'S CLAIM ALLEGING ATTORNEY CONFLICT OF INTEREST.

Trepal next asserts that his trial counsel was unconstitutionally acting under a conflict of interest. According to Trepal, the fact that his wife was paying his attorney's fees, coupled with the fact that his wife was also a suspect, created an impermissible conflict of interest. The court below denied this claim following the evidentiary hearing. The denial of this claim involved the application of legal principles to the factual findings made below; this Court must review the factual findings for competent, substantial evidence, paying great deference to the trial court's findings, and review of the legal conclusions is de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998).

With regard to this claim, the court below held:

> (3) Claim #6 alleged trial counsel had an actual conflict of interest that rendered them ineffective. In support of the claim, the defendant states that "[d]uring the months leading up to the commencement of Mr. Trepal's trial in February of 1991, Diana Carr (the wife of the defendant and a suspect in the homicide) met and conferenced with the various attorneys at Boswell, Stidham, Conner & Wilson on numerous occasions and discussed with them how the case was proceeding and the strategies that should be carried out in her husband's defense." (*See*, rule 3.850 motion, p. 141).

> The portions of the trial transcript listed by the defendant indicate that counsel attempted to elicit potentially incriminating evidence from Diana Carr. The court sustained objections to the questions, but allowed counsel to proffer the questions and answers. The defendant has failed to demonstrate how any conflict of interest effected the lawyers' ability to effectively represent Mr. Trepal.
>
> The defendant claimed that Diana Carr met with her husband's lawyers and discussed how to try the case. Evidence presented at the hearing clearly refuted this claim. Wofford and Jonathan Stidham both testified that Diana Carr did not meet with them to discuss the case. Also, Jonathan Stidham testified that after the firm sent Diana Carr a second bill for legal services, she became extremely upset and hostile. Jonathan stated that he never had any further contact with Diana Carr after that incident.
>
> The defendant also alleges that it was ineffective assistance of counsel to fail to inform the jury that Diana Carr was testifying under immunity. Trial counsel testified that they saw no need to elicit this information from Diana Carr. Again, counsel was bound by their client's desire not to implicate Diana Carr in any way. Further, as noted previously, her testimony was not damaging to the defense and the tactical decision was made not to attempt to impeach her. Part of the tactical decision was based upon counsel's opinion that if the jury believed Diana Carr was involved in the poisonings, the jury would also believe that she could not have acted alone, and that the defendant would have had to assist her.

(PCR. V20/3371-72).

The court below properly analyzed this claim, and the conclusion that no actual conflict of interest was demonstrated is supported by the record. Absent an actual conflict, no

relief is warranted. Cuyler v. Sullivan, 446 U.S. 335 (1980). In Smith v. Massey, 235 F.3d 1259 (10th Cir. 2000), a similar claim was considered and rejected. The defendant in that case was charged with murder based on her actions in killing her son's former girlfriend. The son was also implicated and was represented by the same counsel. In postconviction proceedings, a conflict of interest argument much like that presented in this case was raised. The court concluded that the attorney's performance was not altered by the potential conflict to the extent that the outcome of the proceedings could have been affected. The court noted that counsel's performance with regard to implicating the defendant's son was dictated by the defendant herself, who forbade her attorneys from pursuing this theory.

Similarly, in the instant case, testimony at the evidentiary hearing established that Trepal advised his attorneys not to implicate his wife in any manner (PC-R. V13/2054-55). Thus, to the extent Trepal now complains that his attorneys did not thoroughly impeach Diana Carr or present a defense that she committed these crimes, that was strategy dictated by Trepal rather than by an actual conflict of interest.

No basis for relief has been offered on these facts. The court below properly denied the attorney conflict of interest claim, and its ruling on this issue must be affirmed.

ISSUE V

WHETHER THE LOWER COURT ERRED IN DENYING TREPAL'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE IN PENALTY PHASE.

Trepal also challenges the validity of his death sentence, asserting that the court below erred in denying his claim of penalty phase ineffective assistance of counsel. Trepal asserts that his defense attorneys were deficient for failing to present evidence to humanize their client and for failing to argue the existence of lingering doubt as to guilt. Once again, the trial court's ruling was proper, and presents no basis for relief on this issue.

This claim was denied following an evidentiary hearing. The rejection of this claim involved the application of legal principles to the factual findings made below; this Court must review the factual findings for competent, substantial evidence, paying great deference to the trial court's findings, and review of the legal conclusions is de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998).

The testimony presented at the evidentiary hearing clearly established that Trepal's defense attorneys made a reasoned, strategic decision against presenting the "humanizing" evidence which Trepal now insists should have been presented. The court's order denying this claim summarizes the testimony and

relevant findings:

> (2) Claim #5 concerned the lack of mitigation evidence presented at the sentencing phase of the trial. This claim alleged ineffective assistance of counsel and the records did not refute the claim. See, Deaton v. Dugger, 635 So. 2d 635 (Fla. 1994). Trial counsel claimed that the failure to produce mitigation evidence was strategic (R. 4369-70 and 4397-98), but the court could not reach this conclusion without conducting an evidentiary hearing. After hearing the testimony at the hearing, the court finds that the decision not to present mitigation evidence was tactical and reasonable under the circumstances. There is no reasonable probability that the jury's recommendation would have been different had the proposed evidence been presented.
>
> The specific examples of evidence that the defendant alleged should have been introduced in the penalty phase are listed below.
>
> (a) CHARACTER EVIDENCE FROM MENSA FRIENDS
>
> At the evidentiary hearing, the defendant called several MENSA members to testify on behalf of Mr. Trepal. All the witnesses basically testified that the defendant was a nice, caring, intelligent, thoughtful, generous and non-violent individual. In cross-examination, the state attorney asked all of the witnesses if they knew that the defendant had been convicted of a felony in the 1970's, that he spent time in federal prison, that he and his wife engaged in sado-masochistic practices, that he had physically battered his wife, that his wife had to flee to a neighbor's house because Mr. Trepal was being violent, and that he had in his house a pornographic video depicting an actual murder. Most of these "bad acts" were referred to in a pre-trial motion in limine filed by the defendant. (R. 4905) Many of the witnesses did not know of these facts, and although all stated that their opinion of Mr. Trepal

would not change, the impact on the jury would have been potentially devastating to the defense.

The trial attorneys testified that they were aware of the state's 'bad character' evidence and that it effected their decision not to call any of the defendant's MENSA friends. The decision was obviously tactical, and after hearing the testimony and the state's cross-examination, the court finds that the decision was reasonable.

(b) ABILITY TO FORM CLOSE, LOVING RELATIONSHIPS

This mitigator would appear to rely upon much of the evidence from the defendant's family and MENSA friends. Once again, the potential that negative evidence would reach the jury effected counsel's decision not to introduce the evidence. The strategy was reasonable and did not constitute ineffective assistance of counsel.

(c) THE DEFENDANT WAS A MODEL PRISONER

No evidence was presented on this ground. Therefore, the court does not know if the defendant was a model prisoner. In any event, the court finds that the decision was not to present this type of mitigation evidence, if it existed, was harmless.

(d) THE DEFENDANT HAS STRONG RELIGIOUS BELIEFS

No evidence was presented on this ground. Therefore, the court does not know if the defendant has strong religious beliefs. In any event, the court finds that the decision not to present this type of mitigation evidence, if it existed, was harmless. Further, it is conceivable that the state could have presented negative character evidence to rebut the potential mitigation evidence, so the decision appears to be tactical.

(e) FAMILY HISTORY WAS NOT PRESENTED TO JURY

Several of the defendant's family testified at the evidentiary hearing. The court finds that the decision not to present the family history and character evidence from family members was harmless. Further,

> it is conceivable that the state could have presented negative character evidence in rebuttal, so the decision appears to be tactical.
>
> A portion of this claim related to the defendant being an intellectually "gifted" child. An expert in gifted children testified at the evidentiary hearing. The state asked the expert numerous questions about some of the defendant's letters and journal entries, which detailed criminal experiences and other bad acts, that the expert had relied upon formulating her opinion. The material was extremely damaging to the defendant. To open the door to such evidence during the penalty phase would have been a tremendous tactical mistake. Further, the court doubts that a jury who has convicted a man of one count of first degree premeditated murder and six counts of attempted first degree murder would find that the defendant's "giftedness" mitigated the crime.
>
> Another part of the claim related to the defendant's speech impediment. An expert speech pathologist testified to the effects of stuttering on a child. The court finds that the decision not to present this type of mitigation evidence was harmless.

(PCR. V20/3366-69). Thus, the court below concluded that the decision not to present humanizing testimony in mitigation was reasonable, noting that the negative evidence that could have been generated as a result of producing such testimony could have been "devastating."

Trepal now claims that the court erred by simply accepting, without any meaningful analysis, trial counsels' characterization of the failure to present this evidence as strategy, and that the court's reliance on the negative

testimony that would be available to counter the humanizing evidence was improper because the defense attorneys did not know about the negative evidence, so it could not have been part of any trial tactics. He also asserts that, to the extent any strategic decision was made to avoid negative testimony, it was unreasonable because the jury had already convicted Trepal of criminal acts. These claims are all easily rebutted by the record and do not provide any basis for relief on this issue.

As to the claim that the court below simply accepted counsel's statements that this was strategic, Trepal's assertion is refuted by the fact that the court held an evidentiary hearing. In this case, the trial transcript itself reflected that counsel asserted they were making a strategic decision not to present mitigating evidence (DA-R. V18/4369-70, 4397-98). The court below noted these representations, but determined that it could not reach that conclusion without an evidentiary hearing (PC-R. V11/1838). As well, Trepal's assertion that the defense attorneys did not know about the negative testimony that would be presented had they chosen to elicit the humanizing testimony is directly refuted by the testimony from the evidentiary hearing that the attorneys were aware of the State's bad character evidence and that it effected their decision not to present character evidence in mitigation. Wofford Stidham testified directly:

> I recall we discussed this a long time. One of the options was to put on some of Mr. Trepal's friends to testify as to what a gentle person he was and that he wasn't capable of these bad things. I mean, that's the gist of what we talked about. Because he had friends from his Mensa days, and a good many people would come in and support him.
>
> The trouble was, as I recall, and you better -- you have to rely on the other two lawyers if it comes down to a conflict, but one of the troubles was that we had this mountain of excluded evidence on prior bad acts that the State had accumulated, and most of it had been kept out on motions in limine and motions to suppress and -- but there was so much of it, as I remember, we thought if we go into that, Aguero's going to have about a five-day field day now using these things not to prove guilt, but to prove -- show that -- to rebut the character issue.
>
> And that was one of the things that, rightly or wrongly, that we talked about, and I remember that.

(PC-R. V12/2033-34). Counsel's knowledge of some bad character evidence is also evident from the motion in limine filed prior to trial (DA-R. V21/4905). Finally, Trepal's assertion that any strategic decision on these facts was unreasonable is obviously just a disagreement over trial strategy, insufficient for a finding of ineffective assistance of counsel or the granting of postconviction relief.

Case law establishes that no ineffectiveness of counsel is evident on these facts. Trepal's claim and the testimony from the postconviction hearing establish only that his current

counsel disagree with trial counsel's strategic decision on this issue. This is not the standard to be considered. Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"); Rose, 675 So. 2d at 570 (affirming denial of postconviction relief on ineffectiveness claim where claims "constitute claims of disagreement with trial counsel's choices as to strategy"); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994), cert. denied, 525 U.S. 1159 (1999); State v. Bolender, 503 So. 2d 1247, 1250 (Fla.), cert. denied, 484 U.S. 873 (1987). In reviewing Trepal's claim, this Court must be highly deferential to counsel:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to

> evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689; see also, Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial"); Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Stano v. State, 520 So. 2d 278, 281, n. 5 (Fla. 1988) (noting fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness).

The trial court also properly rejected Trepal's claim of ineffectiveness for the failure to argue "lingering doubt" as a mitigating circumstance:

> Prior to the start of the penalty phase closing arguments, the court announced "under Florida case law that to argue residual doubt to the jury is improper at this stage." The state attorney told the court that "my opinion disagrees with the court's. I think residual doubt is something that the defense can argue if they want to." (R. 4370-72). The rule 3.850 motion alleged that even though counsel was given permission to argue lingering doubt, counsel failed to do so and therefore was ineffective.
>
> A portion of the lingering doubt argument would have to focus upon other suspects. As noted previously, the

> defendant told his lawyers not to argue Diana Carr committed the crime. There has been no evidence presented to suggest that the defendant had changed his position on this issue.
>
> The other potential suspect was Pye Carr. Trial counsel testified that they did not have any evidence that Pye Carr was involved in the poisonings. Trial counsel had numerous problems with blaming Pye Carr. Some of the reasons were that it was his wife who died; his son was the sickest of the two boys poisoned; there was no evidence to suggest a motive; there is no evidence that Pye had the knowledge and ability to use thallium, and; Pye had ingested thallium as well. Trial counsel testified that during the guilt phase the decision was made that counsel would not continue to point the finger at Pye Carr because counsel believed that their credibility with the jury would ultimately be lost if they continued. The same concerns would have been present at the penalty phase.
>
> The defendant lists other potential areas of lingering doubt that trial counsel should have argued, but the court finds that the decision not to argue lingering doubt was ultimately harmless and that there is no reasonable probability that the jury's recommendation would have been different had the arguments been made.

(PCR. V20/3369-70).

Trepal asserts this ruling was improper because counsel had a unique opportunity to argue lingering doubt and the failure to do so was unreasonable. He cites Garcia v. State, 622 So. 2d 1325 (Fla. 1993), and Young v. State, 739 So. 2d 553 (Fla. 1999), but these cases do not suggest any error in the court's ruling denying this claim. Neither of those cases involves an allegation of ineffective assistance of counsel based on an

attorney's failure to argue lingering doubt in mitigation. In Garcia, counsel failed to present testimony that Garcia's codefendant had made statements corroborating Garcia's account of the robbery under the mistaken belief that hearsay could not be admitted in penalty phase. Young involved a Brady claim regarding information consistent with Young's claim of self-defense. These cases are obviously distinct from the facts presented by Trepal and do not provide a basis for finding any error in the trial court's rejection of this claim.

Of course, this Court has repeatedly recognized that residual doubt is not an appropriate mitigating circumstance. Darling v. State, 27 Fla. L. Weekly S541 (Fla. Jan. 3, 2002); Preston v. State, 607 So. 2d 404, 411 (Fla. 1992). The court's rejection of Trepal's claim that the defense attorneys should have taken advantage of the opportunity to do something which this Court has held improper and argued the existence of lingering doubt as mitigation was correct.

Trepal's claim that the penalty phase proceeding was unreliable due to the absence of any live witness is without merit. Although unusual, the decision against presenting any mitigating evidence is not, in and of itself as a matter of law, ineffective assistance of counsel; deficiency and prejudice must still be shown. The court below carefully considered this claim, and ultimately concluded:

> In all candor, prior to the evidentiary hearing, the court was very concerned with the failure to present any mitigation evidence, other than the stipulation. At first glance, it appears that the decision not to put on evidence constituted *per se* ineffectiveness. Once the court heard the testimony of the trial attorneys and could begin to understand the legal strategy, the initial presumption of ineffectiveness was overcome by evidence of sound legal tactics and competent counsel. As to all of the arguments concerning the penalty phase proceedings, the court finds that "there is no reasonable probability that the sentence would have been different even if what was presented to this court had been during the penalty phase of the defendant's trial." *Stewart v. State*, 481 So. 2d 1210, 1212 (Fla. 1985). Collateral counsel argued that trial counsel must have been ineffective at the penalty phase, because even with minimal mitigation evidence, the jury returned a 9 to 3 recommendation. However, after hearing what mitigation was available and the reasons for not introducing a majority of the evidence, the court believes that the jury returned a 9 to 3 vote, not **in spite of**, but **because of**, the strategy of trial counsel.

(PC-R. V20/3370-71).

There is no absolute duty to introduce mitigating or character evidence. Chandler v. United States, 218 F.3d 1305, 1319 (11th Cir. 2000); Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc) (noting counsel's performance can be constitutionally sufficient when no mitigating evidence was produced even though it was available).

On these facts, Trepal has failed to establish any error in

the trial court's denial of his claim of penalty phase ineffective assistance of counsel. No relief is warranted on this issue.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN RULINGS ON PUBLIC RECORDS.

Trepal's final issue attacks the rulings of the court below with regard to public records. A trial court's ruling on a request for the disclosure of public records is subject to an abuse of discretion standard of review. Mills v. State, 786 So. 2d 547, 552 (Fla. 2001). The record in this case fails to support any claim that the court below abused its discretion in denying the particular records requests challenged in this appeal.

A. Confidential Informant

Trepal filed a motion for disclosure of the identity of a confidential informant, which the court below granted. Trepal then filed a motion for reconsideration, asserting that not just the identity of the informant, but the entire file maintained by the Polk County Sheriff's Office regarding this individual should be disclosed. The trial court granted an evidentiary hearing on this motion and thereafter denied access to the file.

Trepal asserts that the court below denied his request for the file, "concluding that the interests in maintaining the confidentiality of the informant's file outweighed Mr. Trepal's right to view the information" (Appellant's Initial Brief, p.

96). In fact, the court's ruling states:

> CCR filed a motion on March 4, 1996, requesting the identity of a confidential informant mentioned in a Polk County Sheriff's Office Intelligence Report dated April 12, 1989. Without requiring CCR to show the necessity of disclosing the informant's name and disregarding Fla. Stat. §119.(3)(c), which reads "[a]ny information revealing the identity of a confidential informant or a confidential source is exempt from" the Public Records Act, the court ordered the name revealed. The court's order limited the disclosure to the name and last known address of the informant. CCR now requests the entire confidential informant file from the sheriff's office.
>
> At the time the court issued the order directing the sheriff's office to reveal the name of the informant, the court did not hold any type of hearing. With the due date of the amended rule 3.850 motion being approximately 2 weeks from the date of the request by CCR, the court believed that it would save time to simply reveal the name and proceed. This estimation appears to be erroneous. CCR cannot show why any information concerning the confidential informant should be revealed at this time. Had the court held the hearing and heard the arguments presented on August 6, 1996, it would not have authorized the release of the informant's name. CCR argues that since the name has been released, the court should order the entire file be disclosed. The court disagrees. Even though the horse is out of the barn, it is not too late to close the barn door. The reasons and arguments made by CCR do not outweigh the sheriff's office statutory right under the public records law to keep its confidential informants files confidential.

(PCR. V11/1809-10).

Trepal now argues that the court below misconstrued his

arguments and misapplied the law. Curiously, Trepal does not cite any actual law himself, and does not address the public records exemption for this information relied on by the court below. Trepal simply maintains that he was entitled to "all public records" and that this file could have cast doubt on the entire investigation and therefore should have been disclosed.

The court's ruling was proper. The confidential file was not subject to disclosure under Florida's public records law, but was statutorily exempt under the provision noted in the court's order. To the extent that Trepal suggests the court below should have conducted an in camera inspection of this file, his argument is not preserved for appeal since he did not request such an inspection below. Clearly, no relief is warranted.

B. Exempt State Attorney Records

Trepal also asserts error in the court's ruling with regard to records possessed by the State Attorney's Office. Trepal criticizes the court below for failing to indicate in the written order denying his motion to compel that the court had reviewed the exempt documents for any Brady information as part of the in camera inspection. Obviously Judge Bentley was well aware of his responsibility to review these records for

exculpatory information and there is no basis to suggest the court ignored its responsibility. The record in this case reflects numerous orders entered below after careful consideration of the facts and law on a variety of issues; the court below went to extraordinary effort to resolve all disputes regarding public records, discovery, and a host of other issues. Trepal's criticism of the order rendered after review of the State Attorney records is unwarranted, and other than that criticism, he has not offered any basis for relief. He merely states that these records must be reviewed in camera which, of course, they were. No further relief is compelled on these facts.

C. Goreck Book Deal

Trepal's last public records issue asserts that the court below erred in denying his request to depose Jeffrey Good. He claims that, pursuant to State v. Davis, 720 So. 2d 220, 227 (Fla. 1998), he should have been permitted to depose Good and to have access to taped interviews Good conducted while writing a book with Susan Goreck. According to Trepal, Good should be deposed to see if any of the witnesses that Good spoke with in researching the book may have made statements inconsistent to their trial testimony, because if such statements were made they could have been used for impeachment purposes and therefore must

be disclosed as exculpatory. Trepal does not explain how interviews conducted after the conclusion of trial could have been used for impeachment purposes.

On these facts, Trepal's speculation that it may have been possible to glean inconsistent statements from the interviews conducted by Good after Trepal's trial and conviction does not provide a reasonable basis for disclosure of this information, let alone establish a compelling need to overcome Good's privilege to maintain the confidentiality of these interviews. Therefore, the court below properly denied Trepal's request for further discovery on this issue and no relief is warranted.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's orders denying Trepal's motions for postconviction relief must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Todd Scher, Litigation Director, Capital Collateral Regional Counsel, South Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida, 33301 this _____ day of February, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

COUNSEL FOR APPELLEE