IN THE SUPREME COURT OF FLORIDA

CASE NO. SC89,710

GEORGE JAMES TREPAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal involves a consolidated appeal from the denial of two Rule 3.850 motions on which an evidentiary hearing was granted on some issues, and summarily denied on others. References in the Brief shall be as follows: (R. __)--Record on Direct appeal; (1PCR. __)--Record from first postconviction appeal; (2PCR. PCR. ___)--Record from second postconviction appeal. References to the exhibits introduced during the hearing and other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Trepal requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF THE CASE AND OF THE FACTS

Mr. Trepal was indicted by the grand jury in the Tenth Judicial Circuit, Polk County, Florida, on April 5, 1990, for one count of first-degree murder, several counts of attempted first-degree murder, poisoning food or water, and tampering with a consumer product. Jury trial commenced January 7, 1991. At the close of the 4-week trial, the jury found Mr. Trepal guilty of all counts. The penalty phase took place on February 7, 1991, the day after the guilty verdict, and the jury recommended death by a vote of 9-3. On March 6, 1991, the Court sentenced Mr. Trepal to death. This Court affirmed, with two justices dissenting. Trepal v. State, 621 So. 2d 1361 (Fla. 1993), cert. denied, 114 S. Ct. 892 (1994).

An initial Rule 3.850 motion was filed on June 16, 1995, and an amendment thereto on March 21, 1996 (1PCR 1107-1361).[1] An evidentiary hearing was conducted on some claims in October, 1996, and an order denying relief was entered on November 6, 1996 (Id. at 3337). Following a rehearing motion which was denied (Id. at 3515), a timely notice of appeal was filed.

On April 15, 1997, the Office of the Inspector General issued a report (OIG Report) regarding various serious deficiencies noted in a

[1]In the interim, Mr. Trepal filed an interlocutory appeal regarding public records. Trepal v. State, 704 So. 2d 498 (Fla. 1997).

number of cases, including this one, in which the FBI Crime Laboratory and its scientists were involved. On June 20, 1997, Mr. Trepal sought, and this Court granted, a relinquishment of jurisdiction to investigate and file a second Rule 3.850 motion. Mr. Trepal thereupon filed his motion, which was later amended after disclosure of additional records by the federal government (2PCR. 2485).[2] The circuit court held an evidentiary hearing[3] and issued an order denying relief on October 26, 2000 (Id. at 2675). Mr. Trepal timely filed a notice of appeal, which was consolidated with the first 3.850 appeal.

A. 1996 EVIDENTIARY HEARING.[4]

Wofford Stidham. Stidham's criminal experience consisted of one murder trial "a good thirty years" before Mr. Trepal's trial (1PCR. 1962-63; 1967). His son, Jonathan, worked in the same law firm, as did attorney Dabney Connor (Id. at 1963-64). Because the case involved scientific issues, Connor, who had majored in chemistry in college, was

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[2]Mr. Trepal eventually had to initiate Freedom of Information litigation in federal court due to the lethargic disclosure by the government of the requested information. See Trepal v. United States Dept. of Justice, No. 97-796-CIV-21B (M.D. Fla.). The suit was voluntarily dismissed once the records had all been disclosed.

[3]The hearing was bifurcated, having been stayed during another interlocutory appeal. Trepal v. State, 754 So. 2d 702 (Fla. 2000).

[4]At the hearing on his first 3.850 motion, Mr. Trepal called some 30 witnesses. Due to page limits, not all witness testimony can be summarized in this section, but their testimony will be addressed in those portions of the brief to which the testimony is relevant.

brought onto the team (Id. at 1964). Connor handled the scientific issues, Jonathan did most of the discovery and fact development, and W. Stidham did most of the legal work (Id. at 1968-69). The focus of the defense preparation was the guilt phase (Id. at 1975). The defense was one of reasonable doubt and to attack the State's entirely circumstantial case (Id. at 1976). No decisions about what evidence to put on in the defense case were made until "near the end of the trial" (Id. at 1978).

The victim's husband, Pye Carr, was a suspect, but there was not much "concrete evidence on it" (Id. at 1981). Evidence that Pye had motive to commit murder would have been important for the jury, as would trouble in the marriage (Id. at 1982). Pye had a girlfriend named Laura Ervin, but he did not recall what evidence they had to support any inquiry on this point (Id. at 1985).

At trial, Stidham had not seen a note written by Peggy Carr to Pye, revealing that the marriage was troubled (Id. at 1986-87).[5] The fact that the note indicates that the marital problems were serious is information he would have expected to receive from the State during discovery and is "consistent with the theory that Pye Carr may have

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[5]The note was introduced below as Defense Exhibit 1. At the hearing, Detective Ernest Mincey testified that he found the letter in a garbage can during a search of Pye Carr's home (Id. at 2498). After Mr. Trepal's arrest, Mincey showed the note to prosecutor Aguero (Id. at 2506-08).

been the perpetrator" (Id. at 1988-89; 1991).

Exhibit 2 was a statement taken by Detective Paul Schaill of Larry Dubberly (ex-husband of Peggy Carr and father of Duane), in which Dubberly recounts seeing Pye after he was interviewed by lead detective Mincey; according to Dubberly, Pye was trembling and "so nervous he couldn't even talk" (Id. at 1994-95). This statement is consistent with Pye as a suspect (Id. at 1995). He did not recall if the defense had this statement, nor if Larry testified (Id. at 1996). The statement also revealed that Larry told Mincey that when Travis Carr was in the hospital, Larry heard Travis screaming "They are trying to kill me. They tried to kill me before, and they're trying to kill me again" (Id. at 1997). The "they" Travis was referring to were Pye and his sister, Carolyn Dixon (Id.).[6] Stidham did not recall if this information was presented to the jury (Id. at 1998). The same statement further revealed a scene in the hospital where Larry, Pye, Carolyn, and Margaret Carr (Pye's ex-wife) were informed that the substance was "lathium or lithium or something" used in labs and derived from phosphates; at that point, Margaret turned to Pye and said "You've been working at the Silver City mine all these years, and they've got two chemist labs out there, do you know anything about this -- the kids got into?" (Id. at 1999-2000). Pye then turned to his ex-

[6]This incident was confirmed by Larry Dubberly at the evidentiary hearing (Id. at 3119; 3127).

wife and said "You shut your Goddamn mouth" (Id. at 2000). Stidham did not know if this had been told to the jury, but the statement "doesn't really bowl me over" (Id. at 2001).

Susan Goreck was a detective with the Polk County Sheriff's Office who went undercover and befriended Mr. Trepal (Id. at 2016). Her credibility was "a significant factor," as one of the goals of the defense was to raise the inference or suspicion that the bottle found in Mr. Trepal's vacated garage was planted by law enforcement (Id. at 2018-22). Stidham was shown an internal intelligence report authored by Goreck dated March 15, 1990, stating that on March 5, 1990, she received a call from FBI Agent Brekke indicating that .64 grams of thallium I nitrate had been found in the bottle (Id. at 2022-23). Stidham did not recall ever receiving any of the internal intelligence reports (Id. at 2023).[7] The report also indicated that on March 6, 1990, Goreck called Donald Havekost at the FBI Crime Lab to confirm that the bottle contained thallium I nitrate in the amount of .64 grams (Id. at 2024). According to the FBI Lab reports, however, the testing and results therefrom did not occur until months after March of 1990, and the fact that Goreck knew what the substance was in the bottle before the FBI testing had occurred is "a significant piece of

[7]The prosecutor stipulated that Goreck's intelligence reports were not provided to the defense during discovery, and Goreck herself confirmed that she did not disclose them (Id. at 2031; 3144-45).

information" (Id. at 2029).

No decision was made about what to present at the penalty phase until after the verdict (Id. at 2032). One of the "options" was to put on some of Mr. Trepal's friends to show that he was a "gentle person" and incapable of these crimes (Id. at 2033). One problem was some prior bad act evidence which had been excluded by the judge, and the concern that the State could "rebut" the character evidence (Id.). Any jury that would convict Mr. Trepal with the evidence that the State had "was certainly not going to listen to very much" in terms of the penalty phase (Id. at 2038).

Another issue in the case involved trace amounts of thallium detected in Pye Carr's apartment (Id. at 2051). Several witnesses at trial were questioned about this issue (Id. at 2052). He did not recall anything about levels of arsenic being detected in Peggy Carr's system (Id.). The defense team did not discuss the case or strategies with Mr. Trepal's wife, Diana Carr (Id. at 2053). He did recall arguing in closing that Diana was "as logical a candidate as George Trepal was" for having committed the crime; this was over Mr. Trepal's objection (Id. at 2054). He did not recall what occurred with respect to the jurors contacting the newspaper office during trial (Id. at 2055-56).

Dabney Connor. A lawyer for 26 years, Connor became involved with the scientific issues because of his educational background in

chemistry (Id. at 2078-79). He had experience with "a few" criminal cases, but had never done a jury trial in a criminal case (Id. at 2080). The theory at trial was "to hold the State's feet to the fire and make them prove their case" (Id.). Although the team discussed putting on evidence, they felt that "the best opportunity we had for creating a reasonable doubt was through trying to shoot holes in the State's case (Id. at 2082). The bottle of thallium discovered in Mr. Trepal's garage as well as the introduction of his prior involvement as a chemist in a drug lab were the most significant parts of the State's case (Id. at 2083). One of the ways they were trying to create reasonable doubt was to infer that others could have committed the crime, specifically Pye Carr (Id. at 2083-84). Any information bearing on Pye as a suspect would have been something the jury should have been aware of (Id. at 2084). The status of the Carr marriage was also an issue, but the court would not permit them to fully explore it (Id. at 2084-85).[8] The team agreed on the importance of informing the jury of the status of the marriage of Pye and Peggy Carr (Id. at 2085-86). Connor had not previously seen the letter from Peggy to Pye, which definitely would have been something to investigate and question Pye Carr and other family members about, and something he would have wanted the jury to know (Id. at 2088-89).

[8]The issue of the trial court's restriction on the defense cross-examination is addressed in Mr. Trepal's state habeas corpus petition.

The discovery of thallium under a sink in Pye's apartment showed that "someone on that property had access to thallium" (Id. at 2090). The State downplayed the significance of this (Id. at 2091). An expert could have been useful because "the layman would have some problem in understanding what is thallium, where does it come from, and, you know, how does it get here" (Id. at 2091-92; 2134-36; 2164).

Connor recalled seeing medical records indicating that Peggy Carr had elevated levels of arsenic in her system when she was hospitalized, although he did not recall it being "a bell ringer sort of elevation" (Id. at 2093-94). In response to the arsenic levels, the hospital gave Peggy a treatment called BAL (British Anti-Lewisite) (Id. at 2094-95). Connor did not recall whether he brought out at trial the fact that Peggy had elevated levels of arsenic (Id. at 2095), or whether other family members had elevated levels of arsenic; however, hospital records indicated abnormally high arsenic levels for Duane Dubberly and Travis Carr (Id. at 2095-98).[9]

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[9]Connor did indicate that one of the State's experts had testified in deposition that he questioned the level of arsenic in Peggy Carr's urine, and thus Connor considered it an "anomaly" (Id. at 2137), However, he acknowledged his conclusion was based on his own subjective interpretation of the one test; he deposed none of the experts who conducted the tests to determine if they had accurately calibrated the machines (Id. at 2166). Had he had an expert who could have testified that the results were not an anomaly but rather significant information, Connor could not say whether or not he would have presented that to the jury (Id. at 2169). He confirmed that no arsenic was ever found in any of Mr. Trepal's property (Id. at 2171).

Medical records also revealed that the level of thallium in Travis Carr's urine increased significantly while he had been hospitalized (Id. at 2098-99).[10] Connor was "not sure" how this matter was handled with the jury, but did recall discussing with the legal team the accuracy of the test results or whether someone was continuing to supply Travis with thallium while he was in the hospital (Id. at 2099-2100). The fact that Travis' level of thallium increased in the hospital is consistent with a reasonable doubt defense (Id. at 2100).

Connor did the penalty phase closing argument, and nothing was presented by the defense (Id. at 2101). Witnesses were available in the hallway to testify "in a very simplistic term, that George was a nice guy" (Id. at 2106-07). Connor has also asked Dr. Ed Willey to review the overall poisoning situation, and although he did not recall his conclusions, he did remember that they were "helpful" (Id. at 2110).[11] Although Judge Maloney precluded Willey from testifying at

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[10]The records showed that on October 31, Travis had 2 milligrams per liter of thallium; on November 7, however, the level had increased to 3.9 milligrams per liter (1PCR. 2098-99).

[11]Mr. Trepal called Willey at the hearing. He testified that in June 1990, he was asked by trial counsel to review the medical aspects of the case, after which he recommended that they retain an expert in toxicology because of the "level of sophistication and analysis" involved with the issue of thallium (Id. at 3015; 3021). Willey himself circulated a letter among various toxicologists and many had volunteered their services (Id. at 3016). One had previously worked on a case of thallium poisoning, and another had previously testified in Bartow (Id. at 3016). He provided this information to Mr. Trepal's trial attorneys (Id. at 3017). No toxicologist was ever retained by

the guilt phase, his order specifically did not indicate that Willey could not be used at the penalty phase (Id. at 2111). He also recalled having Mr. Trepal's prison records from his North Carolina incarceration which indicated "no blemishes" in his conduct (Id. at 2112-13). Good prison conduct was admissible at the penalty phase, but it was not presented (Id. at 2113). Connor believed that they had a "better chance" of receiving less than death from the jury if they did not put on any witnesses (Id. at 2108). Because the defense was "still a little surprised" at the guilty verdict, they believed because "it was such a close call" that "surely they will not vote for the death penalty" (Id. at 2109).

Connor had many interactions with Mr. Trepal's wife, Diana, who was "frustrated" with "everything" and concerned about being implicated in the crime (Id. at 2104). The fact that a particular witness in a case is also considered a suspect is something for the jury to know in a criminal case (Id. at 2115). Mr. Trepal indicated that he did not want the finger pointed at his wife (Id. at 2146); however, Connor did argue during closing arguments, "against [Mr. Trepal's] instruction," that Diana could have committed the crime (Id. at 2175).

Regarding Exhibit 4 (Goreck's intelligence report), Connor did not believe he saw this at the time of trial (Id. at 2116-17). The

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the defense, however.

report "makes me wonder if she knew" that the bottle found in Mr. Trepal's garage contained thallium I nitrate before she had even requested the testing on the bottle (Id. at 2122). This information "certainly" implies that she planted the bottle herself, which was consistent with the defense (Id. at 2123). Had he had the report, he would have presented the information to the jury (Id.).[12]

Jonathan Stidham. Stidham was admitted to the Florida Bar in October, 1987 (Id. at 2218). At the time of Mr. Trepal's trial, he hac done no murder cases (Id. at 2221-22). The "initial approach" at trial was to cast light on other suspects like Pye Carr, and then "trying to create reasonable doubt" (Id. at 2225). To show Pye's motive, the defense wanted to pursue at trial the state of the marriage of Peggy and Pye; however, the State repeatedly objected to the evidence (Id. at 2228). He recalled a witness named Rita Tacker, who was a friend of Peggy's who had information about the marital trouble (Id. at 2229); however, he was not permitted to question Tacker at trial about the relationship between Peggy and Pye on hearsay grounds (Id. at 2231-32). Stidham confirmed that he had never seen the note from Peggy to Pye, which should have been disclosed under Brady (Id. at 2235). The note

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[12]Even if Goreck had an explanation for the dates, the defense still would have made the argument to the jury that the bottle was planted, and that Goreck's explanation was not believable (Id. at 2152; 2177-78). In fact, "that would have been real strong ammunition" and he would have "done everything I could to get that in front of the jury and to make a strong argument about it" (Id. at 2179).

is something he would have wanted the jury to know about, and is consistent with the defense theme at trial (Id. at 2234-35). It refuted the State's theory that although the marriage had its rocky moments, "they were just two lovebirds at the time that this occurred" (Id. at 2237). In addition, the note refuted the notion that the problems in the marriage were related solely to the children (Id.), and supported the argument to the judge that the hearsay evidence about the marriage was reliable enough to be admitted (Id. at 2238; 2251-56). For example, state of mind of a declarant is an exception to the hearsay rule (Id. at 2239). He also would have used the note during his impeachment of Detective Mincey, who testified that he came up with no evidence suggesting that Pye had a motive and that the marital trouble related only to the children (Id. at 2240-42). The note could also have been used to impeach the many state witnesses who attributed the trouble in the marriage to the children (Id. at 2243-47).

He recalled a witness named Laura Ervin, who, according to police reports, had had a conversation with Pye's sister, Carolyn Dixon, on Sunday, October 30, 1988, at which time Carolyn told Ervin that Peggy had been poisoned with thallium (Id. at 2249; Exhibit 15). Stidham recalled that the "time line" of when the conversation occurred did not "pan out" (Id. at 2249).[13] With respect to Larry Dubberly's statement

[13]In reality, the time line fit perfectly. Peggy Carr was hospitalized for the second time on October 30, 1988. In her police

that Travis Carr was yelling from his hospital room (with Pye and Carolyn in the room) "they're trying to kill me" and "you tried it once, and it didn't work, you're trying it again," such statements were consistent with the defense theory (Id. at 2261).[14] Stidham also recalled that Detective Paul Schaill, who was the initial investigator, believed that Pye was the main suspect; Schaill, however, was dismissed from the case with "his investigation [being] far from concluded" and replaced by Det. Mincey (Id. at 2262). Had the defense put on a case in chief, Schaill "would have been the main witness, in my mind" (Id.

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statement, Ervin remembered seeing Dixon in the afternoon at the Wal-Mart. Laura distinctly recalled that she spoke with Carolyn on Sunday, October 30th. The conversation with Carolyn was unexpected and provocative, as she told Ervin on that date that Peggy had been poisoned with "Thallum" (Defense Exhibit 15). What is significant about this statement is that at the time that Dixon made her comment, Peggy had not yet been diagnosed as having been poisoned; the doctors did not suspect poison until November 1, 1988 (R. 1781-82). Moreover, it was not until November 2, 1988, 3 days after Carolyn's comment about thallium, that the lab determined that Peggy had been exposed to thallium (R. 1784). Ervin confirmed her police statement during the evidentiary hearing (1PCR 2418-19). The State called Dixon at the hearing, who, although confirming having spoken with Ervin at the Wal-Mart, testified that the conversation must have occurred sometime in December because, in her recollection, it was not until December that the doctors discovered that Peggy had been poisoned with thallium (Id. at 3161). Again, however, the lab determined that Peggy had been exposed to thallium on November 2, 1988, not in December.

[14]Stidham later explained that he "must have" thought this statement had no value if he did not question anyone about it, "otherwise, I would have" (Id. at 2333). However, this is just a "general recollection" on this point, nothing specific (Id. at 2341).

at 2263).[15]

Although Stidham had "regular contact" with Mr. Trepal's wife in the first few months, she was "very concerned" about the publicity generated by the case and its impact on her, and his contact with her waned over time (Id. at 2264-65). To the extent that George was a suspect, "she was also a possible suspect, an obvious suspect" (Id. at 2266). No information about her being a suspect was brought out because Mr. Trepal "was insistent" that "we not point the finger at Diana" (Id. at 2266; 2270). However, they did point the finger at her during closing arguments against George's wishes (Id. at 2272). Stidham also knew that Diana had pending charges against her at the time of her testimony for battery on a law enforcement officer, but she was not questioned about it (Id. at 2274). She was also not asked about the fact that she refused to give any testimony on Fifth Amendment grounds in a wrongful death lawsuit brought by Pye Carr against George Trepal (Id. at 2275-76). Further, she was not questioned about the fact that, in 1990, she had been sued for an

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[15]Schaill testified at the hearing that in 1988, he was employed by the Polk County Sheriff's Office as a homicide detective (Id. at 3041). As lead detective in the Trepal investigation, Schaill, assisted by lieutenant Juanita Crawford, were actively developing Pye Carr as the suspect (Id. at 3044-45). Schaill was eventually replaced by Mincey due to disagreements with the sheriff's office over the direction of the case (Id. at 3045-46). He had never seen Exhibit 1, which was the note from Peggy to Pye; the note would have provided further evidence of motive on part of Pye Carr (Id. at 3047).

incident at a local hotel where she battered and injured a female guest who was playing her music too loudly (Id. at 2277-78).[16] This could have been used to show bias (Id. at 2312).

David Warren testified about Mr. Trepal's previous involvement with a methamphetamine lab (Id. at 2282). Stidham believed Warren had pending charges at the time he testified, but Warren had indicated in his deposition that he had not, at least at the time of the deposition (Id. at 2284). He did not know if Warren had been arrested between the date of the deposition and his trial testimony, but it was the State's obligation to inform him of such (Id. at 2284).[17] The pendency of criminal charges against a witness affects the witness' credibility (Id. at 2288).

Stidham did not recall an incident during trial when Judge Maloney instructed the jurors not to go down to the newspaper office

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[16]The records from the lawsuit were introduced into evidence as Defense Exhibit 18 (Id. at 2306).

[17]Records introduced during the hearing revealed that Warren had been arrested in North Carolina on November 17, 1990, for operating a vehicle while subject to an impaired substance (Id. at 2286). He was found guilty on February 21, 1991 (Id.). Other records introduced below establish that Warren was again arrested in December, 1990, agair for driving subject to an impaired substance (Id. at 2287). He pled guilty on March 6, 1991 (Id.). The records were introduced as Defense Exhibits 20 and 21 (Id. at 2291). Mr. Trepal attempted to secure an out-of-state subpoena for Warren, and the lower court issued the necessary paperwork. However, Warren challenged the subpoena in North Carolina, and a court in that State refused to honor the Florida certificate of materiality.

any more (Id. at 2301). The fact that jurors visited a newspaper office during trial would probably be grounds for a mistrial, depending on how things were going in the trial (Id. at 2303).

Dr. Marland Dulaney. Dulaney is a practicing toxicologist and also performs toxicology risk assessment (Id. at 2750-51). Among his other credentials, he is a Diplomate of the American Board of Toxicology, of which there are only 1300 members worldwide (Id. at 2751-60). With no objection, Dulaney was admitted as an expert in chemistry and toxicology (Id. at 2759-60).

Dulaney's review began from the "null hypothesis" that the scientific information supported the verdict (Id. at 2761). He was first asked to review the issue of the arsenic levels in the urine of Peggy Carr, Travis Carr, and Duane Dubberly (Id. at 2765). Arsenic is a highly toxic, but common, colorless and odorless poison, which can be eaten, drank, breathed, and absorbed through the skin (Id. at 2766). The symptoms of arsenic poisoning depend on the type, quantity and quality of the arsenic (Id. at 2767). An acute dose of arsenic causes massive diarrhea, bloody stools, gastrointestinal upset, and eventual cardiac collapse (Id. at 2774). A chronic or slower exposure of lesser quantities of arsenic over time "can look like the flu" but then leads to neuropathy which is pain, numbness, and tingling in the hands and feet (Id. at 2775). The latter is consistent with the Peggy's symptoms upon her first hospitalization, although her urine was not screened for

heavy metals (Id. at 2776). If a person is exposed to a low dosage of arsenic over time and is not treated, but the exposure is terminated, the person will get better because the body expels arsenic on its own (Id. at 2779). This is what occurred to Peggy: she had been exposed to low dosages of arsenic but was untreated; however, she was no longer exposed to her arsenic source, got better, and was released from the hospital (Id.).[18]

Peggy was re-hospitalized at Winter Haven Hospital on October 30, 1988, and a heavy metal urine screen revealed 616 micrograms of arsenic, with the expected concentration being less than 25 micrograms (Id. at 2782-83).[19] The screening also indicated a high level of thallium (Id. at 2783-84). Duane's urine, collected November 16, 1988, revealed 52 micrograms of arsenic, also an "elevated" level (Id. at 2785). There was no thallium analysis noted on the report (Id.). Travis's urine, also collected November 16, 1988, revealed 63 micrograms of arsenic, "greater than twice what would be expected" (Id. at 2786). Peggy was given another urine screening on November 15, and still had 36 micrograms of arsenic (Id. at 2808).

Peggy's first complaint was on October 21, when she began to get

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[18]Peggy's records from the first hospitalization indicate that the flu-like symptoms improved, and the feeling in her hands and feet got better (Id. at 2780).

[19]Because arsenic is naturally occurring, there is an "expected range" which is classified as "normal" (Id. at 2782).

flu-like symptoms and tingling in her hands and feet (Id. at 2788). Or October 22, she complained of chest pain, numbness in hands and feet, and flu-like symptoms, all of which are "very characteristic" of arsenic poisoning (Id. at 2789).[20] On October 24, she was admitted to Bartow Hospital, but discharged 3 days later because she got better (Id. at 2791). On October 28, Travis begins to get ill at home, and or October 30, Peggy is re-admitted to Winter Haven Hospital because she is very weak (Id. at 2792). Dulaney opined that it was at this time that she has been exposed to thallium, in addition to an additional exposure to arsenic as, upon re-admission, she had 20 times the normal level of arsenic in her urine (Id.). The second exposure to arsenic made the thallium more toxic (Id. at 2794; 2816-17). It is also known that at the same time, Duane and Travis were getting sicker, and, in Dulaney's opinion, they were exposed to thallium as well as arsenic resulting in their hospitalization on October 31 (Id. at 2795-96).[21]

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[20]Because early symptomology of thallium poisoning includes burning in the feet but not the hands, the State challenged Dulaney's assertion that Peggy initially reported tingling in her hands upon her first hospitalization, and challenged him to show him a medical record indicating that Peggy had tingling in her hands (Id. at 2895-96). On redirect, Dulaney pointed out that notes from both the admission nurse and the doctor at Bartow Hospital, where Peggy was initially hospitalized, revealed that her complaints included "numbness" and "tingling" in her hands (Id. at 2935-36). Peggy had also reported to her friend as well as her husband that her initial symptoms included tingling in her hands (Id. at 2936-37).

[21]At the time of their hospitalization, their symptoms were consistent with arsenic poisoning and thallium poisoning (Id. at 2803).

The urine screenings of Duane and Travis, done 2 weeks later, revealed elevated arsenic levels, which is an "interesting diagnostic find" because they had been hospitalized for 14 days and still had arsenic ir their urine (Id. at 2797). This indicated two possibilities: that they had received a very high dose of arsenic before their hospitalization and the later readings was the "tail end" of that, or that between October 31 and November 14, "they're being given arsenic again" (Id. at 2797; 2801-03).[22]

Dulaney opined that there had been two poisons associated with these incidents because if Peggy had been exposed to thallium at toxic levels prior to her first admission to the hospital, "she's not going to get better" because thallium is "tough" to get rid of from the body (Id. at 2798). Arsenic, however, can be fairly easily expelled from the body, so you are going to get better if nothing else happens (Id. at 2798). He summed up that Peggy was initially poisoned with arsenic, got better, and was then, after being released from the hospital the first time, was subsequently poisoned with toxic levels of thallium and high dosages of arsenic (Id. at 2799). His opinion was supported by the fact that Peggy's urine still reflected elevated levels of arsenic

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[22]Of course, on their admission on October 31, they also had thallium in their system, but because they were possibly not exposed to arsenic at an earlier time like Peggy was, they were not as weak, and, due to their youth, were able to survive the thallium poisoning (Id. at 2801).

over 2 weeks after being hospitalized (Id. at 2809).[23] To a reasonable degree of scientific certainty, Peggy Carr, Travis Carr, and Duane Dubberly were subjected to a separate, second poisoning attempt with arsenic (Id. at 2822-23).[24] Thus, Dulaney rejected his null hypothesis that the scientific evidence supported the verdict because "no one has shown me anything to find a source of arsenic from the Defendant" (Id. at 2931).[25]

Dulaney was also asked to review the issue of the thallium discovered under the sink in an apartment on Pye's property (Id. at 2823). Of the swabs taken by Florida health officials, one revealed 16 micrograms per liter of thallium from under a sink in an apartment on Pye's property (Id. at 2839-40); all the other 280 swabs taken on numerous items were negative (Id. at 2835-37). In Dulaney's opinion,

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[23]Dulaney was aware of a lab report indicating that the levels of arsenic in Peggy's system were "not incompatible with the normal from eating oysters" (Id. at 2810). He opined that her levels of arsenic were "absolutely" incompatible with the level of arsenic found in oysters (Id. at 2811-12). The same opinion applied to the arsenic found in Duane and Travis (Id. at 2813).

[24]Dulaney also explained that someone with a background in chemistry only would not be capable of analyzing these issues: "[t]hat'd be like asking whether a paralegal can argue with a judge on areas of law" (Id. at 2850-51).

[25]Detective Mincey was present at Mr. Trepal's Sebring home when Mr. Trepal was arrested; if any arsenic had been located in Mr. Trepal's home, it would have been listed on the evidence logs (Id. at 2448). He could not recall if any arsenic had been located (Id. at 2449).

in light of the manner in which the swabbing was performed, this reading is "indicative that thallium was there, and that the amount of thallium that was collected in that swab is almost assuredly not all of it" (Id. at 2841). To a reasonable degree of scientific certainty, the thallium under the sink was not "naturally occurring" because it only showed up in that one place "as opposed to everyplace else"; when you have "naturally occurring" concentrations, "you find it at these kind of low concentrations, but you find it in many different samples. You don't find it in a single sample" (Id. at 2841-42; 2844-45).

Allen Dubberly. Allen is the son of Peggy Carr, and he identified the handwriting in Exhibit 1 as that of his mother (Id. at 3056). A month before Peggy first became ill, her communications with Allen began to change, and she started showing interest in visiting him in Tennessee, where he was serving in the Navy (Id. at 3074-75). Shortly before she became ill, Peggy "made it known to me that she wanted to come and stay . . . [I]t wasn't no more of her inquiring about how to come, she wanted to come" (Id. at 3075). She was "nervous," "wanted to be by herself," and that "she needed some time away from the house" (Id. at 3078). Allen arranged for Peggy to come and stay (Id. at 3078). He and Peggy also "developed a password to let me know that she was on her way and when I could expect her" (Id. at 3078-79). At first Peggy did not explain the secrecy about her visit, but "she later said that she didn't want Pye to know" and was "nervous"

and "scared" and "just wanted it to be a secret" (Id. at 3079-80). Sharing her feelings with Allen was unusual, as Peggy generally kept her problems to herself (Id. at 3081). Allen told Detective Mincey of his mother's fear of Pye, but Mincey "just told me to hold that thought" and "put that on the back burner for now"; Mincey never again brought up the subject (Id. at 3087-88). If he had been asked, he would have testified about this information at Mr. Trepal's trial (R. 3088-89). He agreed to testify at the evidentiary hearing "[j]ust to tell my side" and "to tell everything I know and hope that all of the truth gets out" and "to even look at Pye a little closer, you know, just to make sure they see everything, weigh everything" (Id. at 3089).

Larry Dubberly. Peggy Carr was his ex-wife with whom he had their sons, Allen and Duane (Id. at 3109-10). He and Peggy divorced around 1976, but they remained good friends (id. at 3110). About a month or so before she became ill, Peggy told Larry she was having trouble with Pye, that she was afraid of him and was thinking of leaving him (Id. at 3113). When he heard that Peggy and the children had become ill, he came to Florida and camped out in the hospital because he "didn't want [Duane] to be alone with Pye Carr" (Id. at 3114). Larry had suggested to Detective Mincey that all of the family members take lie detector tests "so that everyone won't be so afraid around here" but Mincey said that they were not admissible in court

(Id. at 3116).

Duane shared a room with Travis Carr in the hospital (Id. at 3117). Pye was also there with his son, but not every day and night (Id.). He often saw Pye in the hospital parking lot drinking whiskey and talking with his brother-in-law, Hal Dixon, who was married to Carolyn, Pye's sister (Id. at 3117-18). Larry would see Carolyn at the hospital "when Pye was there" (Id. at 3118). One evening, Larry was in Travis and Duane's hospital room when Pye appeared at the door; Travis hollered "Larry, get him out of here. He's trying to kill me" (Id. at 3119).[26] At that time, Travis was very sick (Id. at 3119-20). Larry also recalled that after Pye would speak with law enforcement, he would be chainsmoking and became "[v]ery restless, very nervous" (Id. at 3120).

Larry was worried about Duane's safety because when he would come into the hospital room, "there was baked goods, Kentucky Fried Chicken, you name it," on the beds with "these two boys laying there dying, supposedly" (Id. at 3121). Larry spoke with the doctors, nurses, and security, but no one knew how the food got into the room (Id. at 3121). He later found out that it was Carolyn Dixon who was baking food and bringing it to the kids (Id.). After this, the doctors ordered that no

[26]He later clarified on cross that Carolyn Dixon was also with Pye during this incident, and that Travis said "they" were trying to kill him again, meaning both Pye and Carolyn (Id. at 3127).

one could visit the children without first signing in (Id. at 3122). Larry is not convinced entirely of Mr. Trepal's guilt (Id. at 3125-26). Had trial counsel asked, he would have testified on behalf of Mr. Trepal (Id. at 3126).

Susan Goreck. During the course of her work in the Trepal case, Goreck had a conversation with FBI Agent Brekke on or about March 5, 1990, who reported that the lab had found thallium I nitrate in the brown bottle found in Mr. Trepal's garage (Id. at 3137). Goreck "got excited" and informed her supervisors (Id. at 3138-39). The next day, her supervisor told her to reconfirm the finding with the lab because Goreck had been "awfully excited" after talking with Brekke (Id. at 3139). She wrote an intelligence report reflecting her conversation with Brekke and the lab (Id.). The report, authored on March 15, 1990, reflects both conversations (with Brekke and with Havekost from the FBI lab), as well as the fact that the brown bottle was found to contain thallium I nitrate (Id. at 3141). She recalled that the first actual lab report only indicated that the bottle contained thallium (Id. at 3141). She later received a lab report dated April 23, 1990, indicating that the bottle contained .64 grams of thallium nitrate (Id. at 3143; 3146). Another lab report dated July 9, 1990, revealed that the brown bottle contained thallium I nitrate (Id. at 3147). Prior to her conversation with Brekke on March 5, 1990, she did not know that the bottle contained thallium of any sort (Id.). Prior to receiving

the lab report, no arrest warrant was sought or received for Mr. Trepal with respect to the murder of Peggy Carr (Id.). She never personally turned over her intelligence report to defense counsel, but made the State aware of it (Id. at 3144-45).[27]

Carolyn Dixon. Dixon has been a nurse for about 30 years, and is the sister of Pye Carr (Id. at 3159). Dixon knows Laura Ervin because she once dated her brother (Id. at 3160). Dixon confirmed having had the conversation with Ervin at a Wal-Mart "several weeks" after Peggy and the children were hospitalized (Id. at 3160-61). She told Ervin that the family were in the hospital and were sick (Id. at 3161). When Peggy and the kids were admitted, Dixon and the others had been told that they had been poisoned with one of three things (Id. at 3161). She believed it was in December that the family was informed that it was thallium (Id. at 3161).

B. 1999-2000 EVIDENTIARY HEARING.

Roger Martz. Prior to January 1997, when the preliminary report

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[27]The State also called Detective Mincey to testify on this topic. He explained that sometime in March, 1990, he got a call from Brekke, who told him that the brown bottle contained thallium I nitrate (Id. at 3149; 3151). That same day he got a call from Goreck, who gave him the same information (Id. at 3149). A few days later, Mincey himself called the lab and spoke with either Roger Martz or Donald Havekost, who confirmed that the bottle contained thallium I nitrate (Id. at 3150; 3153). The discovery of thallium I nitrate in the bottle was "very significant" for the case, and it led to Mr. Trepal's arrest shortly thereafter (Id. at 3153). Mincey did not document his conversations with the FBI lab (Id. at 3154-55).

from the Office of Inspector General [OIG] was released, Martz was the unit chief at the FBI lab's chemistry/toxicology unit, a position he held when he testified at Mr. Trepal's trial (2PRC 2837-38). Following the release of the preliminary report, Martz was put on "temporary assignment" doing "physical security" at an FBI field office (Id. at 2835-36). Martz was issued a letter of censure for his "work" in Mr. Trepal's case (Id. at 2862-63).[28]

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[28]Despite the fact that the OIG Report criticized Martz's performance in numerous cases, including the 1993 World Trade Center bombing and the Oklahoma City bombing, he received a formal censure only for his work in the O.J. Simpson case and Mr. Trepal's case. As to Mr. Trepal's case, the censure letter provided in part:

> In your response to the OIG findings, you stated that an examiner may properly offer an "opinion" about the identification of a questioned substance that is stronger than the conclusions described in the laboratory report. However, you also admitted that, based on some of the test results, your testimony about drug residues in a bottle of thallium nitrate found in Trepal's garage was "debatable." You admitted in your interview with the OIG, moreover, that your case notes were inaccurate and imprecise, and that some charts were labeled incorrectly.
>
> **Your admissions that your documentation of your case work in this case was deficient in several respects, and that you provided trial testimony that exceeded the available scientific findings, are evidence of serious misconduct.** As a Supervisory Special Agent, you are expected to provide a positive example for the employees you supervise. **In any criminal case, but especially in a high profile matter like this one, it is crucial that Laboratory examiners testify accurately and offer opinions that are firmly based on scientifically supported and appropriately documented evidence. You failed to satisfy these requirements, and in so doing, had the potential to undermine the credibility of the FBI Laboratory.**

Martz explained that Donald Havekost was the primary examiner who did the initial analysis on Q1, Q2, and Q3 (samples from 3 Coca-Cola bottles), and determined that thallium was present and quantitated the amount (Id. at 2881). Martz was asked to determine what type of thallium was added to the Coke (Id. at 2882; 2995). At that point, the only information Martz had was that a local lab believed that thallium sulphate was added to the Cokes (Id. at 2882).[29] He did not speak with anyone at the Coca-Cola laboratory, although he conceded that he told the OIG interviewers that he did (Id. at 2890).

Martz identified his handwritten work notes which did not indicate the dates on which he conducted the various testing (Id. at 2887; 2892; 2898). They did indicate that he conducted a screening test called the diphenylamine (DP) test on samples Q1, Q2, and Q3, and compared them against sample K61, which is unadulterated Coke (Id. at 2898-99). According to his notes, the DP test was "positive for Q1 through Q3 and negative for K61," meaning that the samples "could have"

(Defense Exhibit 2) (emphasis added).

[29]He also knew that lab examiners from the Coca-Cola Company were going to be testifying that they believed the Coke bottles contained thallium I nitrate; he was also aware that the Coca-Cola analysts had determined that thallium I nitrate did not alter the appearance of Coca-Cola, but thallium III nitrate did change the appearance (Id. at 2896).

contained a nitrate (Id.).[30] After conducting the DP screening test, Martz then conducted a “silver chloride” test, which revealed the results “same for all” (Id. at 2912). He conceded there was no test called the “silver chloride” test and his notes were wrong; the test he actually ran was a “silver nitrate” test, which looks for the presence of chlorine (Id. at 2913). His notes also revealed that he conducted a “barium nitrate” test, but he again conceded that while there “may be” such a test, “it’s not the one that I ran” (Id.). The test actually conducted was a "barium chloride" test, which tests for the presence of sulfates (Id. at 2914). As to the “silver nitrate” test he actually ran and the results which indicated “same for all,” his notes did not indicate what “same for all” meant (Id.). As to the "barium chloride" test he actually ran, his notes also revealed that the results were "same for all," but did not reveal whether "same for all" meant a positive or negative result for the presence of sulfate (Id. at 2915).[31]

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[30]Martz discussed with other people whether other salts besides nitrate will give a positive result on a DP test, and conceded that he could not say that no other salt such as chlorate could give a positive result (Id. at 2908-09). Moreover, depending on how the DP test is conducted, *i.e.* whether the solution was dropped in slowly or quickly, the results could be manipulated (Id. at 2909-12).

[31]Martz's "recollection" was that the result was positive for all samples on the silver nitrate test, and negative for all samples on the barium chloride test (PCR. 2916); however, he acknowledged that he had no such recollection at the time of his interview with the OIG, and that his "recollection" as to the results "came to him" on the witness

At trial, Martz testified that one of the bases for his conclusion that thallium nitrate had been added to the Cokes was the positive result from the DP test (Id. at 2920);[32] however, he acknowledged at the evidentiary hearing that nitrate is not the only substance that would produce a positive DP result (Id. at 2921).[33] In addition to the DP test, he testified at trial that he relied on the ion chromatography [IC] test to conclude that thallium nitrate was added to the Coke samples;[34] however, he explained below that he did not know what type of reagents were used in conducting the IC test, that he himself did not even run the IC test on the samples, and could

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stand (Id. at 2916-18).

[32]See R. 3557 ("Based on that [DP] test I concluded that thallium nitrate was added to the Coca-Cola").

[33]Martz admitted that his trial testimony that, based on the DP test, thallium nitrate was added to the Cokes, "would not be accurate" (Id. at 2924), and that what he told the jury was incorrect (Id. at 2925). In light of his hearing testimony, Judge Bentley's order later found that "Martz testified falsely at trial when he stated that a positive result on the DP test will yield a blue color indicating the presence of nitrate. In fact, the blue color indicates the presence of an oxidizer which could, among other things, be nitrate" (Id. at 2678).

[34]The charts for the IC testing on the Coke samples revealed the presence of not only nitrate, but also chlorine, phosphate, carbonate, and other substances Martz could not identify (Id. at 2984-85). IC testing on the Q2 sample revealed the presence of not only nitrate, but also chlorine and other substances that Martz could not identify (Id. at 2985-86). These results were never disclosed to defense counsel.

not remember the last time he used IC technology (Id. at 2926).[35] He also admitted that he falsely told the jury that he performed IC testing on all three samples, when in fact "I had only tested two of them" (Id. at 2928).[36]

In addition to the DP and IC testing on the Coke samples that he testified to at trial, Martz acknowledged conducting other testing on the samples, including mass spectrometry [MS], x-ray diffraction [XRD], scanning electron microscopy [SEM], and liquid chromatography [LC] (Id. at 2929-30).[37] Of these tests, he personally only conducted the MS testing, and only on the Q1 sample (Id. at 2930).[38] He conducted the

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[35]At trial, Martz told the jury that he himself ran the IC testing (R. 3558). Below, Martz testified that he never told trial counsel that he personally did not run many of the tests because he was not asked the question (2PCR. 3062).

[36]Judge Bentley found that "Martz testified falsely at trial that he had run Q3 on the IC. Withholding information can constitute a falsity. . . That is the case here" (Id. at 2679).

[37]In his pretrial deposition, however, Martz told Dabney Connor that his conclusion that Q1 through Q3 contained thallium nitrate was based solely on the DP and IC tests, and that this constituted his "entire involvement" in the investigation. He never disclosed that he conducted additional testing, which, as the lower court found, was "particularly important because the defense could have used this information to suggest that Martz was not satisfied with the initial results and sought additional data" (Id. at 2679).

[38]The samples he used for the MS testing on Q1 were mostly solid probes "where you place a small sample and do a probe cum and then heat it up"; other ones were liquid injections done using a wire, a technique that is not done in most forensic laboratories (Id. at 2935-36). Martz knew no one else that conducted the liquid testing using a wire, and "[n]o one to my knowledge in the FBI laboratory had done it

MS testing to determine what salts of thallium were present in the samples and what was present in unadulterated Coca-Cola (Id. at 2930). At this point, he was specifically looking for nitrate (Id.).[39] However, he did not come up with thallium nitrate but instead "a lot of different salts" such as thallium sulfate, thallium phosphate, thallium oxide, and thallium chloride (Id. at 2940; 2948-55; 2958-60). Because he was not able to find nitrate, the MS testing "didn't work" in his view and "was not used for any conclusion I made in this case" (Id. at 2957).[40]

Martz also did IC testing on samples K61 and K66, which were samples of unadulterated known Coca-Cola, in order to determine what known Coca-Cola contained (Id. at 2970). These tests showed the presence of nitrate (Id. at 2972; 2974; 2985). However, Martz did not believe that Coca-Cola truly contained nitrate because he got a negative result on the DP test when he tested K61 (Id.). When confronted with the disparity between the IC test indicating the

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before I did it" (Id. at 2927). This technique was also not something which had been peer reviewed in publications (Id. at 2938).

[39]As Martz later explained, when he received a case for analysis, outside information from law enforcement can be useful, for example, "[i]f we're working on a case where they think a very unusual poison was used and they can tell us what that is, we will target for that compound" (Id. at 2994).

[40]The XRD and SEM testing on the Coke samples also revealed salts other than nitrate (Id. at 2962-64).

presence of nitrate in known Coca-Cola and the DP testing which presumptively determined a lack of nitrate, Martz explained that either there was not "enough" nitrate in the Coca-Cola or the DP test was not "sensitive enough" to detect it (Id.). He had no explanation for the difference in the tests with respect to the presence of nitrate in known Coca-Cola (Id. at 2974).[41]

On the airplane to Florida for the evidentiary hearing, Martz performed a quantitative analysis of the nitrate he identified in the Q1-Q3 samples (Id. at 2990). Prior to trial, he "didn't think it was possible" to do the analysis because he had "misread" one of the charts (Id. at 2991).[42]

Martz was questioned about his deposition testimony which

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[41]This issue was of obvious importance: if there is nitrate in known Coca-Cola, that could explain the presence of the nitrate ion in the adulterated Cokes, thus raising questions about whether it was thallium nitrate put into the soda or some other salt of thallium. Martz affirmatively lied to the jury when asked about this specific issue by the prosecutor (R. 3569). Martz admitted at the hearing that "one test gave an indication and the other didn't" (2PCR 3006). On this point, Judge Bentley found that "Martz misled the jury when he testified that nitrate was not present in unadulterated Coke. In fact, IC testing revealed a substance which could have been nitrate" (2PCR. 2678), a fact which "would have been useful to the jury" (Id.).

[42]During his cross-examination, Martz discussed the details of his airplane analysis (2PCR. 3031). Later at the hearing, FBI scientist Thomas Jourdan testified to the results of the quantitative analysis he also conducted; Jourdan's testimony in this regard, however, was rejected by Judge Bentley as being "not credible" because it relied on flawed charts and unreliable data gleaned from Martz's inaccurate and incomplete testing (Id. at. 2678; 2680).

centered on the actual FBI Lab Report issued in the case on July 10, 1990. At deposition, Martz testified that the report indicated that he "identified" the nitrate ion in the adulterated samples, and concluded that Q1 through Q3 "contained thallium nitrate" (Id. at 2998). In his dictation, he only concluded that the samples were "consistent" with thallium nitrate being added, which are "[d]ifferent words" than the definitive conclusion that the samples "contained" thallium nitrate (Id.). He conceded that "when you say something contained, you're implying that it's in there for sure" and is a stronger statement than "consistent with" (Id. at 2999). Martz contended that perhaps the transcript of his deposition was wrong, and he "should be given the benefit of the doubt that maybe I didn't say that" (Id. at 2999-3000). However, he acknowledged that at trial, he also gave the stronger statement that thallium nitrate was "added to" the Cokes (Id. at 3000). Martz did not think that the two different conclusions were "much different" (Id. at 3001).[43]

Aside from the Coke samples, Martz was also asked to identify a powder located in sample Q206, which was a small bottle located in Mr. Trepal's vacated garage after having moved out of his house (Id. at

[43]Judge Bentley rejected Martz's view on this point: "Martz never explained why he wrote one thing in his notes and testified to something else. Any attempt to say they mean the same thing does not hold water" (2PCR. 2679).

3007-08).[44] He conducted various tests on Q206, including XRD, MS, and infrared spectrophotometry [IR] (Id. at 3008). As with the Coke samples, Martz himself did not run the XRD testing on Q206 (Id.). He concluded that Q206 contained thallium nitrate (Id. at 3009). When asked about the fact that the charts reflecting the results of the XRD run on Q206 revealed peaks showing other substances, Martz explained that he was "not an expert on x-ray diffraction" (Id. at 3010).

As to the IR testing on Q206, Martz indicated that it also revealed thallium nitrate (Id. at 3012). When confronted with the actual charts which showed discontinuity in the peaks, he admitted that "Thallium nitrate is a difficult compound to run an IR on," but was personally "satisfied" that the chart showed a "match" for thallium nitrate (Id. at 3012-13). He also admitted that he told the OIG investigators that his results as to Q206 were "debatable" (Id. at

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[44]See Trepal v. State, 621 So. 2d 1361, 1365 (Fla. 1993). The shed was located on Mr. Trepal's Alturas property, which he eventually moved out of in November, 1989, over a year after the poisonings. Id. at 1365. Shortly after moving, Mr. Trepal agreed to rent the Alturas property to "Sherry Guin," who was, in reality, Susan Goreck, the undercover detective. Goreck, posing as Guin, had previously entered the garage before Mr. Trepal moved out and was familiar with its interior. Id. Once the "rental" arrangement was finalized in December, 1989, law enforcement entered the property and "found" the bottle in a drawer of a workbench. Id. In actuality, the drawer from which this small bottle was recovered was filled with matting, paper cloth stuff, and was likened to a rat's nest (R. 7355, 7357) (Deposition of Brad Brekke).

3013).

Thomas Jourdan. Jourdan and Steven Burmeister were asked to review Martz's work and "offer a defense" on behalf of the FBI to the OIG findings (Id. at 3081-83). He and Burmeister had to speak with Martz because they were not able to figure out his notes and charts, which were "deficient in detail" (Id. at 3086; 3089; 3092; 3095). As an FBI lab unit chief, Jourdan would not have accepted Martz's dictation because of the faults with his notes and charts, as well as the fact that he relied solely on the DP and IC tests (Id. at 3106). Martz should not have testified to the contents of Q3 without having conducted any tests on it (Id.) Jourdan also testified that the IC charts revealed that there was a small amount of nitrate in known Coca-Cola (Id. at 3115-16).

In Jourdan's view, there is a difference between saying something is "consistent with" as opposed to "identified as"; "identified as" demonstrates a "high level of confidence, ruling out other possibilities, essentially exclusively," whereas "consistent with" is a "less confident" conclusion (Id. at 3117). As a unit chief, Jourdan would "have a problem" with one of his examiners concluding in dictation that something was "consistent with" but testifying in court that it was "identified as" because the latter is a "considerably stronger statement" (Id. at 3118). If he had been the unit chief, he would not have signed out the report in this case based on the work

that Martz did (Id. at 3120).

In his opinion, thallium nitrate was added to Q1 and Q2; he could say nothing about Q3 (Id. at 3122 *et. seq.*).[45] In explaining his conclusions, Jourdan conducted a stoichiometric analysis relying on the height of certain peaks on the charts which he measured with a ruler; based on his assessment of the peak height, Jourdan believed that Q1 and Q2 contained thallium nitrate (Id. at 3128-30; 3138-39). He did acknowledge that the issue of whether thallium chloride had been added had not been "fully explored" (Id. at 3141-42).

Steven Burmeister. Currently the unit chief of the chemistry unit at the FBI lab, Burmeister took over the position that Martz previously held (Id. at 3163-64). The IC charts relied on by Martz lacked sufficient standards "that I would have liked to have seen" and was a deficiency (Id. at 3167-70). He was also "not sure exactly" how the samples that Martz used for the IC testing were prepared, which is an important factor to determine how the system is operating (Id. at 3172-73). The charts also lacked information detailing whether the proper pre-testing procedures were employed on the machinery (Id. at

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[45]However, he was impeached with his statement to the OIG in which he testified that he would not have rendered the opinion that thallium nitrate was added to the Coca-Colas (Id. at 3451-52). Judge Bentley later rejected Jourdan's opinion on this point as "not credible" because his role in the OIG investigation "colored" his testimony, as well as the fact that his analysis was grounded on admittedly inaccurate and flawed notes and charts (Id. at 2680).

3173-74).

Burmeister would not have testified at a trial that thallium nitrate had been added to Q3 when no IC test had been run on Q3 and the IC was the basis for the opinion as to Q1 and Q2 (Id. at 3184). Based on the stoichiometric analysis testified to by Jourdan, Burmeister opined that thallium nitrate was added to the Cokes (Id. at 3195-98).[46] Without the stoichiometric analysis conducted by Jourdan, he would be less confident about his opinion that thallium I nitrate was added to the Cokes (Id. at 3198).

Dr. Marland Dulaney. Dulaney was requested to review the issue of Martz's testing as well as the stoichiometric analysis conducted by Jourdan (Id. at 3208-10). According to Dulaney, Jourdan's opinion that thallium nitrate was in the Cokes was premised on assumptions never proven by Martz's work (Id. at 3212-13). Because the process by which Martz, and later Jourdan and Burmeister, ruled out the presence of sulfate or chloride failed to meet scientific standards, "there's no way that from this information alone that you could have eliminated chloride or sulfate in Coca-Cola" (Id. at 3263).

The second problem with Jourdan's analysis is that the peaks on the chromatogram from the IC testing were not stable, and because no standard was run and there is no stable system, it is not possible to

[46]Judge Bentley also found this opinion not credible for the same reasons as with Jourdan (Id. at 2678-80).

determine the contents (Id. at 3214). Moreover, the work in this case is based on more than one set of unknown circumstances: not only is it not known where chloride and sulphate come out on the tests because no known standards were run, but Coca-Cola itself is unknown, particularly when various thallium salts of unknown origin are added to it (Id. at 3218-20). As Dulaney explained, "if you're going to base things on supposition, then everything else carries that stigma. Everything" (Id. at 3224).

Dulaney also discussed the length of the peaks on the charts that Jourdan used in formulating his stoichiometric analysis, explaining that Jourdan's conclusion was based on a "simple mechanical error" because the pen that was recording the peak on the chart ran out of paper, thus failing to register the peak's true height (Id. at 3226-27). In other words, the pen "hits the top [of the chart] and goes no further [] because the pen can go no further. It's a simple mechanical error" (Id. at 3227). Because one cannot tell "how far that pen would have gone if it could have," one cannot make the calculation that Jourdan did (Id. at 3228-29). The machine error, compounded with Martz's failure to run known standards in Coca-Cola, led to unwarranted scientific assumptions by the FBI because "when you start throwing doubt upon doubt upon doubt, the scientific accuracy level gets chipped away" (Id. at 3237). All that can be said about Q1 and Q2 is that they contain thallium; as to Q206, there is "some debate" as whether it

contained thallium I nitrate (Id. at 3228).

Dulaney summed up that "based upon the standards in the scientific community, [Martz's work] certainly would not meet those standards because of the difficulties that we've talked about here" (Id. at 3255). Based on Martz's work, no conclusion can be made to a reasonable scientific certainty that thallium nitrate was added to Q1 and Q2 (Id. at 3257).[47] Martz's trial testimony ruling out the presence of nitrate in known Coca-Cola also did not meet reasonable scientific standards (Id. at 3270). It is not reasonable for scientists to reach conclusions based on possibilities, and that what occurred in Mr. Trepal's case was "junk science" (Id. at 3295). The problem with using possibilities is that they are not based on any scientific methodology and are open to interpretation based on the examiner's bias (Id. at

[47]For example, the pretrial experiments conducted by the Coca-Cola Company revealed that the addition of salts other than nitrate did not result in any detectable change in the appearance of the Coke (Id. at 3267-68). This is consistent with Coca-Cola chemist, Frederick Reese, who testified at trial that he conducted tests to determine if various forms of thallium would dissolve in Coke without changing its appearance (R. 3402). Reese determined that Thallium Sulfate, Thallium Maleanate and Thallium I Nitrate went into solution in Coke without changing its appearance, but that Thallium III Nitrate turned Coke a muddy color (R. 3405-06). Thus, this Court's statement on direct appeal that the evidence at trial was “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,” Trepal, 621 So. 2d at 1364, is factually incorrect, as Reese clearly testified that when he put Thallium Sulfate and Thallium Maleanate in Coke, “The product looked the same” (R. 3405).

3295-97).[48]

Dr. Frederic Whitehurst. Whitehurst is a forensic consultant for the Forensic Justice Project in Washington, D.C. (Id. at 3314). He entered the FBI Lab in 1986, and left in 1998 (Id.). He had specific experience and training with the scientific machinery used for the testing of the evidence in Mr. Trepal's case (Id. at 3315-19). Whitehurst opined that the IC work relied on by Martz to opine that thallium nitrate was added to the Cokes failed to meet acceptable scientific standards (Id. at 3388-91).[49] What left Whitehurst "disturbed" about Martz's work is that "I don't know what will happen when you put a strong oxidizing agent into Coca-Cola," particularly due to "our ignorance of thallium chemistry" (Id. at 3393). Although Whitehurst did not doubt that thallium was found, "I don't know how without research we can determine what thallium salt it was" (Id. at 3394).[50]

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[48]Judge Bentley found Dr. Dulaney's testimony and opinions "highly credible" (Id. at 2678).

[49]Whitehurst testified that the person who actually did the IC testing in this case was not a competent examiner, and that he himself would not rely on his results (Id. at 3428). The charts in Mr. Trepal's case were an example of the shortcomings of the examiner who ran the IC tests (Id. at 3429).

[50]For example, it was possible that one form of thallium salt such as chloride could have been added to the Coke, but the reaction with the Coke could have caused another salt such as nitrate to come out (Id.). Thus, "I'm left with this concern as a chemist, as a scientist,

Whitehurst also reviewed Martz's work on Q206 (Id. at 3398). It was not scientifically reasonable to rely on the XRD testing to conclude that Q206 contained essentially pure thallium I nitrate, because "the chart says there's two things in there" (Id. at 3399). Essentially, "it's kind of like maybe not quite making a blue Volkswagen into a red Chevy, but you know, if it is adjusted a little bit, it can call this thallium nitrate" (Id. at 3401-02). That conclusion, however, is premised on the fact that "the computer program sort of twists the data just a bit" (Id. at 3401). He also reviewed the FTIR testing conducted on Q206 in order to see where Martz was able to identify thallium nitrate; however, he was "concerned about the quality of the spectra" from the FTIR tests (Id. at 3403). The charts suggested that "the sample was prepared improperly" because of the abnormally vacillating peaks and shapes of the spectrum of the charts (Id. at 3404). All the readouts establish is "consistency" with the "presence" of thallium nitrate, which would need to be re-confirmed to the poor quality of the sample preparation and the spectra (Id. at 3405). Opining that the substance in Q206 is consistent with the presence of thallium nitrate, however, is not the same as opining that Q206 contained thallium nitrate (Id. at 3406).[51] Because the FTIR work

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there are too many unknowns here" (Id. at 3395).

[51]Judge Bentley found Whitehurst's testimony and opinions "highly credible" (Id. at 2678).

relied on by Martz was "problematic," Whitehurst could not, to a reasonable degree of scientific certainty, conclude that thallium I nitrate was in Q206 (Id. at 3431). Essentially, "we didn't know enough about thallium chemistry, and we didn't do enough research to find out" (Id. at 3436).[52]

Jonathan Stidham. Stidham testified that "the Q206 bottle and the Coca-Cola bottles and their relationship to one another . . . [were] the most important part of the case" because they were "the only thing that linked George Trepal in anyway to this crime" (Id. at 3510). Without the Q206 bottle, Stidham did not believe that the State could legally prove its case (Id. at 3510-11). The particular kind of thallium that Martz testified was contained in the Q206 and Coke samples was also important to the case and something which the State "made a big deal about" at trial (Id. at 3511).

The defense did not have the notes and charts of Martz's testing and would "absolutely" have expected them to have been disclosed (Id.

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[52]Whitehurst opined that the testing conducted in this case with thallium should have been peer reviewed in 1988-90 (Id. at 3410). Although the machines themselves that were used were well established, the application of certain materials to the machines must also be peer reviewed: "Can we apply what we're doing to an unknown material, Coca-Cola, and undefined reactions between materials that are thallium based which we can feel confident about, but what are they and what will happen?" (Id.). Because these aspects were lacking, "we end up in this environment right here today doing peer review for the first time" (Id. at 3411). Because Martz's work was not peer reviewed, "therefore there are these questions that are associated with it" (Id. at 3412).

at 3513). "[H]ad we been able to cast any doubt on the appropriateness of the scientific testing, I think it would have been significant in the trial" (Id. at 3514; 3515). Q206 and the thallium in the Cokes were "the closest thing to direct evidence that existed. Everything else was just hype" (Id. at 3515-16).

Had the defense known of this information, it would have led to a Frye challenge to the Martz's conclusions (Id. at 3516). Moreover, without the appropriate testing on the thallium by the FBI, the admissibility of Mr. Trepal's prior conviction and the testimony of Richard Broughton could have been affected, because they depended on the link between the salt of thallium found by Martz and the methamphetamine production process that Broughton testified about (Id. at 3517-19). As he explained, "if what the FBI lab had found was not something that could have been used in the process of manufacturing methamphetamine, that would have been further grounds to keep it out of evidence" (Id. at 3519). The defense hired an expert from Georgia Tech to evaluate the evidence, although the expert was doing different examinations than the FBI was (Id. at 3529-30).

Dabney Connor. At no time during the case did Connor ever see Martz's notes or charts (Id. at 3538). Based on the OIG report, there were "certainly many matters that not only would have been proper for cross-examination at trial, but would have been subject for pretrial motions for exclusion of not only his testimony but perhaps other

witnesses that dovetailed or coattailed him in the trial" (Id. at 3540). Martz did "sloppy work" which "bring[s] to my mind to question the validity of the results" (Id. at 3539-40). Connor would have brought a Frye challenge to the evidence, and used it to impeach Martz's conclusions if the Frye challenge had been unsuccessful (Id. at 3567-69).

The fact that Martz conducted more tests then he indicated in deposition would "absolutely" have been important to effectively question him (Id. at 3541). He also would have wanted to know why Martz did not test Q3 but testified that he had (Id. at 3541-42). Connor also explained the importance to the case of the specific salt in the thallium: "the bottom line significance of that is if there is a particular salt of thallium in the Coke bottles and a different salt of thallium in the Q206 bottle, then it would certainly be obvious that the thallium in the Cokes didn't come from the Q206 bottle" (Id. at 3542). It would have been significant to know if the three Coke bottles contained a substance other than thallium nitrate (Id. at 3543). It also would have been significant to know if Martz's testing revealed that known Coca-Cola had nitrate in it: "that goes to the question of, okay, you found nitrate in the Cokes. Did Coke put it there, or did someone else put it there?" (Id. at 3544). Georgia Tech did not conduct the same tests that the FBI lab did (Id. at 3544-48). Georgia Tech's work would not have precluded the defense from attacking

the FBI testing, had the information about Martz been disclosed (Id.).

SUMMARY OF ARGUMENTS

1. Due to the combined effects of the admission of false scientific testimony, withholding of exculpatory evidence, and ineffective assistance of counsel, Mr. Trepal did not receive a fair adversarial testing at the guilt phase. Significantly, the lower court found that FBI chemist Roger Martz committed perjury at Mr. Trepal's trial about the results of the only direct evidence of Mr. Trepal's guilt: the contents of the Coca-Cola bottles consumed by the victims, and a bottle found in Mr. Trepal's vacated garage. Moreover, despite the suggestion by a retained pathologist that the defense team needed to hire an expert toxicologist, no toxicologist was retained. This deficiency severely prejudiced Mr. Trepal in a myriad of ways. The defense also failed to present substantial evidence relating to other suspects, including Pye Carr, his sister, Carolyn Dixon, and Mr. Trepal's wife, Dr. Diana Carr. The State also withheld exculpatory evidence, all of which would have been important information for the jury to know.

2. The State never disclosed that the Polk County Sheriff's Office, long before Mr. Trepal was arrested, was obsessed about making a movie about the case. Discussions in the department were ongoing as to the potential for a movie, including discussions that if Mr. Trepal was not arrested, no movie could be made. The lower court erroneously

concluded that, absent direct evidence that a contract had been signed prior to trial, the claim merited no evidentiary hearing. Considerations of fame and fortune played a role in the ultimate arrest of Mr. Trepal, and the jury should have been entitled to weigh this information.

3. The trial record reveals that jurors went to the local newspaper office during trial to inquire about a picture that appeared in the paper. Because neither trial counsel nor the trial judge recalled what had occurred, the lower court denied relief. However, Mr. Trepal had sought permission to call the jurors at the evidentiary hearing, but his request was denied. This claim should be remanded for a hearing at which time the jurors can be called to testify.

4. Trial counsel were burdened by an actual conflict of interest because they represented Mr. Trepal, who was married to one of the key suspects in the case, Dr. Diana Carr, who was also paying the substantial legal fees. The lower court erred in summarily denying this claim and finding it procedurally barred, for it could not have been raised on direct appeal.

5. No adversarial testing occurred at the penalty phase. No evidence was presented by the defense. Despite having the unique opportunity to present lingering doubt evidence due to the stipulation by the State, no such evidence was adduced. Moreover, a number of family members, Mensa acquaintances, and expert witnesses were

available who could have humanized Mr. Trepal. As a result, confidence is undermined in the jury's 9-3 death recommendation.

6. Public records should be disclosed to Mr. Trepal, including the file relating to a confidential informant, withheld records from the State Attorney's Office, and "hundreds of hours" of witness interviews taken by Jeffrey Good, who, along with Susan Goreck, wrote a nonfiction account of Goreck's exploits in investigating Mr. Trepal's case.

ARGUMENT I--NO GUILT PHASE ADVERSARIAL TESTING

Mr. Trepal's jury was presented with some 80 prosecution witnesses, many of whom testified more than once. The jury was presented with no defense witnesses. The prosecution presented a one-sided case full of salacious innuendo and false evidence, and preyed on the jurors' emotions by portraying the Mensa organization as a "voodoo cult."[53] The absence of evidence was argued as establishing guilt, while the existence of evidence disproving guilt was argued as insignificant. Unbeknownst to the jury, the Sheriff's Office had been interested in pursuing a book or movie deal about the case; once the conviction was returned, the principal law enforcement officers, Susan

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[53]In fact, in an article written after the trial, one of the jurors confessed that "that odd club of his called Mensa -- scared her from the very beginning. [The juror] said she believes Mensa has 'voodoo ceremonies' during meetings." Mike McLeod, "Murder, He Wrote," FLORIDA MAGAZINE, May 12, 1991, at 17.

Goreck and Ernest Mincey, began shopping with Hollywood producers for the rights to the story, and a contract was eventually signed. The only experience any of Mr. Trepal's legal team had in defending a murder case consisted of one attorney having done a murder case "a good thirty years" before Mr. Trepal's trial. In short, Mr. Trepal's trial was the ultimate "sacrifice of [an] unarmed prisoner [] to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975).

Due to the singular and combined effects of false and inadmissible scientific evidence, the withholding of exculpatory evidence, ineffective assistance of counsel, and newly discovered evidence, Mr. Trepal did not receive an adversarial testing. Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963); Strickland v. Washington, 466 U.S. 668 (1984); Jones v. State, 591 So. 2d 911 (Fla. 1991); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The overwhelming evidence adduced at the evidentiary hearings in this case,[54] combined with the factual findings of the lower court, establishes that a new trial is warranted.

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[54]Mr. Trepal did not receive an evidentiary hearing on all of the allegations in his first 3.850 motion. Thus, those allegations must be taken as true at this juncture, and a hearing is warranted if the files and records do not conclusively refute the allegations. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Mr. Trepal submits that a new trial is warranted on the issues which were resolved at the evidentiary hearings, but does not waive his argument that a hearing should have been granted and should be granted on the remaining allegations.

A. FALSE AND INADMISSIBLE SCIENTIFIC TESTIMONY. The lower court found that Roger Martz's "conduct at trial was outrageous and shocking" because he testified falsely and misled the jury (2PCR. 2682). His evidentiary hearing testimony was likewise "evasive and misleading" (Id. at 2678). The court also found that "[t]he testing results of the Coke samples and Q206 were the only direct evidence of Trepal's guilt," that "if Martz had testified truthfully the only direct evidence in the case would have been greatly weakened," and that "[t]here is no doubt that the data available at the time of trial did not support the opinion Martz offered and that he knew it" (Id. at 2679-80). Despite these findings, which are due deference on appeal, Stephens v. State, 748 So. 2d 1028 (Fla. 1999),[55] the court concluded that no new trial was warranted under either a Brady or Giglio analysis because there existed "strong" circumstantial evidence to support the convictions (2PCR. 2688-90).[56] The lower court's legal conclusions are erroneous, and relief is warranted.

1. Frye issue. Below, Mr. Trepal argued that, had trial counsel known of the withheld information regarding Martz's work in

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[55]The ultimate legal conclusions reached by the lower court are reviewable *de novo*. State v. Huggins, 788 So. 2d 238, 242 (Fla. 2001); Way v. State, 760 So. 2d 903, 913 (Fla. 2000).

[56]The lower court did find that trial counsel rendered deficient performance in failing to have an expert to be present at trial to advise them of the appropriate testing procedures and to impeach Martz's conclusions (2PCR. 2687).

this case, not to mention his false and misleading testimony, a pretrial challenge pursuant to Frye would have been made and would have been successful.[57] Although the lower court did not address this issue directly, it cannot be disputed that a Frye challenge, if made, would have been successful, and Martz's testimony would have been excluded based on the lower court's findings regarding Martz's work. This Court's review of Frye issues is *de novo*. Hadden v. State, 690 So. 2d 573, 579 (Fla. 1997).

At trial, the State, as the proponent of the scientific evidence, would have to establish by a preponderance of the evidence that (1) both the underlying scientific principle, theory or methodology used to develop the evidence was generally accepted in the scientific community;[58] and (2) the specific testing procedures employed to develop the evidence were generally accepted in the scientific community. Hayes v. State, 660 So.2d 257, 263-265 (Fla. 1995); Ramirez v. State, 651 So.2d 1164, 1168 (Fla. 1995).[59] Because reliability of

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[57]Trial counsel testified that they would have made a Frye challenge to Martz's conclusions had they known of the information that has since come to light (2PCR. 3561; 3567-69).

[58]This prong examines the testing technique and determines whether the technique is sufficiently established to have gained general acceptance in the scientific field. Hayes, 660 So.2d at 264; Ramirez, 651 So.2d at 1167; Frye, 293 F. at 1014.

[59]The Hayes/Ramirez two-part standard stems directly from this Court's adoption of Frye as the basis for evaluating the admissibility of scientific testimony. See Brim v. State, 695 So.2d 268, 271 (Fla.

the scientific methodology is the *sine qua non* of admissibility, Hadden, 690 So.2d at 577, results of specific experiments based upon generally accepted scientific principles are still inadmissible if the testing done in the particular case did not adhere to procedures themselves generally accepted in the scientific community. Hayes, 660 So.2d at 263-64; Ramirez, 651 So.2d at 1168.[60] This inquiry focuses on, among other things, the quality of lab work and the testing procedures followed. Hayes, 660 So.2d at 263-264 (finding DNA evidence based upon accepted methods still inadmissible because of flaws in particular testing); Ramirez, 651 S.2d at 1167 (principle focus under Frye is on the reliability of the scientific theory or discovery from which expert derives opinion); Husky Industries, Inc. v. Black, 434 So.2d 988, 992 (Fla. 4th DCA 1983) (expert opinion inadmissible where based on insufficient data). The evidence offered at trial must be

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1997); Hadden v. State, 690 So.2d 573, 578 (Fla. 1997); Hayes, 660 So.2d at 262; Ramirez, 651 So.2d at 1167; Flanagan v. State, 625 So.2d 827, 829 n.2 (Fla. 1993); Stokes v. State, 548 So.2d 188, 193-94 (Fla. 1989). The Court has retained the Frye standard because it arguably imposes a "higher standard of reliability" than the federal standard announced in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Brim, 695 So. 2d at 271-72.

[60]Accord Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1177 (1999) (it is not reliability of the general theory that must be established, but the reliability of its specific application to the disputed issue in the case); Holley v. State, 523 So.2d 688, 689 (Fla. 1st DCA 1988) (expert testimony regarding results of paternity test admissible, in part, because defendant did not produce any evidence indicating that any significant errors were made in administration of tests or calculation of results).

based upon actual test results and not just the opinion of the expert witness. Hadden, 690 So.2d at 577.[61]

Martz's opinions as to the contents of both the Coke samples and Q206 fail the Frye test and were inadmissible as a matter of law. The lower court found that "[t]here is no doubt that the data available at the time of trial did not support the opinion Martz offered and that he knew it" (2PCR. 2679). The court also found that Martz was either an incompetent scientist, or "quite skilled and knowingly colored his testimony" (Id.). Martz himself acknowledged that there were numerous deficiencies in his work, and the FBI's own scientists who were "defending" Martz's work would not have accepted Martz's dictation based on the state of the case file in this matter. Due to Martz's outrageous misconduct, the contents of the Coke samples and Q206 were not even what Martz said they were; in fact, the lower court concluded "if all this had been known in advance of trial, Q1, Q2, and Q3 would

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[61]Accord Young-Chin v. City of Homestead, 597 So.2d 879, 882 (Fla. 3d DCA 1992) (expert testimony inadmissible because based on suppositions rather than review of physical evidence); Poulin v. Fleming, 782 So. 2d 452, 457 (5th DCA 2001) (scientific evidence inadmissible under Frye were "the experts' opinions were not shown to be reliable on some basis other than simply that they were their own opinions"); Kaelbel Wholesale, Inc. v. Soderstrom, 785 So. 2d 539, 549 (Fla. 4th DCA 2001) (rejecting argument that expert himself can establish reliability of testing: "[t]his is tantamount to saying that because the court qualifies a witness as an expert, and the expert testifies to the methodology and opinion, it is therefore accepted in the field. Of course, such a proposition is nowhere supported by the law and is completely contrary to Frye").

have been retested" (2PCR. 2689). These findings are hardly consistent with the heightened reliability required under this Court's precedent for the admissibility of scientific evidence.

Because the defense was not aware of this information at the time of trial, these challenges were unavailable at the time, and Mr. Trepal should be put back in the same position he would be in had the information been disclosed. Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993). The State had a duty to disclose this information to defense counsel, and its failure to do so violated Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). This evidence was clearly material and exculpatory to Mr. Trepal. Brady; Troedel v. Wainwright, 667 F. Supp. 1456 (S.D. Fla. 1986), aff'd. sub. nom. Troedel v. Dugger, 828 F. 2d 670 (11th Cir. 1987). Martz was a government witness and the FBI was a co-participant in the investigation. The knowledge of falsity[62] is imputed under these circumstances. Williams v. Griswald, 743 F. 2d 1533, 1541 (11th Cir. 1984); United States v. Antone, 603 F. 2d 566, 569 (5th Cir. 1979).

When inadmissible (and false) evidence is presented to the jury, as is the case here, the reviewing court must consider the effect the evidence had on the decision under State v. DiGuilio, 491 So.2d 1129

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[62]The lower court made a factual finding that "[t]here is no doubt that the data available at the time of trial did not support the opinion Martz offered and that he knew it" (2PCR. 2679).

(Fla. 1986), which "requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influence the jury verdict." Id. The State cannot demonstrate that the admission of Martz's opinions regarding the contents of the Coke bottles and Q206, despite their inadmissibility under Frye, was harmless beyond a reasonable doubt. The lower court found that "[t]he testing results of the Coke samples and Q206 were the only direct evidence of Trepal's guilt," and that "if Martz had testified truthfully the only direct evidence in the case would have been greatly weakened" (Id. at 2680). The court also found that Martz knew that the data did not support his conclusions, but he either was an incompetent examiner, or was "quite skilled and knowingly colored his testimony" (2PCR. 2679). Martz's "expert" opinion that thallium nitrate "was added" to the Coca-Cola's was the only testimony adduced by the State that the Coca-Colas contained thallium nitrate; the lower court, however, declined to find that the bottles contained thallium nitrate (2PCR. 2680). The other scientific evidence simply established that the Coca-Cola bottles contained thallium. The link between the evidence that thallium nitrate was "added" to the Coca-Cola[63] became

[63]A conclusion not borne out by Martz's notes, which only indicated a finding of "consistent with" (2PCR. 2679). As the lower court found, "Martz never explained why he wrote one thing in his notes and testified to something else. Any attempt to say they mean the same

even more important due to Martz's other opinion -- that Q206 also contained thallium nitrate, a finding which even he acknowledged to the OIG was "debatable." Thus Martz provided a critical nexus between the murder weapons and something directly linked to Mr. Trepal (or at least to something located on his property), a nexus which, without Martz's linkage between the Coke bottles and the Q206 sample, would not have existed, thereby gutting the State's case.[64] Under almost identical circumstances, this Court found that scientifically-unsound statements by an expert positively linking a murder weapon to the defendant were not harmless beyond a reasonable doubt because the statements could have influenced the jury verdict. Ramirez v. State, 542 So.2d 352, 355-56 (Fla. 1989).[65]

The erroneous admission of Martz's opinions also directly affects

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thing does not hold water" (Id.).

[64]The alleged "strong" circumstantial evidence of Mr. Trepal's guilt was long in the possession of law enforcement, yet Mr. Trepal was not arrested until Martz's results were disclosed that Q206 contained thallium nitrate, the same substance he allegedly found in the Coke samples. Certainly, if the "strong" circumstantial evidence was insufficient to lead law enforcement to seek Mr. Trepal's arrest without Martz's lab results, this same evidence cannot be independently adequate to support the beyond-a-reasonable-doubt standard for conviction when Martz's opinions are taken out of the equation.

[65]The Court in Ramirez found that, at most, the testimony should have been that the weapon found on defendant *could have been* the murder weapon. The error was not harmless-beyond-a-reasonable-doubt even though the State's case was not entirely circumstantial; for example, fingerprints had been identified at the crime scene. No such evidence exists in Mr. Trepal's case.

the other most significant evidence that the State possessed: the testimony of DEA Agent Broughton and David Warren.[66] At trial, the State contended that the brown bottle found in Mr. Trepal's garage, sample Q206, contained thallium I nitrate and that Coke bottles found in the Carr house also contained thallium I nitrate (R. 4193-94).[67] Because Martz could not identify the form of thallium nitrate in the Cokes, however, the State's theory also depended on the testimony of a Coca-Cola chemist, Frederick Reese, who conducted tests to determine if various forms of thallium would dissolve in Coke without changing its appearance (R. 3402). Reese determined that thallium sulfate, thallium maleanate and thallium I nitrate went into solution in Coke without changing its appearance, but that thallium III nitrate turned Coke a muddy color (R. 3405-06).[68] Thus, to link Mr. Trepal to thallium 1 nitrate,[69] the State presented evidence regarding Mr. Trepal's prior

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[66]Below, trial counsel testified that one of the other things that "sunk us" was the introduction of Mr. Trepal's prior conviction and the testimony of Broughton, which provided the State with a "nexus" (Id. at 1973-74).

[67]This theory depended upon the testimony of Martz, who testified that Q206 contained thallium I nitrate (R. 3561-63), and that thallium nitrate had been added to the Coke bottles (R. 3556-59).

[68]Reese did not conduct actual lab tests like the FBI did, he simply added various thallium salts to known Coca-Cola and made visual observations as to the effects of the salts on the soda.

[69]Thallium nitrate was apparently selected to the exclusion of the other salts that the Coca-Cola Company determined would not alter Coke because of Martz's finding that Q206 also contained thallium nitrate.

involvement in a methamphetamine lab. The only reason this evidence was admissible was the State's contention that it demonstrated that Mr. Trepal knew how to manufacture thallium 1 nitrate, knowledge which the State proved through the hearsay testimony of DEA Agent Broughton.[70]

At a pretrial hearing, the State argued that Broughton's testimony was relevant to show Mr. Trepal's "knowledge and opportunity" because Broughton would testify that the use of thallium III nitrate to produce phenyl-II-propanone (P-2-P), which is then used to manufacture methamphetamine, results in a precipitate of thallium I nitrate (R. 3435). Specifically, the State contended that while there are "any number of compounds of thallium" which "will do different things to Coca Cola[,] ... it just so happens that the thallium we found in Mr. Trepal's garage you can mix with a small amount of Coca Cola in a beaker, let it sit for a couple of minutes so it fizzes out, pour it back in the Coca Cola, and there will be absolutely no effect on the

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Moreover, thallium nitrate is much more rare than thallium sulfate, which was a common ingredient in rat poison (R. 5881). The rarer form of thallium was much preferable for the State because a more common form of thallium would be available to individuals who did not have Mr. Trepal's scientific background. As Martz explained at the hearing, "[i]f we're working on a case where they think a very unusual poison was used and they can tell us what that is, we will target for that compound" (Id. at 2994).

[70]The defense strenuously objected to Broughton's testimony, and this issue is addressed in Mr. Trepal's state habeas corpus petition, currently pending before the Court. The Frye issue, however, is an independent basis for the exclusion of Broughton's testimony at trial.

coloration, no effect on the taste" (R. 5881-83). Thus, because thallium nitrate was (allegedly) contained in Q206, the State needed Broughton to explain that because of Mr. Trepal's prior conviction for methamphetamine production, a process which will eventually produce thallium I nitrate, Mr. Trepal knew how to manufacture thallium I nitrate and must have added thallium I nitrate to the Cokes. The trial court eventually ruled that the testimony of Broughton and David Warren[71] was admissible (R. 3472). Broughton then testified before the jury that thallium III nitrate is used in the production of P-2-P, which is used to manufacture methamphetamine, and that this process produces a sediment of thallium I nitrate (R. 3480-81). The State ther relied upon this evidence to argue to the jury that Mr. Trepal put thallium I nitrate in the Coke bottles because "it just so happened that there's a process by which thallium could be used in that, and that the byproduct of that process is Thallium I Nitrate which is muddy, and it just so happens that he has Thallium I Nitrate which was off-colored in his garage. Maybe that's where the Thallium I Nitrate

[71]Warren testified that in the 1970s he was involved in a methamphetamine lab with Mr. Trepal, that Mr. Trepal was the chemist for the group, that Warren obtained chemicals for the group, and that Warren provided only P-2-P in its final form to Mr. Trepal (R. 3487-88). Warren never testified that he provided thallium III nitrate to Mr. Trepal. The State agreed that without Broughton's testimony regarding the chemical process of manufacturing methamphetamine, Warren's testimony was not relevant and was therefore inadmissible (R. 3440-42).

came from and maybe it is not" (R. 4207).

Broughton's testimony was thus necessary to provide a nexus between Mr. Trepal, the thallium I nitrate in Q206, and the thallium nitrate in the Coke bottles.[72] However, the admissibility of his testimony was premised on Martz's opinion, believed at the time to be grounded on some truth and reliable scientific methodology, that the Coke samples contained thallium nitrate and that Q206 contained thallium I nitrate. As is now known, these opinions are false. The lower court expressly declined to find that the Coke samples contained thallium nitrate (2PCR. 2680) ("While there is a possibility that the substance is in fact thallium I nitrate, the court declines to so find"). As for Q206, Martz himself acknowledged were "debatable"; his findings were premised on laboratory work bereft of reliable and admissible scientific methodology; Dr. Whitehurst, who was found to be "highly credible" by the lower court, could not testify that, to a reasonable degree of scientific certainty, thallium I nitrate was in Q206 (Id. at 3431). Moreover, the lower court found that Martz "knew" that the data available at the time of trial did not support any of his opinions (2PCR. 2679). Absent a firm conclusion that the Coke bottles

[72]Indeed, in a motion for a new trial, the defense specifically argued that Broughton's testimony was "highly prejudicial" because "it is the only testimony that even inferred where defendant may have obtained the thallium that he was alleged to have used to poison the Coca Colas that were consumed by the victims" (R. 5493).

even contained thallium nitrate and that Q206 contained thallium I nitrate, Broughton's testimony, and by implication, Warren's testimony, were absolutely inadmissible because the methamphetamine process described by Broughton which the State imputed to Mr. Trepal is premised on a formula which results in the production of thallium I nitrate.[73] As the lower court correctly noted, "if the three samples had been a form of thallium different from Q206, this would have been clearly favorable to the defense" (2PCR. 2660-61). In light of the lower court's findings, patently inadmissible evidence was introduced at Mr. Trepal's trial, in violation of Frye. Because the Frye issue affects not only the admissibility *vel non* of Martz's opinions, but also directly affects the admissibility of the very prejudicial testimony of Richard Broughton and David Warren, relief is warranted.

2. Giglio issue. Despite finding that Martz knowingly perjured himself at Mr. Trepal's trial on just about every material issue on which he provided testimony,[74] despite the entirely circumstantial

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[73]At the evidentiary hearing, trial counsel Stidham testified that knowledge of Martz's false testimony and test results would have strengthened the argument as to the inadmissibility of Broughton's testimony, as it depended on the link between the salt of thallium found by Martz and the methamphetamine production process that Broughton testified about (Id. at 3517-19). As Stidham explained, "if what the FBI lab had found was not something that could have been used in the process of manufacturing methamphetamine, that would have been further grounds to keep it out of evidence" (Id. at 3519).

[74]The lower court found that Martz lied about testing sample Q3, lied about stating that a positive result on the DP test will yield a

nature of the case, and despite the fact that "the testing results of the Coke samples and Q206 were the only direct evidence of Trepal's guilt" (2PCR. 2689), the lower court concluded that relief was not warranted under Giglio because "there is no reasonable likelihood that the verdict would have been different" given the evidence that Martz "could rightfully have testified about" and the "other evidence in the case" (2PCR. 2689). The lower court employed the incorrect legal standard and relief is warranted. Under Giglio, relief is warranted if the false testimony "could ... in any reasonable likelihood have affected the judgment of the jury." Williams v. Griswald, 743 F. 2d 1533, 1543 (11th Cir. 1984) (quoting Giglio, 405 U.S. at 154). The focus is on the affect that Martz's false testimony may have had on the jury, not on whether the scraps of "truth" to which Martz may also have testified supported the verdict. Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1996). The standard for establishing a Giglio violation is less onerous than for a Brady violation. United States v. Agurs, 427 U.S. 97 (1976).[75] Under a proper application of Giglio, Mr. Trepal is

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blue color indicating the presence of nitrate, "mislead" the jury when testifying that nitrate was not present in unadulterated Coke, and "knew" that the data available at the trial did not support the opinions he offered (2PCR. 2678-79).

[75]The lower court relied on this Court's opinion in Rose v. State, 774 So.2d 629 (Fla. 2000), where the Court wrote that "[t]he standard for determining whether false testimony is `material' under Giglio is the same as the standard for determining whether the State withheld `material' evidence in violation of Brady." Id. at 635 (2PCR. 2689).

entitled to relief.

As noted by the lower court, Martz falsely testified about "the only direct evidence of Trepal's guilt," and that "if Martz had testified truthfully the only direct evidence in the case would have been greatly weakened" (Id. at 2689-90). Martz not only provided false testimony about the contents of the Coke samples and Q206, he also lied about testing sample Q3, lied about stating that a positive result on the DP test will yield a blue color indicating the presence of nitrate, "mislead" the jury when testifying that nitrate was not present in unadulterated Coke, and "knew" that the data available at the trial dic

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Most respectfully this Court's interpretation of the Giglio standard was erroneous. In United States v. Agurs, 427 U.S. 97 (1976), the Supreme Court explained that the post-trial discovery of suppressed information can give rise to several different legal claims. One type of claim occurs where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecutior knew, or should have known, of the perjury." Agurs, 427 U.S. at 103. In this type of situation, a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. Unlike a Brady-type situation where nc intent to suppress is required to be demonstrated, a "strict standard of materiality" applies in cases involving perjured testimony because "they involve a corruption of the truth-seeking process." Id. at 104. Thus, although both Brady and Giglio require a showing of "materiality," the legal standard for demonstrating entitlement to relief is significantly different. The standard for establishing "materiality" under Giglio has "the lowest threshold" and is "the least onerous." United States v. Anderson, 574 So. 2d 1347, 1355 (5th Cir. 1978). See also Craig v. State, 685 So. 2d 1224, 1232-34 (Fla. 1996) (Wells, J. concurring in part and dissenting in part) (discussing differing legal standards attendant to Brady and Giglio claims). Mr. Trepal submits that the analysis in Rose is erroneous and should be abrogated.

not support the opinions he offered (2PCR. 2678-79).[76] Given that all of these opinions related to "the only direct evidence of Trepal's guilt" (2PCR. 2689), Giglio is more than satisfied, particularly in conjunction with the mass of evidence that the jury did not hear which further undermines confidence in the outcome of Mr. Trepal's trial.[77]

3. Brady issue. The State also violated Brady by failing to disclose all of Martz's underlying data, notes, and charts which, as the lower court found, "are actually the indication of false testimony at trial" (2PCR. 2686). See also 2PCR. 2679 ("There is no doubt that the data available at the time of trial did not support the opinion Martz offered and that he knew it"). This information would have led to the conclusion that the Coke samples may not have contained thallium nitrate (as the lower court did find), a conclusion which would have been very significant for trial counsel: "the bottom line significance

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[76]Trial counsel Stidham testified below that "any information that we could have had that showed that the State, the FBI lab, the government, had not performed its tests as it said it had performed them or had performed inadequate testing ... could have been very important" (Id. at 3515). "[T]he thallium bottle was the link. Without it, there was nothing" (Id. at 3515-16).

[77]In fact, under the lower court's "broad view" of penalty phase law, which would include lingering doubt evidence, the court concluded that confidence was undermined in the outcome (2PCR. 2690). If the lingering doubt evidence is sufficient to undermine the sentencing outcome, it is clear that the outcome is also undermined at the guilt phase, for "lingering doubt" is another way of saying "reasonable doubt."

of that is if there is a particular salt of thallium in the Coke bottles and a different salt of thallium in the Q206 bottle, then it would certainly be obvious that the thallium in the Cokes didn't come from the Q206 bottle" (Id. at 3542). Moreover, Martz's undisclosed charts revealed that he did testing which indicated that unadulterated Coke did contain nitrate; because this was not disclosed, Martz was able to "mislead the jury when he testified that nitrate was not present in unadulterated Coke" (Id.). This was an important point, as Dabney Connor explained: "that goes to the question of, okay, you found nitrate in the Cokes. Did Coke put it there, or did someone else put it there?" (Id. at 3544). Martz also failed to disclose that he had done additional testing on the Coke samples beyond those tests he acknowledged at trial and deposition. The lower court found "this particularly important because the defense could have used this information to suggest that Martz was not satisfied with his initial results and sought additional data" (2PCR. 2679).

The quantity and quality of evidence that was suppressed with respect to the FBI testing on the "only direct evidence of Trepal's guilt" warrants relief under Brady. Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v.

Greene, 527 U.S. 263 (1999). Materiality is not a sufficiency-of-the-evidence test, and must be assessed cumulatively with the other evidence the jury did not hear. Id. That the State may not have known that Martz was a perjurer is of no moment, as the knowledge is imputed to the State. In fact, the State has an affirmative duty to learn of such information and disclose it to the defense. Id.

The lower court erroneously concluded as a matter of law that trial counsel could not have secured Martz's lab notes and his charts because they were not discoverable (Id. at 2686-88).[78] Although counsel could have requested them, counsel were affirmatively misled by Martz when, in his deposition, he stated that the DP and IC testing on the Coke samples constituted the extent of his work on the samples. Counsel could reasonably rely on Martz's statement to assume no additional information existed. Way v. State, 760 So. 2d 903, 912 (Fla. 2000); United States v. Bagley, 473 U.S. 667, 683 (1985). Even if the notes and charts were not discoverable under Rule 3.220, the State's Brady obligation trumps the rule if the evidence is exculpatory. Young v. State, 739 So. 2d 553, 558-59 (Fla. 1999). In light of the finding that Martz's notes and charts "are actually the indication of false testimony at trial" (2PCR. 2686), it is difficult to imagine how they were not disclosable prior to trial. In re Brown,

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[78]The notes and charts were in existence prior to trial, although the lower court erroneously stated otherwise (Id. at 2686).

952 P.2d 715 (Cal. 1998) (Brady violated when prosecution failed to disclose lab worksheets containing exculpatory evidence).

B. FAILURE TO OBTAIN TOXICOLOGY EXPERT AND PRESENT EVIDENCE REGARDING OTHER SCIENTIFIC ISSUES.

1. Arsenic. Below, Mr. Trepal presented evidence that Peggy Carr, as well as her son, Duane Dubberly, and step-son, Travis Carr, had elevated levels of arsenic in their systems when they were hospitalized at Winter Haven Hospital. Despite the complicated amount of scientific issues in the case, and in the face of a specific recommendation by Dr. Edward Willey, a pathologist with whom trial counsel consulted, regarding the need for a toxicologist (1PCR. 3015; 3021), trial counsel unreasonably failed to retain a toxicologist to assist in the defense. As a result, the jury was never told that toxicological evidence established that Peggy was in fact first poisoned with arsenic, and that she, as well as Duane and Travis, were subjected to a second arsenic poisoning accompanied by the thallium poisoning. This disturbing evidence obviously is exculpatory to Mr. Trepal, who was never alleged to have arsenic in his possession, nor was he anywhere near the victims in the hospital.

On October 21, 1988, Peggy Carr first complained of flu-like symptoms and tingling in her hands and feet (Id. at 2788). On October 22, she complained of chest pain, numbness in hands and feet, and flu-

like symptoms (Id. at 2789).[79] On October 24, she was admitted to Bartow Hospital, but discharged 3 days later because she got better (Id. at 2791). On October 28, Travis began to get ill at home, and on October 30, Peggy was re-admitted to Winter Haven Hospital (Id. at 2792). Duane and Travis were eventually also hospitalized at Winter Haven. On admission on October 30, a heavy metal urine screen performed the following day revealed 616 micrograms in a 24 hour period, with the expected concentration being less than 25 micrograms (Id. at 2782-83).[80] The screening also indicated a high level of thallium (Id. at 2783-84). Duane's urine, collected on November 16, 1988, revealed 52 micrograms of arsenic, also an "elevated" level (Id. at 2785). There was no thallium analysis noted on the report (Id.). With respect to Travis, his urine also collected on November 16, 1988, revealed 63 micrograms of arsenic, "greater than twice what would be expected" (Id. at 2786). Peggy was given another urine screening on

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[79]Because early symptomology of thallium poisoning includes burning in the feet but not the hands, the State challenged Dulaney's assertion that Peggy initially reported tingling in her hands upon her first hospitalization, and challenged him to show him a medical record indicating that Peggy had tingling in her hands (Id. at 2895-96). On redirect, Dulaney pointed out that notes from both the admission nurse and the doctor at Bartow Hospital, where Peggy was initially hospitalized, revealed that her complaints included "numbness" and "tingling" in her hands (Id. at 2935-36). Peggy had also reported to her friend as well as her husband that her initial symptoms included tingling in her hands (Id. at 2936-37).

[80]Because arsenic is naturally occurring, there is an "expected range" which is classified as "normal" (Id. at 2782).

November 15, at which time she still had 36 micrograms of arsenic (Id. at 2808).

At the evidentiary hearing, Dr. Dulaney opined that Peggy had been initially poisoned with arsenic, leading to her initial hospitalization, after which she was released because she got better. After her release, Dulaney opined that she was exposed to thallium, in addition to an additional exposure to arsenic as, upon re-admission, she had 20 times the normal level of arsenic in her urine (Id.). The second exposure to arsenic made the thallium more toxic (Id. at 2794; 2816-17). Dulaney also opined that Duane and Travis were exposed to thallium as well as arsenic resulting in their hospitalization on October 31 (Id. at 2795-96).[81] The urine screenings of Duane and Travis, done 2 weeks later, revealed elevated arsenic levels, which is an "interesting diagnostic find" because they had been hospitalized for 14 days and still had arsenic in their urine (Id. at 2797). This indicated two possibilities: that they had received a very high dose of arsenic before their hospitalization and the later readings was the "tail end" of that, or that between October 31 and November 14, "they're being given arsenic again" (Id. at 2797; 2801-03).[82]

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[81]At the time of their hospitalization, their symptoms were consistent with arsenic poisoning and thallium poisoning (Id. at 2803).

[82]Of course, on their admission on October 31, they also had thallium in their system, but because it was possible that they were not exposed to arsenic at an earlier time like Peggy was, they were not

This evidence is highly exculpatory to Mr. Trepal. Although the evidence does substantiate the proposition that Peggy Carr did indeed die of thallium poisoning, it does not exclude another distinct attempt at poisoning her and the other family members. Of course, evidence of a separate murderous act would have significantly undermined the State's case against Mr. Trepal: no arsenic was ever found in Mr. Trepal's possession, nor was there any link between Mr. Trepal and Peggy Carr which could have shown that he attempted to initially poisor her with arsenic. In fact, in one of the only references to arsenic during the trial, the State argued that arsenic poisoning was "beneath Mr. Trepal's dignity" (R. 4212). The State had its hands full trying to establish that Mr. Trepal had access to the Carr family on **one** occasion, let alone another, unrelated attempt.[83] Evidence of arsenic poisoning was not developed or explored by either the State or the defense. The tainted Coca-Cola bottles were never tested for the presence of arsenic. Yet the facts remain undisputed. Three family members had been exposed to arsenic, and no investigation was conducted to determine the origin of this lethal toxin.

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as weak and due to their youth, they were able to survive the thallium poisoning (Id. at 2801).

[83]The State admitted it had no evidence that Mr. Trepal supposedly entered the Carr house or otherwise provided the poisoned soda to the family, nor could it be established when this might have happened (R. 4218; 4223).

The defense team utilized Connor to handle the complex scientific area of the trial (1PCR. 2079). Connor attained his bachelor's degree in chemistry and worked for a chemical company doing research, development, and sales for several years before going to law school (Id. at 2130). Ultimately, Connor's background served to Mr. Trepal's detriment in the sense that the defense relied on his basic chemistry skills instead of obtaining a qualified toxicologist to assist with the defense.[84] Crucial trial decisions based upon the scientific and medical evidence were made without the necessary help of expert witnesses.[85] Instead, the defense relied on Connor's decades-old

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[84]Any strategic decisions made by Mr. Trepal's defense team are due less deference due to their lack of experience in handling criminal cases. Spaziano v. Singletary, 36 F. 3d 1028, 1040 (11th Cir. 1994); ("the more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances"); Provenzano v. Singletary, 148 F. 3d 1327, 1332 (11th Cir. 1998) (defense strategy reasonable in light of counsel's experience trying 87 criminal cases and being lead counsel in 9 capital cases; "clearly, these two experienced criminal defense attorneys knew what they were doing"). Accord Ragsdale v. State, 2001 WL 1241135 (Fla. Oct. 18, 2001).

[85]Connor's testimony below demonstrates the unreasonableness of the defense's reliance on a non-expert such as Connor to evaluate complex scientific evidence. When questioned about how he (Connor) deposed Dr. Hostler, Peggy Carr's doctor, regarding the elevated arsenic levels, Connor responded "That's my recollection, and that's why I interpret that as an anomaly" (1PCR. 2137). At another point, Connor stated "I formed the opinion that arsenic was not significant in the cause of death of these people." (Id. at 2138). What Connor failed to realize, both in his deposition of Dr. Hostler and when he formed his opinion about the "insignificance" of the arsenic, is that the arsenic levels he found not to be significant were based on Peggy's

chemistry experience, and rejected the suggestion by Dr. Willey that the team needed to hire an expert toxicologist to evaluate all the evidence. Indeed, regarding the FBI lab issue, the lower court found deficient performance for the failure of the defense to retain an expert to assist in Mr. Trepal's defense (2PCR. 2687). The defense had an obligation to educate themselves or to obtain expert assistance so that they would be able to reasonably challenge the prosecution's case. Driscoll v. Delo, 71 F.3d 701, 709 (8th Cir. 1995).

In denying relief, the lower court *sub silentio* accepted Dulaney's testimony,[86] but concluded that although the arsenic issue "raised some questions" and "was one of the most important claims" raised, trial counsel had to focus on the fact that (1) Peggy died of

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test results taken two weeks after she was hospitalized. As Dr. Dulaney pointed out in his evidentiary hearing testimony, "If you look at the clinical literature, you'll find out that arsenic is removed 50 to 80 percent in about three days" (Id. at 2792). The fact that Dr. Hostler was basing his opinion that the arsenic levels were only slightly above normal in Peggy Carr on November 15, 1990, fails to consider that the arsenic was being washed out of her system for two weeks. As Dr. Dulaney points out, "I do find that interesting that she still has 36 (micrograms) considering that she has been admitted to the hospital for two weeks. I think that is indicative that she has had -- and supports the 616 (micrograms) found on October 31, so she has -- two weeks later, she still has an elevated arsenic level" (1PCR. 2809). By relying on his own chemistry knowledge, and not on an expert toxicologist, Connor completely mistook the significance of Peggy Carr's elevated arsenic level, as Dulaney's testimony illustrates.

[86]In fact, the court concluded that the chronology of events set forth in the records "comports with Dr. Dulaney's opinion that there were two separate poisoning attempts" (1PCR. 3365).

thallium, not arsenic, poisoning, (2) that arsenic exposure "did not exclude" Mr. Trepal as the guilty party, and (3) the State experts had "different opinions on why Peggy Carr became sick" (1PC-R 3365-66). The lower court's analysis is exactly wrong as to the significance of the arsenic poisoning. In a circumstantial case such as this one, the fact that a second and ongoing poisoning attempt was being perpetrated on the victims by someone other than the person on trial establishes the reasonableness of a hypothesis of Mr. Trepal's innocence and the guilt of another suspect who had close contact with the victims over a long period of time. The conclusion that the arsenic evidence does not exclude Mr. Trepal as "the guilty party of that poisoning as well" is supported by no evidence whatsoever, much less competent and substantial evidence, and overlooks entirely the State's position at trial that arsenic poisoning was "beneath the dignity" of Mr. Trepal (R. 4212). Finally, that the State's experts had a different view of the arsenic issue is precisely the reason why the failure to hire a toxicologist was so prejudicial; it should not be a surprise that State experts, none of whom was a toxicologist, would not come to exculpatory opinions.

2. Thallium Increase in Hospital. Below, Mr. Trepal also presented evidence that the level of thallium in Travis Carr's urine

increased in the hospital (Id. at 2098-99).[87] The startling fact that the thallium level in one of the victims continued to increase while ir the hospital was not presented to the jury, despite its obvious significance, alone and in conjunction with the other evidence in the case.

Defense counsel Connor was "not sure" how this matter was handled with the jury, but did recall discussing with the legal team the accuracy of the test results or whether someone was continuing to supply Travis with thallium while he was in the hospital (Id. at 2099-2100). He acknowledged that Travis' level of thallium increasing in the hospital is consistent with the defense of reasonable doubt that Mr. Trepal committed the crime (Id. at 2100). However, no expert toxicologist was ever retained by the defense team, which instead relied on Connor's own personal interpretation of test results in a field in which he had no experience. This is deficient performance.

The evidence of Travis' increased thallium levels is evidence that he continued to receive poison while in the hospital, and should have been presented to the jury. The evidence is consistent with the

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[87]The lower court wrote that Mr. Trepal "put on no evidence" as to this claim (1PCR. 3360). This is incorrect. As the testimony showed, Travis' records showed that on October 31, he had 2 milligrams per liter of thallium; on November 7, however, the level had increased to 3.9 milligrams per liter (1PCR 2098-99). This signified that the "test showed approximately twice as much [thallium] a week later" (Id. at 2099).

other evidence presented below, such as the incident when Travis screamed out to Larry Dubberly that Pye Carr and Carolyn Dixon were "trying to kill him again" when they entered his hospital room (1PCR. 1997; 2261; 3119). It is also consistent with the fact that Dixon, one of the chief suspects in the case and the individual who had been providing the poisoned sodas to the family, was also entering the hospital rooms of the victims with baked goods, fried chicken, and other food (Id. at 3121). None of the doctors, nurses, or security personnel knew how the food got into the room (Id.). In conjunction with the evidence of the separate poisoning attack with arsenic, this evidence certainly suggests that the family was continuing to be poisoned while in the hospital, something which was clearly not attributable to Mr. Trepal and thus is exculpatory.

3. Thallium on Pye Carr's Property. During the investigation, Florida health officials took a number of swabs of areas in Pye Carr's home, one of which revealed 16 micrograms per liter of thallium from under a sink in an apartment on Pye's property (Id. at 2839-40). At trial, this issue was significantly downplayed by the State, which argued that the thallium may have been a remnant of a pesticide that had been on the surface of the shelf (R. 3092).[88] Below, Mr. Trepal

[88]This argument ignored the fact that thallium had been banned by the EPA for uses as a rodenticide in 1974, and that Pye had not renovated the garage into an apartment and installed the sink and the shelf beneath the sink until 1988, shortly before the poisonings.

presented the expert opinion testimony of Dr. Dulaney to debunk the State's theory at trial that the thallium source found on Pye's property was insignificant. In Dulaney's opinion, in light of the manner in which the swabbing was performed, the reading is "indicative that thallium was there, and that the amount of thallium that was collected in that swab is almost assuredly not all of it" (Id. at 2841). To a reasonable degree of scientific certainty, the thallium located under the sink was not "naturally occurring" because it only showed up in that one place "as opposed to everyplace else"; when you have "naturally occurring" concentrations, "you find it at these kind of low concentrations, but you find it in many different samples. You don't find it in a single sample" (Id. at 2841-42; 2844-45).

Rather than consulting with an expert toxicologist, as Dr. Willey had recommended, the defense team simply relied on the position of the State's witnesses and the prosecutor that the thallium located in Pye's apartment was "naturally occurring" and failed to present the jury with a scientific explanation which was inalterably at odds with the State's position. While the State's position at trial was that thallium is "so rare" that finding it on Mr. Trepal's property signified his guilt, the fact that it was also found on Pye Carr's property was simply meaningless in the State's view, as was the arsenic issue and the increased levels of thallium in Travis Carr's urine. Of course, if the thallium located in Pye's house had actually been located in Mr.

Trepal's house, the State would characterize this as strong evidence of guilt. There comes a point when enough meaningless facts give rise to incontrovertible facts, and the information that the jury did not know about due to trial counsel's deficient performance is staggering in its quality and import. Relief is warranted.

C. OTHER EXCULPATORY EVIDENCE. Aside from the matters discussed above, Mr. Trepal's jury failed to receive a great deal of exculpatory evidence, some of which was withheld by the State, and some of which was known but which counsel unreasonably failed to present. Despite a wealth of evidence which could have been presented to create a reasonable doubt, very little was presented through the cross-examination of State witnesses, and none was presented during the State's case-in-chief.

1. Brady issues. To preempt defense attempts to argue that Pye Carr was a suspect, one of the significant themes of the State's case was to portray Peggy and Pye's marriage as healthy, and that any troubles were simply related to strife amongst the children. Prior to trial, the court had ruled that testimony about the state of the marriage, although it might be hearsay, would be appropriate to show the police did not fully investigate Pye Carr (R. 1509). Every time the defense attempted to elicit such testimony, however, the State objected and the court sustained the objections (R. 1513-22; 1538;

1605; 1723-25; 3602-04; 3652-53).[89] At the same time, the State was permitted to elicit testimony indicating that Pye should be excluded as a suspect, including a number of hearsay statements from Peggy to Pye (R. 1855-58; 3587-89; 3613-15; 3656). Unbeknownst to the defense, however, the State possessed a letter from Peggy to Pye which clearly indicated that the trouble in the marriage was more serious than simply the children (Defense Exhibit 1).[90] The failure to disclose the note violated Brady, as it would have been admissible to show Peggy's state of mind toward Pye and was evidence of a motive for Pye to want to kill his wife; these issues directly coincided with the defense theme that the police failed to fully investigate Pye Carr. Kennedy v. State, 385 So. 2d 1020, 1021-22 (Fla. 5th DCA 1980) ("the state of mind exception to the hearsay rule allows the admission of extrajudicial statements to show the state of mind of the declarant at the time the statement is made if that it at issue in the case"). Accord Peede v. State, 474 So. 2d 808 (Fla. 1985); State v. Bradford, 658 So. 2d 572 (Fla. 5th DCA 1995). The note would also have greatly assisted defense counsel in questioning witnesses at deposition regarding the marriage, and in arguing that the testimony of the various state witnesses that the defense attempted to elicit was reliable enough to overcome a hearsay

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[89]The issue of the restriction on cross-examination is addressed in Mr. Trepal's state habeas corpus petition.

[90]The State stipulated that Peggy's note was never disclosed to trial counsel (1PCR. 2433).

objection (1PCR. 1988-89; 1991; 2234-35; 2237-38; 2240-47; 2251-56).

The State also violated Brady by failing to disclose numerous intelligence reports authored by Susan Goreck. One of these reports, introduced below, indicated that Goreck knew that the Q206 bottle contained thallium I nitrate before the FBI lab even did, or at least gave rise to the inference that she did, according to defense counsel's testimony below (1PCR. 2029; 2122-23). Even though Goreck might have had an explanation for this startling fact, as the lower court concluded (1PCR. 3372-73), trial counsel indicated that it was still something which "would have been real strong ammunition" as to credibility, and counsel would have "done everything I could to get that in front of the jury and to make a strong argument about it" (Id. at 2179).

Goreck had and failed to disclose numerous other intelligence reports which indicated the full extent of the law enforcement efforts to find any evidence against Mr. Trepal, efforts which were entirely unsuccessful; the lower court did not grant a hearing on this issue, concluding that "[t]he extent of the investigation is irrelevant to these proceedings" (1PCR. 3347). The reports were, however, quoted extensively in the 3.850 motion (Id. at). The reports revealed, for example, that Mr. Trepal was continually under the watchful eye of investigators from early 1989 with wiretaps, tracking devices, and other surveillance devices, including aerial surveillance (Id. at 1266

et. seq.). The surveillance began by law enforcement representing to local judges that they were investigating whether Mr. Trepal, based on his 16-year old conviction, was involved in a clandestine drug operation (Id. at 1266); in reality, there was no drug operation, and the information they relied on came from an unreliable confidential informant (Id. at 1267). However, judges, hoodwinked by the police, continued to authorize the highly intrusive surveillance techniques, which revealed absolutely nothing. This "concerned" the lower court, which concluded, however, that no prejudice ensued because no incriminating evidence was ever obtained (1PCR. 3347). Of course, the fact that no incriminating evidence was obtained is in and of itself exculpatory.

Goreck's logs revealed that Mr. Trepal was continually under surveillance by airplanes, cars, phone taps, mail taps, pen registers, and tracking devices (Id. at 1270). Detectives pawed through garbage at his home and business under cover of darkness (Id. at 1271-72). Phone calls by Diana Carr to her attorneys were monitored (Id. at 1274-75). Every piece of mail, whether US Mail, UPS, or Federal Express, passing through Mr. Trepal's house was secretly monitored and notated (Id. at 1275-76). If someone contacted him who appeared "suspicious," that person's privacy also became violated by secret phone taps (Id. at 1277). One time, the phone number for a Donald Mogul appeared on the phone tolls; when law enforcement went to interview him, detectives

told him that they needed more evidence against Mr. Trepal because "some of his superiors had their jobs on the line" (Id. at 1280). The detective also told Mogul that the only evidence they had was a brown bottle found in Mr. Trepal's garage, but the detective "thought the bottle had been planted" (Id.). Mogul refused to provide information because "he didn't know anything about the case" (Id.).

The information contained in Goreck's undisclosed logs is clearly exculpatory for the very reason the lower court concluded it was not: nothing incriminating was found despite Mr. Trepal having been subjected to such secret intrusive measures over such an extended period of time. This is relevant information, because it demonstrates that despite the lengths that law enforcement went to in peering into Mr. Trepal's life, they came up with nothing; it also dovetails with the defense theme that the police focused on Mr. Trepal to the exclusion of other viable suspects. The failure to disclose the logs violated Brady.

2. Other suspects. Due to unreasonable performance by trial counsel, the jury was not provided with important information relating to the police investigation into other suspects. In addition to the information about Pye Carr, discussed in section 1, supra, the jury failed to hear the statement that Travis Carr made to Duane Dubberly ir the hospital, when he yelled out that Pye and Carolyn, who had entered his hospital room, were "trying to kill him again" (1PCR. 1997; 2261;

3119). As noted above, this was consistent with a continued attempt to poison or otherwise kill the family while they were in the hospital. The jury likewise never heard a statement made by Pye when the family was informed that the poison was "lathium or lithium or something" used in labs and derived from phosphates; at that point, Margaret Carr, Pye's ex-wife, turned to Pye and said "You've been working at the Silver City mine all these years, and they've got two chemist labs out there, do you know anything about this -- the kids got into?" (Id. at 1999-2000). Pye then turned to his ex-wife and said "You shut your Goddamn mouth" (Id. at 2000). This statement too gives rise to an inference that Pye Carr had something to hide. The jury never knew that, on October 30, 1988, the very day that Peggy was re-hospitalized but several days before the toxicology reports were conducted at the hospital, Carolyn Dixon told Laura Ervin that Peggy had been poisoned with a "very rare" poison "like thallum or fallum" (Id. at 2418).[91] The jury also did not know that Dixon, who happened to be a nurse and who was the person plying the family with the Coca-Cola in the first instance, was later bringing in baked goods and other foods into the hospital; this information, along with the arsenic levels and the

[91]Although Mr. Trepal does not believe that Laura Ervin was confused about the date of this conversation, to the extent that "there is some confusion over the actual date" of this conversation, as the lower court wrote (1PCR. 3358), this is what juries are for: to sort out such confusion.

increased level of thallium in Travis Carr, would have given rise to the strong inference that someone other than Mr. Trepal was poisoning the family.

The jury also failed to be fully apprised of significant impeachment information of Mr. Trepal's wife, Diana. The State called Diana to testify about a conversation she had had with Peggy Carr regarding the Carr children playing loud music in the yard shortly before they became ill (R. 3576-78). She also testified that she believed Mr. Trepal was home at the time of this conversation, that she had never had a container of thallium, that she had read the book THE PALE HORSE, that she owned that book when Mr. Trepal was arrested, and that she owned several thousand books (R. 3578-79). On cross-examination, the defense questioned Diana regarding her educational background and the fact that while she and Mr. Trepal had "several thousand" murder mystery books in their house, Mr. Trepal read mostly science fiction (R. 3579). Diana testified that murder mysteries were "only indirectly" the inspiration for the Mensa murder mystery weekends (R. 3579-80). When the defense asked whether she wrote the plots for the murder mystery weekends, the prosecution objected that the question was beyond the scope of direct, and the court sustained the objection (R. 3580). When the defense asked Diana whether Mr. Trepal drank bottled water or regular water, the prosecution's objection was sustained (Id.). When the defense asked whether Mr. Trepal had any

speech impediments, the prosecution's objection was sustained (R. 3580-81).

After a brief redirect examination by the prosecution, the State excused Diana. The defense then asked to proffer the answers to the cross-examination questions to which the State's objections had been sustained. The defense asked one question on the proffer, eliciting that Diana was the one who wrote the plots for the murder mystery weekends (R. 3585). Following her answer, Richard McKinley, Diana Carr's attorney, pointed out that "Dr. Carr is still testifying based on the subpoena that compelled her attendance here today. And the testimony that's given pursuant to this proffer, we would invoke the same immunity as any testimony that's been elicited prior" (R. 3583). The prosecutor disagreed, arguing that if Diana were to answer any questions not asked by the State, then the immunity would disappear (Id.). The court refused to require her to answer (Id.), and counsel then proffered that Diana would have testified that she wrote the plots for the murder mystery weekends, that George did not help write the plots, that George did some technical research, and that George drank bottled water (R. 3583-84).[92]

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[92]The evidence that Mr. Trepal drank bottled water was important for the jury to know because the State argued that since Mr. Trepal felt safe enough to drink water coming from the Carrs' well, he was guilty of placing the poison in the Coca-Cola bottles (R. 4184). The exclusion of the evidence that Diana wrote the murder mystery weekend plots allowed the State to argue that the murder mystery weekends

Aside from the information that the court refused to allow counsel to ask, trial counsel did possess information to question Diana's motivations. The jury did not know that the police considered her a suspect, nor that she was testifying under immunity. Counsel also were aware that she had pending charges against her at the time of her testimony for battery on a law enforcement officer, but she was not questioned about it (1PCR. at 2274). She was also not asked about the fact that she refused to give any testimony on Fifth Amendment grounds in a wrongful death lawsuit brought by Pye Carr against George Trepal (Id. at 2275-76). Further, she was not questioned about the fact that, in 1990, she had been sued for an incident at a local hotel where she battered and injured a female guest who was playing her music too loudly, an incident eerily analogous to what supposedly was the motive in the poisoning case (Id. at 2277-78).[93] Moreover, Diana could have been questioned about the fact that she and Mr. Trepal had been actively looking to move from Alturas long before the poisoning because she was disenchanted with her medical practice (Id. at 2603-04). This

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indicated Mr. Trepal was guilty. For example, the State argued that Mr. Trepal "was practicing when he was at Mensa murder weekends" (R. 4212), and that Mr. Trepal must have sent the threatening note to the Carr family because "on each of the Mensa murders . . . a threatening note is sent to the victim" (R. 4216). In his state habeas petition, Mr. Trepal has contended that the lower court erred in restricting his cross-examination of Diana Carr.

[93]The records from the lawsuit were introduced into evidence as Defense Exhibit 18 (Id. at 2306).

would have been important information to refute the State's theory that Mr. Trepal killed the neighbors to get them to "move away." In short, compelling information could have been elicited from Diana Carr that was important for the jury to know, yet counsel unreasonably failed to elicit it. In light of the defense closing argument pointing the finger directly at Diana as a suspect (R. 4246), any strategic reason asserted during the evidentiary hearing rings hollow and is unreasonable.

3. Speech impediment. At trial, the State presented testimony that Mr. Trepal was guilty of poisoning Peggy Carr and the other family members because he made strange sounds when he was first interviewed by Detective Mincey and FBI Agent Brekke (see, e.g., R. 2079, 3175). Despite knowing the State was relying on Mr. Trepal's speech pattern as evidence of guilt,[94] counsel never investigated the issue to see if there was a benign explanation for Mr. Trepal's speech. In fact there is: Mr. Trepal suffers from a speech impediment known as dysarthria,

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[94]Counsel possessed police reports indicating that when Mincey and Brekke approached Mr. Trepal, he "was visably [sic] nervous during the interview. His mouth went dry and he began making clucking type sounds and he visibly shook." Mincey explained that Trepal was "making clucking sounds ... like he was trying to put moisture in his mouth" (R. 5827). Brekke was more precise in his description: "As we began talking, he -- his mouth got dry, began ... making a clucking, clicking sound, as someone who is often nervous. His hands had the shakes as such, and he was slightly moving his head back and forth a little bit -- a minor tremble, a minor shake to it as such" (R. 7329). Thus, defense counsel were clearly aware that Mr. Trepal's speech, as it were, was an important issue in the case.

secondary to problems in his neuromuscular system, which causes him to "make noise with the tongue" (1PCR. 2974; 2981-83). Dysarthria is neurologically-based, and differs from garden-variety stuttering (Id. at 2974).

The aspect of this claim relating to the guilt phase was summarily denied, the lower court concluding that the reason why the police initially viewed Mr. Trepal as a suspect was "irrelevant" (Id. at 3343).[95] This conclusion is untenable because the State made Mr. Trepal's speech relevant, presenting witnesses to testify that he was nervous, shaking, and make "clucking" noises when approached by Brekke and Mincey (R. 1480, 2079, 3175). Evidence which causes police to view a person as a suspect is hardly "irrelevant." Counsel failed to investigate the issue, and thus the jury was deprived of the knowledge that there was a much less "sinister" reason behind Mr. Trepal's behavior than presented by the law enforcement witnesses.

4. The threatening note. At trial, the State presented evidence and argued to the jury that the Carr family had received a threatening note, and that when Mr. Trepal was first questioned by Mincey and Brekke, he employed language similar to that used in the note (R. 2077; 3176-77; 4219). Unbeknownst to the jury, the contents

[95]However, Mr. Trepal presented below the testimony of speech pathologist Dr. Francis Smith because she also related to the penalty phase issues (1PCR. 2966-85).

of the note were not a secret in the Carr family. At the evidentiary hearing, Mr. Trepal presented the testimony of Thomas Blair, who lived in Alturas and has known Pye Carr all his life (1PCR. at 2197). Blair heard about the threatening note that Pye received in the summer months of 1989; as he recalled, "a bunch of boys [were] talking about it while I was doing a job" (Id. at 2196). According to Blair, "a lot" of people knew about the note, and he heard about it more than once from people "just mentioning it in passing in the store and stuff like that" (Id. at 2199-2200). At the hearing, he indicated that he never heard the exact words of the note (Id. at 2209), but acknowledged that in his statement to police, which occurred much closer to the events, he reported that he did know the contents of the note (Id. at 2294; Defense Exhibit 22). He would have testified at trial if asked (Id. at 2210).

Blair's information is yet another small piece of the larger picture in this case, for it is more information which puts a benign spin on a significant aspect of the State's case. Because nothing was presented by the defense, the jury only heard the prosecution's version of events. Counsel unreasonably failed to challenge the State's case by calling Blair.

D. CONCLUSION. There comes a time when, due to various factors, the recognition that a criminal defendant was not afforded a fair trial must be acknowledged. The fundamental principle upon which our

criminal justice system is premised is the right of a criminal defendant to have a reliable adversarial testing of the charges levelec by the government; this principle must be even more strictly adhered tc when the ultimate penalty is involved. In Mr. Trepal's case, the time has come to recognize that a new trial must be ordered. The evidence presented below in both 3.850 motions establish that confidence is undermined in the result obtained in this case. A new trial is warranted.

ARGUMENT II--LAW ENFORCEMENT'S CONFLICT OF INTEREST

In his first Rule 3.850 motion, Mr. Trepal alleged that a conflict of interest existed due to the Polk County Sheriff's Office "obsession" about making Mr. Trepal's case into a movie "once George Trepal was convicted" (1PCR. 1262). The motion alleged that the Sheriff's Office obsession pre-dated even Mr. Trepal's arrest and, while discussed within the confines of the Sheriff's Office, was not known to those not in the information loop" (Id.). Polk County Sheriff Lawrence Crow admitted to the press in April, 1989, well before Mr. Trepal's arrest, that "the case had the makings of `a good book or movie'" (1PCR. 1265). Colonel Paul Alley, a friend of actor Burt Reynolds, was also obsessed about making a movie of the case (Id.). Nc lucrative deals could be made, however, without an arrest.

Mr. Trepal was sentenced on March 6, 1991;[96] as the 3.850 alleged, less than 2 weeks later, the Sheriff's Office hired a top Hollywood entertainment lawyer to negotiate a deal for the Trepal story (Id. at 1291). Burt Reynolds' production company beat out Victoria Principal's company because Sheriff Crow trusted Reynolds not to portray the department "like a bunch of hayseeds"; moreover, Reynolds lived in nearby Jupiter and his father was a former law enforcement officer (Id. at 1294). As noted above, Colonel Alley knew Reynolds, and it was "known in the sheriff's office that even before Mr. Trepal was arrested, Colonel Alley and Burt Reynolds had decided who would play Mr. Trepal in the movie" (Id. at 1296-97). In fact, "Colonel Alley wanted to be in the movie himself" (Id. at 1296). It was Alley who arranged for Lynne Breidenbrach, the department's public information officer, to contact producers after the guilty verdict (Id. at 1295). Alley also put tremendous pressure on investigators to "solve the case" and in fact "kept the undercover investigation going when there were supervisors who wanted to end it" (Id. at 1296). As the motion also alleged, "[a]ny time anyone complained about the lack of resources to continue Goreck's undercover investigation, Colonel Alley would say they had to keep going because *without George's arrest, no movie could*

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[96]Even before the death sentence was formally imposed, Detectives Goreck and Mincey appeared in PEOPLE MAGAZINE detailing their exploits in securing Mr. Trepal's arrest and conviction (1PCR. 1293 n.57).

be made (Id.) (emphasis added). The movie rights were eventually sold (Id. at 1300).[97]

Movie deals were not the end of it: in September 1995, Susan Goreck's book POISON MIND was published. Despite discovery requests, the lower court refused to order Goreck to provide the financial arrangements regarding her book (Id. at 1306 n.69). All that is known is if there are royalties from the book, Goreck will be paid 25% of the profits; co-author Jeffrey Good will be paid 75% of the royalties. Additionally, Goreck contracted with a company called Citadel in 1994 to make a movie based on the book.

Mr. Trepal's motion was sufficiently pled and the allegations presented remain unrefuted by the record. The lower court, however, summarily denied the claim, concluding that a hearing would only be warranted if Mr. Trepal had "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" (1PCR. 3347). Because the contract was not signed until after Mr. Trepal's conviction, the court found the claim "facially insufficient to warrant relief" (Id.). The lower court erred. Buenoano v. Singletary, 963 F.2d 1433 (11th Cir. 1992) (evidentiary hearing warranted on allegation that trial counsel's execution of media rights contract after

[97]The 3.850 motion set out the details of the final contract entered into regarding the sale of the movie rights (1PCR. 1299-1300).

defendant's conviction because it could have affected counsel's performance at trial); United States v. Hearst, 638 F.2d 1190 (9th Cir. 1980) (same).

The conflict claim is not automatically meritless because the actual negotiations commenced after the trial: the underlying constitutional violation is that law enforcement had an agenda to arrest Mr. Trepal due to 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. Mr. Trepal clearly alleged that the department was discussing movie possibilities even before Mr. Trepal's arrest, and that tremendous pressure was laid to bear on the investigators to find evidence to warrant an arrest warrant. This information, which clearly should have been disclosed pursuant to Brady v. Maryland, 373 U.S. 83 (1963), would have been powerful impeachment at trial, particularly given that the focus of the defense was on the "rush to judgment" of the Sheriff's Department, as well as the specter that the brown bottle found in Mr. Trepal's vacated garage was planted. Knowing that the Sheriff's Department was obsessed about making a movie about the case to the point of speculating on which actors would play Mr. Trepal would have been cannon-fodder for devastating impeachment in the hands of competent counsel. Mr. Trepal has met the requisite showing of facts to warrant an evidentiary hearing. See Valle v. State, 705 So.2d 1331 (Fla. 1997); Gaskin v. State, 737 So.2d 509 (Fla.

1999).

ARGUMENT III--JUROR MISCONDUCT

Prior to the trial testimony of Susan Goreck, the trial judge told the jurors that he had spoken with the editor of the POLK COUNTY DEMOCRAT, who had called the judge about providing the jurors with copies of a picture that appeared in the paper; the judge then stated "I would appreciate it if you don't visit the office of the newspaper anymore" (R. 3201). The judge then questioned the jurors *en masse* about whether they had read any of the news stories about the case, a question to which "some jurors" indicated negatively (Id.). The record reveals no objection was made, nor were the jurors questioned about this incident by defense counsel or the trial court.[98]

In his 3.850 motion, Mr. Trepal raised a substantive juror misconduct claim, accompanied by allegations of ineffective assistance of counsel. The lower court found that the substantive misconduct claim should have been raised on direct appeal and only the allegation of ineffective assistance of counsel would require a hearing (1PCR. 1839). Prior to the hearing, Mr. Trepal notified the lower court in writing of his intention to subpoena the jurors to testify at the evidentiary hearing, but the request was denied and Mr. Trepal's

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[98]The jurors were clearly not being candid with the court regarding press coverage. Right after Judge Maloney discussed the photograph issue, he asked the jurors whether they had read any of the stories that appeared in the press that day and the day before. Only "some" jurors indicated negatively (R. 3201). If "some" jurors did not read the papers, then "some" apparently did.

counsel was ordered not to subpoena the jurors because the court denied the substantive misconduct claim (1PCR. 1902-03). The court did indicate that if necessary, he would bifurcate the issue and allow juror testimony if needed (Id. at 1903).

In denying relief after the hearing, the lower court concluded that no relief was warranted because the attorneys and trial judge had no recollection of this incident, thus "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" (1PCR. 3373).[99] It is thus clear that the hearing was not full and fair, and the court erred in not permitting Mr. Trepal to call the jurors at the hearing. Given that neither the attorneys nor the judge recalled the incident, Mr. Trepal should have been allowed to question the jurors about what occurred.

Alternatively, even without juror testimony, Mr. Trepal is entitled to relief. Despite trial counsel's failure to recall this troublesome incident, the record is clear that a number of sitting

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[99]Judge Maloney "vaguely" recalled an incident during trial when he informed the jurors that he received a call from the editor of the POLK COUNTY DEMOCRAT about gladly providing the jurors copies of the photographs that appeared recently in the papers, and telling the jurors not to visit the newspaper office any more (Id. at 3102). He did not recall raising this issue off the record with counsel, but it was "unlikely" that he did (Id. at 3103). His admonishment to the jurors is consistent with his having had knowledge that some juror having visited the newspaper office, which is a concern to him as a judge (Id. at 3104-05).

jurors went down to the office of the POLK COUNTY DEMOCRAT's office on an unidentified number of occasions to obtain information which appeared in the newspaper concerning the trial. There can be no reasonable strategic purpose for not moving for a mistrial when patent jury misconduct occurs. At the very least, the attorneys should have requested the trial judge to specifically inquire into what exactly occurred. Without inquiring into what extra-evidentiary information was utilized by the jury, the trial attorneys had no way of knowing how harmful or innocuous the information was, or its subsequent effect on the jury. Moreover, one has to wonder how the jurors knew that their pictures had appeared in the newspaper; jurors are instructed not to talk to anyone or read anything about the case. Trial counsel's failure to object is objectively unreasonable under the unique circumstances of this case. Prejudice is clear in the instant situation where Mr. Trepal's trial was a focus of local publicity and the jurors violated their oath. The most basic constitutional guarantee to a criminal defendant is the right to a fair trial before an impartial tribunal. Under longstanding Florida law, outside influence of the jurors is prohibited. Russ v. State, 95 So. 2d 594, 600 (Fla. 1957). The failure to object was prejudicially deficient performance, and relief is warranted. Strickland v. Washington, 466 U.S. 668 (1984).

ARGUMENT IV--ATTORNEY CONFLICT OF INTEREST

In his Rule 3.850 motion, Mr. Trepal alleged that a conflict of interest existed between trial counsel and Mr. Trepal's wife, Diana Carr, in violation of the Sixth Amendment and Cuyler v. Sullivan, 446 U.S. 335 (1980). The lower court ruled that the claim should have beer raised on direct appeal, and thus denied an evidentiary hearing on the substantive conflict issue; the court did allow a hearing to explore issues relating to counsel's failure to adequately cross-examine Diana Carr (1PCR. 3346). This issue is addressed in Argument I, supra.

The lower court's procedural ruling, however, is in error. For example, the conflict of interest addressed in Cuyler had not been raised on direct appeal but rather in a collateral proceeding. Cuyler, 446 U.S. at 348. If the evidence of the conflict is extra-record, as it is here, it is appropriately raised in a 3.850 motion. Harich v. State, 542 So. 2d 980 (Fla. 1989). Absent fundamental error or a conflict apparent on the face of the record, a conflict of interest claim cannot be raised on appeal. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). The lower court erred in finding the substantive conflict claim procedurally barred.

In his 3.850 motion, Mr. Trepal alleged more than sufficient facts to warrant a hearing on the substantive conflict claim (1PCR. 1243-61). George Trepal and Diana Carr had conflicting interests--George was arrested for a crime for which Diana was an equally likely

suspect. Yet, as alleged, Diana was paying the bills[100] and none of the evidence of her involvement was elicited at trial for the jury's consideration. The jury did not know that she was testifying under immunity from the State, that she had pending charges against her for battery on a law enforcement agent, or, most significantly, that in 1990, she had been sued for an incident at a local hotel where she battered and injured a female guest who was playing her music too loudly.[101] Due to the conflict, the jury also did not know that, during the investigation into the murder of Peggy Carr, Diana's personal and business records were secretly subpoenaed, her telephone calls were secretly monitored, her appointment books were seized so that agents could "see where she was on the day of the poisoning or around the day of the poisoning" (1PCR. 1248-49). When questioned during his deposition about when Diana ceased becoming a suspect, FBI Agent Brekke responded "I don't know if one could say she's totally ceased" (Id. at 1249). This, of course, was *after* Mr. Trepal had been arrested. Defense counsel knew this information, yet, due to the conflict, failed to elicit the compelling evidence of bias and the fact that she herself was a suspect in the murder.

To the extent that the State will point to trial counsel's

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[100]The 3.850 motion detailed the fee arrangements and contracts entered into between counsel and Diana Carr (1PCR. 1244-47).

[101]The records from the lawsuit were introduced into evidence as Defense Exhibit 18 (1PCR. 2306).

testimony below relating to the ineffectiveness claim in order to defeat the conflict claim, this would not be proper, as it is an entirely different legal issue. Moreover, "[t]he existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict." Sanders v. Ratelle, 21 F. 3d 1446, 1452 (9th Cir. 1994). See also Fitzpatrick v. McCormick, 869 F.2d 1247 (9th Cir. 1989) (after review of the entire record, court concluded that there was an actual conflict of interest, despite counsel's protestations that his actions stemmed from ethical considerations); Burger v. Kemp, 483 U.S. 776, 806 n.11 (1987) (Marshall, J., dissenting) ("Counsel's self-serving declarations that he did not permit his representation of Stevens to affect his representation of petitioner cannot outweigh the conflict revealed by the record itself"). The very fact that Mr. Trepal's attorneys were in a position where they had to cross-examine a witness, under immunity, with pending criminal charges, who was paying the legal fees for their client, raises the impression of a conflict of interest. The very same witness who was paying Mr. Trepal's tremendous legal fees was also a principal suspect in the very same crime for which he was being tried. An evidentiary hearing and/or relief are warranted.

ARGUMENT V--NO PENALTY PHASE ADVERSARIAL TESTING

Mr. Trepal "had a right--indeed a constitutionally protected right--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Williams v. Taylor, 120 S.Ct. 1495, 1513 (2000). Accord Strickland v. Washington, 466 U.S. 668 (1984). Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Id. at 1524. Mr. Trepal was denied this right by the ineffective assistance of his trial attorney, as he established at the evidentiary hearings conducted below.

A. THE LOWER COURT ERRED IN FINDING TRIAL COUNSEL MADE A REASONABLE AND TACTICAL DECISION NOT TO PRESENT MITIGATION.

1. Humanizing mitigation. The lower court granted an evidentiary hearing on Mr. Trepal's claim that trial counsel failed to investigate and present abundant mitigation. At trial, the defense presented no witnesses during the penalty phase. In disposing of the claim after the first evidentiary hearing, the lower court concluded 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" (1PCR. 3367). Under this Court's *de novo* review of this issue, Stephens v. State, 748 So. 2d 1028 (Fla. 1999), the lower court's order must be reversed. Although counsel uttered the magic words, "merely invoking the word strategy to explain

errors [is] insufficient since `particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.'" Horton v. Zant, 941 F. 2d 1449, 1461 (11th Cir. 1991). Under the circumstances of Mr. Trepal's case, the strategy of the trial attorney's may very well have been tactical but under a fair and thoughtful analysis of the facts and the law, the decision to forego mitigation was the result of a lack of understanding of the purpose of mitigation made by attorneys with no experience in capital cases, not a reasonable and tactical decision aimed at avoiding a death sentence.

The mitigating evidence presented at the evidentiary hearing consisted of numerous friends and family who provided heartfelt testimony regarding Mr. Trepal's caring and generous reputation, as well as his distressed youth and the effects of being a gifted intellectual but social outcast.[102] Mr. Trepal also presented numerous

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[102]Mr. Trepal's uncle, Joseph Trepal, as well as his wife, Ann, testified to many positive attributes of George (1PCR. 2540-43; 2547-52). Ann also discussed George's unusual speech pattern, which he had as a child (Id. at 2549). Mr. Trepal's father, George Trepal, Sr., also testified about his son's upbringing in South Carolina, the traumatic circumstances surrounding his birth (George's twin had been miscarried at birth, and George slipped into his mother's intestines requiring surgical removal), and other attributes (Id. at 2554-65). Lucy Davis, a school teacher of George's in South Carolina, testified to the inadequacies of the school attended by George, which could not properly handle a gifted child (Id. at 2571-74). Shirley DuBose attended school with George, and she recounted how George, due to his intellect, was labeled a "nerd" by his classmates (Id. at 2577-82).

friends and fellow Mensa members who testified that Mensa was an innocuous social club with amiable members (including doctors, lawyers, and even a Polk County judge), who enjoyed each other's company and participated in harmless, intellectually stimulating activities.[103] Simply put, Mensa was a social group like many others in most communities. This evidence was not presented to the jury, which instead was left with the impression that Mensa was a group of weird misfits that are dangerous and suspect. Finally, Mr. Trepal presented the testimony of Dr. Francis Smith, an expert in speech pathology, who explained that Mr. Trepal suffers from a neurologically-based speech impairment (1PCR. 2966 *et. seq.*), as well as Dr. Hilda Rosselli Kostoryz, an expert in special education, giftedness, and higher learning, who explained the nature of Mr. Trepal's giftedness, how it affected him as both a child and adult in terms of social and professional interactions, and that among gifted people, Mr. Trepal is a "normal" individual (Id. at 3182 *et. seq.*)

The mitigating evidence which was presented at the evidentiary hearing, but which was not presented at the penalty phase, not only put

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[103]Mr. Trepal presented 8 fellow Mensa members: Holly Horton (1PCR. 2589 *et. seq.*); Bill Horton (Id. at 2621 *et. seq.*); Bob Babik (Id. at 2634 *et. seq.*); Sue Prince (Id. at 2665 *et. seq.*); Stewart Prince (Id. at 2685 *et. seq.*); Beverly Sidenstick (Id. at 2700 *et. seq.*); Kathleen Stipek (Id. at 2720 *et. seq.*); and Charles Allen (Id. at 2730 *et. seq.*). These witness were all available to testify at the trial, but were not asked to do so.

a human side to George Trepal but demonstrated something significant that the jury never knew; although George had faults, he had friends, he had supporters, and he had many people who would stand to his defense if only to say that the George they knew well was not the "most diabolical man" that the jury ever saw. The essence of a defense in a penalty phase, which is to show the unique characteristics and experiences of the defendant, was unreasonably denied to Mr. Trepal. The jury only knew the side presented by the prosecution. Without knowing who George Trepal was, the jury's recommendation that he should die is an unreliable determination.

Without conducting a meaningful evaluation of trial counsel's testimony, the lower court essentially condoned each tactical decision asserted by counsel without any consideration of the reasonableness of the asserted strategies. The lower court's order breaks down the evidence presented at the evidentiary hearing into categories: (a) character evidence from Mensa friends, (b) ability to form close, loving relationships, (c) model prisoner, (d) strong religious beliefs, (e) family history, and (f) failure to argue lingering doubt. For each of these categories, the lower court either found that the evidence was not established at the hearing, that if it existed was harmless, or "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" (1PCR. 3368-70). The lower court's findings

are not supported by competent evidence, nor is the court's speculatior that the State "could have" presented negative character evidence. The putative decision not to present the multitude of positive character evidence because of the fear of opening up the door to negative character evidence was unreasonable because counsel failed to properly and fully investigate the extent to which such mitigation was available. Strategic decisions to forego mitigation cannot be made absent adequate investigation. Deaton v. Dugger, 635 So.2d 4, 8 (Fla. 1993); Ragsdale v. State, 2001 WL 1241135 (Fla. Oct. 18, 2001). Moreover, in light of the fact that the jury had all ready found that Mr. Trepal murdered one person and injured others, such a concession out of fear was unreasonable. Counsel had an obligation to challenge and ascertain exactly what negative information would have actually been presented to the jury. In fact, the lower court's order denying postconviction relief lists several bad acts that either the jury already knew, or were inadmissible or harmless. For example, the jury was already aware Mr. Trepal was convicted of a non-violent felony in the 1970's. The lower court lists other "bad acts" such as Mr. Trepal and his wife engaging in sado-masochistic practices, or that he possessed a pornographic video allegedly depicting a murder (1PCR 3367). These so called "bad acts" were rebuttable and were not a reasonable basis to forego allowing the jury to know the kind and positive reality of Mr. Trepal. Williams, 120 S.Ct. at 396 (strategy

rejected even though "not all of the additional evidence was favorable to Williams).

2. Lingering Doubt. Defense counsel had the unusual benefit of a stipulation by the State that "lingering doubt" evidence could be presented at the penalty phase, and the court permitted its introduction (R. 4370-72). Without any reasonable tactical strategy, and to Mr. Trepal's detriment, no lingering doubt evidence was presented. All of the information discussed in Argument I of this Brief also affects the issue of penalty,[104] and constitutes valid mitigation, particularly in light of the State's stipulation at trial.

The lower court disposed of this claim by asserting that "a portion of the reasonable doubt argument would have to focus on other suspects," a claim which he rejected as to the guilt phase (1PCR. 3369). However, the concerns about presenting this information at a guilt phase are not the same as at a penalty phase, where the jury has already convicted. The defense had the unique benefit of being able to cast doubt on Mr. Trepal's guilt in a way that they decided not to at the guilt phase, and had everything to gain and nothing to lose by pursuing the ample lingering doubt evidence that they did not present at the guilt phase. Moreover, the FBI lab issue affects the reliability of the sentencing outcome. Under a "broad" view of the law

[104]Those arguments are expressly incorporated herein.

encompassing lingering doubt evidence, the lower court did find that "confidence in the outcome has been undermined" (Id. at 2690).

Counsel failed to argue lingering doubt to refute the aggravation. In a sentencing proceeding, "[t]he basic concerns of counsel ... are to neutralize the aggravating factors advanced by the state, and to present mitigating evidence." Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994). Here, counsel failed to present compelling, readily available evidence to rebut the aggravating circumstances. See Garcia v. State, 622 So. 2d 1325, 1329 (Fla. 1993) (defense counsel ineffective for failing to introduce in the penalty phase the statement of a witness who would testify that someone else confessed to the murder for which Garcia was convicted); Young v. State, 739 So.2d 553, 558-59 (Fla. 1999) (confidence undermined in sentencing due to suppression of witness statement which supported aggravator). Counsel's failure to put on a lingering doubt case at the penalty phase was unreasonable and prejudicial, for it would have created reasonable doubt that Mr. Trepal had the mental state required for CCP and great risk of death aggravators.

Finally, the penalty phase was rendered unreliable by counsel's unreasonable decision to stipulate to present no live witnesses. Prior to the beginning of the penalty phase, defense counsel agreed to stipulate to Mr. Trepal's prior conviction for conspiracy to manufacture methamphetamine, and to have that stipulation read to the

jury. In exchange for the State agreeing that the mitigating factor of no significant criminal history was established, the defense agreed to call no live witnesses (R. 4350). This decision by the defense was inexplicable and unreasonable. Mr. Trepal in fact had no significant history of prior criminal activity. There was no reason for the defense to agree to forego calling live witnesses in exchange for the State's stipulation to a mitigating circumstance that existed without question. Both the defense and State knew Mr. Trepal had no other criminal convictions besides the 1975 conviction for conspiracy to manufacture methamphetamine. Thus, counsel's stipulation was unnecessary, and only served to prejudice Mr. Trepal, for the jurors could not but be influenced by the fact that not one person cared enough for Mr. Trepal to appear before them and testify on his behalf. Relief is warranted.

ARGUMENT VI--PUBLIC RECORDS

That Mr. Trepal is entitled to all public records about his case is well-settled. See, e.g. Ventura v. State, 673 So. 2d 479 (Fla. 1996). Although many public records which later formed the basis of significant claims were disclosed, some important records were not.

A. RECORDS OF CONFIDENTIAL INFORMANT. During the proceeding below, Mr. Trepal filed a motion requesting the court to reveal the identity of a confidential informant mentioned in a Polk County Sheriff's Office report received pursuant to Mr. Trepal's public records requests (1PCR.

969-73). The court ordered the name and last known address of the informant to be revealed (Id. at 1088-91). Mr. Trepal On April 25, 1996, Mr. Trepal sought reconsideration and requested that the entire confidential informant file be disclosed (Id. at 1415). After a hearing on August 6, 1996, the court denied the request, concluding that the interests in maintaining the confidentiality of the informant's file outweighed Mr. Trepal's right to view the information (PC-R. 1809-10).

The lower court erred by both misconstruing Mr. Trepal's arguments and misapplying the law. Mr. Trepal asserted two arguments at the hearing. First, he pointed out that "We are not asking for anything we don't already know," as the identity of the source had already been revealed (1PCR. 1718). Second, Mr. Trepal argued that the public records statute at the time did not require a showing of relevance in order to obtain public records; relevance would be an issue as to whether 3.850 relief would be appropriate, not whether the documents should be disclosed (Id. at 1719). Notwithstanding the lack of a requirement to show relevance, Mr. Trepal did assert that he had information that the informant was unreliable and was requesting the file to determine to what extent the sheriff's office was aware of this. If the sheriff's office relied on information known to be false in order to secure numerous search warrants against Mr. Trepal, Mr. Trepal's due process rights were violated. Likewise, this information

would cast doubt on the entire validity and veracity of the investigation perpetrated upon Mr. Trepal and was therefore exculpatory. The lower court denied the release of the confidential informant file (Id. at 1089-10).

Mr. Trepal is entitled to the files pertaining to the confidential informant. In the very least, he is entitled to an *in camera inspection* to determine if the files pertaining to the informant contain exculpatory information. Relief is proper.

B. EXEMPT RECORDS OF STATE ATTORNEY'S OFFICE. On October 5, 1995, the circuit court ordered the State Attorney's Office to provide CCR with a copy of all documents which had been requested (1PCR. 326). Where an exemption had been raised, the State was to provide the court with those records for *in camera* inspection. The State provided the court with the following documents: Notes; Motion notes; Deposition Notes and notices; Trial notes; Witness questions; Jury selection; Autopsy report (notes of State Attorney regarding report); Criminal history; FBI reports; October 1988 calendar; Bond motion notes; Investigative interviews; Dr. Carr's statement to State; Dr. Wiley; Penalty phase closing; Closing argument notes; and MJOA argument (Id. at 245-46).

While the circuit court reviewed the exempt documents and determined the records were in fact exempt under F.S. § 119.07 (3)(n),

there is no indication in the court's order that the work product documents were reviewed for exculpatory information under Brady v. Maryland, 373 U.S. 83 (1963). Certainly, interview notes, Dr. Carr's statement to the State, any notes or statements of Dr. Wiley, and particularly "investigative interviews"[105] may contain exculpatory information and must be reviewed *in camera*. Relief is warranted.

C. INTERVIEWS RELATED TO SUSAN GORECK'S BOOK. Despite protracted litigation, the lower court denied Mr. Trepal's request for access to the "hundreds of hours" of taped interviews conducted by Jeffrey Good, who, along with Susan Goreck, authored a book about Mr. Trepal's case called POISON MIND - THE TRUE STORY OF THE MENSA MURDERER -- AND THE POLICEWOMAN WHO RISKED HER LIFE TO BRING HIM TO JUSTICE. Mr. Trepal submits that the interviews should be disclosed at this time.[106]

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[105]This is of particular importance because the undersigned has just recently learned from attorneys conducting litigation in another Polk County case that it was the practice of the Polk County State Attorney's Office to issue state attorney subpoenas to trial witnesses, who would come in for investigative interviews. It was also the practice of that office not to disclose the fact that the witnesses were subpoenaed or the substance of the interviews.

[106]Mr. Trepal has gone to great lengths to obtain these interviews. After initially requesting their production, the lower court suggested Mr. Trepal conduct depositions in order to obtain the cassette tapes. A deposition of Good was eventually terminated by a Pinellas County judge after Good asserted a reporter's privilege. Pursuant to Fla. R. Civ. P. 1.310(d), Mr. Trepal then filed a motion to compel in Polk County (1PCR. 501), as well as a petition for relief in this Court seeking to reverse the order of the Pinellas County judge. The Polk County court denied the motion to compel, and this Court denied the All Writs petition without prejudice to refile the matter in Polk County. Mr. Trepal did so, and the Polk County court again denied

The Polk County court based its ruling denying Mr. Trepal's motion to depose Jeffrey Good solely on the basis of Mr. Good's qualified reporter's privilege. The lower court erroneously decided that any First Amendment privilege Good may enjoy trumped Mr. Trepal's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. The lower court's ruling is a misapplication of the qualified reporter's privilege. Even if the lower court properly found the reporter's privilege to apply, it must cede to Mr. Trepal's rights.

Just recently, but after Mr. Trepal sought relief on this issue in the lower court, this Court issued its opinion adopting a 3-part test on the scope of the journalistic privilege. State v. Davis, 720 So. 2d 220, 227 (Fla. 1998). The Court recognized that when

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the motion, concluding that Mr. Trepal had not exhausted alternative sources for getting the information. In an effort to exhaust alternative sources, Mr. Trepal next filed a motion to depose individuals who may have communicated with Good. The circuit court granted the motion, noting however that the depositions were not to be used to relitigate the Jeffrey Good matter (Id. at 1820). After more litigation, the court issued an order clarifying that the depositions were not granted for the purpose of asking witnesses what they told Jeffrey Good (Id. at 1828; 1852-1883). Given that limitation, and the fact that Mr. Trepal sought to depose the individuals only to exhaust alternative sources, Mr. Trepal withdrew his motion to permit depositions, and filed another All Writs petition in this Court. While that was pending, the lower court conducted an evidentiary hearing on Mr. Trepal's Rule 3.850 motion and issued an order denying the motion on November 6, 1996. On January 16, 1997, Mr. Trepal's Petition for All Writs was denied as moot.

determining the compelling need of a defendant, the weighing court must also consider the defendant's rights to compulsory and due process. Id. Under Davis, Mr. Trepal must prevail. The information Good has (such as "hundreds of hours" of interviews with witnesses) is relevant to the issues before the tribunal, as the information came from sources directly involved in the investigation and prosecution of Mr. Trepal, sources who have an interest in seeing that Mr. Trepal's conviction and sentences are left intact. The lower court acknowledged that any inconsistent statements made to Good by a witness possibly could be introduced as a prior inconsistent statement for impeachment purposes. Mr. Trepal has diligently sought to exhaust all alternative sources of the information. He deposed Goreck, who refused to answer any questions regarding the book except to state that Good was the one who conducted all the interviews.[107] He attempted to depose numerous other individuals who may have spoken to Good, but the lower court refused to permit any questions on this topic. Good is thus the only source for the information Mr. Trepal seeks. Under Davis, Good has no qualified privilege. If Good has any qualified privilege, it is overcome by Mr. Trepal's rights to compulsory process, confrontation, and due process.

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[107]Goreck, a law enforcement agent, never disclosed the interviews pursuant to Mr. Trepal's 119 requests. Mr. Trepal submits that her involvement with the book requires that any exculpatory information that was discovered in the course of the book's production be disclosed.

Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Davis v. Alaska, 415 U.S. 306 (1974). Mr. Trepal requests that this Court reverse the lower court and find that Mr. Trepal has satisfied the three-part test, or, in the alternative, remand to the lower court with directions that the lower court permit Mr. Trepal to take the depositions he requested in order to establish that no alternative sources for the information held by Good exist.

CONCLUSION

Based on the foregoing arguments and the record in this case, Mr. Trepal submits that his convictions and sentences, including his sentence of death, must be vacated and a new trial ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Carol Ditmar, Office of Attorney General, Westwood Building, 7th Floor, 2002 North Lois Avenue, Tampa, FL 33607, on October 24, 2001.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is typed in Courier 12 point font, in compliance with Fla. R. App. P. 9.210(a)(2).

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