Filing # 88854810 E-Filed 05/01/2019 10:54:31 PM

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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

REPLY BRIEF OF APPELLANT

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ARGUMENT ONE IN REPLY

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, AN 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

I. This is not an ineffective assistance of counsel claim

This Court may disregard the State's lengthy ineffective assistance of counsel (IAC) analysis, because this is a juror concealment claim based on Mr. Martin's Fifth Amended right to due process[1] and Sixth Amendment right to a fair and impartial jury,[2] not a Sixth Amendment right to effective assistance of counsel.

II. This claim is not procedurally barred

---

[1] See Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases, . . . safeguard[ing] the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process.")

[2] Irvin v. Dowd, 366 U.S. 717, 722 (1961) ("the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."); Wilding v. State, 674 So. 2d 114, 116 (Fla. 1996) (recognizing that Sixth Amendment guarantees right to a fair and impartial jury)

The State, as it did in Boyd v. State, 200 So. 3d 685 (Fla. 2015), argues that this postconviction claim of juror concealment is procedurally barred because Mr. Martin should have raised it on direct appeal. This argument is baseless as postconviction claims of juror misconduct have been considered by this Court. 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).

Additionally, Mr. Martin discovered Juror S's concealment during *postconviction* investigation. As set forth in the record, the matter of Juror S's dishonesty in voir dire first came to light when postconviction counsel reviewed State Attorney records tendered by the capital records repository and discovered that the juror failed to disclose a DUI. Then, prior to a court-authorized juror deposition in postconviction, the State informed the defense that Juror S also had an undisclosed juvenile sexual battery adjudication. The State had not revealed this fact to trial counsel or at any time previous in Mr. Martin's case.

Then, during the postconviction deposition of Juror S, it was revealed that Juror S also failed to disclose that his grandmother murdered his grandfather by shooting him at point blank range, and that he was still emotional from this incident although it occurred many years prior. Next, Juror S admitted during the postconviction evidentiary hearing on this claim that he purposely concealed all of

this information, i.e., he lied, despite being asked relevant questions which should have prompted him to reveal it.

Therefore, the information was not known at the time of direct appeal, could not reasonably have been known at the time of direct appeal, and could not have been raised on direct appeal. Cf., Israel v. State, 985 So. 2d 510, 520 (Fla. 2008) (defendant was barred from raising claim regarding defective jury instructions in postconviction because the claim could and should have been made on direct appeal). The trial court agreed that Mr. Martin was duly diligent in presenting this postconviction claim based on Juror S's sexual battery conviction and grandfather's murder. (PCR 1957.)

III. The application of Carratelli to Mr. Martin's jury concealment claim would be contrary to clearly established law – Carratelli only applies to ineffective assistance of counsel claim arising from counsel's failure to challenge a juror

While the State and Mr. Martin agree that Jones v. State, "probably produce an acquittal on retrial" standard does not apply to his claim (Answer 32), the State persists in incorrectly arguing that Carratelli, an ineffective assistance of counsel standard for failure to challenge a juror, applies to this juror concealment claim. Jones v. State, 709 So.2d 512, 521 (Fla. 1998); Carratelli v. State, 961 So. 2d 312, 320 (Fla. 2007).

Contrary to the State's misguided argument, De la Rosa's is the appropriate standard here.[3] The State ignores that Carratelli's specific procedural and factual posture gave rise to that "actual bias" standard. Mr. Martin's claim is not an ineffective assistance of counsel claim, like Carratelli, because it involves a juror who purposely concealed relevant, material information during voir dire from the defense, which would have resulted in a cause or peremptory challenge had defense counsel been aware of the concealment. The State's argument is inconsistent with the United States Constitution, clearly established federal law, Florida precedent, and public policy as it seeks to put this capital defendant at a disadvantage for the misconduct of a third party, the juror, because he is in the postconviction posture. In other words, the State is willfully ignoring the applicable law to posture itself for a better standard of review.

However, Carratelli's "actual bias" standard does not apply here. Instead, De la Rosa, a somewhat reduced materiality showing, is appropriate for the same reasons as there is a reduced materiality standard in Giglio, so long as due diligence

[3] (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 v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995).

to present the claim beyond 1-year is established. See Fla. R. Crim. P. 3.851(e)2)(C)(allowing successive 3.851 claims based on new evidence, newly found Brady, or Giglio claim); United States v. Bagley, 473 U.S. 667, 687 (1985) (explaining that the defense-friendly standard of materiality is justified because the knowing use of perjured testimony involves prosecutorial misconduct and "a corruption of the truth-seeking function of the trial process."); Guzman v. State, 868 So. 2d 498 (Fla. 2003) ("Under Giglio once the defendant establishes that the prosecution knowingly used false testimony the state bears the burden to show it was not material. The Giglio standard reflects a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a defendant.");

The State's reliance on Boyd, 200 So. 3d 685 as support for the application of Carratelli is mistaken on numerous grounds:

First, this Court has already determined that De la Rosa applies to postconviction claims like Mr. Martin's regarding new evidence of juror concealment. See e.g., Braddy v. State, 219 So. 3d 803, 825-26 (Fla. 2017) (finding that claim was procedurally barred because juror concealment was known at the time of direct appeal, but applying De la Rosa under merits determination); and Lugo v. State, 2 So. 3d 1, 14 (Fla. 2008)(conducting De la Rosa and Carratelli analyses where the Appellant raised a new evidence juror misconduct claim *and* an alternatively

posed ineffective assistance of counsel claim concerning the juror misconduct) (See Initial Brief of Appellant, SC06-1532, at *35.). Tellingly, all of this Court's cases cited by the State supporting the application of Carratelli are *ineffective assistance of counsel* claims. (Answer 23-24); see e.g., Patrick v. State, 246 So. 3d 253, 262-63 (Fla. 2018) ("Patrick argues that the postconviction court erred in summarily denying the claim that counsel was ineffective for failing to challenge or adequately question two jurors concerning alleged biases.")

Next, Boyd is factually distinguishable from Martin because the thrust of the issue in Boyd was whether the presence of a statutorily disqualified convicted felon on his jury, who had not had her rights restored, was "inherently prejudicial," requiring per se reversal. This court found that it was not per se reversible error and applied Carratelli. Boyd, 200 So. 3d at 695, 698.

Further, the State's reliance on Boyd for the general application of Carratelli to juror concealment claims is inappropriate for the reasons explained by the United States District Court for the Southern District of Florida, which determined that this Court's Boyd decision amounted to an unreasonable determination of the facts and "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," i.e. McDonough Power Equip. v. Greenwood, 464 U.S. 548 (1984). Boyd

v. Jones, 2018 US. Dist. LEXIS 110889, *35, 2018 WL 3240009, Case No. 16-62555-CIV-GAYLES.

In Boyd, appellant raised a juror misconduct claim in his capital postconviction motion alleging that two jurors failed to reveal relevant, material issues in voir dire and argued that this constituted per se reversible error. Particularly, Juror Striggles failed to reveal that she had five felony convictions and significant mental health issues. The State conceded that the juror had five felony convictions. The circuit court denied Boyd's request for juror interviews and denied relief on the claim. Boyd, 200 So. 3d at 595. The circuit court first found, similar to the State's argument in Martin, that the issue was procedurally barred because it should have been raised on direct appeal. Boyd, 2018 U.S. Dist. LEXIS 110889, at *18. The circuit court also found that the defendant failed to meet the three prongs of De la Rosa while additionally finding that the defendant failed to show that the juror was "actually biased." Id. On appeal, this Court did not address the procedural bar argument and ruled on the merits, applying Carratelli's "actual bias" standard.

The Southern District in Boyd explained why Carratelli's scope is limited to claims of ineffective assistance of counsel for failure to challenge a juror, and why the application of Carratelli in claims of juror misconduct violates clearly established federal law:

> Carratelli expressly distinguished its holding regarding the actual bias standard in postconviction from its prior holding in Singer v. State,

> 109 So 2d 7, 22 (Fla. 1959) which applied an "any reasonable doubt" about the juror's impartiality standard on direct appeal. Although Singer has a factual scenario more akin to the instant claim, the Florida Supreme Court applied Carratelli to the Petitioner's case. Applying Carratelli, the court required the Petition to show on "the plain face of the record" that Juror Striggles did not deliberate fairly and impartially.
>
> According to clearly established federal law, the Petitioner does not have to show that Juror Striggles did not deliberate fairly or impartially if he can show that she failed to answer a material voir dire question honestly and that her response would have been a valid basis for a cause challenge. See McDonough, 464 U.S. at 556.
>
> ***
>
> It was unreasonable for the Florida Supreme Court to apply Carratelli to the Petitioner's case. **Carratelli "explains the standard** that courts should apply [in Florida] **in deciding whether a trial counsel's failure to preserve a challenge to a potential juror constitutes ineffective assistance of counsel**." Carratelli, 961 So. 2d at 315. Carratelli explicitly states that "this case requires us to address only the requirements for establishing prejudice under Strickland on a postconviction claim that counsel was ineffective for failing to preserve or raise a cause challenge before a jury is sworn."

Id, at *40. For the reasons given by the Southern District in Boyd, the Carratelli standard may only be applied to ineffective assistance of counsel claims regarding juror bias known at the time of trial, not juror misconduct claims "that came to light after trial…" Id. at *38. In a juror misconduct claim, there should be no requirement that a defendant show that the juror in question "did not deliberate fairly or impartially…" Id. at *38. Adopting a more stringent standard in postconviction to a juror misconduct claim that could not have been discovered by the accused's attorney at trial also belies common sense – an accused would be punished for a juror

violating his oath, concealing information that could not be discovered with due diligence, and interfering with the constitutional rights to due process and a fair and impartial trial.

Under this reasoning, this Court's precedent in De la Rosa, which is consistent with the clearly established federal law of McDonough, is the standard which should be employed.[4] In fact, it has always been the standard in cases like Mr. Martin's, but the State attempts to confuse this Court with an analysis under Carratelli because it puts them in a better posture to win. Instead, Mr. Martin must prove that the information is relevant and material to jury service in his case, and that the juror concealed the information during questioning. De la Rosa, 659, So. 2d at 241.

Under the reasoning explored above, the State's contention that "actual bias" must be established here, is wrong. Boyd, 2018 U.S. Dist. LEXIS 110889, at *40. (Answer 26.). To the extent that Mr. Martin must establish the juror's bias, the inquiry is not whether he can show that the juror deliberated unfairly, but whether

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[4] McDonough includes a requirement that an honest answer from the juror would have been the basis for a cause challenge from the juror. McDonough Power Equip., 464 U.S. 548. To the extent that De la Rosa materiality requires a showing that the dishonesty "prevented counsel from making an informed judgment—which would in all likelihood have resulted in a peremptory challenge," De La Rosa, 659 So. 2d at 242 (internal citation omitted), McDonough constitutes the floor, not the ceiling, of constitutional protection a State may afford. Michigan v. Long, 463 U.S. 1032, 1040 (1983). On the other hand, if this Court were to apply Carratelli's actual bias requirement here, that standard would sink beneath McDonough's floor. Boyd, 2018 U.S. Dist. LEXIS 110889, at *40.

he can show that the juror failed to answer a material voir dire question honestly, and whether the response would have been a valid basis for a [] challenge. McDonough Power Equip., 464 U.S. 548; De la Rosa, 659, So. 2d at 241. The Eleventh Circuit found "[a] juror[']s dishonesty is a strong indication of bias." United States v. Carpa, 271 F. 3d 962, 967 (11th Cir. 2001).

Accordingly, the State's attempt to persuade this Court to recede from De la Rosa in favor of applying Carratelli to juror misconduct claims, asks this Court to run afoul of the Fifth and Sixth Amendments, clearly established federal precedent, and decades of Florida case law, which ensures a defendant's constitutional right to due process a fair and impartial trial are protected.[5] See Boyd, 2018 U.S. Dist. LEXIS 110889, at *40. There is simply no need to do so because De la Rosa and Carratelli apply in entirely different situations and do not conflict with each other whatsoever.

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[5] In support of that argument, the State argues that De la Rosa is unfairly one-sided in its application in criminal cases. (Answer 25.) However, nothing precludes the prosecution from using De la Rosa to its benefit in appropriate circumstances. See e.g. Merchant v. State, 201 So. 3d 146, 155 n.7 (Fla. 3d DCA 2016)(State argued that mistrial was properly granted and that defendant's right against double jeopardy was not violated by retrial because mistrial was appropriate under De la Rosa where two jurors' failure to reveal their relationship required reversal.")

IV. Lord Mansfield's Rule does not apply

The State's suggestion that Lord Mansfield's Rule[6] applies to juror selection, despite its acknowledgment that the Rule is "usually applied to deliberations" is an irrelevant tangent. (Answer 21.)

A Lord Mansfield's-type bar against interviewing Juror S was inapplicable and inappropriate here because, as conceded by the State, it has only been applied to juror deliberations, and for good reason. The common law rule, which has been codified under Fed. R. Evid. 606(b), protects the sanctity of *the jury deliberation process* unless it appears the verdict was tainted by extrinsic forces. See Tanner v. United States, 483 U.S. 107 (1987); see also Cave v. State, 476 So. 2d 180, 187 (Fla. 1985)("The privacy and sanctity of jury deliberations are critical to the right of a jury trial"); Aragon v. State, 853 So. 2d 584, 588 (Fla. 5th DCA 2003).

On the other hand, 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), which is ensured by the voir dire process. It is the duty of a juror in voir

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[6] Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 872 (2017) ("In 1770, Lord Mansfield refused to receive a juror's affidavit to impeach a verdict, declaring that such an affidavit 'can't be read.' *Rex* v. *Almon*, 5 Burr. 2687, 98 Eng. Rep. 411 (K. B.). And in 1785, Lord Mansfield solidified the doctrine, holding that '[t]he Court [could not] receive such an affidavit from any of the jurymen' to prove that the jury had cast lots to reach a verdict. *Vaise* v. *Delaval*, 1 T. R. 11, 99 Eng. Rep. 944 (K. B.).")

dire "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." Loftin v. Wilson, 67 So. 2d 185 (Fla. 1953).

There can be no logical extension of Lord Mansfield's Rule, concerning deliberations, to voir dire where the entire purpose of voir dire is to question jurors and receive honest answers to determine their suitability for service:

> 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. *See 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.").

Roberts v. Tejada, 814 So. 2d 334, 342 (Fla. 2002). The State's discourse about Lord Mansfield's Rule and whether or not Juror S was a racist, is completely irrelevant to this juror misconduct inquiry. Indeed, Devoney, the very case cited by the State about Lord Mansfield's rule explains that a juror's personal bias is an "extrinsic" problem which acts as a "germ" to "infect" the jury deliberation process. Devoney v. State, 717 So. 2d 501, 504 (Fla. 1998) ("biases are carried like germs from *outside* the process of the trial to infect the jury's deliberation") (emphasis original).

V. Merits under De la Rosa

The State's failure to engage in any analysis of the instant juror concealment claim under De la Rosa, and specious argument that De la Rosa does not apply, signals that Mr. Martin has established a meritorious claim under this standard, as argued at length in his initial brief. (IB 25-39.) As explained in the initial brief, the test under De la Rosa is:

(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. The materiality prong is established by showing that the juror's concealment prevented counsel from making an informed judgment, which would in all likelihood have resulted in a peremptory challenge," Id. at 242 (internal citation omitted).

The State remarks, without analysis, that Mr. Martin was not duly diligent in presenting this claim. (Answer 33). However, the trial court correctly ruled that Mr. Martin was duly diligent:

> [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.) Due diligence is settled.

The State's failure to dispute that Mr. Martin has satisfied the remaining elements in De la Rosa is also telling:

Here, the trial court found (PCR 1950-1951), and the State does not appear to refute, that Juror S concealed information in voir dire that he had been arrested and convicted for DUI and sexual battery and that his grandmother murdered his grandfather in voir dire despite relevant questioning from the parties. He further acknowledged that he knew that he should have provided the information due to the questions asked by the parties and that other jurors with similar backgrounds responded affirmatively upon questioning. Thus, **Mr. Martin has satisfied the concealment prong**.

Finally, where Attorney Till testified in the evidentiary hearing and provided an affidavit stating that he would have attempted to remove Juror S for cause and would have used a peremptory challenge given Juror S's likely sympathy to the victim's family, **Mr. Martin has satisfied the materiality prong**. (PCR 1838-40, 3188, 3190, 3194.) The State has offered no argument suggesting that this prong was not established.

Based on the foregoing, Mr. Martin is entitled to a new trial without Juror S. The failure to grant a new trial will result in violations of his due process rights under

the Fifth and Fourteenth amendments and right to a fair and impartial jury under the Sixth and Fourteenth amendments.

ARGUMENT TWO IN REPLY

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 initially notes that the State's current position is in contravention of its previous *agreement* that an evidentiary hearing was appropriate in three of the four issues presented herein. (e.g. PCR 1568-69, 1578, 1579.) The State's current position, that evidentiary hearing should not have been granted, should be considered waived. See Cook v. State, 638 So. 2d 134, 135 (Fla. 1st DCA 1994) ("by responding to all nine claims of ineffective assistance of counsel below, the state has waived any argument that some of the supplemental claims were untimely.")

The State's Answer brief fails to acknowledge that under this Court's longstanding precedent, evidentiary hearing is all but required in capital postconviction claims, because the stakes are so great. See Floyd v. State, 808 So. 2d 175, 182-83 (Fla. 2002) ("In *Gaskin*, we reiterated that '[w]hile the postconviction defendant has the burden of pleading a sufficient factual basis for

relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief.' *Gaskin*, 737 So. 2d at 516. Indeed, we have strongly urged trial courts to err on the side of granting evidentiary hearings in cases involving initial claims for ineffective assistance of counsel in capital cases. *See id.* at 516 n.17; *see also Mordenti v. State*, 711 So. 2d 30, 33 (Fla. 1998) (Wells, J., concurring) (advocating mandatory evidentiary hearing for all initial 3.850 motions asserting ineffective assistance of counsel, *Brady*, and other newly discovered evidence claims in capital cases); *Ragsdale*, 720 So. 2d at 207 (recognizing that this Court has encouraged trial courts to hold evidentiary hearings on postconviction motions).") Moreover, claims of ineffective assistance of counsel for failure to present expert testimony ordinarily require hearing, as explained by the Fourth DCA in Terrell:

> Ordinarily, where, as here, the defendant has identified specific exonerating testimony which could have been provided by an expert, an evidentiary hearing will be required to determine whether the decision not to present the expected testimony was tactical or an unprofessional failure on the part of appointed counsel. *See State v. Riechmann*, 777 So. 2d 342, 354 (Fla. 2000) (deciding whether failure to call blood spatter expert was ineffective assistance of counsel after evidentiary hearing at which expert testimony was presented); *see also Carmona v. State*, 814 So. 2d 481, 482 (Fla. 5th DCA 2002) (deciding whether defense counsel's decision not to call physician was tactical after evidentiary hearing).

Terrell v. State, 9 So. 3d 1284, 1289 (Fla. 4th DCA 2009).

The trial court's ruling below and the State's suggestion here, that counsel's

guilt phase performance is immaterial because this was an unwinnable guilt phase case, ignores the law and the reality of the issues presented.

I. Confession Expert:

Contrary to its current position (Answer 50), the State's 3.851 Response conceded that an evidentiary hearing was necessary to adequately explore Mr. Martin's claim of ineffective assistance of counsel for failure to retain and present the testimony of a confession expert:

> Simmons v. State, 105 So.3d 475, 492-93 (Fla. 2012)(rejecting a claim of ineffectiveness for failing to present a false confession expert because it may have been excluded at trial and, even if such an expert had been presented at trial, it "would not have significantly diminished the incriminating effect of the other evidence").
>
> Accordingly, in an abundance of caution, however, and because counsel will be testifying regarding the other claims of ineffectiveness, this claim should be explored at the evidentiary hearing, as it was in *Simmons*.

(PCR 1568-69.) As noted in the State's 3.851 Response, in Simmons, the trial court denied a capital defendant's 3.851 claim of failure to present a confession expert *after hearing from the expert in an evidentiary hearing*. Simmons v. State, 105 So. 3d 475, 486 (Fla. 2012).

The State's current position that counsel was not deficient because testimony from a confession expert would not have been admissible, is incorrect. Confession experts were routinely used at the time of Martin's trial and before. See Ross v. State, 45 So. 3d 403 (Fla. 2010); Boyer v. State, 825 So. 2d 418, 420 (Fla. 1st DCA

2002) ("Had Dr. Ofshe's testimony been admitted, it "would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." *Id*. at 1345. It is for the jury to determine the weight to give to Dr. Ofshe's testimony, and to decide whether they believed his theory or "the more commonplace explanation that the confession was true." *Id*., *citing* 18 U.S.C. § 3501."); Wiley v. State, 427 So. 2d 283 (Fla. 1st DCA 1983) (noting that defense expert in suppression hearing challenged the interrogation tactics used by police); United States v. Hall, 93 F.3d 1337 (7th Cir. 1996).

The State's alternative argument, that the proposed testimony of the confession expert is a "*non sequitur*" because Mr. Martin claimed at trial that he was under the duress of Mike Gregg, attempts to misdirect this Court. (Answer 40-42.) That Mr. Martin testified *at trial* about duress under Gregg, *after the suppression motion was denied*, is the real "non sequitur." Trial counsel's strategy in the suppression hearing did not have anything to do with Mike Gregg, but attempted to demonstrate that the confession was involuntary given the "psychological coercion" of the police. (1 SR 20.) This strategy would have been expanded by the presentation of an expert to support it. See Elledge v. Dugger, 823 F.2d 1439, 1445 (11th Cir. 1987)("As the court noted, 'counsel presented a psychiatric defense without a psychiatrist,' relying instead solely on Elledge's 'free-form' testimony about his background and mental impairments…We accept the district court's view that

counsel's failure at least to interrogate Elledge's relatives and to seek an expert witness was outside the range of competent assistance."); see also Strickland v. Washington, 466 U.S. 668, 690-91 (1984) ("…in other words counsel has a duty to make reasonable investigations"); Heiney v. State, 620 So. 2d 171 (Fla. 1993) (holding trial counsel's failure to investigate and prepare cannot be deemed sound strategy because counsel's failure to discover evidence reveals his or her failure to even begin an investigation to determine if further investigation is necessary). Mr. Martin's trial testimony that Mr. Gregg threatened and intimated him has no bearing on what trial counsel could have presented in furtherance of its motion to suppress.

Assuming arguendo Mr. Martin's trial testimony about Mr. Gregg is relevant to an inquiry of whether a confession expert should have been presented at trial,[7] the expert testimony proposed by Mr. Martin concerning the existence of involuntary confessions, the pressure and coercive tactics employed by the officers, Martin's sleep deprivation, age, and drug use, and his testimony that he was under duress by Mike Gregg, are not mutually exclusive. The additional factors suggested in Mr. Martin's 3.851 motion, which would have been available had counsel presented the testimony of a confession expert, could have been argued along with the Gregg defense at trial to create a compelling argument that the confession was coerced.

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[7] The relevance of the State's argument in this regard should be limited to the portion of the claim arguing that counsel should have presented a confession expert at trial if a pretrial suppression motion was denied.

The State also persists in arguing that Dr. Krop could have been used by the State to rebut a confession expert's testimony regarding the voluntariness of Mr. Martin's confession to law enforcement. The State ignores the difference between a custodial interrogation by law enforcement, and a voluntary interview by a confidential psychiatric expert for the defendant. Mr. Martin's statements to his own expert is not relevant to whether his confession to the police was voluntary, as the totality of the circumstances that existed at the time of the police confession were different than the circumstances in the mental health visit. See Blackburn v. Alabama, 361 U.S. 199, 206 (1960) (whether a confession is voluntarily given is based upon the totality of the circumstances on a case-by-case basis). The only reason the State would want to present Dr. Krop's testimony would be to show that Mr. Martin's confession to the police *was, according to the State, true*, a factor that is immaterial to the question of whether it was *voluntary*. Jackson v. Denno, 378 U.S. 368, 384-85 (1964); Rogers v. Richmond, 365 U.S. 534 (1961).

The State's prejudice argument is similarly misguided. Defense counsel in evidentiary hearing admitted that the guilt phase was won or lost at the suppression hearing, and that it was a close issue. (PCR 3203-04) (when the suppression motion was denied, defense counsel was "leaning towards there was going to be a conviction in the guilt phase.") (PCR 3205) (the suppression hearing was "very close.")

The State's Answer even points to Mr. Martin's confession to argue that an

acquittal was not "realistic," which is another reason the motion to suppress it warranted extensive investigation and preparation. (Answer 59.) However, counsel presented virtually nothing in support of its involuntariness argument, and the motion was denied. This Court recognized on direct appeal that the suppression of Mr. Martin's confession was a close call, despite that counsel presented no evidence in support of its motion, merely cross-examining the interrogating officer. Martin v. State, 107 So. 3d 281, 298 (Fla. 2012)("this case presents the very outer limit as to what tactics law enforcement may employ when performing a custodial interrogation.")

Had counsel presented additional evidence of the involuntariness through a confession expert, the confession would have been suppressed, which is the prejudice standard here. See Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) (establishing prejudice in a claim of ineffective assistance of counsel for failing to suppress evidence requires a showing that the motion would have been granted). At the very least, the additional testimony would have resulted in a reversal on direct appeal. See 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."); Ross, 45 So. 3d at 434.

Remand for an evidentiary to hear from a confession expert and defense counsel is necessary. 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….”); 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.”)

II. Additional information in support of totality of the circumstances:

The State’s primary argument is that because defense counsel consulted with Dr. Krop, counsel is absolved from any failure to present mental health considerations in support of its motion to suppress. The State ignores that Dr. Krop’s purpose for the defense was to evaluate Mr. Martin for potential *mitigation* purposes in the penalty phase. There is no evidence that counsel requested that Dr. Krop evaluate Mr. Martin for suppression hearing purposes, or provide any kind of opinion concerning the confession (to the extent there is any question about Dr. Krop’s role, it should be explored in an evidentiary hearing as the facts in Mr. Martin’s 3.850 motion must be taken as true in a summary denial). In any event, as argued in the mitigation claims of the 3.851 below, counsel failed to present Dr. Krop with necessary background information and records and failed to follow up with Dr. Krop’s recommendation that additional mental health testing be performed. (PCR 447, 1505.) Where Dr. Krop did not have the necessary information to make

an informed assessment, and counsel failed to get Mr. Martin the testing suggested by Dr. Krop (which was completed in postconviction and showed that Mr. Martin has structural abnormalities of the brain), the handling of Dr. Krop actually supports a finding of deficient performance, rather than refuting it. See e.g., Porter v. McCollum, 558 U.S. 30, 40 (2009) ("The decision not to investigate did not reflect reasonable professional judgment"), Douglas v. State, 141 So. 3d 107, 121 (Fla. 2012) ("even after Dr. Krop's request for additional materials, the record does not disclose that counsel made any effort to provide Dr. Krop with readily available evidence… there were sufficient facts in this case to place counsel on notice that further investigation of mental health mitigation was necessary. Consequently, counsel's failure to investigate this line of defense was not reasonable under prevailing professional norms")

With respect to the remaining considerations that Mr. Martin argues should have been presented by his trial counsel in the suppression hearing, such as age, drug use, lack of education, sleep deprivation, and lack of meaningful experience with the police, the State's Answer incorrectly analyzes each factor individually, determining that none of the factors would have made a difference. (Answer 48-49.) However, voluntariness is a *totality* of the circumstances test. See e.g., Thomas v. State, 55 A.3d 680, 688-89 (2012) ("A court, [] does not parse out individual aspects so that each circumstance is treated as its own totality in the application of the law.

Rather, when doing a constitutional analysis, a court must look at the circumstances as a whole. *Ransome v. State*, 373 Md. 99, 104, 816 A.2d 901, 904 (2003) (stating that a court conducting a "totality of the circumstances test" must not "parse out each individual circumstance for separate consideration")"). Rarely, if ever, would an individual element in a totality of the circumstances evaluation "carry the day." (Answer 48.)

As argued by Mr. Martin, all of the factors he identified, (which have not even been factually developed because no evidentiary hearing has been held) must be evaluated together along with evidence of police coercion presented in the suppression hearing, and the testimony of a confession and mental health expert to determine whether the confession was involuntary under the totality of circumstances. If witnesses had been presented at the suppression hearing concerning other factors, the trial court would have determined that Mr. Martin was particularly susceptible to police coercion and suppressed the statement. Where trial counsel believed that the suppression matter was a close issue, and this Court appeared to agree on direct appeal, additional evidence concerning Mr. Martin's state of mind at the time of the confession was highly relevant to this determination. Like the problem with the State's piecemeal assessment of the circumstances here, defense counsel's focus on a single aspect of the confession – the coercive tactics

employed by the police – was a deficient approach to proving involuntariness under a totality of the circumstances test.

Consequently, had counsel presented the trial court with additional elements for its totality evaluation, the motion to suppression would have been granted. Kimmelman, 477 U.S. at 375. Remand for an evidentiary hearing on this issue so that Mr. Martin can present evidence in support of additional factors supporting the involuntariness of his confession is necessary. See Atwater, 788 So. 2d at 238; Weible, 761 So. 2d at 473.

III. Cell phone expert:

The problem addressed in the instant claim is that the State's cell phone witness, Det. Matos, gave inaccurate and misleading information about the nature of cell phone technology which went uncorrected by defense counsel. (10 R 450-52) ("Well, from what I understand the – when you utilize a cell phone it will make contact and communicate with the nearest tower.") (later testifying that a cell phone tower range is only three to five miles). The inaccuracies should have been addressed by counsel in a pretrial motion in limine, or at very least through further questioning of Det. Matos in cross-examination or through a defense witness at trial.

The State's Answer argues extensively that the cell phone testimony was admissible through a lay witness. However, as the initial brief makes clear, counsel was deficient in challenging the accuracy of Det. Mato's testimony, not his

credentials for giving such testimony. (IB 60-61.) Mr. Martin is not attacking the general admissibility of the lay witness testimony.

The State inappropriately attempts to cast the issue at hand as a "change in the law," to immunize defense counsel from a finding of deficient performance. However, the failure to challenge the State's forensic evidence is not a failure to anticipate a "change in the law." Moreover, as noted in Mr. Martin's 3.851 motion, accurate cell phone testimony was being given at the time of Mr. Martin's trial. As pointed out in Mr. Martin's 3.851 motions, a State cell phone witness in the Duval Co. State v. John Mosley case, which was tried in 2005 in the same circuit as Mr. Martin's case, gave accurate testimony about how cell phone "pinging" works:

> Q: All right. And I believe you said that the cell phone will use the tower that it currently has the signal from?
>
> A: Correct.
>
> Q: Okay. Oftentimes is that the closest tower?
>
> A: **It doesn't have to be.**
>
> Q: What other factors affect what tower would be used?
>
> A: Well, again, the phone doesn't know where the tower is. All it knows is that it sees the strongest signal. What can affect what the phone sees as the strongest signal are the towers themselves, the antennas, the terrain, the weather, the handset itself. Half of our network is the handset itself.

(R. 470-75, 1476) (emphasis added) (testimony from State v. John Mosley, No. 16-2004-CF-667-AXXX). The fact that cell phones do not always ping off the closest

tower and the area a specific tower will service was known across the country at the time of Mr. Martin's trial. See e.g., Lewis v. State, No. 14-07-00377-CR, 2008 Tex. App. LEXIS 4064, at *12 (Tex. App. May 29, 2008) ("McDaniel explained that typically a cell phone would use the closest tower, but based on the network traffic, the system sometimes routed a call to a tower further away."); United States v. Allums, No. 2:08-CR-30 TS, 2009 U.S. Dist. LEXIS 28276, at *4-5 (D. Utah Mar. 30, 2009) "there are questions regarding the reliability of [cell phone] evidence, … particularly the factors that would cause a cell phone to use a tower other than the closest cell tower…"); State v. Bobo, 770 N.W.2d 129, 137 n.4 (Minn. 2009).

Tellingly, defense counsel's cross-examination of Det. Matos indicates that he attempted to illicit correct information concerning the cell tower radius and uncertainty about whether a cell phone hits the closest tower. However, when Det. Matos gave incorrect answers to defense counsel's questions, counsel was unable to correct the misinformation because he failed to consult with or retain a cell phone witness to provide accurate testimony in the defense case.

The State's attempt to distinguish the problem that occurred in Det. Mato's testimony from the cases and supporting material cited by Mr. Martin in his 3.851 motion(s) and initial brief – whether there was a "***single***" or multiple cell phone towers involved – fails. (Answer 53) (emphasis original). Whether there were one or more calls (Answer 53), is a distinction without a difference -- regardless of the

number of times Mr. Martin's cell phone pinged off of any particular tower, the State testimony, that a phone will ping off the closest tower and that a tower only has a radius of 3-5 miles, was wrong, or at best misleading.

As *originally conceded* in the State's 3.851 Response, (PCR 1578), this issue requires evidentiary hearing so that Mr. Martin can present trial counsel concerning his strategy and a cell phone expert to fully develop his claim. See Atwater, 788 So. 2d at 238; Weible, 761 So. 2d at 473.

IV. Witnesses to support Martin's testimony:

Once again, the State argued in its 3.851 response that "[t]his claim should also be explored at the evidentiary hearing" (PCR 1579) but now argues that it was appropriately summarily denied.

The State's Answer praises defense counsels' experience and work in this case (e.g. Answer 12), states that the case could not be won in the guilt phase, and suggests that counsel appropriately focused on the penalty phase. (Answer 58-59.) However, counsel *failed* to secure a life sentence for Mr. Martin, presenting almost nothing in mitigation, despite the availability of significant, compelling mitigation which was discovered in postconviction. An argument that an outstanding penalty phase performance somehow prevents a finding of ineffectiveness in guilt phase is not supported by the law. Even if it was, the penalty phase work *in this case* certainly does not support such a finding.

Further, in analyzing whether counsel was ineffective in failing to present Mike Gregg and noting that an "empty chair defense" requires an empty chair, the State fails to show how this reasoning is applicable to Tracy Ray or Cliff Putnam's testimonies. (Answer 59-60.) Ms. Ray and Mr. Putnam could have provided testimony supporting Mr. Martin's testimony, without risk of undermining his alternate suspect defense.

The State's suggestion that Ms. Ray would have been cross-examined about her son's possession of the victim's car, etc., is incorrect, as any such questioning would call for speculation – Ms. Ray has no direct knowledge of Mr. Martin's activities during the time in question.[8] (Answer 60.) Her testimony would have been limited to her observations of Mr. Gregg at her place of work. Moreover, the State failed to provide any analysis concerning Mr. Putnam's proposed testimony which would have supported Mr. Martin's trial testimony.

Contrary to the State's suggestion, the record, without an evidentiary hearing, does not establish that Mr. Martin's trial attorney made a strategic decision not to present Ms. Ray and Mr. Putnam at trial (Answer 59), and does not conclusively

[8] The State also postulates that the jury would be able to view photographs or video from Ms. Ray's store to see if Gregg's manner was threatening or intimidating. (Answer 60.) Undersigned is unaware of any such evidence and if it exists it would arguably constitute Brady material, which should have been tendered to the defense. At this juncture, to the best of undersigned's knowledge, it is not part of this record, has not been tendered at any evidentiary hearing, and probably does not exist.

refute Mr. Martin's allegations that the failure to present these witnesses was due to counsel's failure to investigate. Instead, it appears, as suggested by the State, that defense counsels simply abandoned Mr. Martin when he chose to take the stand contrary to their advice. (Answer 60.)

As originally conceded in the State's 3.851 Response, (PCR 1579), this issue requires evidentiary hearing so that Mr. Martin can present trial counsel concerning his strategy and the proposed witnesses to fully develop his claim. See Atwater, 788 So. 2d at 238; Weible, 761 So. 2d at 473.

CONCLUSION

WHEREFORE, based on the argument set forth in his initial brief, and above, 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 1st day of May, 2019.

/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.

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