IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-896
LOWER TRIBUNAL NO. 2008-CF-658

DAVID JAMES MARTIN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Clay County, Florida

Honorable Circuit Judge John Skinner

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Martin's motions for post-conviction relief under Florida Rule of Criminal Procedure 3.851.

David Martin will be referred to as "Mr. Martin," "Martin," or "Appellant."

The record on direct appeal will be referenced as "R" for citation purposes, preceded by the volume number and followed with the page number: (1 R 1.) The supplemental record on direct appeal, will be referenced as "SR" preceded by the volume number and followed with the page number: (1 SR 1.) The record on appeal generated for 3.851 proceedings will be referenced as "PCR" followed by the page number: (PCR 1.)

STATEMENT OF THE CASE

Mr. Martin was originally charged with second-degree murder of Jacey McWilliams. He was subsequently charged by information with first-degree murder and armed robbery on August 15, 2008. The state filed a motion of intent to seek death on October 3, 2008. The defense filed a motion to suppress Mr. Martin's custodial statements on the grounds that the statement was obtained in violation of his privilege against self-incrimination and was involuntary, based largely on a 36-page motion that Mr. Martin had prepared. (3 R 520-522; 1 SR 18.) A hearing on the motion to suppress occurred on November 13, 2009 (1 SR 16-182), and the court denied the motion. (1 R 175-176.)

Jury selection occurred on November 16, 2009, and trial began November 17, 2009; the jury found Martin guilty on both counts. The penalty phase occurred on December 2, 2009. The jury recommended death by a vote of 9-3. (4 R 708.) A Spencer[1] hearing was held on January 8, 2010. (2 SR.) This Court issued its Sentencing Order on March 3, 2010, sentencing Mr. Martin to death.[2] (5 R 825.)

Mr. Martin filed a timely direct appeal with the Florida Supreme Court

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[1] See Spencer v. State, 615 So. 2d 688 (Fla. 1993)

[2] [2] The Court found and gave great weight to three aggravators: aggravator—that at the time of the murder Martin was on felony probation; that Martin committed the murder while engaged in the commission of a felony—armed robbery; and that Martin committed the murder in a cold, calculated, and premeditated (CCP) fashion without any moral or legal justification. The Court addressed two statutory mitigators: Martin's age, and additional factors in Martin's background that would mitigate against imposition of the death penalty. The trial court found that the first mitigator was not proven by the defense. The Court found the following mitigators under the "additional factors" statutory mitigator: (1) "drug abuse—suffered from substance abuse during his adolescent and adult life" (slight weight);4 (2) lack of positive role models and the lack of the benefit of stable and nurturing parents during Martin's formative years (slight weight); (3) lack of a violent history (slight weight); (4) incident was situational and his aberrant behavior was an isolated incident (slight weight); and (5) has family members who are concerned about him and love him (slight weight). The trial judge found the following mitigating factors not proven and gave them no weight: (1) emotional abuse; (2) sexual abuse; (3) led law enforcement to the crime scene and location of Jacey's body; (4) failure of the system; (5) lack of impulse control; (6) has a reason to do well in prison; (7) exhibited a lack of sophistication in the way the crime was committed; and (8) showed remorse. The trial court found that Martin proved six nonstatutory mitigating circumstances: (1) performed kind deeds for others (slight weight); (2) shares love and support with his family who continues to love him (slight weight); (3) attempted to have a positive influence on family members despite his incarceration (slight weight); (4) has artistic skills (slight weight); (5) cares about animals (slight weight); and (6) is amenable to rehabilitation and a productive life in prison (slight weight)

(FSC) raising eight claims: (1) The trial court erred in denying Martin's motion to suppress his confession that was (a) obtained in violation of his Fifth Amendment right to silence and (b) procured by threats, promises, lies and improper inducements and therefore involuntary; (2) The trial court erred in instructing the jury on and in finding the aggravating factor of CCP; (3) The trial court erred in rejecting the mitigating evidence of emotional abuse, sexual abuse, and remorse; (4) The trial court's failure to consider Dr. Krop's testimony in evaluating the aggravating and mitigating circumstances deprived Martin of a fair sentencing proceeding; (5) Martin's death sentence is disproportionate; (6) The trial court erred in sentencing Martin to death because Florida's capital sentencing amendment pursuant to Ring v. Arizona.

This Court found that a number of the interrogation tactics employed by the law enforcement officers who questioned Martin upon his arrest were "less than ideal," however, after a totality of the circumstances analysis, it held Mr. Martin's confession was admissible. Martin v. State, 107 So. 3d 281, 316 (Fla. 2012) ("Although some of the tactics and techniques used by the detectives may have been less than ideal, West and Wolcott did not directly threaten, deceive, or delude Martin into confessing.") This Court warned: "some of the techniques the detectives employed walked the line that separates permissible from impermissible interview tactics, and we, as a result, note that this case presents the very outer

limit as to what tactics law enforcement may employ when performing a custodial interrogation." Id. at 298. This Court denied relief and affirmed Mr. Martin's conviction and sentence.

Mr. Martin timely filed an initial 3.851 motion on June 3, 2014 (PCR 20-89), and an amended 3.851 on December 1, 2014 (PCR 389-466), upon permission of the trial court. The trial court stayed Mr. Martin's case pending the outcome of the Hurst litigation and on January 11, 2017, Mr. Martin filed a Second Amended 3.851 motion raising a Hurst claim. (PCR 1443-1543.) On or about July 13, 2017, the trial court issued an order vacating the death sentence under Hurst and granting resentencing, but summarily denying the guilt phase claims without an evidentiary hearing.

Mr. Martin filed a timely motion for rehearing on the court's order summarily denying all of the guilt phase 3.851 claims. The trial court then withdrew its July 13, 2017 Order, and granted an evidentiary hearing on Mr. Martin's claim of ineffective assistance of counsel for failing to discover that juror S lied in voir dire.

Mr. Martin then filed a motion to interview the juror in question, which was granted. Following the juror interview, on December 22, 2017, Mr. Martin filed a Third Amended 3.851 motion raising a claim of new evidence based on the juror's deposition testimony that not only had he failed to reveal that he had a DUI

conviction, but that he was also adjudicated delinquent as a juvenile for sexual battery of an 11 or 12 year old girl. Further, the juror revealed that his uncle murdered his grandfather when he was a child and that he was profoundly impacted by that event. (PCR 1752-1839.) This juror acknowledged under oath in postconviction that he should have revealed all three of these things in response to questions in voir dire.

In sum, the 3.851 issues presented for the lower court's consideration were: 1) The state failed to comply with Fla. R. Crim. P. 3.852; 2) Ineffective assistance of counsel in the guilty phase: a) failure to retain a confession expert; b) failure to present adequate evidence in support of a suppression motion; c) failure to object to improper cell phone testimony and to retain a cell phone expert; d) failure to investigate and present evidence supporting Mr. Martin's trial testimony; 3) Ineffective assistance of counsel in the penalty phase; 4) Ineffective assistance of counsel regarding dishonest juror S; 5) lethal injection is unconstitutional given botched executions; 6) Martin's death sentence is unconstitutional under Hurst; 7) Cumulative error; 8) newly discovered evidence that Juror S concealed not only his DUI arrest, but juvenile arrest and adjudication of delinquency for sexual battery; and the fact that his uncle was convicted of the capital murder of his grandfather when he was a child.

An evidentiary hearing was held on newly discovered evidence and

ineffective assistance of counsel claims concerning Juror S on February 2, 2018. (PCR 3141-3225.) On March 28, 2018, the parties made oral arguments. (R 3235-3281.) On April 9, 2018, the trial court issued an order again granting Hurst relief and denying the remainder of the 3.851 claims. (PCR1923-2994.)

STATEMENT OF THE FACTS

Trial proceedings

On March 11, 2008, Jacey McWilliams, 23, was living with her mother in Jacksonville Florida and working at Regency Dodge. (9 R 399.) Christine McWilliams, Jacey's mother, testified Jacey was with her friend, David, that night and that David and Jacey had been in Middleburg. (10 R 406-09.)

Erin Urban testified that she was Mr. Martin's girlfriend at the time of the incident. They dated since March 2007 and had lived together before she moved from Jacksonville to St. Petersburg with her family in November 2007. (10 R 460-65.) Mr. Martin informed her that Jacey was a friend who helped him out with food and money, and let him use her car. (10 R 466-67.)

Mr. Martin arrived at Ms. Urbin's mother's house unexpectedly around 3 or 4 in the morning on March 12, 2008. He told her he borrowed Jacey's car for $50. (10 R 472-74.) They spend some time together then he drove back to Jacksonville. (10 R 475-77, 96.) He came back to St. Pete the next day. Mr. Martin was arrested for shoplifting at a Walmart. (10 R 478-85, 503.)

Ms. Urbin's brother, Michael Christian, a St. Pete police officer, testified that he ran the plates of the car Mr. Martin showed up in and it came back registered to Jacey McWilliams. (10 R 426-30.)

Mr. Martin was arrested by Officer Kelly Burns for shoplifting at Walmart in Pinellas Park. Mr. Martin asked Officer Burns to leave his keys in a car in the parking lot. (10 R 520-26.)

After Jacey's mom reported her missing on March 14, Jacksonville Sheriff's office ran her car tag, discovered that Officer Christian had run it a few days earlier, and obtained Mr. Martin's name from officer Christian. (10 R 436.)

Law enforcement testified that they used Jacey's cell phone records to determine that she never returned to Duval County from Clay County on March 11. They also tracked Mr. Martin's cell phone records from a tower near his house in Jacksonville from 3:13 to 8:28 p.m. on March 11; to a tower near Old Jennings State Forest from 8:28 to 10:51, to a tower in Middleburg from 11:02 to 11:10, and with a Middleburg tower and a tower in Lawtey from 11:17 to 11:50. After 11:50, his cell tower communication continued south ending in St. Pete. (10 R 444-50.) They learned that there were two attempts to use Jacey's ATM card on March 12 in Ocala. They collected that surveillance tape. (10 R 544-46.)

Det. West testified that he and Det. Wolcott interviewed Mr. Martin on March 20, 2008 in Pinellas County. They were there because they learned that

Jacey's car had been found there and linked to Mr. Martin. They were hoping to find Jacey. (11 R 573-77.) Mr. Martin signed the form indicating that he understood his Miranda rights. However, he didn't sign a form that he wanted to waive those rights. West was trained in interrogation tactics, which included downplaying the severity of the trouble a suspect was facing. (11 R 760-63.) After 3 to 4 hours of questioning Mr. Martin, he admitted that he killed Jacey and told them where to find her body. (11 R 762-63.) A video of this interrogation was played for the jury.

They found the victim's remains off Johns Cemetery Road in Middleburg following Mr. Martin's interrogation. (13 R 803-13.)

Medical Examiner Dr. Nicolaescu testified about the autopsy he performed. He determined that Jacey died as a result of blunt force trauma (1 R 819-31), which, according to Dr. Walsh-Haney, a forensic anthropologist, was probably caused by a hammer. (13 R 856-883.)

Mr. Martin took the stand, and testified that he did not kill Jacey, but was present for her murder. (13 R 901.) He lied to police about his involvement because he was afraid of the person who killed her. (13 R 957.) He communicated with Jacey that day – he had gotten paid and wanted to take her out as repayment for her prior kindness to him. She picked him up, they got gas, went to McDonald's, then to the boat dock on Black Creek. They walked the trails –

Jacey's mother called as they were leaving. (13 R 912-20.) From there, they went to Mike Gregg's house on Malloy Court near John's Cemetery Road. Mr. Martin met Gregg a couple weeks earlier when they went there to buy marijuana. Mr. Martin then went over there regularly to buy weed. Mr. Gregg allowed sex offenders to live on his property in RVs behind his trailer. One day, while visiting Mr. Gregg's home, Gregg made a sexual advance on Mr. Martin. Another time, he offered Mr. Martin weed in exchange for sex. Mr. Martin declined and didn't think much of it. However, on a subsequent visit to Gregg's to buy weed, Gregg put a gun in Mr. Martin's mouth and forced him to perform oral sex. Gregg then had sex with Mr. Martin and took photos. He told Martin to come back the next day, and when Mr. Martin declined, Gregg threatened to show the photos to his mother and Ms. Urbin. So Mr. Martin continued going out to Greggs and doing whatever Gregg wanted. Gregg would call Mr. Martin up and tell him when to stop by. (13 R 921-30.)

Mike Gregg called Mr. Martin a few days before March 11 and told him to come out, but Mr. Martin had been unable to borrow a car. So that evening, Mr. Martin planned to have Jacey drop him off at Greggs or wait somewhere while he went to Greggs. When they got there, Gregg was upset that he was late. Jacey told him where they had been, then Gregg mentioned another place they'd enjoy, and Jacey suggested they go there. They followed Gregg to the end of Johns Cemetery

Road, they walked down to the lake, and smoked and talked for 10 or 15 minutes. When they got back to the car, Gregg asked if Jacey was Mr. Martin's girlfriend. They told Gregg no, that he had a girlfriend. Gregg then told Jacey that Martin was gay, that they had done sexual things together, and that Gregg had photos. Jacey thought he was joking, but Gregg went to his car, got a camera, gave it to Jacey, told her to take photos, and started undoing Mr. Martin's pants. She told him no, and Gregg pulled out his gun, and told her to do what he said and resumed taking off Mr. Martin's pants. She dropped the camera and ran to the car. Mr. Martin jumped on Gregg and tried to grab the gun. Jacey came back swinging a hammer, but Gregg caught her by the arm, grabbed the hammer, swung it, dropping her to the ground. Mr. Martin got the gun off the ground and shot at Gregg but nothing happened.

When Gregg stopped swinging the hammer, he looked confused and said it wasn't supposed to happen. (13 R 931-48.) Gregg told Mr. Martin that he knew his mom worked at Value Pawn, drove a blue car, and lived off of Woodside, and that his girlfriend lived in St. Pete. He told Mr. Martin not to say anything or he would do something to his mom or girlfriend. (13 R 948-49.) Gregg made Mr. Martin help him drag her body, then left. He covered her with a blanket, feeling guilty that he brought her there. Then he picked up the hammer, got in the car, and drove to St. Pete. (13 R 948-53.) He pretended that nothing was wrong when he

got there. (13 R 956.) He was still afraid that Gregg would hurt his loved ones when the police interrogated him. Mr. Martin had never been interrogated before and, pursuant to their assertions, he believed that if he told them what they wanted to hear the case would go away. He thought everything would be okay and that he would get help when he got back to his home area of Clay County. (13 R 961-63.) He explained that when he told the officers that it felt good to get things off his chest, it was because he felt bad about bringing her there. (13 R 973-74.)

Jury selection

In voir dire, the prosecutor asked questions related to prior arrests of the jurors or close friends or family as well as whether the jurors or a close friend or family member had ever been the victim of violent crime.

As to arrests, the prosecutor asked the jury pool the following:

> State: This is a criminal trial and we are proceeding with a first degree murder charge, so if one of y'all has that old second degree murder charge in South Dakota you don't want us to know about we're going to have to ask you about it, okay? I say that half jokingly, but any experiences y'all have had with the – having either been arrested or knowing someone who's been arrested it's pertinent information for us, so understand we're not trying to pry into your business.
>
> What I'm going to do is go row by row through our seven rows and ask you the following four questions, same as before, either you, a close friend or close family member ever been arrested for anything? I don't mean got a parking ticket. I don't mean, you know, didn't renew your tag when you were supposed to. I mean something where someone had to go to jail at least overnight and charged with a crime, okay?

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State: I'm talking about where someone was – you know, went to jail at least overnight, got arrested for – charged with a crime. Whatever happened to it is immaterial. Either yourself, a close friend or a close family member. Again, please, I'm not – we're not trying to pry. This is information we have to have, okay? I hope y'all understand why we're asking that question.

(9 R 228.) Although numerous members of the jury pool revealed a variety of prior arrests and convictions, including DUI's, (e.g. 9 R 231, 233, 239, 240), Juror S remained silent when questioned.

As to violent crime, the prosecutor asked the panel:

State: Okay. Now has anyone here on this panel ever yourself, it's the same sort of thing, close friend, close family member, yourself ever been the victim of a violent crime?

Okay. I don't mean you had your home broken into. I don't mean you had your car windows busted out. I mean [sic] were the victim of a violent crime against yourself, close friend or a close family member. If so, I would ask you to raise your hand.

(9 R 263.) In response to his question, so many hands went up that the prosecutor went row by row, to hear each juror's answer. (9 R 263.) Juror S did not respond.

November 14, 2017 Jury deposition

During his postconviction deposition on November 14, 2017, Juror S admitted to both a DUI and the Sexual Battery arrest, and that he spent a night in jail for both. (PCR 1896-98, 1902-03.) Juror S admitted that he was guilty of both of those crimes. (PCR 1901-02.) After being given the opportunity to review the

types of crimes that the other jurors admitted to, Juror S acknowledged that "I believe that I should have disclosed" the fact that he had been arrested for the DUI and Sexual Battery. (PCR 1890-91.) The juror agreed that "by failing to disclose that [, he was] not honest with the Court." (PCR 1892, 1897.) The juror agreed, that "based on the State's statement, together with what the other jurors were disclosing, that [he] had the obligation to disclose [his] DUI and sexual battery conviction." (PCR 1893.)

In response to a follow up question in his deposition about whether a family members had been arrested for a crime that he did not disclose, Juror S responded, "No. Well, something happened when I was a kid," and he went on to reveal that his grandmother Mary Rowe was arrested and convicted of the murder of his grandfather Elijah Rowe in Duval County when Juror S was around seven years old. (PCR 1808-17, 1893-94, 1905)

Juror S stated that he did not reveal his grandfather's murder by his grandmother because "it was embarrassing" and "I don't talk about it. I didn't want to do that in front of everybody." (PCR 1894.) Juror S acknowledged that he should have also revealed the information about that murder during jury selection, and that the crime still emotionally affects him. (PCR 1894.) Juror S explained that he did not reveal about his family's murder as follows: "That's a little more personal. It rather bothered me. I was close to my grandfather. It was a very

gruesome crime. It was pretty bad." (PCR 1902.) Juror S stated that his grandmother claimed that she acted in self-defense in killing his grandfather, but "later it was proven in trial that she provoked it, and kind of, I guess, staged it where it looked like [self-defense]." (PCR 1904.)

Juror S left out of his deposition testimony that his uncle was also involved in the murder of his grandfather. Rowe (Mary) v. State, 417 So. 2d 981, 982 (Fla. 1982) ("The district court reversed the trial court's order on the basis of its prior decision in *Rowe v. State*, 394 So.2d 1059 (Fla. 1st DCA 1981), a companion case involving Mrs. Rowe's son, Douglas McArthur Rowe."); see State v. Rowe (Douglas); (PCR 1819.)

3.851 evidentiary hearing

Mr. Martin was granted an evidentiary hearing on only two claims: that trial counsel was ineffective in failing to determine that Juror S failed to admit to a prior DUI upon voir dire questioning about criminal convictions; and new evidence that Juror S failed to disclose a prior juvenile adjudication of sexual battery and his grandmother's murder of his grandfather and her subsequent arrest and conviction for that crime.

Juror S

Juror S testified at the evidentiary hearing – he's a grocery clerk at Publix. He was a juror in David Martin's trial. He has a 1992 DUI conviction – he spent

the night in jail for that offense. (PCR 3149.) He was booked and made bail the next morning. He entered a plea of guilty, was on probation for 6 months, paid court costs, and took a DUI course. (PCR 3150.) He was also arrested for a sexual battery in 1985 when he was 17. The victim was many years younger than him, but he doesn't recall how old she was. He spent the night in jail for that, too. He pleaded guilty to that and was probation for 6 months. He pleaded guilty because he was guilty. (PCR 3151.)

Additionally, his grandmother killed his grandfather in 1977 or 1978. His recollection is that she was convicted of second-degree murder and "went to prison for a couple of years." (PCR 3152.) She went to trial. He's still concerned about it. It was a murder trial, like Mr. Martin was on trial for murder. (PCR 3152-53.) It was a gruesome crime – his maternal grandfather was shot 6 times at close range. (PCR 3153.) His grandmother framed the incident as self-defense. His uncle, Douglas Rowe, was also involved. His grandmother implicated him and he spent about a year in prison as well. (PCR 3153.) Juror S is not upset with his grandmother. It still upsets him to talk about it. He agrees he should have disclosed these things in jury selection. (PCR 3154.) He also agrees that when asked about prior offenses by the State Attorney, he should have disclosed his arrests and his close family members arrests. He was not honest during jury selection. He still considers himself an 8 out of 10 in support of the death penalty.

(PCR 3155.)

On cross, Juror S stated that he originally did not recall why he didn't answer the questions in voir dire, but reasoned that he did something wrong because he has now been deposed and had to testify at this hearing. (PCR 3159.) He was 10 years old when his grandmother shot his grandfather. (PCR 3160.) He learned the facts of the crime second-hand. He is very embarrassed by the murder, but opined it had no impact on his deliberations. (PCR 3161.)

On redirect Juror S conceded that he saw new of his grandfather's murder on TV. He is still affected by missing his grandfather. Juror S was his uncle's caretaker when he was dying, and he spoke with his uncle about his grandfather's death. His uncle said he was not there and was not guilty. (PCR 3163.)

Trial counsel, Quentin Till

The defense also called Mr. Martin's trial attorney Quentin Till as a witness. (PCR 3166.) Mr. Till took the lead in making decisions about which perspective jurors to strike. (PCR 3181.) Mr. Till was unaware that Juror S had a DUI at the time of the jury selection. (PCR 3182.) He was not aware that Juror S had an adjudication of delinquency for sexual battery. (PCR 3182.) Mr. Till was unaware that Juror S's grandmother had murdered his grandfather. (PCR 3183.) He was unaware of all of these things until speaking to Mr. Sichta more recently. Since then, Mr. Till has reviewed Juror S's deposition. (PCR 3183.) Mr. Till finds it

hard to believe that Juror S simply overlooked these crimes when asked questions in voir dire. (PCR 3184.) Had Mr. Till been aware Juror S's DUI, Mr. Till would have made a note of it in jury selection. (PCR 3185.) He feels the same about Juror S's failure to disclose the sexual battery adjudication, especially considering the sexual aspects of Mr. Martin's defense. (PCR 3185-86.) Mr. Till also would have liked to know about the murder of his grandfather, especially in light of the fact that he was an 8 out of 10 in favor of the death penalty. (PCR 3187.) Mr. Till would have moved to excuse Juror S based on his multiple dishonest answers and 8 of 10 support of the death penalty. (PCR 3187-88.) He "definitely" would have attempted a cause challenge. (PCR 3188.) Given Juror S's experience with having his grandfather murdered, Mr. Till could "see [Juror S] relating to and being very sympathetic to the victim" in Mr. Martin's case, especially since the victim's mother testified in the guilt and penalty phase. (PCR 3190.) In Mr. Till's mind, had he known these issues with Juror S, "there's four reasons why Mr. [S] more than likely would have been – would have not been sitting on that jury panel." He would have moved for a peremptory challenge if his cause challenge had been denied. (PCR 3194.)

In cross, the state, over defense objection, was allowed to go into Mr. Till's strategy for all of the claims alleged in Mr. Martin's 3.851 motion, despite that the trial court had only granted an evidentiary hearing into the Juror S claims. (PCR

3204-05.)

Mr. Till explained that prior to trial, he sent an investigator to go out to Michael Gregg's place. (PCR 3204-05.) However, he did not present any additional witnesses because "there [were] three people at the crime scene, so, I mean, who else—you know, there were no – there was no audience there." (PCR 3200.) Mr. Till clarified that he probably could have had 20 "sexual perverts" come in and corroborate Mr. Martin's testimony concerning about the atmosphere at Mr. Gregg's compound, however, he didn't want to call a bunch of sex offenders at trial. (PCR 3200.) Mr. Till explained that when trying cases in Clay County, you're dealing with "the most conservative jury panels in the State of Florida." (PCR 3201.) When his suppression motion was denied, and he knew the confession was coming in, he was "leaning towards there was going to be a conviction in the guilt phase." (PCR 3203-04.) Mr. Till believed that the suppression hearing was "very close." (PCR 3205.)

When the state on cross pointed out that there was still a person with a DUI left on the jury, Mr. Till pointed out that it wasn't the DUI that was important, it was the fact that Juror lied about not having one. "It isn't the fact that he had a DUI, like I've explained twice, it's the fact that he lied by not telling us." (PCR 3207, 3208.) Mr. Till explained that regardless of whether Juror S spent 8 hours or 24in jail, "He knows he got convicted of a DUI, he knows he went to jail." (PCR

3208.) Mr. Till explained that he does not have the "manpower" to pull the complete criminal histories of a complete jury panel – he said it's also duplicative of what the State Attorney's Office does. They are provided to the defense by the State Attorney's Office – according to Till "it's been that way for years…you [state attorney] know all about it." (PCR 3213.) Mr. Till doesn't check his own public defender records. (PCR 3215.) Mr. Till explained that to him people who say they are 8 out of 10 in favor of the death penalty believe that "every case is a death penalty case…" An eight in and of itself in Clay County wasn't that unusual. (PCR 3221.) However, those numbers could be grounds for a cause challenge. (PCR 3220.) This particular juror didn't say very much – but if Mr. Till had had the knowledge of the convictions along with his score of 8/10, "I want him off my jury panel." (PCR 3220.)

On re-direct Mr. Till affirmed that he was trying to get a not guilty or guilty of a lesser included in the guilt phase. (PCR 3217-18.)

SUMMARY OF THE ARGUMENTS

ARGUMENT I – Recently discovered evidence of Juror S's dishonesty in voir dire meets the De la Rosa standard "where the omission of the information prevented counsel from making an informed judgment which in all likelihood would have resulted in a peremptory challenge." A new trial is required.

ARGUMENT II – The trial court erred in summarily denying the guilt-phase

ineffective assistance of counsel claims in Ground 2. There is a presumption that evidentiary hearing is necessary for these sufficiently pleaded, factually based capital claims: failing to investigate and present a confession expert in the suppression hearing and at trial; failing to investigate and present additional evidence in the suppression hearing that would have tipped the scales in favor of suppressing the confession; failing to investigate and present a cell phone expert at trial to rebut the state's cell phone evidence and otherwise attack the state's incorrect cell phone testimony; and failure to investigate and present witnesses to support Mr. Martin's trial testimony. This case must be remanded to for an evidentiary hearing on these issues.

ARGUMENT III – The errors in Mr. Martin's trial individually and cumulatively prejudiced his case.

STANDARD OF REVIEW

ARGUMENT I: A trial court's failure to apply the correct legal standard is legal error subject to de novo review. See Geibel v. State, 817 So. 2d 1042, 1045 (Fla. 2d DCA 2002).

ARGUMENT II: Where the circuit court denies 3.851 claims without evidentiary hearing, this Court reviews the circuit court's decision de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling only if the record conclusively shows that the movant is

entitled to no relief. Howell v. State, 109 So. 3d 763, 777 (Fla. 2013).

ARGUMENT III: Where multiple errors are discovered, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007).

ARGUMENT ONE

NEW EVIDENCE EXISTS THAT JUROR S INTENTIONALLY CONCEALED HIS PRIOR DUI AND SEXUAL BATTERY CONVICTIONS, AND FAILED TO INFORM THE PARTIES THAT HIS GRANDMOTHER WAS CONVICTED OF MURDERING HIS GRANDFATHER, RESULTING IN VIOLATIONS OF MR. MARTIN'S RIGHTS TO DUE PROCESS, IMPARTIAL JURY, AND A FAIR TRIAL CONTRARY TO THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The United States Supreme Court has long held that "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). This guarantee did not occur in the present case, and a new trial is required as Mr. Martin's right to be tried by impartial jurors in violation of the Sixth Amendment to the U.S. Constitution, as well as Art 1,§16 of the Florida Constitution.

In his postconviction proceedings, Mr. Martin uncovered newly discovered evidence ("NDE") that a sitting juror [Juror S] failed to disclose critical information relevant to his suitability as a juror in response to direct questions from the prosecutor during voir dire: **that his grandmother and uncle had *murdered* his grandfather when he was ten years old, that the murder was brutal and he still was emotional to this day, that he had an adjudication of delinquency for *sexual battery* as a 17 year old, and that he had a DUI conviction as an adult**.

An NDE claim has two elements: 1) trial counsel was not nor should have

been aware of this information at the time of trial, and 2) the new information is material. See Jones v. State, 709 So.2d 512, 521 (Fla. 1998). The materiality standard is typically governed by whether the new evidence would probably produce an acquittal on re-trial. See, e.g., Id. However, for the specific type of NDE alleged here—juror nondisclosure to direct questioning during voir dire—Florida caselaw has applied a special standard for materiality or prejudice, taken from the civil case of De La Rosa v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995): whether the juror's concealed information was relevant and material to jury service. See Buenoano v. State, 708 So. 2d 941, 952 (Fla. 1998) (evaluating postconviction claim regarding juror's failure to disclose that he had been convicted of involuntary manslaughter in another state under De la Rosa). Under De la Rosa, concealed information is relevant and material "if it is so substantial that, if the facts were known, the defense likely would peremptorily exclude the juror from the jury." Johnston v. State, 63 So. 3d 730 (Fla. 2011) (internal citations omitted) (evaluating Strickland challenge for failing to raise juror's nondisclosure in motion for new trial); see also Buenoano, 219 So. 3d at 825-26 (applying De la Rosa to a postconviction juror misconduct claim though finding that the issue could and should have been raised on direct appeal because the issue was discovered during trial and the juror was removed); Lugo v. State, 2 So. 3d 1, 16-17 (Fla. 2008) (evaluating postconviction juror misconduct claim under both De la

Rosa and Carratelli's actual bias standard, without deciding which standard controls).

The primary error committed by the trial court in denying this claim was in applying the wrong legal standard for the materiality analysis. Instead of making findings on whether the defense "likely would [have] peremptorily exclude[d]" this juror had he known about this substantial new evidence—which trial counsel swore in an affidavit and testimony at the evidentiary hearing that he would have done—the trial court instead attempted to make a speculative outcome-determinative inquiry into whether Juror S's presence on the jury likely affected the verdict, despite Mr. Martin's argument that De la Rosa governed.

This Court's precedent appears to recognize that juror misconduct through nondisclosure creates a unique type of NDE claim that justifies a materiality analysis focused on the effect on voir dire itself, and the ultimate constitution of the jury, rather than the verdict and how juror deliberations might have been affected by the particular juror's presence. Applying the correct standard of law de novo here, it is clear that Mr. Martin carried his burden at the evidentiary hearing in showing that the new information would have been both relevant and material to trial counsel, as required by De la Rosa. Therefore, this Court should reverse the trial court's decision and remand for a new trial in these very serious nondisclosures by Juror S.

I. Applicable law

Because Mr. Martin has presented this issue outside of the 1 year 3.851 deadline, he must demonstrate that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence…" Fla. R. Crim. P. 3.851(d)(2)(A). This requirement is largely the same as prong one under Jones, 709 So.2d at 521.

Then, after establishing that he is duly diligent under Fla. R. Crim. P. 3.851(b)(2)(A), Mr. Martin must demonstrate under De la Rosa, that

(1) "the complaining party must establish that the information is relevant and material to jury service in the case,"

(2) "the juror concealed the information during questioning," and

(3) "the failure to disclose the information was not attributable to the complaining party's lack of diligence."

De la Rosa, 659 So. 2d at 241; see Bolling v. State, 61 So. 3d 419, 419-20 (Fla. 1st DCA 2011) ("While *De La Rosa* is a civil case, the supreme court routinely applies its three-part test in criminal cases. *See, e.g., Murray v. State*, 3 So. 3d 1108, 1121-22 (Fla. 2009)).

Mr. Martin will address the necessary considerations under Fla. R. Crim. P. 3.851(b)(2)(A) (due diligence) and De la Rosa (due diligence) (juror concealment) (relevant and material) in turn.

II. Due diligence

Fla. R. Crim. P. 3.851(b)(2)(A) concerning postconviction claims brought outside the 1 year window, Jones, and the De la Rosa standard all have a due diligence requirement.

The trial court correctly found that Mr. Martin was duly diligent in presenting his claim:

> [T]he trial court, Defendant, and Defendant's counsel did not know and could not have known, with the exercise of due diligence, or Juror [S]'s delinquency adjudication for sexual battery, that his grandmother was convicted of murdering his grandfather, or that his uncle was somewhat involved in his grandfather's murder, absent disclosure of some of this information from Juror [S].

(PCR 1957.) Indeed, as apparently recognized by the trial court, a defendant's due diligence with respect to undisclosed information should be measured from the date when the defendant is first made aware of it. See e.g., Allen v. State, 854 So. 2d 1255, 1259 (Fla. 2003) ("The defendant's duty to exercise due diligence in reviewing Brady material applies only after the State discloses it."); Roberts v. Tejada, 814 So. 2d 334, 342 (Fla. 2002) ("Lawyers representing clients in litigation are entitled to ask, and receive truthful and complete responses to, the relevant questions which they pose to prospective jurors.").

Here, the parties in voir dire specifically asked the potential jurors whether they had ever been arrested and whether they, a close friend or family member, had ever been the victim of violent crime:

As to prior arrests, the prosecutor stated:

State: This is a criminal trial and we are proceeding with a first degree murder charge, so if one of y'all has that old second degree murder charge in South Dakota you don't want us to know about we're going to have to ask you about it, okay? I say that half jokingly, but any experiences y'all have had with the – having either been arrested or knowing someone who's been arrested it's pertinent information for us, so understand we're not trying to pry into your business.

What I'm going to do is go row by row through our seven rows and ask you the following four questions, same as before, either you, a close friend or close family member ever been arrested for anything? I don't mean got a parking ticket. I don't mean, you know, didn't renew your tag when you were supposed to. I mean something where someone had to go to jail at least overnight and charged with a crime, okay?

***

State: I'm talking about where someone was – you know, went to jail at least overnight, got arrested for – charged with a crime. Whatever happened to it is immaterial. Either yourself, a close friend or a close family member. Again, please, I'm not – we're not trying to pry. This is information we have to have, okay? I hope y'all understand why we're asking that question.

(9 R 228.) Numerous potential jurors raised their hands in response to these questions. (e.g. 9 R 231, 233, 239, 240.) Despite these direct questions and answers given by people with similar offenses to Juror S, he failed to raise his hand.

As to violent crime, the prosecutor asked the panel:

State: Okay. Now has anyone here on this panel ever yourself, it's the same sort of thing, close friend, close family member, yourself ever been the victim of a violent crime?

Okay. I don't mean you had your home broken into. I don't mean you had your car windows busted out. I mean [sic] were

> the victim of a violent crime against yourself, close friend or a close family member. If so, I would ask you to raise your hand.

(9 R 263.)

Where these straightforward questions were asked of the jurors, and numerous venire people raised their hands with respect to each question giving examples similar to Juror S's crimes and experience with violent crime, Mr. Martin was duly diligent in securing this information from the jurors. As observed by this Court in Loftin v. Wilson, 67 So. 2d 185 (Fla. 1953):

> It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause.

Id. Where these questions were asked in voir dire, Mr. Martin was entitled to rely on Juror S's failure to respond without pressing the matter further. See Tejada, 814 So. 2d at 342.

Mr. Martin only learned about Juror S's sexual battery adjudication when the state **finally revealed this sealed information in the days prior to Juror S's November 14, 2017 deposition**. Then Juror S confirmed his adjudication of sexual battery of a child under 12 when he was 17 years old, and revealed the horrific circumstances of his grandfather's murder during the November 14 deposition. (PCR 1875). Mr. Martin presented a postconviction claim addressing Juror S's disclosures just a few days later on December 22, 2017 upon leave of the

trial court. (PCR 1749.) He could not have presented this misconduct at an earlier date as he had no way of knowing about it. See e.g. Allen, 854 So. 2d at 1259, Tejada, 814 So. 2d at 342. As such, the trial court correctly determined that Mr. Martin was duly diligent in presenting the sexual battery adjudication and grandfather's murder, and this Court should determine that the due diligence requirement of Fla. R. Crim. P. 3.851(b)(2)(A), Jones, and De la Rosa is satisfied.

III. The juror concealed the information

Juror S concealed from the Court and the attorneys during jury selection his adjudication of delinquency for his sexual battery of a girl under 12 years of age when he was 17, a DUI, and the circumstances surrounding his grandmother and uncle's conviction for the shooting murder of his grandfather.[3]

As explained above, the prosecutor asked clear, straightforward questions in voir dire about the potential jurors' prior arrests and convictions and whether they or a close friend for family member had ever been the victim of a violent crime. (9 R 228.) Numerous potential jurors raised their hands in response to questions concerning prior arrests, several responding that they or their family members had DUIs; that their daughter stabbed someone in self-defense, and got convicted of carrying a concealed weapon (9 R 231, 233, 239), people reported drug charges (9

[3] In Mr. Martin's 3.851 claim regarding trial counsel's ineffectiveness in failing to discover that Juror S had a DUI conviction and file a motion for new trial on that basis, the trial court properly found that Juror S concealed the information concerning the DUI. (PCR 1950.)

R 233, 238), family crimes of violence (9 R 235), disorderly conduct (9 R 238), arson (9 R 239), one had a nephew "locked up for child molestation" (9 R 240), and so forth. Despite these direct questions and answers given by people with similar offenses that Juror S should have reported, he failed to raise his hand.

The prosecutor also asked specific questions whether they or someone they were close to was the victim of a violent crime. (9 R 263.) In response to his question, enough hands went up that the prosecutor indicated that he would go row by row, to hear each juror's answer. (9 R 263.) Jurors reported crimes involving rape to a juror herself, a juror's stepdaughter being molested, a juror being stabbed with a bottle, a juror's friend being murdered 10 years prior, a friend of a juror's husband was murdered in California, a juror's coworker was murdered by her boyfriend, a juror was robbed, a juror was raped, a juror's sister-in-law was murdered by her husband, a juror's daughter was shot but survived, a juror's brother was robbed, and a juror was robbed at the bank where he worked. (9 R 263-73.) Juror S never reported that his grandmother, and apparently his uncle, were arrested and convicted of the capital murder of his grandfather, a horrific offense involving a close range shooting. (PCR 1875.)

During his deposition on November 14, 2017, Juror S admitted that he had been arrested for both a DUI and sexual battery and spent the night in jail for both offenses. (PCR 1896-98, 1902-03.) He conceded his actual guilt to those offenses.

(PCR 1901-1902.) Juror S confessed "I should have disclosed" the fact that he had been arrested for the DUI and sexual battery. (PCR 1891-92.) He agreed that "by failing to disclose that [he was] not honest with the Court." (PCR 1892, 1897.) Juror S agreed, "based on the State's statement, together with what the other jurors were disclosing, that [he] had the obligation to disclose [his] DUI and sexual battery conviction." (PCR 1893.)

In response to a follow up question in his deposition about whether a family members had been arrested for a crime that he did not disclose, Juror S admitted that he also failed to disclose that this grandmother, Mary Rowe, was arrested and convicted of the murder of his grandfather Elijah Rowe in Duval County when Juror S was around seven years old. (PCR 1808-17, 1893-94, 1905)

Juror S stated that he did not reveal his grandfather's murder by his grandmother because "it was embarrassing" and "I don't talk about it. I didn't want to do that in front of everybody." (PCR 1894.) Juror S acknowledged that he should have revealed the information about that murder during jury selection, and that the crime still emotionally affects him. (PCR 1894.) Juror S explained that he did not reveal about his family's murder as follows: "That's a little more personal. It rather bothered me. I was close to my grandfather. It was a very gruesome crime. It was pretty bad." (PCR 1902.) Juror S stated that his grandmother claimed that she acted in self-defense in killing his grandfather, but "later it was

proven in trial that she provoked it, and kind of, I guess, staged it where it looked like [self-defense]." (PCR 1904.)

Further, and this was not even disclosed by the juror in his deposition, a review of his grandmother's appeal to the Florida Supreme Court regarding bail revealed additional information: that Juror S's uncle was also convicted as a co-defendant of this capital murder. Rowe, 417 So. 2d at 982 ("The district court reversed the trial court's order on the basis of its prior decision in *Rowe v. State*, 394 So.2d 1059 (Fla. 1st DCA 1981), a companion case involving Mrs. Rowe's son, Douglas McArthur Rowe."); see State v. Rowe (Douglas), Duval County, 16-1979-CF-007672-AXXX-MA; (Exhibit D (Duval County clerk's docket).) When questioned about this during the evidentiary hearing, Juror S explained that his uncle told to him he was not actually involved in the murder, and Juror S believed him.

Juror S reiterated much of his above-deposition testimony at the 3.851 evidentiary hearing on this issue, admitting again that he was not honest during jury selection. (PCR 3149-63, 3154-55).

In Tripp v. State, the 4th DCA found concealment by a juror, reasoning as follows:

> Here, the trial judge asked all the jurors whether any of them knew defendant or his family. The question is not reasonably susceptible to mistake or misinterpretation. Non-disclosure of this kind of relevant and material information is reasonably capable of affecting a decision

> to exercise peremptory challenges even if the juror is not disqualified for cause. And as defendant notes, the juror's failure to disclose his knowledge of defendant's brother was reasonably material to the exercise of a peremptory or cause challenge against Johnson.

874 So. 2d 732, 733 (Fla. 4th DCA 2004). Further, a juror's nondisclosure "need not be ***intentional*** to constitute concealment." Tejada, 814 So. 2d 334 (emphasis added). Thus, it is not necessary that Mr. Martin prove that Juror S intentionally was trying to mislead the parties during voir dire or intending to do anything wrong or improper. However, it is clear from the record this was intentional concealment, as juror S admitted. Although Juror S has stated multiple times in postconviction that he should have disclosed these things and that it was dishonest of him not to (PCR 1891-93, 1897), Mr. Martin only needs to show that Juror S was presented with a clear question and that he failed to disclose the information, and that certainly occurred here.

Upon review of the transcript of jury selection, combined with Juror S's concession during his deposition and at evidentiary hearing, that he failed to disclose this information even though he knew he should have, it is clear that the juror concealed this information upon straightforward questions by the prosecutor. Thus, this element of De la Rosa is definitively satisfied.

IV. The information was material and relevant to deciding whether to use a peremptory strike against the juror.

The final De la Rosa element is whether the information concealed by Juror

S was material and relevant to deciding whether the defense team would use a peremptory strike against him. There is no question about this element being met here as well, given the gravity of the undisclosed facts about Juror S discovered in postconviction. Given the facts of Mr. Martin's case, these three pieces of critical information were absolutely material and relevant to that determination. There is no requirement—as there is in a Strickland claim that counsel was ineffective for failing to strike a juror based on comments that were made during voir dire—that Mr. Martin show that Juror S was actually biased against him. In analyzing an appeal based on a motion for new trial, the 2d DCA made the following observation:

> [J]uror nondisclosure of facts material to the juror's service in the case is likely to result in service by a juror who is biased or prejudiced in fact. Under these circumstances, *a lesser showing for granting a new trial is warranted*. Thus, if the other two parts of the three-part test are shown, the complaining party need only establish the materiality of the undisclosed information to obtain a new trial, not bias or prejudice in fact.

Companioni v. City of Tampa, 958 So. 2d 404, 416 (Fla. 2d DCA 2007); see also Johnston, 63 So. 3d at 738-39 (materiality exists "where the omission of the information prevented counsel from making an informed judgment—which would in all likelihood have resulted in a peremptory challenge"); Murray v. State, 3 So. 2d 1108, 1121-22 (Fla. 2009). Further, if a defendant or his counsel is misled by false answers in voir dire, there is no need to show that the juror's prejudice or bias

produced an unjust result in the outcome. Mitchell v. State, 458 So. 2d 819, 821 (Fla. 1 DCA 1984); see also Blaylock v. State, 537 So. 2d 1103, 1107 (Fla. 3d DCA 1988). The Court in Mitchell expanded De la Rosa's three elements into five, which is illuminating in considering the relevant and material prong here:

> (1) the question propounded to the jury was straightforward and not reasonably susceptible to misinterpretation; (2) the juror gave an untruthful answer; (3) the inquiry concerned material and relevant matter to which counsel may reasonably have been expected to give substantial weight in the exercise of peremptory challenges; (4) there were peremptory challenges remaining which counsel would have exercised at the time the question was asked; and (5) counsel represents that he or she would have peremptorily excused the juror had the juror truthfully responded.

458 So. 2d at 821.

Points one and two have already been addressed above in the first two prongs of De la Rosa. As to point four, counsel had all of his peremptory strikes available at the time of Juror S nondisclosure of the pertinent information, and he also had a peremptory strike remaining when he accepted the jury panel, including Juror S. (9 R 340-42.)

As sworn to in an affidavit and testified to by trial counsel Quentin Till, this information would have been essential for him to have known, and, most importantly, had he been aware of it, he would have used his final peremptory strike to have removed Juror S from Mr. Martin's jury. As Mr. Till explained in his affidavit:

As co-counsel for Mr. Martin, I was not aware of any of above facts [related to the DUI, Sexual Battery, or the family murder] concerning Mr. [S]. Nor was I provided these facts by the prosecution. Had I known about Mr. [S]'s deceitfulness during jury selection I would have moved for a cause strike and in my experience, it would have been granted because Mr. [S] was required to disclose these facts. Jurors that fail to disclose serious offenses like these impede the integrity of the case and the judicial system. Because of [S]'s failure to disclose these facts, I was unable to make an accurate determination of what jurors to exercise our peremptory challenges on. Further, in reading Mr. [S]'s deposition it was apparent to me he was still emotionally scarred from the murder of his grandfather by his grandmother and cared for his grandfather very much. This emotional attachment to his grandfather, the victim, over three decades later, would have caused me great concern that he would not be able to give Mr. Martin a fair trial in his own murder case. This is especially so considering Mr. [S]'s concession his grandfather's homicide bothered him, it was personal, he was close to his grandfather, and it was a very gruesome crime. Further, from reviewing the Florida Supreme Court opinion in Juror [S]'s grandmother Mary Rowe's case, Ms. Rowe's son was also convicted of first-degree murder as a co-defendant of Ms. Rowe and sentenced to life—a fact which Juror [S] did not disclose even in the deposition. Again, Juror [S] also failed to disclose he did not want to be in this jury selection, which is yet another red flag that he was unfit and biased to be a juror in this death penalty case. The parties have the right to truthful information in making a judgment whether to strike a particular juror, and that did not happen in this case as this juror failed to disclose material facts which included a serious crime he admitted to and a serious crime (which happens to be the same crime Mr. Martin was accused of committing) committed by a close family member against another close family member.

Had the cause challenge been denied, I would have exercised my peremptory strike on this juror. Out of all the jurors, Mr. [S]'s repeated deception, emotional connection to his grandfather's homicide, admission to rape, and reluctance to serve as a juror would

> have made his excusal from this case priority number one. Not only did he deceive the parties and the Court which causes me great concern as I expressed in the above paragraph, he also was an 8 out of 10 on the death penalty scale. Juror [S]'s repeated failures to disclose serious crimes by him and his family were relevant and material to Mr. Martin's capital trial, and I would have given substantial weight to his deceitfulness and made it a priority to exclude him from serving from this jury. Further, had Mr. [S] disclosed this information during jury selection, I would have struck him for the same reasons. Further, had I known that Juror [S] had committed and been adjudicated of a sexual battery as a juvenile, this would have given me particular concern, given my knowledge that Mr. Martin would testify at trial to incidents surrounding the homicide that involved an act of sexual violence of a homosexual nature. An emotionally scarred juror who has an extreme lack of candor in failing to disclose a previous adjudication for a sexual battery and the loss of his grandfather after being murdered by his grandmother would cause any attorney grave concern about the juror's ability to be fair and impartial in a capital death penalty trial. This is especially so considering the victim in Mr. Martin's case was beaten to death and the evidence at trial would have been as similarly gruesome to what Mr. [S] described his own grandfather's death as being.
>
> Had I discovered these facts about Mr. [S] prior to Mr. Martin's sentencing, I also would have filed a Motion for New trial based on his misconduct in jury selection.

(PCR 1838-40.) Further, Mr. Till testified in evidentiary hearing that he would have moved to excuse Juror S based on his multiple dishonest answers and 8 of 10 support of the death penalty. (PCR 3187-88.) He "definitely" would have attempted a cause challenge. (PCR 3188.) Given Juror S's experience with having his grandfather murdered, Mr. Till could "see [Juror S] relating to and being very sympathetic to the victim" in Mr. Martin's case, especially since her mother

testified in the guilt and penalty phase. (PCR 3190.) In Mr. Till's mind, had he known these issues with Juror S, "there's four reasons why Mr. [S] more than likely would have been – would have not been sitting on that jury panel." He would have moved for a peremptory challenge if his cause challenge had been denied. (PCR 3194.)

Mr. Till's affidavit and testimony explain that Till's decision-making process was hindered during jury selection by Juror [S]'s nondisclosure, and this satisfies the prejudice prong of newly discovered evidence.

Similarly, in Mitchell, a prospective juror answered in the negative a question concerning having family members who worked as correctional officers. 458 So. 2d at 820-21 (Fla. 1 DCA 1984). In fact, she did have a nephew who worked as a correctional officer in the county. Id. When confronted with this information after the trial, she said that she had misunderstood, thinking that the question referred only to immediate family. Id. She assured the court that her nephew's employment had no impact on her deliberations or ultimate opinion in the trial. Id. at 820. Defense counsel admitted that although he had used all of his peremptory challenges in the jury selection process, he still had challenges remaining when the offending juror's number was reached. Id. He said that had she answered truthfully, he would have likely used a challenge to dismiss her. Id. The court focused the inquiry regarding counsel's effectiveness to hold that "the

question and negative answer being both clear and straightforward, it was not incumbent upon defense counsel to explore the topic further . . . ." Id. at 821. The court reversed and remanded for a new trial.

Juror S's contention during his deposition that he did not ***believe*** that these important nondisclosed facts affected his decision-making process in Mr. Martin's conviction and sentence is irrelevant to whether Mr. Martin is entitled to a new trial here. Rather, the focus must be on whether "the omission of the information prevented counsel [Till] from making an informed judgment—which would in all likelihood have resulted in a peremptory challenge." Johnston, 63 So. 3d at 738-39. In light of Mr. Till's well-reasoned affidavit and testimony, there is clarity here that he in fact would have used the peremptory strike against Juror S, had he known this information that has only now come to light. See also Tripp, 874 So. 2d at 734 (reversing the trial court's denial of a new trial based on juror's nondisclosure of his acquaintance with the defendant's brother, and remanding for an evidentiary hearing and juror interviews).

V. The trial court applied the wrong standard

Mr. Martin has consistently argued that a juror's belatedly disclosed conduct (which satisfies the due diligence requirement of Fla. R. Crim. P. 3.851(d)(2)(A) and Jones prong 1) amounted to juror misconduct under De la Rosa.

Nevertheless, the trial court denied this claim finding that the appropriate

materiality standard for the new evidence concerning the juror's misconduct was Jones – that Mr. Martin must establish that the new evidence would probably produce an acquittal on retrial. (PCR 1957.) This finding was in error as Jones' second prong is not the standard for juror misconduct claims. Instead, Mr. Martin must demonstrate De la Rosa materiality -- "that the information is relevant and material to jury service in the case." De La Rosa 659 So. 2d at 241.

This Court has consistently applied the De la Rosa in postconviction. In Buenoano, a defendant alleged, beyond the 3.850 time limit, that she was entitled to relief under De la Rosa because it was discovered that a juror failed to disclose that she was convicted of involuntary manslaughter in another state. Buenoano, 708 So. 2d at 952. This Court reasoned that because this juror had, in fact, answered affirmatively on the jury form when asked whether she had any prior convictions, the defendant was not duly diligent in presenting this claim. Id. However, the Court did not find that De la Rosa was inapplicable to this newly discovered juror misconduct claim. Id.

Further in Braddy, this Court applied De la Rosa to a postconviction juror misconduct claim, although it found in that case that the issue could and should have been raised on direct appeal because the issue was discovered during trial and the juror was removed. Braddy, 219 So. 3d at 825-26. Additionally, in Lugo, where the defendant argued that his juror misconduct claim should be evaluated

under De la Rosa and the state argued that prejudice must be determined under Carratelli, this court conducted analyses under both Carratelli and De la Rosa, without deciding which standard controls. Lugo, 2 So. 3d at 16-17.

It would be inappropriate to hold defendants to a Jones or Carratelli prejudice/materiality standard here where Mr. Martin has demonstrated that, through no fault of his own, a juror on his panel failed to reveal two serious arrests and that his grandmother was convicted and sentenced for shooting his grandfather, a person Juror S was very close to. Due to Juror S's misconduct in failing to reveal key factors affecting his ability to serve, Mr. Martin was deprived of the right to truthful information to make a judgment as to a legal cause for challenge the right to exercise a peremptory challenge. Mitchell, 458 So. 2d at 821. Unlike the situation here, in the cases where this Court has applied an "actual bias" standard, the fault lie with the defendant or his attorney for failing to strike a juror. Carratelli v. State, 961 So. 2d 312, 320 (Fla. 2007); Mosley v. State, 209 So. 3d 1248 (Fla. 2016).

We know that application of the De la Rosa prejudice/materiality standard is appropriate given this Court's treatment of successive postconviction Giglio and Brady claims. Like Brady and Giglio, a De la Rosa claim addresses a problem not attributable to the defendant or his attorney: obviously, a Brady the claim involves a state discovery violation; a Giglio claim addresses the state's failure to correct

false testimony; and a De la Rosa claim addresses juror misconduct that was unknown to the defendant at trial. In each of these situations, the defendant enjoys a somewhat reduced prejudice threshold because it was not his fault that another party failed to disclose something critical to his case without his knowledge. See McCauslin v. O'Conner, 985 So. 2d 558, 560 (5th Cir. 2008) ("Trial counsel and their clients are entitled to assume that a prospective juror will truthfully answer the questions posed by the court or by the parties' counsel").

When defendants allege Brady or Giglio issues in successive postconviction motions, this Court requires due diligence in presenting the claim, presumably under Fla. R. Crim. P. 3.851(d)(2)(A)); then, the court goes on to evaluate the claim under its respective materiality standard under Brady or Giglio. This court does not evaluate the materiality of belated postconviction Brady and Giglio claims under Jones' prong II. See Rivera v. State, 187 So. 3d 822, 835 (Fla. 2015) (finding that defendant failed to establish due diligence in his successive 3.850 motion alleging new Brady and Gilgio claims, but addressing them on the merits, nonetheless, and evaluating them under their respective standards, not a newly discovered evidence standard); Johnson v. State, 44 So. 3d 51, 72 (Fla. 2010) (finding that the defendant was duly diligent in presenting the Giglio claim in his successive 3.851 motion, and applying the Giglio materiality standard to grant a new penalty phase).

Based on the above reasoning, it is clear that the trial court's reliance on Foster in finding that Mr. Martin's claim must be considered under Jones' second prong is misplaced. (PCF 1957.) In Foster, the appellant made a cursory juror claim based on a juror's single post-trial comment to a book author that the photographs shown in court were "more detailed than what was in the paper." Foster v. State, 132 So. 3d 40, 64 (Fla. 2013). Mr. Foster failed to adequately articulate a claim of relief and this Court indicated that it did not know what type of claim Mr. Foster was alleging. Id. at 65. ("Foster fails to make clear whether he is raising a newly discovered evidence claim or whether he was seeking appellate review of the trial court's denial of his motion to interview jurors.") Indeed, both the trial court and this Court determined that the claim should be summarily denied because appellate failed to articulate what, exactly, the juror supposedly did wrong. Id. ("Even if she mentally noted during trial that the trial photographs showed more than the photographs in the newspaper, such does not indicate that she relied on evidence outside of court or was not fair and impartial—or most importantly, that she lied during voir dire when she said she thought she could be fair. Finally, if she made those mental comparisons during deliberations, such would inhere in the verdict and her mental considerations are not subject to challenge.") Where the Foster defendant barely raised any cognizable issue, and he never alleged that the issue was one of juror misconduct

to be evaluated under De la Rosa, this cannot be a considered a controlling case for whether De la Rosa applies to Mr. Martin's case.

VI. Conclusion

In conclusion, the trial court's finding that Mr. Martin must establish, under Jones', that the new information concerning Juror S would "probably produce an acquittal on retrial" is incorrect. Mr. Martin has established in postconviction that Juror S concealed two convictions and his grandmother's murder of his grandfather with a gun at point blank range, when specifically questioned about personal and family experiences with both prior convictions and violent crime. Loftin, 67 So. 2d at 192 ("full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause.") He further demonstrated, through trial counsel's testimony and affidavit that Juror S would have been removed either for cause or with a peremptory challenge had counsel been aware of the concealed factors.

Under these circumstances, Mr. Martin has established the basis for relief under De la Rosa and a new trial is required. See Tejada, 814 So. 2d at 342 (During voir dire, potential jurors have a "duty… to make full and truthful answers…neither falsely stating any fact, nor concealing any material matter.")(quoting Loftin, 67 So. 2d at 192).

ARGUMENT TWO

THE TRIAL COURT ERRED IN SUMMARILY DENYING THE MAJORITY OF MR. MARTIN'S GUILT PHASE CLAIMS WITHOUT AN EVIDENTIARY HEARING, RESULTING IN VIOLATIONS OF MR. MARTIN'S DUE PROCESS RIGHTS AND RIGHT TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL CONTRARY TO THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Mr. Martin submitted four ineffective assistance of counsel claims under Strickland v. Washington, 466 U.S. 668 (1984) in ground one of his 3.851 motion:[4] 1) failure to retain and present testimony of a confession expert in the suppression hearing and at trial; 2) failure to present adequate evidence in support of the suppression motion; 3) failure to object to improper cell phone testimony and retain an independent cell phone expert; 4) and failure to investigate and present evidence in support of Mr. Martin's trial testimony. (PCR 546.)

Although the trial court apparently found these claims sufficiently pleaded, it did not grant an evidentiary hearing any of them. (PCR 1939, 1941, 1943, 1945.) This was in spite of this Court's repeated instructions that trial courts should hold evidentiary hearings on claims such as these, pursuant to "this Court's long-time policy establishing a presumption in favor of holding evidentiary hearings." See Rivera v. State, 995 So. 2d 191, 197 n.2 (Fla. 2008). Evidentiary hearings should

[4] The claims were stylistically formatted as sub-claims of an umbrella "ineffective assistance of counsel in guilt phase" claim. (PCR 1449.)

be granted, where, as here, the claims were sufficiently pleaded, required factual development, and were not refuted by the record. See Fla. R. Crim. P. 3.851(f)(5)(A)(i)(requiring an evidentiary hearing on all initial postconviction claims requiring a factual determination); see also Mordenti v. State, 711 So. 2d 30, 33 (Fla. 1998) (Wells, J. concurring) (Expressing a preference that evidentiary hearings are granted on a fact-based 3.851 postconviction proceedings.).

I. Relevant law

Where the trial court has summary denied Mr. Martin's claims without an evidentiary hearing, this Court must accept Mr. Martin's allegations "as true" unless they refuted by the record. See Gore v. State, 91 So. 3d 769, 774 (Fla. 2012)(quoting Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009)) cert denied, 132 S. Ct. 1904, 182 L. Ed. 2d 661 (2012).

This Court has "encouraged courts to liberally allow" an evidentiary hearing "on timely raised claims that are factually based and commonly require a hearing." See Rivera, 995 So. 2d at 197 n.2 (emphasis supplied). This Court has also reminded circuit courts "of the **critical importance of evidentiary hearings in death penalty cases on issues that require factual development**." Jackson v. State, 147 So. 3d 469 (Fla. 2014) (emphasis supplied). R. 3.851 itself contemplates that an evidentiary hearing "shall" be scheduled for all claims "requiring factual determination." Fla. R. Crim. P. 3.851(f)(5)(A) ("the trial court **shall**: (i) schedule

an evidentiary hearing, to be held within 150 days, on claims listed by the defendant as requiring a factual determination") (emphasis added).

In the present case, the trial court's order handicapped Mr. Martin's capital collateral litigation, where he was unable to factually demonstrate entitlement to relief. See Cherry v. State, 659 So. 2d 1069, 1074 (Fla. 1995) (Remanding for an evidentiary hearing based upon the cumulative effect of several ineffective assistance of counsel claims). As a result of the lower court's order, Mr. Martin's due process rights were denied as he was prohibited a full and fair postconviction hearing in his death penalty case. See Evitts v. Lucey, 469 U.S. 387, 405 (1985) (Due process concerns are involved when States "set up a system of appeals as of right but had refused to offer each Defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal Protection concerns are also implicated when the State treats a class of defendants, like indigent ones, differently for purposes of offering them a meaningful appeal.).

II. The Summarily Denied Claims

A. Ground 2, sub-claim 1: Trial counsel was deficient in failing to retain a confession expert to testify in Mr. Martin's suppression hearing and at trial, resulting in prejudice where the outcome of Mr. Martin's trial would have been different but-for counsel's error

Mr. Martin has consistently alleged that the confession in his case was involuntary in that it was the result of improper police tactics such as threats,

promises, coercive tactics, and manipulation, in combination with his age, drug use, and lack of sleep. Trial counsel, noting the viability of this defense, filed a suppression motion upon the request of his client. However, trial counsel utterly failed to present adequate information in support of that motion – the focus was almost entirely on whether the police tactics were coercive, while largely ignoring a plentitude of mental health and environmental factors suggesting that Mr. Martin was particularly susceptible to coercion. As a result, the suppression motion was denied by the trial court, and Mr. Martin's conviction and sentence was upheld by this Court on direct appeal, despite that it was a close call. In denying relief on Mr. Martin's suppression issue on direct appeal, this Court stated:

> [S]ome of the techniques the detectives employed walked the line that separates permissible from impermissible interview tactics, and we, as a result, note that this case **presents the very outer limit as to what tactics law enforcement may employ when performing a custodial interrogation**.

Martin v. State, 107 So. 3d 281, 298 (Fla. 2012)(Emphasis supplied).

Had trial counsel performed reasonably at the suppression hearing and presented the *other* type of information that is necessary and relevant to a totality of the circumstances voluntariness analysis – the abundance of mental and environmental factors present at the time of the confession – instead of merely cross-examining the interrogating officer, there reasonable probability that the trial court and this Court would have reasoned that his confession was involuntary and

the scales would have tipped in Mr. Martin's favor.

One of the areas trial counsel failed to adequately explore, and the focus of this sub-claim, was the presentation of a confession expert at the suppression hearing and at trial in support of Mr. Martin's position that the confession was involuntary. Such an expert would have explained the concept of involuntary confessions to the judge and jury, evaluated Mr. Martin, and testified about his particularly susceptibility to the officer's coercive tactics given concerns such as his lack of sleep, drug abuse, age, lack of experience, and lack of education. (PCR 1461-62.)

In summarily denying relief on this claim, the trial court reasoned: "Defendant's contention that a confession expert would have changed the Court's ruling at the suppression hearing is a conclusory statement and fails to demonstrate prejudice." (PCR 1936.) This finding of the trial court is erroneous in several important respects.

First, all that Mr. Martin is required to do in his 3.851 claim is to sufficiently plead it. To sufficiently plead a 3.851 claim, the claim must include:

> (A) a description of the judgment and sentence under attack and the court that rendered the same;
> (B) a statement of each issue raised on appeal and the disposition thereof;
> (C) the nature of the relief sought;
> **(D) a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought**

Fla. R. Crim. P. 3.851(e)(1) (emphasis added). There is no requirement that a

defendant **prove** his claim in pleading the 3.851 claim – that is what the evidentiary hearing is for. See Roush v. State, 468 So. 2d 1103, 1104 (Fla. 1st DCA 1985)("We therefore remand for an evidentiary hearing **so that appellant may have an opportunity to prove the allegations of his motion and to prove, if he can**, **that the allegedly deficient conduct** on the part of counsel was so substantial that there was a reasonable probability that it affected the outcome of the trial) (emphasis added). A factual determination is necessary in this case to hear what the confession expert would have offered at the suppression hearing and at trial; further, a factual determination as to counsel's rationale or lack thereof for failing to consult with a confession expert is necessary. Thus, an evidentiary hearing is required. Fla. R. Crim. P. 3.851(f)(5)(A).

Second, Mr. Martin did not merely "contend" that a "confession expert would have changed the Court's ruling…" Instead, Mr. Martin specifically explained that the evidence presented in support of Mr. Martin's motion to suppress was virtually non-existent, comprising only of cross-examination of one of the interviewing officers. Mr. Martin also explained, with specificity, what a confession expert could have testified if presented at the suppression hearing:

> Had counsel presented a confession expert at the suppression hearing and at trial to explain that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of Mr. Martin's case, in addition to opining whether Mr. Martin's case gives indices of a possible false confession, there is a reasonable probability that the confession would have been suppressed.

* * *

> Had this Court, through the testimony of a confession expert, been informed how and why countless comments used by the detectives were coercive in nature and learned that given the circumstances of Mr. Martin's mental state, fatigue, psychiatric background, and history of drug abuse leading right up to the interrogation, there are many factors at play which support the existence of a false confession, there is a reasonable probability that the Court would have suppressed Mr. Martin's confession.

(PCR 1460, 1463.) Mr. Martin has satisfied the pleading requirements.

To the extent that the trial court's finding that Mr. Martin's prejudice showing was "conclusory" amounted to a finding that it was "insufficiently pleaded" the trial court was required to give Mr. Martin an opportunity to amend the claim to bring it to facial sufficiency. Spera v. State, 971 So. 2d 754 (Fla. 2007).

Turning to the trial court's findings on the merits – the trial court's finding that suppression would not have been warranted under a totality of the circumstances analysis is premature and conclusory where the trial court has **never heard from a confession expert**, thus doesn't know what the testimony would be or the weight the testimony would be given. (PCR 1937); see Atwater v. State, 788 So. 2d 223, 238 (Fla. 2001) ("Without an evidentiary hearing, it is impossible to state that the evidence Atwater sought to present was merely cumulative … Without an evidentiary hearing, we do not know the potential qualitative effect of this evidence….")

The trial court also appears to say that it is unnecessary to hear from a confession expert because no amount of evidence could ever convince this judge that the totality of the circumstances weighs in favor of suppression. However, this is tantamount to improper prejudgment of an issue. See e.g. Weible v. State, 761 So. 2d 469, 473 (Fla. 4th DCA 2000)("The error here is that the second trial judge refused to consider the Defendant's evidence and imposed a sentence after hearing only half of the evidence. Prejudging cases in such a way is improper."); Gonzalez v. Goldstein, 633 So. 2d 1183, 1184 (Fla. 4th DCA 1994) (announcing an intention to make a specific ruling prior to evidence or argument "is the paradigm of judicial bias and prejudice").

Furthermore, the conclusion that Dr. Krop could have been called to talk about Mr. Martin's confession to him to rebut a confession expert is also incorrect. (PCR 1937.) In this claim, Mr. Martin is alleging that his confession was involuntary. A voluntary confession **to Dr. Krop** is irrelevant to whether Mr. Martin confession to law enforcement was voluntary. Dr. Krop evaluated Mr. Martin for the purpose of establishing mitigation – when Mr. Martin gave that confession, he knew the evaluation was subject to HIPAA confidentiality and could not be used against him unless he used the evaluation in advancing his mitigation case. Thus, it would not be admissible for the purpose of refuting Mr. Martin's suppression issue. Compare with State v. Stein, 641 P.2d 1148, 1150

(Ore. 1982) (finding confession to state psychiatric expert admissible "Dr. Kuttner testified that before interviewing defendant on the night she was taken into custody, he informed her that he had been requested by the district attorney to evaluate her, that the interview would not be a confidential psychiatric interview, that anything she said would be admissible against her in court and that he could testify against her in court. After being so informed, defendant agreed to continue the interview.")

To the extent the trial court points to Dr. Krop's testimony as proof that Mr. Martin's confession is reliable and thus, voluntary, the United States Supreme Court makes clear that reliability of a confession shall not be considered in the totality of the circumstances evaluation:

> [T]he reliability of a confession has nothing to do with its voluntariness -- proof that a defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overborne.

Jackson v. Denno, 378 U.S. 368, 384-85 (1964); Rogers v. Richmond, 365 U.S. 534 (1961)("Any consideration of this "reliability" element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known."); see also Michigan v. Harvey, 494 U.S. 344, 351 (1990) ("We have mandated the exclusion of reliable and probative evidence for *all* purposes [] when it is derived from involuntary statements."). In referencing a corroborating confession to Dr. Krop, the trial court clearly and improperly considered the

reliability of Mr. Martin's confession in evaluating this claim.

In conclusion, the trial court erred in summarily denying Mr. Martin's claim that trial counsel was ineffective in failing to consult with and present the testimony of a confession expert in the suppression hearing and trial. This matter must be remanded for an evidentiary hearing to hear from a confession expert and trial counsel.

B. Ground 2, sub-claim 2: Defense counsel was deficient in failing to adequately litigate Mr. Martin's Motion to Suppress his Confession and the failure in this regard prejudiced the outcome of Mr. Martin's proceedings

In this Strickland claim, Mr. Martin set forth numerous factors relevant to a totality of the circumstances voluntariness analysis which should have been investigated and established by trial counsel with testimony at the suppression hearing: Mr. Martin and Erin Urbin could have testified that Mr. Martin was living out of his car and not sleeping in the period leading up to the interrogation (PCR 1467-68); Mr. Martin and Erin Urbin could have testified to Mr. Martin's drug use, including marijuana and Zyprexa, leading up to the interrogation and a pharmacologist could have testified about the likely effect of those drugs and the combination with other factors such as his lack of sleep and mental health disorders at the time of the interrogation (PCR 1468); Mr. Martin, his friends and family, and a mental health expert could have testified regarding Mr. Martin's mental health history including but not limited to episodes of disassociation and a

stint in a child mental institution[5] (PCR 1469); and Mr. Martin, Erin Urbin, his mother, educational witnesses, and the like could have testified that Mr. Martin dropped out of school in 9th grade and had never experienced a serious police interrogation before. (PCR 1470.)

The law is clear that a totality of the circumstances analysis concerning the voluntariness of a confession encompasses all manner of considerations. "[A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." Colo. v. Connelly, 479 U.S. 157, 164 (1986). Thus, under the totality of circumstances analysis, courts must consider factors such as the defendant's mental health, mental deficiency, emotional instability, education, age, and familiarity with the judicial system. See Clewis v. Texas, 386 U.S. 707, 712 (1967) (education); Culombe v. Connecticut, 367 U.S. 568, 602-03 (1961) (mental deficiency); Spano v. New York, 360 U.S. 315, 322 (1959) (emotional instability); Fikes v. Alabama, 352 U.S. 191, 193 (1957) (mental health). "Athough Connelly states that a determination of involuntariness cannot be

[5] Mr. Martin discovered numerous, relevant mental health concerns in postconviction upon evaluations by mental health experts and upon receiving an MRI showing that he has **brain damage**. However, he was unable to present any of that evidence because he was not granted an evidentiary hearing, and this Court has yet to be provided a full account of the facts in this case for its "totality of the circumstances" review of the confession issue. Mr. Martin was truly crippled in not being afforded an evidentiary hearing here.

predicated solely upon a defendant's mental state, 'his mental state is relevant to the extent it made him more susceptible to mentally coercive police tactics.'"[6] Smith v. Duckworth, 910 F.2d 1492, 1497 (7th Cir. 1990) (internal citations omitted). Despite the breadth of information available to counsel to show that the totality here tipped in Mr. Martin's favor, counsel did almost nothing to prepare for or present evidence at the suppression hearing, merely cross examining the interrogating officer, who clearly had a direct interest in refuting any voluntariness issue posed by Mr. Martin. Neither the trial court nor this Court on direct appeal was able to consider an abundance of relevant necessary information in its analysis of this issue.

Rather than holding an evidentiary hearing to afford Mr. Martin the opportunity to present an abundance of evidence establishing the relevant factors set forth above, the trial court improperly concluded that defense counsel's cursory cross-examination of the interrogating officer, which appears to have gone into only one of those factors,[7] refutes this claim. Here, as with the above-claim, the trial court has put the cart before the horse. Without knowing what evidence could have been presented in the suppression hearing, or the weight the evidence would have been given, it is impossible to know how trial counsel's failure to present this

[6] Colo. v. Connelly, 479 U.S. 157, 165 (1986).

[7] Trial counsel briefly cross-examined the officer about Mr. Martin being "tired" during the interview (1 SR 143); counsel himself, pointed out during West's cross-exam that Mr. Martin was a "20 year old young man." (1 SR 149.)

evidence may have affected the outcome of the suppression hearing. Atwater, 788 So. 2d at 238 ("Without an evidentiary hearing, it is impossible to state that the evidence Atwater sought to present was merely cumulative … Without an evidentiary hearing, we do not know the potential qualitative effect of this evidence…. It may be that defense counsel made a strategic decision not to present family members or other witnesses and to instead rely solely on the testimony of Dr. Merin. Without an evidentiary hearing, however, we are unable to make this determination."); Ciambrone v. State, 128 So. 3d 227, 234 (Fla. 2d DCA 2013) ("without an evidentiary hearing it is impossible to conclusively determine that the testimony of twenty-eight witnesses would not have added substance to the defense or challenged the State's case."); see also United States v. Espinosa-Hernandez, 918 F.2d 911, 913 (11th Cir. 1990) ("Without the benefits of discovery and an evidentiary hearing, it is impossible to say that evidence of Urso's misconduct is merely impeaching."); Bush v. State, 964 So. 2d 181, 182 (Fla. 4th DCA 2007) ("Without the benefit of an evidentiary hearing, it is impossible to determine whether Bush's assertions are true.")

As with the previous claim, the trial court essentially concluded, without taking evidence on the testimony in support of this claim, that there was nothing that would have changed the outcome of the suppression hearing, a finding that amounts to inappropriate prejudgment of this issue. (PCR 1939-41.) See Weible,

761 So. 2d at 473 (The error here is that the second trial judge refused to consider the Defendant's evidence and imposed a sentence after hearing only half of the evidence. Prejudging cases in such a way is improper."); Gonzalez, 633 So. 2d at 1184 (announcing an intention to make a specific ruling prior to evidence or argument "is the paradigm of judicial bias and prejudice").

And again, the trial court improperly reasoned that this claim should be denied because available rebuttal testimony of Dr. Krop establishes that Mr. Martin's confession is reliable. (PCR 1941.) Where the purpose of excluding involuntary confessions is to prevent future constitutional violations on the part of law enforcement and to punish the state for utilizing unconstitutional interrogation tactics, *reliable,* involuntary confessions must be suppressed*, just as unreliable* involuntary confessions must be suppressed. Denno, 378 U.S. at 385-86; Rogers, 365 U.S. 534; Harvey, 494 U.S. at 351. The United States Supreme Court in Jackson v. Denno explained:

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," *Blackburn* v. *Alabama*, 361 U.S. 199, 206-207, and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano* v. *New York*, 360 U.S. 315, 320-321. Because it

> did not recognize this "complex of values," *Blackburn, supra*, underlying the exclusion of involuntary confessions, *Stein* also ignored the pitfalls in giving decisive weight to the jury's assumed determination of the facts surrounding the disputed confession.

Denno, U.S. 368, 385-86. That Mr. Martin confessed to his own psychological expert, with whom he had an expectation of confidentially, has no bearing on whether he voluntarily confessed following Miranda warnings to police officers, except to show that the confession was reliable, which is a constitutionally precluded consideration. Thus, Krop's testimony would not be admissible on retrial as the trial court suggests. (PCR 1941.)

In conclusion, this sufficiently pleaded, factually based claim requires an evidentiary hearing where Mr. Martin may set forth the evidence proposed in his 3.851 motion concerning the circumstances of his confession which would be relevant and necessary for a totality of the circumstances voluntariness test under Moran v. Burbine, 475 U.S. 412, 421 (1986).

C. Ground 2, sub-claim 3: Defense counsel was deficient in failing to object to the state's improper cellphone testimony and in failing to retain and present a cell phone expert at trial, prejudicing the outcome given the state's significant reliance on the cell phone evidence

In this claim, Mr. Martin has alleged that because counsel failed to consult with a cell phone expert at trial, he was unable to adequately attack the state's cell phone testimony at trial, which was a highlight of its case. (PCR 1472-81.) Essentially, the state was allowed to present testimony through Det. Matos in

conjunction with a map, that Mr. Martin's cell phone could be used as a tracking device.

However, if counsel had merely consulted with a cell phone expert in pre-trial, he would have learned that cell phone records cannot be traced with the precision alluded to by Det. Matos, (for instance, cell phones do not necessary ping off the closest tower, and that the range of cell towers can be far greater than 3-5 miles) and could have confronted the incorrect testimony in a number of ways: via motion in limine, objection, motion to strike, cross-examination, and/or presenting a defense cell phone expert.

The court's reliance on Perez v. State, 980 So. 2d 1126 (Fla. 3d DCA 2008) in denying this claim is misplaced. Perez is a direct appeal case, where the DCA considered whether cell phone records custodians should have been allowed to testify about cell phone tower locations, among other topics. The DCA found that the testimony was admissible as non-expert testimony because it was "general background information." Id. at 1131. However, in finding the non-expert cell phone testimony admissible, the DCA specifically noted **that no defense witness had testified that any of the information provided by the state's cell phone witnesses was incorrect.** Id. at 1131-32 ("Moreover, there was no direct evidence presented by the defendant to dispute these generalized facts or question their validity") Here, unlike Perez, Mr. Martin **is alleging** that the Det. Matos' non-

expert cell phone testimony was incorrect and was prepared to present evidence at evidentiary hearing to support his position. Thus, the cases are distinguishable. Additionally, unlike Perez, Mr. Martin is not challenging Det. Mato's ability to testify about the cell phone records. Instead, Mr. Martin is challenging defense counsel's failure to address Det. Mato's dissemination of misinformation to the jurors about critical evidence that was a highlight of the state's case.

As with the preceding sub-claims, disposition of this claim is premature where the trial court neither heard testimony from a cell phone expert as to the flaws in Det. Mato's testimony or heard from defense counsel as to his rationale for failing to confer with a cell phone expert. A remand for evidentiary hearing on this claim is appropriate.

D. Ground 2, sub-claim 4: Trial counsel was deficient in failing to investigate and present evidence supporting Mr. Martin's trial testimony

Trial counsel knew that Mr. Martin was going to give testimony that contradicted his confession and, given Mr. Martin's description of a criminal and sexual deviant underworld, the testimony would be difficult for a conservative Clay County juror to follow.[8] (13 R 896-97.) As such, and as alleged in Mr. Martin's second claim of this 3.851 motion, defense counsel had a responsibility to investigate and present available evidence supporting that defense to assist the jury

[8] Mr. Martin points out that if his suppression issue was granted, he never would have testified, and this claim would be moot.

in accepting Mr. Martin's iteration of events, strengthening his defense.

Mr. Martin's 3.851 motion explains that counsel should have investigated and presented Mike Gregg, Tracy Ray, and Mr. Putnam at trial. Mike Gregg's proposed testimony is that he had a sexual relationship with Mr. Martin, that he took photos of Mr. Martin, that he was a registered sex offender, he lived where Mr. Martin said he did, and that he was familiar with the Jones Cemetery area, consistent with Mr. Martin's testimony. (PCR 1482.)

Tracy Ray's (Martin's mother) proposed testimony is that around the time of the victim's death and Mr. Martin's arrest, Mike Gregg, who lived near her, started visiting her place of employment with regularity to inquire about Mr. Martin's status. (PCR 1483.) This evidence demonstrates that Mr. Gregg knew where Ms. Ray lived and worked, supporting Mr. Martin's testimony that he was afraid that Mr. Gregg would show his mother pictures of their sexual encounters and that Mr. Martin feared Mr. Gregg would harm his mother if Mr. Martin told the police about Gregg's involvement. Further, Ms. Ray's testimony would establish that Mr. Gregg took a peculiar interest in Mr. Martin following Mr. Martin's arrest, establishing Mr. Gregg's preoccupation with the case and potential consciousness of guilt.

Cliff Putnam's proposed testimony would be that he introduced Mr. Martin to Mr. Gregg for the purpose of buying drugs from Gregg and that Gregg owned

firearms. Putnam would have confirmed that Mr. Gregg was gay and was known to photograph nude men. (PCR 1483.) This testimony would have corroborated Mr. Martin's testimony that he frequented Mr. Gregg's home to buy drugs, and supported Mr. Martin's statements that Gregg took sexually explicit photos of him and that Gregg threatened the he and the victim with a firearm.

The trial court summarily denied this claim finding that Mr. Martin failed to "demonstrate how such testimony would change the outcome of the proceeding." (PCR 1944.) However, an evidentiary hearing is usually required on ineffective assistance of counsel claims for failing to investigate and present witnesses. See Campbell v. State, 247 So. 3d 102, 106 (Fla. 2d DCA 2018) ("A facially sufficient claim that counsel was ineffective in failing to call witnesses whose testimony would cast doubt on the defendant's guilt generally requires an evidentiary hearing, the purpose of which "is to determine whether trial counsel acted reasonably in not presenting the alleged exculpatory evidence.")(citing Perez v. State, 128 So. 3d 223, 226 (Fla. 2d DCA 2013)). That is because it is "impossible" to determine the potential effect of numerous proposed defense witnesses on a defendant's trial without actually hearing from them. Ciambrone, 128 So. 3d at 234 ("without an evidentiary hearing it is impossible to conclusively determine that the testimony of twenty-eight witnesses would not have added substance to the defense or challenged the State's case.")

The corroborative evidence proposed by Mr. Martin is not merely "character evidence," as suggested by the trial court. (PCR 1944.) Counsel can be ineffective and prejudice may ensue from a failure to present witnesses who would have corroborated Mr. Martin's story, even if the witnesses would not directly state that Mr. Gregg was the real killer – an unreasonable requirement suggested by the trial court in its order denying relief. (PCR 1944-45)("The purported testimony does not offer evidence that Gregg was with the Defendant and victim…does not offer supporting evidence that Gregg instructed Defendant to help drag the body of Jacey McWilliams in the bushes or help dispose of the weapon…"; see Peals v. State, 744 So. 2d 1181, 1182 (Fla. 2d DCA 1999) (finding that the defendant may have been prejudiced by counsel's failure to corroborate the exculpatory testimony of a witness whom "the jury may have been disinclined to believe" because she admitted at trial that she had initially lied to the police); Meus v. State, 968 So. 2d 706, 711 (Fla. 2d DCA 2007) (observing that the testimony of an independent and unbiased witness that would have corroborated the testimony of the defense's paid expert "would have been crucial to the defense"); Balmori v. State, 985 So. 2d 646, 651 (Fla. 2d DCA 2008) ("In sum, we conclude that the documents and witnesses Mr. Balmori allegedly asked his trial counsel to investigate would not have been cumulative to Mr. Balmori's trial testimony. It follows that the postconviction court erred when it summarily denied Mr. Balmori's claims that his

trial counsel provided ineffective assistance in failing to investigate evidence and witnesses that would have supported Mr. Balmori's defense.")

Without the testimony from these additional witnesses, Mr. Martin's story – concerning a man who lived amongst sex offenders and peddled drugs in exchange for gay sex and homoerotic photographs – must have seemed utterly ridiculous to one of the "most conservative" jury panels in Florida. (PCR 3201.) Establishing through other witnesses that Mr. Gregg was exactly the person that Mr. Martin claimed he was would have been a large step in clearing the jurors' mental hurdle in believing that Mr. Gregg was responsible for killing the victim. Evidentiary hearing on this claim is required so that Mr. Martin may call these witnesses and present evidence in support of this claim for the court's consideration. Further, Mr. Martin must be allowed to opportunity to present testimony from defense counsel as to why he failed to investigate these leads and present this corroborative evidence at trial. See Campbell, 247 So. 3d at 106.

ARGUMENT THREE

MR. MARTIN'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE VIEWED AS HARMLESS WHEN CONSIDERED AS A WHOLE. THE COMBINATION OF ERRORS DEPRIVED MR. MARTIN OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The Supreme Court in Woodson determined that because death is such a unique penalty and is irrevocable, greater caution and safeguards have to be utilized to ensure the constitutional validity of this ultimate sentence. Woodson v. North Carolina, 428 U.S. 280 (1976). Because of the uniqueness and severity of the death penalty, the United States and Florida Supreme Courts have held that when errors are viewed as a whole, even if they would not require a reversal if viewed individually, can amount to cumulative error that requires a reversal in convictions. See Berger v. U.S., 295 U.S. 78, 88-89 (1935)("[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. "); Jones v. State, 569 So. 2d 1234 (Fla. 1990)(remanding for new penalty phase due to "cumulative errors"); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990); Martinez v. State, 761 So. 2d 1074, 1082-83 (Fla. 2000).

The various errors in Mr. Martin's trial individually and cumulatively resulted in a violation of his rights to due process, effective assistance of counsel, and a fair trial under the United States and Florida Constitutions and are sufficient to require reversal of his guilt and penalty phase for a new trial.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Martin respectfully requests this Honorable Court reverse and remand the trial court's denial of his 3.851 Motion for Postconviction relief for a new trial and an evidentiary hearing on the summarily denied claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been delivered via email to the Office of the Attorney General at capapp@myfloridalegal.com on this 2nd day of November, 2018.

/s/ Rick Sichta_____
ATTORNEY

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Rick Sichta_____
ATTORNEY