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IN THE SUPREME COURT OF FLORIDA

MARK A. TWILEGAR,

Appellant,

v.

CASE NO. SC13-2169
L.T. No. 03-CF-2151
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Twilegar was charged by indictment on April 3, 2003 with the first-degree murder of David Thomas. (R. 1/12-13).[1] A jury trial began on January 17, 2007. (T. 3/454). On January 25, 2007 Twilegar was found guilty of the murder. (T. 12/2222). A penalty phase proceeding was conducted February 16, 2007 without the presence of a jury as Twilegar had waived his right to a penalty phase jury. (R. 16/1231-81; T. 1/30-43). Following a Spencer[2] hearing, conducted February 19, 2007, the Honorable James R. Thompson sentenced Twilegar to death on August 14, 2007. (R. 17/1297-1329, 20/1874, 21/1878-91).

In his sentencing order, Judge Thompson found the following aggravating factors: 1) the capital felony was committed for pecuniary gain, given great weight; and 2) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, given very great weight. (R. 21/1880-86, 1890). After considering statutory and non-statutory mitigation, the

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[1] Citations to the record on direct appeal will be as follows: R. followed by the appropriate volume and page number; citations to the trial transcript will be as follows: T. followed by the appropriate volume and page number. Citations to the postconviction evidentiary hearing record will be as follows: PCR followed by the appropriate volume and page number.

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

following mitigation was found to apply: 1) Twilegar had a disadvantaged and dysfunctional family background and childhood, given little weight; 2) Twilegar had very limited formal education (seventh grade), given little weight; 3) Twilegar abused drugs when he was a teenager, given very little weight; and 4) the alternative punishment to death is life imprisonment without parole, given significant weight. (R. 21/1886-90).

Twilegar appealed his convictions to this Court raising nine issues:

> ISSUE I: WHETHER THIS COURT MUST VACATE APPELLANT'S CONVICTION BECAUSE THE CIRCUMSTANTIAL EVIDENCE WAS INSUFFICIENT TO PROVE APPELLANT KILLED THOMAS.
>
> ISSUE II: WHETHER THE EVIDENCE FAILS TO PROVE FIRST-DEGREE MURDER BECAUSE THERE IS INSUFFICIENT EVIDENCE TO PROVE PREMEDITATION, AND BECAUSE THE JURY SPECIFICALLY RULED OUT FELONY MURDER; AND WHETHER THE CONVICTION SHOULD BE REDUCED TO MANSLAUGHTER.
>
> ISSUE III: WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS THE PROPERTY SEIZED FROM THE CAMPSITE IN TENNESSEE WHEN THE STATE FAILED TO PROVE HE ABANDONED THE PROPERTY, AND BECAUSE THE WARRANT EXCEPTION OF "EXIGENT CIRCUMSTANCES" CANNOT JUSTIFY SEIZING THE TENT AND ITS CONTENT AND THE PROPERTY REMAINING AT THE CAMPSITE.
>
> ISSUE IV: WHETHER THE COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING EVIDENCE THOMAS HAD BEEN ARRESTED FOR CONSPIRACY TO KILL HIS WIFE, THAT HE HAD SYMPTOMS OF DRUG USE, AND THAT AT ONE POINT HE ASKED A GIRLFRIEND TO SELL COCAINE; AND WHETHER THE COURT ERRED BY EXCLUDING THOMAS' BANK STATEMENTS, WHICH SHOWED TRENDS CONTRARY TO TESTIMONY; AND WHETHER THE COURT DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS IN

REFUSING TO CONSIDER GRANTING A CONTINUANCE TO ALLOW APPELLANT TO CALL A WITNESS WHO WOULD HAVE TESTIFIED THOMAS MADE STATEMENTS INDICATING HE WAS AFRAID OF SOMEONE OTHER THAN APPELLANT.

ISSUE V: WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF APPELLANT'S LEAVING FORT MYERS TO ARGUE CONSCIOUSNESS OF GUILT AND ERRED IN ALLOWING THE STATE TO INFER CONSCIOUSNESS OF GUILT FROM THE FACT HE EITHER LEFT THE TENNESSEE CAMPGROUND OR FAILED TO CLAIM HIS PROPERTY FROM THE CAMPGROUND WHEN THAT EVIDENCE DEMONSTRATES A DESIRE TO AVOID ARREST FOR AN OUTSTANDING WARRANT AND A DESIRE TO HIDE HIS DRUG DEALING FROM LAW ENFORCEMENT.

ISSUE VI: WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AUDIOTAPES OF PHONE CALLS BETWEEN THE APPELLANT AND HIS MOTHER AND BETWEEN THE APPELLANT AND DEBBIE MILLER BECAUSE THE TAPES WOULD HAVE BEEN MISLEADING IF REDACTED AND BECAUSE THE TAPES DID NOT CONTAIN ADOPTIVE ADMISSIONS WHEN PLAYED IN THEIR ENTIRETY, WHICH RESULTED IN THE REVELATION OF THE HIGHLY PREJUDICIAL EVIDENCE OF OTHER OFFENSES.

ISSUE VII: WHETHER THE TRIAL COURT ERRED IN ADMITTING THE CASH REGISTER RECEIPTS WHEN THE STATE FAILED TO LAY A FOUNDATION FOR THE "BUSINESS RECORDS" EXCEPTION TO THE HEARSAY RULE.

ISSUE VIII: WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WHEN THE EVIDENCE FAILED TO DEMONSTRATE HOW THE OFFENSE OCCURRED; AND WHETHER THE JURY'S VERDICT PRECLUDES A FINDING OF THE PECUNIARY GAIN AGGRAVATOR.

ISSUE IX: WHETHER THE COURT ERRED IN ALLOWING APPELLANT TO WAIVE AN INVESTIGATION INTO POSSIBLE MITIGATION EVIDENCE FOR THE PENALTY PHASE AND TO WAIVE PRESENTATION OF MITIGATION WITHOUT AN INVESTIGATION.

This Court affirmed Twilegar's conviction and sentence on January 7, 2010. Twilegar v. State, 42 So. 3d 177 (Fla. 2010).

Twilegar filed a motion for rehearing which was denied August 9, 2010 and the mandate issued August 25, 2010.

The following factual summary is taken from this Court's opinion affirming Twilegar's conviction and sentence on direct appeal:

> On April 3, 2003, Mark Twilegar was charged with first-degree murder, either by premeditated design or in the course of a robbery, for the shooting death of David Thomas in Fort Myers on August 7, 2002. The evidence presented at trial showed that Twilegar came to Fort Myers from Missouri in the spring of 2002 and lived for a couple of weeks with his niece, Jennifer Morrison, who rented a residence from the victim, David Thomas, and his wife, Mary Ann Lehman. Twilegar's mother arrived a few weeks later and also moved in with Morrison. After several weeks, Twilegar moved out and eventually pitched a three-room tent in an undeveloped area adjacent to the backyard of a house at 412 Miramar Road, which was occupied by Britany and Shane McArthur. Twilegar did not own a car and did not have a regular job. In lieu of paying rent, he worked as a handyman on the premises. His possessions included a couch, a TV, some clothes and a twelve-gauge shotgun, which he kept in the tent. The McArthurs moved out of the house in June 2002, and Britany's younger brother, Spencer, moved into the house in September. Prior to moving in, Spencer stopped by the house on a regular basis to perform renovations, as discussed below.
>
> On occasion, Twilegar worked as a handyman for the victim, David Thomas, and on August 2, 2002, the two drove in Thomas's pickup truck to Montgomery, Alabama, where Twilegar had agreed to install a deck on a house Thomas owned there. Thomas told his wife that he would be gone six to eight weeks. On the morning of August 6, 2002, Thomas withdrew $25,000 in cash from a bank in Montgomery, ostensibly to purchase a house at an auction, and then later that same morning he rented a Dodge Neon, arranging to return

the car in Montgomery on August 9, 2002. Thomas called his girlfriend, Valerie Bisnett Fabina, in Fort Myers and told her that he and Twilegar would be returning to Fort Myers that night. Thomas's neighbor last saw Thomas and Twilegar at the Montgomery house at approximately 3 p.m. that afternoon. Thomas and Twilegar then returned to Fort Myers, where Thomas met with Fabina at approximately 11 p.m. and obtained a motel room key card from her. At the meeting, Fabina observed Twilegar sitting in the passenger seat of the Neon.

The next evening, August 7, 2002, Thomas visited Fabina at her job at 7 or 7:30 p.m. and returned the motel key card. When he opened his wallet to remove the key card, Fabina noticed that he had an unusually large amount of cash. Thomas told her that he and Twilegar were going to go look at a truck to buy for Twilegar to use on the job in Alabama, and that he would meet her later that night at the motel. Fabina never saw or heard from him again. Thomas spoke with his wife, Mary Ann Lehman, by phone a little after 9 p.m. that evening, and they made arrangements to speak again in the morning. She never saw or heard from him again. Later that night, Twilegar, alone, arrived at Jennifer Morrison's house, where Twilegar's mother was staying. Morrison then drove Twilegar to 7-Eleven where he purchased cell-phones and supplies. She also drove him to Wal-Mart where he made additional purchases. When they arrived back at the house, Morrison went to bed. When she woke the next morning, Twilegar and his mother and their possessions were gone. Morrison would never see Twilegar in Fort Myers again.

After Britany and Shane moved out of the Miramar house in June but before Spencer moved into the house in September, Spencer arrived at the house one day at 4 p.m. to perform renovations and he saw Twilegar digging in the backyard on the far side of his tent. Spencer watched him briefly, unobserved, then returned to the front of the house. A few minutes later, Twilegar approached him and explained that a man would be stopping by to deliver a couple of pounds of "weed" and that the man would not stop if he saw Spencer

there. Twilegar asked him to leave the premises and told him that if he did he would give him either $100 or an ounce of weed. Spencer left, and when he returned the next day, he found a $100 bill in the prearranged spot. He also found Twilegar's tent disassembled and smoldering in the backyard incinerator. Most of Twilegar's possessions were gone, including the shotgun. Spencer would never see Twilegar in Fort Myers again. On September 26, 2002, after Thomas's disappearance was publicized, Spencer went to the spot where Twilegar had been digging and found that the area was covered by Twilegar's couch. He moved the couch aside and found an area of freshly dug dirt, covered with palm fronds. Beneath the palm fronds was a piece of plywood, and beneath that a couple of cinder blocks and a car ramp. After digging several feet, he detected a strong odor. Police were called and they discovered Thomas's body.

Thomas died from a single shotgun blast to his upper right back, delivered at close range. The 7 1/2 birdshot, from a twelve-gauge shell, had travelled through his body at a downward trajectory. He had died within minutes of being shot. Soft fine sand, similar to that which covered the exterior of his body, was found deep inside his throat, in his larynx, indicating that he had still been breathing, though not necessarily conscious, when buried. He was still wearing the same clothes he had been wearing when Fabina last saw him on August 7, 2002, but his wallet was missing. His body was badly decomposed, and the time of death was uncertain. A spent twelve-gauge shell was found in the incinerator, along with a broken D-shaped garden tool handle. Twilegar's shotgun was never found. Several live twelve-gauge shells were found discarded in the area, along with a shovel with a broken handle. Thomas's rental car key fob was found approximately 100 feet from the body. The rental car was found earlier, on August 13, 2002, burned in a remote area of Lee County. Twilegar was apprehended September 20, 2002, in Greenville, Tennessee, where he had been staying at a campground since August 21, 2002. Among the property seized at the campground were numerous retail receipts totaling thousands of dollars for camping supplies and other items purchased after

> Twilegar had left Fort Myers. The merchandise was all purchased with cash. While awaiting trial, Twilegar made several incriminating phone calls, which were recorded.
>
> Twilegar's trial began January 16, 2007, and he testified in the guilt phase. He stated that the "weed" incident had in fact occurred but that it had happened before he left for Alabama with Thomas, not after he returned. He said that he had often dug holes near his tent for latrine purposes. He also testified that he had returned from Alabama not with Thomas on August 6, 2002, but alone on August 5, 2002, in a car Thomas had given him as partial payment for the deck work he was doing, and that he had later sold the car to an itinerant in Palm Beach. He testified that during the early morning hours of August 8, 2002, after shopping at 7-Eleven and Wal-Mart, he had driven his mother's car, which was already packed with their possessions, back to his tent to get his shaving kit and that someone had pointed a shotgun at him in the dark and that he had deflected the shot, injuring his hand. He kicked the assailant and ran away.
>
> After closing arguments, the jury deliberated for little more than an hour and on January 26, 2007, returned a verdict finding Twilegar guilty of first-degree premeditated murder. Twilegar waived a penalty phase jury and waived both the investigation and the presentation of mitigation. The penalty phase proceeding was held before the judge on February 16, 2007, and the State presented argument in aggravation, while the defense stood mute. The *Spencer* hearing was held February 19, 2007. On August 14, 2007, the court sentenced Twilegar to death, based on two aggravating circumstances, no statutory mitigating circumstances, and four nonstatutory mitigating circumstances.

Twilegar v. State, 42 So. 3d 177, 185-88 (Fla. 2010)(footnotes omitted).[3]

[3] The State rejects Twilegar's colorful rendition of the facts and accusations leveled against victim Thomas (which are outside

Twilegar filed a petition for writ of certiorari in the United States Supreme Court. The Court denied Twilegar's petition for writ of certiorari on February 22, 2011. Twilegar v. Florida, 131 S. Ct. 1476 (2011).

POSTCONVICTION PROCEEDINGS

Twilegar filed his initial motion to vacate on February 7, 2012, raising the following six claims and sub-claims:

> CLAIM I: MR. TWILEGAR IS BEING DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING LAW BECAUSE HE IS BEING DENIED ACCESS TO PUBLIC RECORDS.
>
> CLAIM II: REQUIRING THE APPLICATION OF RULE 3.851 TO MR. TWILEGAR VIOLATES HIS RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION.
>
> CLAIM III: MR. TWILEGAR'S CONVICTION IS UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE OF THE INEFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND DURING THE GUILT PHASE OF HIS TRIAL.
>
> 1 FAILURE TO ADEQUATELY CONDUCT VOIR DIRE
>
> 2) FAILURE TO OBJECT TO THE DEATH QUALIFICATION OF THE JURY
>
> 3) FAILING TO OBJECT TO THE STATE'S SYSTEMATIC EXCLUSION OF WOMEN FROM THE JURY
>
> 4) FAILURE TO UTILIZE AN EXPERT IN FORENSIC PATHOLOGY[4]

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the record on appeal) in his "Introduction", and would submit the facts as found by this Court more fairly represent the actual evidence at trial.

[4] This subclaim consisted of additional subclaims Twilegar was granted a hearing on, as discussed *infra*.

5) FAILURE TO EFFECTIVELY PRESENT EVIDENCE IN SUPPORT OF THEORY OF DEFENSE

(a) Alliant Bank Statements
(b) Testimony of Michael Shelton

CLAIM IV: EVIDENCE OF JUROR MISCONDUCT ESTABLISHES THAT THE OUTCOME OF MR. TWILEGAR'S TRIAL WAS UNRELIABLE AND VIOLATED HIS DUE PROCESS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY UNDER THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM V: MR. TWILEGAR IS BEING DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE OF THE RULES PROHIBITING MR. TWILEGAR'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

CLAIM VI: FLORIDA STATUTE § 922.105 AND THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATE ARTICLE II, SECTION 3 AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION, AS APPLIED AND ON ITS FACE.

(PCR 6/1089-1156).

The State filed its Response on May 7, 2012. (PCR 7/1276-1347). On October 1, 2012, Twilegar filed an amended motion to vacate and the State filed an amended response on October 23, 2012. (PCR 8/1490-1565; 9/1670-1743) The Case Management Conference was held October 26, 2012. (PCR 13/2414-2506). On November 26, 2012, the postconviction court issued an Order granting an evidentiary hearing on Claim III's sub-claims

alleging (1) trial counsel was ineffective for failing to call a forensic expert to contradict the Medical Examiner's findings, (2) trial counsel was ineffective for failing to adequately cross-examine the Medical Examiner, (3) trial counsel failed to adequately impeach the Medical Examiner, and (4) trial counsel was ineffective for failing to call David Twomey at trial. (PCR 10/1821-41; 13/2403-04). Twilegar filed a second amended motion to vacate on December 26, 2012, supplementing the sub-claims the court granted a hearing on. (PCR 10/1951-2029). The State did not file a response to the second amended motion.

At the evidentiary hearing, collateral counsel presented the testimony of Dr. Terri Haddix, Jacobus Swanepoel and Twilegar's trial counsel, Neil McLoughlin. The State presented the testimony of Medical Examiner Dr. Rebecca Hamilton.

Dr. Haddix was contacted in this case to offer an opinion on pathology issues with regard to victim Thomas' autopsy. (PCR 14/2544, 2549).[5] She testified regarding four areas: 1. The number of shotgun wounds inflicted upon the victim, 2. The "alternate interpretation" of other injuries inflicted upon the victim, 3. Things that "may or may not" have been done during the course of the autopsy, and 4. The issue of sand or debris

[5] The majority of Haddix's testimony in criminal cases has been on the behalf of criminal defendants, but not in Florida. (PCR 14/2545, 2551-52).

within the victim's airway. (PCR 14/2556). In reaching her opinions, Dr. Haddix relied upon a forensic pathology book entitled "Spitz and Fisher's Medicolegal Investigation of Death" authored/edited by Dr. Daniel Spitz, the expert utilized by trial counsel, Neil McLoughlin. (PCR 14/2597).

Dr. Haddix did not have any dispute with the shotgun wound to the right upper back found by Dr. Hamilton. (PCR 14/2556, 2588). However, Dr. Haddix testified she believed victim Thomas suffered a second gunshot wound to the left front chest. (PCR 14/2558-59, 2588-89). She could not state which wound was inflicted first. (PCR 14/2588). When asked if she knew for "certain" that there were two shotgun wounds, she responded she believed there was "very good evidence" that there was a "minimum of two." (PCR 14/2588-89). Additionally, she testified regarding an injury to the victim's right arm but could not opine it represented a shotgun wound due to the lack of an x-ray. (PCR 14/2559). She indicated she could not definitively determine the cause of the injury, but viewed it as occurring antemortem. (PCR 14/2588-2591). She indicated the injury was "superficial" and doubted it would have been life threatening. (PCR 14/2590-91). Dr. Haddix was not able to determine the order of the injuries sustained. (PCR 14/2597).

Dr. Haddix testified that there was an injury on the

victim's neck which left an irregular shaped wound. (PCR 14/2576). Haddix believed the wound evidenced an antemortem injury. (PCR 14/2576-78, 2591). Dr. Haddix associated the wound with the fracture to the victim's hyoid bone. (PCR 14/2579-80). She opined a blunt force injury penetrating the neck could produce the fracture. (PCR 14/2580). She also indicated strangulation could cause the injury. (PCR 14/2580). She could not state what definitely caused the injury. (PCR 14/2591).

Dr. Haddix opined the shotgun pellets she viewed in victim Thomas' head x-ray were not "compatible" with the shotgun wound on Thomas' back. (PCR 14/2571-72). She indicated the dispersion of shotgun pellets she viewed was consistent with an injury inflicted from approximately four to five feet whereas the shotgun injury to the back was a close range shot, within a couple feet. (PCR 14/2571-72).

Regarding Dr. Hamilton's autopsy, Dr. Haddix's opinion was the autopsy was deficient in that Dr. Hamilton did not describe the nature of the defects on the victim's clothing, victim Thomas' extremities were not x-rayed, and victim Thomas' scalp was not reflected. (PCR 14/2566-71, 2592-93). She further testified she disagreed with Dr. Hamilton's trial testimony that burying a body would accelerate decomposition, indicating such was well known in forensic literature. (PCR 14/2575). However,

no literature on this subject was ever presented below. When asked if photographic documentation of the internal organs would assist in determining "how long the body has been dead," Dr. Haddix responded: "I don't know that the photographic documentation would necessary assist so much with that. That's a very difficult thing to determine, irrespective of photographs." (PCR 14/2573-74).

Regarding the sand found in victim Thomas' larynx, Dr. Haddix indicated Dr. Hamilton's autopsy was deficient in that it did not include photographic documentation of the sand. (PCR 14/2572-73). She testified it was difficult to comment on the sand without seeing what Hamilton saw. (PCR 14/2573, 2582). Ultimately, she concluded that "what the source of sand was, et cetera, it's difficult to make a lot of conclusions about that." (PCR 14/2582-83). Dr. Haddix could only "wonder" if the waxing and waning water tables could have carried the water into Thomas' larynx. (PCR 14/2583, 2596).

Dr. Haddix has never conducted an autopsy in the State of Florida. (PCR 14/2586). She has conducted six or fewer autopsies on bodies that were buried. (PCR 14/2586-87). None of Dr. Haddix's writings or publications were related to decomposition of buried bodies. (PCR 14/2587). Although Dr. Haddix reviewed and criticized Dr. Hamilton's work, she never contacted or spoke

to Dr. Hamilton. (PCR 14/2587). Despite her differing opinions and conjecture, Dr. Haddix would not change the cause and manner of death found by Dr. Hamilton. (PCR 14/2597).[6]

Forensic scientist Jacobus Swanepoel, who works with Dr. Haddix, examined Twilegar's clothing. (PCR 14/2621-22, 2639-40, 2650). After his examination, he believed three defects in the clothing were "likely" caused by a gunshot or shotgun (one being the known shotgun wound to the right upper back). (PCR 14/2624-25, 2637-38, 2649). Postconviction chemical testing of the clothing only revealed traces of lead in the area of the known shotgun wound. (PCR 14/2641-42).[7] Swanepoel reviewed Thomas' head x-ray and did not believe the pellets he saw could be contributed to the back shotgun wound. (PCR 14/2635-36, 2648-49).

Neither Dr. Haddix nor Mr. Swanepoel testified they were available at the time of Twilegar's trial, or that they would have been able to assist in any form or fashion.

Neil McLoughlin represented Twilegar at his trial. McLoughlin has been an attorney since 1986. (PCR 14/2655).

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[6] Like Dr. Hamilton, Dr. Haddix indicated Thomas would have only lived a few minutes after his injuries. (T. 3/500; PCR 14/2598).

[7] Postconviction chemical testing was performed at the Florida Department of Law Enforcement. Swanepoel did not find any deficiencies in the testing. (PCR 14/2639).

McLoughlin is an assistant public defender and has been employed in that capacity since October 1996. (PCR 14/2655). His first trial was in 1993, and he estimated he has tried "hundreds" of cases. (PCR 14/2714-15). McLoughlin has been trying homicide cases since 1998 or 1999. (PCR 14/2656). Presently, he only handles homicide cases, however he held the position of head of the public defender's child sex crimes division. (PCR 14/2656, 2657). He has been counsel in six to ten capital cases. (PCR 14/2657-58). He has tried two capital cases through the penalty phase. (PCR 14/2658). McLoughlin indicated in every murder case he utilizes a forensic pathologist. (PCR 14/2720).

McLoughlin began representing Twilegar approximately six months into the case. (PCR 14/2659-60). Philadelphia Beard joined Twilegar's defense with McLoughlin acting as lead counsel. (PCR 14/2662). He testified while he was lead counsel, it did not mean he was making the ultimate decisions during trial as he discusses as much as possible about everything with co-counsel. (PCR 14/2662). McLoughlin indicated his focus was on the guilt phase of trial, and science was generally his job. (PCR 14/2661, 2700).

He testified his strategy in attacking the State's "purely circumstantial" case was to put on a defense and challenge "everything." (PCR 14/2663-64, 2665). Regarding the defense,

McLaughlin testified:

> If I recall, we tried to challenge everything. I tried to keep out the jail phone calls. We tried to get in the bank statement of Mr. Thomas, the victim in this case, and the large amounts of cash that were going into his bank accounts without any source of income, which we got out through his wife. We tried to focus on his withdrawing within three, four, five, six days of his death twenty-five thousand dollars in cash in twenty dollar bills, which makes no sense. We tried to, which is part of it, you will ask me about it, Mr. Tomey [sic] seeing him, supposedly, after he died. We tried to challenge whether Mark was seen with Mr. Thomas after he left Burmingham [sic]. I don't -- yes, that's about everything I remember.

(PCR 14/2665-66).

According to McLoughlin, the theory he sought to develop was that victim Thomas "was involved in drug dealing, and that's who killed him." (PCR 14/2666, 2718). In presenting this theory, McLoughlin was asked if it was important to show that the shooting of the victim, did not occur at the grave site. He responded it was important and that he believed he tried to develop that noting how the victim's car was found "out in Lehigh in the middle of nowhere." (PCR 14/2666).

McLoughlin was familiar with Dr. Hamilton and had deposed her prior to conducting her deposition in the instant case. (PCR 14/2667, 2669). Postconviction counsel asked McLoughlin would deficiencies in Dr. Hamilton's autopsy fit in with the argument that law enforcement focused on Twilegar, and did not pursue

other areas. (PCR 14/2668-69). He answered: "Yes, of course, whether it occurred there or somewhere else." (PCR 14/2669).

While McLoughlin did not have any independent recollection of Dr. Hamilton's deposition, he did recall consulting with Dr. Spitz regarding the autopsy prior to deposing Dr. Hamilton. (PCR 14/2669, 2719). McLoughlin used Dr. Spitz previously and indicated he spoke to him and he was very straightforward and knowledgeable. (PCR 14/2669-70). He considered him and still considers him to be a reputable medical examiner. (PCR 14/2719). When Dr. Spitz was appointed, he was provided the autopsy report, certificate of death, criminal investigation report, and fifty-two photographs. (PCR 14/2672-73). He was later provided with additional autopsy photos, including blow-ups of the x-rays. (PCR 14/2673-79). Correspondence to Dr. Spitz referenced providing him a better view of the victim's left shoulder, providing him images of the victim's upper left chest, and right arm. (PCR 14/2673-78). In fact, McLoughlin provided Dr. Spitz the same x-ray images and photos postconviction counsel provided Dr. Haddix. (PCR 14/2559, 2562-65, 2676-78).

McLoughlin explained he provided Dr. Spitz the additional images as there were questions as to how many injuries the victim sustained, whether there were was an injury to the left shoulder, to the right arm, and why pellets were in different

areas. (PCR 14/2674-77). Through his investigation, McLoughlin believed the victim sustained multiple injuries. (PCR 14/2720). When asked about the significance of the x-rays, McLoughlin responded: [T]here was a question about how many wounds, and why there were pellets here, and why there were pellets there, and how the x-rays were taken, whether the body was face up or face down. (PCR 14/2677).

Thereafter the following exchange took place:

> Postconviction counsel: And in your investigation into the case, would the distribution of pellets show additional gunshot wounds?
>
> McLoughlin: It could have.

(PCR 14/2677).

In response to being asked about sending Dr. Spitz blow-ups of the x-rays, McLoughlin answered:

> It was something we had to do research into. How important it was, that I can't tell you, but we were trying to -- we spared nothing. We went for everything, and we wanted to know the answers to anything.

(PCR 14/2678-79, 2720).

McLoughlin testified in addition to the correspondence with Dr. Spitz we had several conversations with him. (PCR 14/2679). In addition to discussing other potential injuries and pellet distribution, McLoughlin testified he discussed "the defect in the neck, whether that was a wound, or from blunt force trauma,

or just disintegration of the skin. About the sand in the larynx, how quick death would have been and so on." (PCR 14/2679).

Notes of McLoughlin's consultation with Dr. Spitz indicated McLoughlin's concerns with possible deficiencies in Dr. Hamilton's autopsy. (PCR 14/2679-81). The notes were not verbatim renditions of conversations, but appeared to represent questions McLoughlin had and comments Dr. Spitz made. (PCR 14/2679-80, 2683-84, 2685-86). McLoughlin could not recall when the notes were compiled. (PCR 14/2721). The notes referenced where the sand was found, how it was deposited there, and whether any samples of the sand were retained. (PCR 14/2681, 2683, 2684-86). Furthermore, his notes indicate he consulted with Dr. Spitz regarding pellet distribution, and time of death. (PCR 14/2681-83). McLoughlin's notes also indicated that he was concerned with the hole on the left side of the victim's neck. (PCR 14/2686). McLoughlin testified it was "possible" he was told that it was "possibly a premortem injury." (PCR 14/2686). Prior to Dr. Hamilton's deposition, McLoughlin consulted with Dr. Spitz. (PCR 14/2725).

Dr. Spitz was not called to testify. (PCR 14/2722). McLoughlin indicated if Dr. Spitz had told him that the sand could have migrated into victim Thomas' mouth simply by being in

his mouth, he would have called him to testify. (PCR 14/2722). McLoughlin indicated had Dr. Spitz been able to provide information that was helpful to his case, he would have called him to testify. (PCR 15/2738). McLoughlin received a copy of Dr. Spitz's deposition, and it was filed as part of the court record. (R. 24/2033; PCR 14/2722).[8]

Dr. Hamilton's March 7, 2005 deposition indicates that McLoughlin explored those issues raised by postconviction counsel. Dr. Hamilton was questioned regarding: the possible injury to his neck, the possible injury to his right arm, the left shoulder "defect", the hyoid bone fracture, x-rays of the extremities, sand found, sand migration, the number of pellets counted, pellet dispersion, the pellets found in the head, time of death, location of death, and the possibility the body could have been moved. (PCR 14/2687-97, 2696; PCR 20/3803-09, 3814-28). In fact, during the deposition McLoughlin challenged whether there was an antemortem wound to the victim's left shoulder. (PCR 14/2696; PCR 20/27-28). McLoughlin indicated he

[8] A review of the deposition indicates that Spitz did not disagree with Dr. Hamilton's autopsy findings, did not take "fault" with the autopsy she performed, did not form any opinion regarding how the sand got into the victim's larynx (but agreed it would have to have been breathed in to appear there), and did not form an opinion as to whether the victim was alive when he was buried but opined, as Dr. Hamilton did, he would have died within several minutes of being shot. (T. 3/500; PCR 9/1744-61).

"could" have cross-examined Dr. Hamilton on those points he discussed with Dr. Spitz, and on those items he raised during Dr. Hamilton's deposition such as pellet distribution, and additional injuries. (PCR 15/2742-44).

Regarding additional chemical testing of the victim's clothing, McLoughlin indicated he considered it, consulted with Dr. Spitz and others in the criminal field and recalled the testing was not done. (PCR 14/2694-95). He explained:

> And I think the general -- I think the general consensus was that it had been wet too long to give any type of chemical, uh -- you couldn't do a chemical analysis, and -- that's all I remember.

(PCR 14/2694).

Upon cross-examination, McLoughlin indicated he would have hired a firearms expert if he believed there was a need to have one assist in the case. (PCR 15/2746).

During the evidentiary hearing, McLoughlin was questioned regarding his handling of Dr. Hamilton at trial. He was questioned why he did not question her regarding "multiple injuries" and "multiple gunshots" during cross-examination. McLoughlin explained how such questions **were not consistent** with the defense theory of the case:

> **If I can recall now, it wasn't -- it wouldn't have been relevant to our theory that Mark didn't do it. And I was concerned, and this is trying to stretch back, that I didn't want the jury to think that if --**

> **that besides being shot he was beaten and mutilated. And I was trying to just focus on whether, uh -- about the sand, and whether he was buried alive.**

(PCR 14/2697)(emphasis supplied).

While McLoughlin stated that multiple injuries could have supported his theory that victim Thomas was not killed at the gravesite, he explained his trial approach to this was different, focusing on the sand instead:

> **. . .I got in about the sand, and it wasn't tested, and she didn't test -- take any samples so that they could test it with the sand in that area to say that it was similar.**

(PCR 14/2698)(emphasis supplied). McLoughlin noted this was important as the victim's car was found burned in Lehigh Acres. (PCR 14/2702-03).

McLoughlin then further explained his strategy upon being asked why he failed to question Dr. Hamilton about the lack of x-rays of the extremities:

> **Honestly, if I recall, it just wasn't relevant because Mark wasn't the one who did it. And I didn't -- I didn't want to just throw things on the wall just for the heck of it. Now, maybe I should have, but at the time that wasn't our focus. Our focus was, someone else did it.**

(PCR 14/2699)(emphasis supplied).

As his theory of the case was that Twilegar did not commit the murder, McLoughlin did not feel it was necessary to challenge "how" the murder transpired. (PCR 14/2699).

During McLoughlin's cross-examination of Dr. Hamilton he was able to establish she was unable to determine the victim's time of death, and she was unable to determine how long the victim had been buried. (PCR 14/2723). McLoughlin made the point to bring out through Dr. Hamilton that burying a body can accelerate decomposition. (PCR 14/2723). McLoughlin indicated that this would have helped his theory of the case as he could have argued that victim Thomas was buried after August 7th - the date the State asserted he was murdered. (PCR 14/2724).

During his cross-examination of Dr. Hamilton, McLoughlin was able to show that Dr. Hamilton did not take a sample of the sand, and if a sample was taken soil analysis could indicate where the victim was murdered. (PCR 14/2724). He also suggested that it could be possible for victim Thomas to inhale sand into his laryngeal cavity from lying in piles of uneven sand, and Dr. Hamilton agreed. (PCR 14/2725).

McLoughlin indicated upon cross-examination that additional gunshot wounds may have shown that victim Thomas was shot at a distance more than one time. (PCR 14/2726). He conceded that such evidence could have shown that victim Thomas was alive and suffered pain between shots. (PCR 14/2726). He conceded that the hole in victim Thomas' neck could be evidence victim Thomas was tortured before his death. (PCR 14/2726-27). He conceded that

the fact victim Thomas' hyoid bone was broken could have established he was strangled. (PCR 14/2727).

McLoughlin's theory of the case was that Twilegar did not commit the murder, and the State did not have sufficient evidence to connect Twilegar to the crime. (PCR 14/2727). Upon cross-examination the following exchange took place regarding the defense theory and additional injuries:

> **State: So, whether the victim was shot one time, two times, or five times, did not go to whether or not Mr. Twilegar was the person who pulled the trigger, correct?**
>
> McLoughlin: **Correct.**
>
> State: But, if, in fact, the jury had believed that the defendant had shot the victim multiple times, and/or tortured him, that would not bolt [sic] well for the defendant, would it?
>
> McLoughlin: It wouldn't help.
>
> State: **In fact, if that information were brought out, the State might have been able to argue more effectively that the crime was heinous, atrocious, and cruel?**
>
> McLoughlin: **That would have been a consideration, yes.**
>
> State: **And, in fact, none of that information would have gone to show that the defendant was not guilty, would it?**
>
> McLoughlin: **Correct.**

(PCR 14/2727-28)(emphasis supplied).

McLoughlin recalled Dave Twomey, and testified during his

course of the investigation he spoke to him two to four times. (PCR 14/2703). According to McLoughlin's evidentiary hearing testimony, Twomey had told McLoughlin he saw victim Thomas approximately one week after he was last seen. (PCR 14/2704, 2706-09). McLoughlin indicated he tried to call Twomey to testify at trial but ultimately did not as Twomey showed up at 8:00 a.m. "high as heck." (PCR 14/2708-09; 15/2733). When questioned why he did not ask for a continuance, McLoughlin testified:

> Oh, I remember there was a reason why. If I didn't, the reason is, Mr. Tomey [sic] showed up extremely high, and said, what do you want me to say? And that threw into doubt in my mind, and Ms. Beard's mind whether anything he said is true, because **it appeared that he was willing to say anything on the stand** if we told him what to say.
> . . .
> **And I wouldn't be involved in that.**

(PCR 14/2708-09)(emphasis supplied).

Additionally, upon cross-examination McLoughlin conceded had Twomey ever been called to testify he could have been impeached with his prior criminal history, and prior sworn inconsistent statements (*i.e.*, that he saw victim Thomas prior to the date of his disappearance). (PCR 15/2733-36, 2739-41). McLoughlin testified he had serious doubts about Twomey's credibility and "grave concerns" about him testifying truthfully. (PCR 15/2737).

Dr. Hamilton was called by the State during the evidentiary hearing. Dr. Hamilton has been the Chief Medical Examiner for District Twenty-One since 2001, and has worked as a medical examiner since 1997. (PCR 15/2750-51, 2796). She has conducted several thousand autopsies. (PCR 15/2758). In her time with District Twenty-One, Dr. Hamilton testified she has conducted approximately one hundred and fifty autopsies where the weapon used was a shotgun. (PCR 15/2758).

Dr. Hamilton testified that the scalp is reflected in all autopsies in her office and she in fact did reflect victim Thomas' scalp. (PCR 15/2752-53). She testified x-rays of the victim's extremities were not done and explained they are done when she is looking for an injury or attempting to identify a victim. (PCR 15/2754). Dr. Hamilton explained the x-ray of victim Thomas's head depicted the back of his head. (PCR 15/2755-56). She testified she associated the pellets in the x-ray with the right upper back shotgun wound. (PCR 15/2756-58). She explained: ". . . Once they enter -- once they enter their target, they make contact with other pellets and other anatomical structures and then disperse accordingly." (PCR 15/2757). Hamilton also associated the defects in the back of the neck with the same wound. (PCR 15/2793-94).

Dr. Hamilton considered the pellet pattern in this case to be typical. (PCR 15/2758). In her opinion, the statement that it would be impossible for a shotgun wound to the right upper back to result in pellets in the back of the head is an incorrect statement. (PCR 15/2758-59). Her opinion would not change even if the statement was attributed to a firearm expert. (PCR 15/2795-96). She explained:

> . . . Because what a firearm's expert does and what a forensic pathologist does are two different things. They are specialized in examining ammunition and weapons. We specialize not in examining ammunition and weapons, but we are considered experts in patterns of injury. And I base my decision on this specific case regarding the pellets at the back of the head on all cases of shotguns that I have personally witnessed or done. And it's not uncommon to have straggling pellets radiate outwards from the actual entrance wound to other areas.

(PCR 15/2796).

Dr. Hamilton testified she was able to locate the sand in victim Thomas' laryngeal cavity upon dissection of the neck structures. (PCR 15/2759). Regarding the hole to victim Thomas' left neck, Dr. Hamilton indicated she observed the hole and described it in her autopsy report. (PCR 15/2760). She testified she could not definitively indicate it was trauma or just due to decomposition. (PCR 15/2761). Dr. Hamilton testified it was not possible for sand to passively migrate through the neck hole to the laryngeal cavity. (PCR 15/2761-62). She explained that in

order for sand to passively migrate into the laryngeal cavity there would need to be a corresponding defect within the cavity and there was none. (PCR 15/2761-62). In fact, the neck wound was examined and **did not** connect to the air cavity. (PCR 15/2799).

Dr. Hamilton's testimony indicates she was aware of defects other than the shotgun wound to right upper back but did not define them as injuries, because as a medical examiner she must provide an opinion to a reasonable degree of medical certainty and could not do so regarding the defects. (PCR 15/2762-63). In pertinent part, the following exchange took place:

> State: And when you conducted the autopsy, were you aware of the defects to the body, including the hole to the neck, the front of the chest, and the arm, and the shoulder?
>
> Dr. Hamilton: Yes. And they are actually in my diagrams.
>
> State: And those specific defects, were you able to define those as injuries?
>
> Dr. Hamilton: I could not definitively define them as injuries, no.
>
> State: And your purpose, as a medical examiner is to provide your opinion to a reasonable degree of medical certainty, is that correct?
>
> Dr. Hamilton: That is correct.
>
> State: And the reason that you could not say that they were, in fact, injuries, is that because you could not say it to a degree of medical certainty?

> Dr. Hamilton: That is correct. And mainly due to the advance decomposition of the decedent.

(PCR 15/2762-63).

Dr. Hamilton testified as a medical examiner she would not speculate whether something was an injury. (PCR 15/2763-64). She explained:

> For me to say it is an injury I have to feel confident it is an injury. And once again, unfortunately, in decomposed bodies, we are very limited by what we actually can see, due to the natural process of decomposition. So, the clues that may normally be present on a body, if a body is found relative [sic] quickly after death, are lost to the decomposition.

(PCR 15/2764).

Upon her cross examination, Dr. Hamilton was asked if she recalled in her deposition conceding that there was a possible antemortem injury to the victim's left shoulder. (PCR 15/2809-10). She indicated she did in fact recall that, but testified "I am not going to put in my report that it's a definitive injury if I can't scientifically support it." (PCR 15/2810).

Following written closing arguments by Twilegar and the State, the trial court, the Honorable Mark A. Steinbeck issued an Order on September 27, 2013, denying postconviction relief. (PCR 15/2819-2907; V16/2958-75).

Twilegar now appeals to this Court. (PCR 17/3199-3200).

SUMMARY OF THE ARGUMENT

Issue I: Twilegar failed to prove the claims upon which he was granted an evidentiary hearing. Trial counsel made a strategic decision to not delve into extraneous forensic issues that were not consistent with his defense. Twilegar's offer in postconviction of additional injuries, and possibilities regarding the inhalation of sand does not support a finding of ineffective assistance of counsel. Twilegar's claim regarding the calling of witness Dave Twomey was properly rejected as Twomey was a witness with questionable credibility that counsel did not want to present, and was subject to impeachment. The claim regarding Michael Shelton was properly summarily denied as it was insufficiently pleaded.

Issue II: Twilegar's claim regarding public records is without merit. Florida Rule of Criminal Procedure 3.852 does not constitutionally restrict a defendant's access to public records. Twilegar's demands were properly denied as they did not comply with the rule.

Issue III: Twilegar's juror misconduct claim is procedurally barred. Twilegar failed to establish that any juror's background was relevant and material to jury service in his capital trial. Summary denial was proper.

Issue IV: Twilegar's ineffectiveness of counsel at voir dire claim was insufficiently pleaded and summary denial was proper.

ARGUMENT

ISSUE I

THE GUILT PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

I. Twilegar's Claim Trial Counsel Failed To Challenge The State's Forensic Evidence

The postconviction court granted an evidentiary hearing on portions of this claim, and subsequently denied relief based upon its finding that trial counsel's actions were strategic, and prejudice was not established. (PCR 16/2958-75). Furthermore, the postconviction court correctly found that to the extent Twilegar was challenging the sufficiency of the evidence, "this argument was raised on direct appeal and is now procedurally barred." (PCR 16/2962). The State submits that the postconviction court properly concluded that Twilegar was not entitled to relief on his claims.[9]

In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984) a defendant must establish two general components.

[9] The State asserted, among other things, the claims were procedurally barred as Twilegar challenged the sufficiency of the evidence on direct appeal, and had advanced many of the same arguments he asserted in his postconviction motion. (PCR 9/1706-15).

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986).

Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Strickland, 466 U.S. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

As this Court has recognized it does not reach both Strickland prongs in every case. "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Preston v. State, 970 So. 2d 789, 803 (Fla. 2007) (*quoting* Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001)).

Defendant's argument and the testimony from the postconviction hearing establish only that collateral counsel

disagrees with trial counsel's strategic decisions. This is not the standard to be considered. Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was *both* a deficient performance and a reasonable *probability* of a different result"). Indeed, in reviewing Twilegar's claims, this Court must be highly deferential to trial counsel. Strickland, 466 U.S. at 689; see also Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial"); Stano v. State, 520 So. 2d 278, 281, n. 5 (Fla. 1988) (noting fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness).

On appeal, when reviewing a trial court's ruling on an ineffectiveness claim, this Court defers to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this

case, the postconviction court properly identified the applicable law in analyzing Twilegar's claims, correctly applied this law to the facts, and concluded that Twilegar was not entitled to postconviction relief. The claims that were the subject of the evidentiary hearing and which Twilegar now seeks review of, were: **(1) trial counsel was ineffective for failing to call a forensic expert to contradict the Medical Examiner's findings, (2) trial counsel was ineffective for failing to adequately cross-examine the Medical Examiner, (3) trial counsel failed to adequately impeach the Medical Examiner, and (4) trial counsel was ineffective for failing to call David Twomey at trial.**

Twilegar's claims here amount to a disagreement regarding the handling of the forensic evidence, in particular Twilegar faults trial counsel for his cross-examination of Medical Examiner, Dr. Hamilton. Twilegar's argument centers around his assertion that trial counsel should have cross-examined the Medical Examiner regarding multiple wounds, and more thoroughly cross-examined her regarding the sand found in victim Thomas' larynx, and her autopsy procedures. However, while Twilegar offers conclusory statements and criticisms throughout his brief, he does not explain how he established deficient performance or prejudice under Strickland.

Failure to call a forensic expert to contradict the Medical Examiner's findings

To the extent Twilegar claims that trial counsel should have called Dr. Haddix or Mr. Swanepoel, this Court should deny the claim. Neither expert stated they would have been willing to testify on Twilegar's behalf. As such, their testimony is of little value in regard to this claim. Unavailable evidence cannot support an ineffective assistance of counsel claim. See State v. Riechmann, 777 So. 2d 342, 354-55 (Fla. 2000) (claim of ineffective assistance of counsel properly denied where evidence did not definitely show that evidence was available at the time of trial). Lastly, to the extent Twilegar appears to argue that trial counsel was ineffective for failing to present Dr. Spitz, this claim was summarily denied, and is not part of the instant appeal. (V10/1834-35).

As to a bare assertion that trial counsel should have retained an expert, trial counsel is not required to retain an expert on every issue. See Atkins v. Dugger, 541 So. 2d 1165, 1166 (Fla. 1989) ("One tactic available to counsel is to present expert testimony. However, it is by no means the only tactic, nor is it required."). Indeed, Strickland "does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from

the defense." Harrington v. Richter, 131 S. Ct. 770, 791 (2011). Relief must be denied.[10]

Moreover, as the postconviction court properly found counsel was not deficient for failing to utilize an expert. This is especially true here where the postconviction experts offered merely speculative testimony. Further, it was not necessary nor was it mandated that trial counsel utilize a forensic expert at trial where counsel's cross-examination was sufficient to elicit those portions trial counsel sought to highlight, and **that were argued to the jury**. (T. 12/2137, 2142-43, 2166; PCR 14/2728; 15/2732-33; see also pp. 43-44, *infra)*. See McLean v. State, 2014 WL 2765827, *4 (Fla. June 19, 2014) (trial counsel not ineffective for failing to call expert on eyewitness identification where counsel determined it would not have made "sense" and jury was presented with argument identification was questionable); Crain v. State, 78 So. 3d 1025, 1040-41 (Fla. 2011) (counsel not ineffective for failing to retain an expert to challenge the State's expert forensic pathologist where

[10] To the extent Twilegar relies upon the ABA guidelines to support his argument trial counsel should have presented an expert, such reliance is misplaced. Appellant's Initial Brief at p. 39. The ABA guidelines are not a set of "rules" that are "mandated" and do not govern a Strickland analysis. They are only guides, and to conclude otherwise "would effectively revoke the presumption that trial counsel's actions, based on strategic decisions, are reasonable. . . ." Mendoza v. State, 87 So. 3d 644, 653 (Fla. 2011).

counsel obtained concessions through cross-examination and noting Strickland does not require a defense expert in every case because "in many instances cross-examination will be sufficient"); Smithers v. State, 18 So. 3d 460, 469-71 (Fla. 2009) (trial counsel not ineffective for failing to retain independent medical examiner where trial counsel cross-examined State medical examiner to establish facts necessary for defense). For example, trial counsel argued evidence was not followed up on, the medical examiner did not test the sand found, could not say when the victim was murdered, and there was no way of knowing where the victim was murdered.

Failure to adequately cross-examine and impeach the Medical Examiner

Here, the postconviction court found:

> **17. The Court finds Mr. McLoughlin's performance was not deficient. He testified that it was a strategic decision not to cross-examine or impeach the Medical Examiner regarding the defects which could represent wounds relating to possible strangulation and additional gunshots, in order to keep that potentially negative information from the jury's consideration. This decision was not unreasonable, as it was an attempt to limit additional evidence that could have gone toward the HAC aggravating circumstance. Further, he testified that the issues Defendant now believes should have been raised during the cross examination of the Medical Examiner were not relevant to the defense theory that Defendant was not the person who committed the crime.** "Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected." Rutherford v. State, 727 So. 2d 216, 223

(Fla. 1998). Counsel is not ineffective for failing to present testimony or evidence damaging to the defense. Johnson v. State, 104 So. 3d 1010, 1023 (Fla. 2012); Medina v. State, 573 So. 2d 293, 298 (Fla. 1990). **The Court finds that Mr. McLoughlin adequately cross examined the Medical Examiner regarding her inability to determine time or location of death, and Defendant has failed to establish what other questions counsel should have asked. The Court finds Mr. McLoughlin adequately cross examined the Medical Examiner regarding the sand found in the victim's larynx, and did establish that it was possible the sand entered the victim's body through some means other than inhalation. Defendant did not establish prejudice with regard to the sand, since, even if the Medical Examiner had taken a sample and had tested the sand with samples of soil from other locations to determine where the victim was killed, there is no reasonable probability of a different outcome.** Knowing where the victim died would not have proven the Defendant was not the person who killed the victim, and there was sufficient evidence presented linking the Defendant to the crime for the jury to find Defendant guilty.

18. Defendant has not established prejudice. **There is no reasonable probability of a different outcome even if this information had been presented at trial, as this information would not have proven Defendant was not the person who committed the crime, and there was sufficient other evidence linking Defendant to the crime for the jury to find him guilty.** The Florida Supreme Court held that Defendant's "hypotheses, reasonable or not, are inconsistent with a single evidentiary fact: Thomas was killed and buried at the same spot outside Twilegar's tent where Twilegar had been seen digging a hole earlier on what was probably August 7, 2002, the last day Thomas was seen alive. There is no reasonable way to reconcile this evidentiary fact with any of Twilegar's various hypotheses of innocence. Further, the totality of the evidentiary facts noted above is inconsistent with each of Twilegar's hypotheses of innocence." Twilegar, 42 So. 3d at 189-190.

> 19. Mr. McLoughlin testified that he spared nothing in the defense of this case. He testified that if a forensic expert, such as Dr. Spitz, had information that would have assisted him in any way, he would have called that expert at trial. He testified that if a firearms expert would have assisted him in any way, he would have called such an expert at trial. **The Court finds Mr. McLoughlin was not deficient in failing to call a firearms expert, since it was established in his cross examination of Agent Soto at trial that, without the shotgun used in the crime, it was impossible to determine the distance between the shooter and the victim (Evidentiary Hearing T. pp. 198-200). Thus, any opinions presented by Dr. Haddix and Mr. Swanepoel as to the impossibility of the spread of shotgun pellets from one shot are speculation, because the distance and range of the shot are not known. Likewise, if trial counsel had retained a firearms expert, any testimony on that subject would also have been speculation. Counsel is not ineffective, and prejudice is not established, where a postconviction expert testifies about a "possibility." Davis v. State, 990 So. 2d 459, 468 (Fla. 2008); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997).** Trial counsel was not deficient merely because postconviction counsel has secured an expert who will provide more favorable testimony. Card v. State, 992 So. 2d 810, 818 (Fla. 2008); Bowles v. State, 979 So. 2d 182 (Fla. 2008).

(PCR 16/2970-72)(emphasis supplied).[11]

No ineffectiveness of counsel is evident on the facts presented. Twilegar's claims and the testimony from the postconviction hearing establish only that collateral counsel

[11] Swanepoel indicated, without the shotgun, he could not be able to definitively state a distance. (PCR 14/2652). Further, contrary to Twilegar's assertion there was evidence presented in postconviction that the injury to the hyoid bone could have been caused by strangulation. Initial Brief at p. 48 n.5. (PCR 14/2580, 2727).

disagree with trial counsel's strategic decisions. Here, trial counsel **was aware** of potential additional injuries, and possible deficiencies in Dr. Hamilton's autopsy through his investigation as evidenced by his testimony, notes, and questioning at deposition. Trial counsel consulted with his expert Dr. Spitz, provided him with all relevant material, and chose not to use him or the material from his notes as it did not help his case. Trial counsel's theory of the case was that Twilegar did not commit the murder. Evidence of additional injuries, and questions about x-rays or autopsy procedures were not relevant to his case. Moreover, this evidence, as trial counsel recognized could have proved to be more harmful than helpful, and trial counsel did not want the jury to hear about this evidence. Lastly, as trial counsel recognized, showing there were additional injuries or Dr. Hamilton's autopsy was lacking in some regard would not show Twilegar did not commit the murder. Additional injuries or possible deficiencies in the autopsy likewise would not have altered the outcome of the trial. Simply put, nothing offered in postconviction undermines the jury's verdict.

Trial counsel made a sound strategic decision in not presenting this type of evidence to the jury. An ineffective assistance of counsel claim cannot be predicated upon the

presentation of evidence where that evidence presents a double-edged sword. This is especially true where counsel has conducted a reasonable investigation, and chose not to present certain evidence. Willacy v. State, 967 So. 2d 131, 142-44 (Fla. 2007); see also Johnson v. State, 104 So. 3d 1010, 1023 (Fla. 2012) (trial counsel not deficient for failing to call experts who would present damaging testimony to defense); Medina v. State, 573 So. 2d 293, 298 (Fla. 1990) (trial counsel was not ineffective for failing to investigate and present evidence that would have presented the defendant in an unfavorable light). Moreover, an ineffective assistance of counsel claim does not lie where counsel makes a strategic decision to forego the presentation of damaging testimony that is inconsistent with his trial strategy. Winkles v. State, 21 So. 3d 19, 24-28 (Fla. 2009); see also Davis v. State, 990 So. 2d 459, 468 (Fla. 2008) (trial counsel not ineffective where postconviction expert presented testimony that could undermine defense and noting expert's statements about a "possibility" does not establish prejudice).

The law is well established that strategic decisions of trial counsel do not constitute deficient performance. See Strickland, 466 U.S. at 691; Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). Furthermore, the fact that collateral

counsel has presented experts she may consider more compelling than trial counsel's investigation is not a basis for relief. This Court has repeatedly held that "counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert." Card v. State, 992 So. 2d 810, 818 (Fla. 2008); see also Asay v. State, 769 So. 2d 974, 986 (Fla. 2000); Jones v. State, 732 So. 2d 313 (Fla. 1999).

The testimony from the evidentiary hearing establishes that trial counsel adopted a defense theory which **he** believed to be most beneficial to his client. As McLoughlin explained, regarding questioning Dr. Hamilton on additional injuries and lack of x-rays:

> **If I can recall now, it wasn't -- it wouldn't have been relevant to our theory that Mark didn't do it. And I was concerned, and this is trying to stretch back, that I didn't want the jury to think that is -- that besides being shot he was beaten and mutilated. And I was trying to just focus on whether, uh -- about the sand, and whether he was buried alive.**

(PCR 14/2697)(emphasis supplied).

> . . .
>
> **Honestly, if I recall, it just wasn't relevant because Mark wasn't the one who did it. And I didn't -- I didn't want to just throw things on the wall just for the heck of it. Now, maybe I should have, but at the time that wasn't our focus. Our focus was, someone else did it.**

(PCR 14/2699)(emphasis supplied).

The current hindsight arguments by collateral counsel is simply a disagreement over the chosen strategy employed by trial counsel, and since trial counsel's strategy was reasonable,[12] this disagreement is insufficient to entitle Twilegar to postconviction relief. Occhicone, 768 So. 2d at 1048. Relief must be denied.

Trial counsel also cannot be deemed deficient as he did challenge Dr. Hamilton on cross-examination and revealed those points that were most salient to him - questions regarding the sand, where the murder occurred, and whether the victim was buried alive. As the postconviction court found, "Mr. McLoughlin adequately cross examined the Medical Examiner regarding the sand found in the victim's larynx, and did establish that it was possible the sand entered the body through some means other than

[12] The State notes that presenting evidence that victim Thomas was shot multiple times, was shot or impaled with an instrument that entered the neck, was possibly strangled, and experienced a tortured death could arguably support the HAC aggravator the State sought and the trial court rejected. (R. 17/1316-18; 21/1883-84). See Wainwright v. State, 2 So. 3d 948, 952 (Fla. 2009); Belcher v. State, 851 So. 2d 678, 683-84 (Fla. 2003). A finding of this aggravator would not bode well for Defendant, as this Court has recognized, HAC is one of the weightiest aggravators in Florida's statutory scheme. Butler v. State, 100 So. 3d 638, 667 (Fla. 2012); Hampton v. State, 103 So. 3d 98, 121 (Fla. 2012). Even if not sufficient to support HAC, additional grisly facts of a victim's demise would not appear to benefit any defendant.

inhalation." (PCR 16/2971).

A review of the record reveals through cross-examination Dr. Hamilton conceded that she had "no idea" as to the time of death and "no idea" as to how long the body had been buried. (T. 3/495). Trial counsel was also able to have Dr. Hamilton agree that burying a body can accelerate decomposition, and this can make it more difficult to know how long a body has been buried. (T. 3/495). Trial counsel cross-examined Dr. Hamilton regarding her failure to take a sample of the sand, and did reveal upon cross-examination that had she sampled the sand it might have indicated where victim Thomas was murdered. (T. 3/496). Additionally, trial counsel did cross-examine and challenge Dr. Hamilton on her opinion that victim Thomas inhaled the sand while he was buried alive. (T. 3/497-98). Dr. Hamilton eventually agreed that victim Thomas could have been face-down on little piles of sand or uneven ground. (T. 3/498).

Collateral counsel has simply shown in postconviction that she disagrees with trial counsel's approach. Interestingly, collateral counsel was given the opportunity to cross-examine Dr. Hamilton armed with all the information she purports trial counsel should have. Despite this, collateral counsel did not perform a cross-examination that exhibits trial counsel rendered deficient performance. Moreover, there was nothing in her cross-

examination that would have established prejudice under Strickland - that is, the result of the proceeding would have been different. While Twilegar asserts he posited additional relevant questions below, a review of the postconviction transcript reveals that Hamilton simply indicated that an additional wound was "possible", and that it was "possible" the sand found in the larynx was the result of the "waxing" water tables. Initial Brief at 52-53. (PCR 14/2583). However, Dr. Hamilton was quite clear as the medical examiner she would not speculate as to injuries. (PCR 15/2763-64).

Twilegar mistakenly asserts that Dr. Hamilton's was the "lynchpin" of the State's case, establishing his guilt, the premeditated nature of his crime, and the CCP aggravator.[13] Appellant's Initial Brief at pp. 49-50, 58. This misconception underscores Twilegar's misinterpretation of the facts of this case.

Assuming this case had been tried as collateral counsel insists it should have been, the result would not have been any different. The record reflects Spencer Hartman saw Twilegar

[13] The State notes that Twilegar did not raise a freestanding claim of ineffective assistance of counsel at the penalty phase. The state also notes that Twilegar challenged the finding of the CCP aggravator on direct appeal and this Court found this aggravator was supported by competent, substantial evidence. Twilegar, 42 So. 3d at 200-01.

digging a hole in the same location victim Thomas' body was discovered. (T. 6/1023-29, 1034-35, 1065, 1099-1100, 1117, 1170, 1172-73; 10/1865). When unearthed, Thomas was wearing the same clothes he was last seen in on August 7th. (T. 3/465-68, 506-17; 4/760-62; 5/796-98; 6/1118, 1173). In summarizing the evidence presented at trial, this Court noted, consistent with the record, that Spencer saw Twilegar "digging" and police discovered Thomas' body where Spencer saw him digging in the same clothes he was last seen wearing on August 7th. This Court notably indicated that "[s]oft fine sand, similar to that which covered the exterior of his body, was found deep inside his throat, in his larynx, indicating that he had still been breathing, though not necessarily conscious, when buried." Twilegar, 42 So. 3d at 186-87.[14] Moreover, in finding sufficient evidence established Twilegar was the killer and the murder was premeditated, this Court held:

> . . .First, viewing the evidence of guilt in the light most favorable to the State, a rational trier of fact could find that the elements of the crime have been established beyond a reasonable doubt. The evidence of guilt includes the following: (1) Twilegar returned from Alabama with Thomas on August 6, 2002, and was seen in his company late that night; **(2) Twilegar was**

[14] Assuming for the sake of argument that trial counsel had Hamilton agree that the sand was the result of the "waxing" water tables, this would not dispute the fact the sand atop his body was similar to the sand in his larynx. Initial Brief at p. 53.

seen digging a hole near his tent at approximately 4 p.m. on what was probably August 7, 2002, the last day Thomas was seen alive; (3) Twilegar did not know that he had been seen digging the hole; (4) at the time he was digging the hole, Twilegar asked the only person in the area, Spencer, to leave the premises; (5) when Thomas was last seen later that night, he told his girlfriend he was going to go meet with Twilegar; (6) at that point, Thomas had in his possession an unusually large amount of cash; **(7) Thomas's body was later found buried in the same spot where Twilegar had been digging; (8) Thomas had been shot in close proximity to the grave site because he died within minutes of being shot and he was still alive when buried and had inhaled soil that was consistent with the grave site soil; (9) crime scene evidence supports the conclusion that the burial hole had been dug prior to the shooting because the investigator testified that the soil was extraordinarily difficult to excavate due to palmetto and other tree roots and yet the hole had been dug three or four feet deep and Thomas had died within minutes of being shot and was still alive when buried;** (10) Thomas was shot in the upper back at close range with a twelve-gauge shotgun, at a downward angle, and Twilegar was known to possess such a weapon and to keep it in his tent; (11) Twilegar's shotgun disappeared after the murder and has never been found; (12) immediately after the disappearance of Thomas, Twilegar fled the Fort Myers area and eventually settled at a secluded campsite in Tennessee; (13) in fleeing the area, Twilegar was involved in a series of uncharacteristic and extensive retail purchases that totaled thousands of dollars, all of which were paid in cash; and (14) after he was taken into custody, Twilegar made a number of incriminating phone calls that appear to implicate him in the murder.

And second, competent, substantial evidence supports the conclusion that this evidence is inconsistent with any reasonable hypothesis of innocence proposed by Twilegar. **Twilegar asserts various hypotheses of innocence: that Thomas's wife was responsible for the killing, that Thomas's girlfriend was responsible for the killing, that a**

drug dealer or other assailant happened upon Thomas on the Miramar Road property and killed him, or that Thomas was kidnapped and killed by an unknown assailant. Yet, all these hypotheses, reasonable or not, are inconsistent with a single evidentiary fact: Thomas was killed and buried at the same spot outside Twilegar's tent where Twilegar had been seen digging a hole earlier on what was probably August 7, 2002, the last day Thomas was seen alive. There is no reasonable way to reconcile this evidentiary fact with any of Twilegar's various hypotheses of innocence. Further, the totality of the evidentiary facts noted above is inconsistent with each of Twilegar's hypotheses of innocence. Accordingly, Twilegar has failed to show that the trial court erred with respect to this claim.

. . .

Twilegar contends that the trial court erred in concluding that the evidence is sufficient to support premeditation. We disagree.

. . .[W]e conclude that Twilegar has failed to show that the trial court erred in determining that the evidence is sufficient to support premeditation. First, competent, substantial evidence supports the finding of premeditation: (1) Twilegar was seen digging a hole near his tent at approximately 4 p.m. on what was probably August 7, 2002, the last day Thomas was seen alive; (2) when Thomas was last seen later that night, he told his girlfriend he was going to go meet with Twilegar, and he had in his possession an unusually large amount of cash; **(3) Thomas's body was later found buried in the same spot where Twilegar had been digging;** (4) Thomas had been shot in the upper back at close range with a twelve-gauge shotgun, at a downward angle; (5) Thomas had been shot in close proximity to the grave site; **(6) crime scene evidence supports the conclusion that the burial hole had been dug prior to the shooting;** and (7) immediately after the disappearance of Thomas, Twilegar was involved in a series of uncharacteristic and extensive retail purchases that totaled thousands of dollars, all of which were paid in cash.

> And second, viewing the evidence in the light most favorable to the State, competent, substantial evidence supports the conclusion that the evidence is inconsistent with any reasonable inference other than premeditation. Any inference that the killing may have been accidental or impulsive is belied by three evidentiary facts: (1) Thomas was shot in the upper back at close range with a twelve-gauge shotgun, at a downward angle; **(2) Thomas was killed and buried at the same spot outside Twilegar's tent where Twilegar had been seen digging a hole earlier on what was probably August 7, 2002, the last day Thomas was seen alive; and (3) crime scene evidence supports the conclusion that the burial hole was dug prior to the shooting.** There is no reasonable way to reconcile these evidentiary facts with any reasonable inference of an accidental or impulsive killing. Further, the totality of the evidentiary facts noted above is inconsistent with any such inference. Accordingly, Twilegar has failed to show that the trial court erred with respect to this claim.

Twilegar, 42 So. 3d at 189-91 (emphasis supplied).[15]

The facts arguably attributed to Dr. Hamilton above - Thomas died within minutes of being shot in the upper back at close range with a shotgun in close proximity to the grave site; and inhaled soil consistent with the grave site soil - were not disputed by Twilegar's postconviction experts. See Initial Brief at pp. 54-55. (PCR 14/2556, 2571-73, 2582-83, 2588, 2596-98, 2624-25).

Furthermore, there was other evidence victim Thomas was

[15] The State notes that trial counsel argued various hypotheses of innocence as noted by this Court, and maintained the defense that Twilegar did not commit the murder. (T. 12/2141-44, 2147-52, 2154, 2159-64, 2166-68).

killed at the Miramar location. Lee County crime scene manager Harry Balke searched the backyard incinerator where Twilegar's tent was found burning after he fled Florida. (R. 13/847, 881; T. 6/1031-33, 1043; 7/1194). A fired shotgun shell was found burnt in the backyard incinerator. (T. 7/1202, 1209-10). FDLE firearm specialist Yolanda Soto determined the fired shell from the incinerator was similar to shells collected around the excavation site. (T. 7/1320-21). According to Soto, the wadding from victim Thomas' back, the fired shell found in the incinerator and the shells recovered around the scene all appeared to be of the Winchester type. (T. 7/1209-10, 1319-21, 1326). Twilegar's assertion that no casings were found on or near the body is incorrect. Initial Brief at p. 48.[16]

Twilegar has not demonstrated that trial counsel rendered deficient performance, nor has he demonstrated a reasonable probability of a different result. Testimony of additional injuries and possible deficiencies in Dr. Hamilton's autopsy (which the State disputes),[17] would not have altered the outcome

[16] As discussed at p. 53 *infra*, a shotgun cup was removed from victim Thomas' back.

[17] Twilegar appears to argue that Dr. Hamilton's autopsy did not follow "standard procedures." Initial Brief at 55. There was no direct evidence of any standard procedures applicable to Dr. Hamilton, nor was there any evidence that Dr. Hamilton failed to meet same. Assuming for the sake of argument that Dr. Hamilton did not follow a certain procedure, there was no showing of

of the trial. Nothing offered in postconviction has established prejudice, nothing offered has undermined confidence in the outcome of the trial. The facts cited above still remain; relief must be denied. Twilegar simply presented speculative testimony that took issue with how many times victim Thomas was shot and whether he was buried alive. Nothing offered in postconviction refuted evidence of guilt, or premeditation.

Lastly, Twilegar appears to assert that trial counsel was ineffective for failing to challenge the manner in which victim Thomas was shot as this evidence (he argues) was used to support the CCP aggravator. Initial Brief at 58. First, as this claim was not ruled upon below, it is not preserved for review. Jones v. State, 998 So. 2d 573, 581-82 (Fla. 2008). In any event, Twilegar is not entitled to relief. To the extent Twilegar is challenging counsel's performance at the penalty phase (which was not explored at the hearing below), it should be noted in order to obtain a reversal of a death sentence on the ground of ineffective assistance of counsel at the penalty phase, the defendant must show "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the

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prejudice - that is, the result of the proceeding would have been different.

deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Occhicone, 768 So. 2d at 1049 (citations omitted); Strickland, 466 U.S. at 694 (for prejudice finding, sentencer would have weighed the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty). Twilegar has failed to make this showing.

Of note, Twilegar challenged the CCP aggravator in his direct appeal. In rejecting Twilegar's challenge, this Court observed the following facts supported the CCP aggravator:

> According to the record, Twilegar was seen digging a hole near his tent at approximately 4 p.m. on what was probably August 7, 2002, the last day Thomas was seen alive; when Thomas was last seen later that night, he told his girlfriend he was going to go meet with Twilegar, and he had in his possession an unusually large amount of cash; Thomas's body was later found buried in the same spot where Twilegar had been digging; **Thomas had been shot in the upper back at close range with a twelve-gauge shotgun, at a downward angle**; Thomas had been shot in close proximity to the grave site; crime scene evidence supports the conclusion that the burial hole had been dug prior to the shooting; and immediately after the disappearance of Thomas and in the following days, Twilegar was involved in a series of uncharacteristic and extensive retail purchases that totaled thousands of dollars, all of which were paid in cash.

Twilegar, 42 So. 3d at 201, n.9.

Nothing offered in postconviction mitigates the finding of

the CCP aggravating factor. Second, nothing in postconviction refuted the "manner" in which the victim was shot. Twilegar simply presented experts that opined he was shot more than once. No relief is warranted. The State notes the direct appeal record reveals a single shotgun wound was apparent in Thomas' right upper back. (R. 13/822; T. 3/470, 472, 484). Further, Dr. Hamilton and Yolanda Soto both testified the shotgun was fired at close range. (T. 3/477-79; 7/1326). In fact, State's Exhibit # 12 is a photograph of the shotgun "plastic cup from entrance wound" that was removed from victim Thomas. (R. 13/822; T. 3/483-84).

Twilegar has not established deficient performance or prejudice under Strickland.[18] Relief must be denied.

Failure to call Dave Twomey

Twilegar was granted a hearing on this claim. The State reasserts its procedural bar to this claim as it was raised on direct appeal, and decided adversely to Twilegar. (PCR 9/1724-26; V10/2002-03); Twilegar, 42 So. 3d at 195-96.

Notwithstanding, the postconviction court granted an evidentiary hearing on this claim, and subsequently denied it

[18] Twilegar's own experts did not dispute the finding of the shotgun wound to the right upper back, nor was there a dispute that the firing was a close range shot. (PCR 14/2556, 2571-73, 2588, 2624-25, 2637-38).

based on a finding that trial counsel's actions were strategic, and prejudice was not established. As the court found:

> 21. **The Court finds Mr. McLoughlin's decision not to call Mr. Twomey to testify was reasonable trial strategy. He testified he had grave concerns about Mr. Twomey's credibility when he observed Mr. Twomey under the influence, and when Mr. Twomey asked what they wanted him to say on the stand. Counsel is not ineffective for failing to present a witness with questionable credibility. Bolin v. State, 21 So.3d 151, 159-160 (Fla. 2010), This was a strategic decision for which trial counsel is not rendered ineffective merely because postconviction counsel disagrees. Rutherford, 727 So. 2d at 223.** Further, Defendant has not established prejudice. There is no reasonable probability of a different outcome had counsel called Mr. Twomey, as the State would have impeached Mr. Twomey with his prior offense and two prior inconsistent statements that contradicted the allegation that he had seen the victim after his disappearance. Even if the allegation had been presented, the fact that the victim may have died later than the State theorized would not disprove that the Defendant was the individual who committed the offense. There was sufficient other evidence presented for the jury to find Defendant guilty.
>
> 23. Defendant has failed to meet his burden of proof as to either prong of Strickland.

(PCR 16/2973-74)(emphasis supplied).

Trial counsel was not ineffective for failing to present the testimony of Dave Twomey. When questioned at the hearing regarding Twomey, trial counsel testified to his concerns regarding Twomey's credibility. Twomey was willing to "say anything" and trial counsel did not want to call a witness like that. Trial counsel doubted Twomey's credibility and had "grave

concerns" about him testifying truthfully.[19]

Not pressing to present Twomey was a strategic decision. Thus, Twilegar has simply established that current counsel disagrees with trial counsel's strategic decision on this issue. This is not the standard to be considered.[20] Furthermore, the law is well settled that "advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." Strickland, 466 U.S. at 681; Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic

[19] The substance of Twomey's testimony was not presented as he was not called to testify. At trial, trial counsel proffered Twomey saw victim Thomas prior to his death. (T. 11/2099). At the evidentiary hearing trial counsel indicated he "misspoke" and Twomey had indicated he saw victim Thomas after his death. (PCR 14/2704, 2710). The only sworn statements attributed to Twomey indicated he saw victim Thomas prior to his death. (PCR 18/3537-85). Whichever the actual statement may be is of little consequence as trial counsel decided to not present Twomey due to his questionable credibility.

[20] Strickland, 466 U.S. at 689; Rutherford, 727 So. 2d at 223 ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"); Cherry, 659 So. 2d at 1073 (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"); see also Rivera, 629 So. 2d at 107 ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial").

decision, and it is one that we will seldom, if ever, second guess.").

Trial counsel considered presenting Twomey as a witness, but ultimately decided not to pursue him given his questionable credibility. Because Twilegar failed to establish his burden under Strickland, this Court should deny relief. See Deparvine v. State, 2014 WL 1640219, *8 (Fla. Apr. 24, 2014) (counsel not ineffective for failing to call a witness with questionable credibility and recognizing defendant failed to overcome presumption counsel was not ineffective where evidence established counsel made strategic decision not to call witness); Fennie v. State, 855 So. 2d 597 (Fla. 2003) (noting tactical decisions regarding whether or not a particular witness is presented are subject to collateral attack only in rare circumstances when the decision is so irresponsible as to constitute ineffective assistance of counsel). Relief must be denied.

II. Twilegar's Claim Trial Counsel Failed To Present The Testimony Of Michael Shelton.

The postconviction court summarily denied this claim. This Court reviews the propriety of such rulings *de novo*. Henyard v. State, 992 So. 2d 120, 125 (Fla. 2008). Such a review confirms that the court correctly rejected this claim without an

evidentiary hearing.

In order to obtain an evidentiary hearing on a postconviction claim of ineffective assistance of counsel, a defendant must specifically allege both deficient performance and prejudice. Ponticelli v. State, 941 So. 2d 1073, 1104 (Fla. 2006); Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004). Where the postconviction motion lacks sufficient factual allegations, or where the alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Hamilton v. State, 875 So. 2d 586, 591 (Fla. 2004). Claims that are based upon speculation or contain only conclusory allegations are insufficient and should be summarily denied. Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000); Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998). See also Doorbal v. State, 983 So. 2d 464, 485 (Fla. 2008) ("Counsel for Doorbal appears to operate under the incorrect assumption that conclusory, nonspecific allegations are sufficient to obtain an evidentiary hearing on claims of ineffective assistance of counsel, and specific facts and arguments need not be disclosed or presented until the evidentiary hearing. We strongly reiterate to those who represent capital defendants in postconviction proceedings that claims of ineffective assistance of counsel must comply with the pleading requirements enunciated

by this Court"). As will be seen, this claim was insufficiently pled, and summary denial was proper and must be affirmed.

Prior to trial, the State filed a Motion in Limine to exclude the hearsay statements of Michael Shelton that victim Thomas was involved in the sale or use of drugs, and that he was wanted by drug dealers. (R. 11/749-50). A hearing on the State's motion took place on January 12, 2007. Trial counsel indicated the statement was "similar to the effect that he [the victim] was headed to Fort Myers to deal with some dealers. . . ." (R. 11/707).[21] The State argued the statements were inadmissible hearsay and irrelevant. (R. 11/705-06). The trial court reserved ruling on the motion. (R. 11/711, 716, 718).

In postconviction, Twilegar claimed trial counsel was ineffective for failing to secure a ruling or failing to call Michael Shelton. He argued that Shelton's hearsay statements would have supported his theory that victim Thomas' death was due to his involvement in illegal drug activity, and the hearsay statements would have been admissible under the state of mind exception to the hearsay rule, and under the statement against penal interest exception. (PCR 10/2006-11).

[21] Twilegar asserted in his postconviction motion victim Thomas stated to Shelton he was going to "meet" with some drug dealers, that Shelton stated victim Thomas was "hiding" from drug dealers, and Shelton knew that victim Thomas had withdrawn a large sum of money from the bank. (PCR 10/2007).

The postconviction court summarily denied this claim finding counsel was not ineffective for failing to present inadmissible evidence or for failing to seek a ruling on a non-meritorious issue. Moreover, the court found Twilegar had failed to allege facts to establish either prong under Strickland. (PCR 10/1836-37). The trial court properly summarily denied this claim, and its judgment should be affirmed.

The Shelton statements were not admissible hearsay. Rather, they were irrelevant, bad character evidence of the victim that would have been properly excluded by the trial court. In fact, the statements were the same type of evidence the trial court did exclude. Twilegar challenged the trial court's ruling on appeal and this Court affirmed holding:

> . . .[W]ith respect to the proffered testimony of Twilegar's niece, Jennifer Morrison, concerning Thomas's alleged drug use and acceptance of sexual favors in lieu of back rent, the court excluded this testimony, concluding that the evidence was not sufficiently relevant or probative. Based on this record, the court did not err in this respect, see *Hayes v. State*, 581 So. 2d 121, 126 (Fla. 1991) ("Although such evidence [of drug use] may be relevant in some circumstances, it was not relevant to any material issue on the facts of this case."), for the court reasonably may have concluded that the probative value of the evidence was substantially outweighed by the danger of prejudicing or confusing the jury. *See* § 90.403, Fla. Stat. (2007).
>
> . . .[W]ith respect to the testimony of both Thomas's prior girlfriend, Patricia Sweeney, concerning the conspiracy case against Thomas and his

> alleged drug use and the fact that she had seen him and a business associate waving guns at each other in 1998, and the testimony of David Twomey that he had seen Thomas at a convenience store sometime prior to the murder and Thomas had told him, "If anybody asks, you haven't seen me," the court excluded this evidence, concluding that the evidence was not sufficiently relevant or probative. Based on this record, the court did not err in this respect, for the court reasonably may have concluded that the probative value of the evidence was substantially outweighed by the danger of prejudicing or distracting or confusing the jury. *See* § 90.403, Fla. Stat. (2007).

Twilegar, 42 So. 3d at 195.[22]

As this Court found this similar evidence was properly excluded, Twilegar cannot show that counsel was deficient. Notwithstanding, Twilegar is not entitled to any relief here. In discussing the state of mind exception to the hearsay rule, this Court has recognized that a victim's state of mind is not generally admissible in a murder prosecution because the victim's state of mind is not a material issue in a murder case. Stoll v. State, 762 So. 2d 870, 874 (Fla. 2000); see also Huggins v. State, 889 So. 2d 743, 757 (Fla. 2004). "The only exceptions to this rule are where the victim's state of mind goes to a material element of the crime . . . or where the evidence rebuts a defense raised by the defendant." Woods v.

[22] Twilegar asserted on direct appeal that this testimony was relevant as it went to the defense theory that victim Thomas was killed as "his activities involved the highly dangerous activity of drug dealing." Initial Brief of Appellant, Florida Supreme Court Case No. SC07-1622, at pp. 75-76.

State, 733 So. 2d 980, 987 (Fla. 1999). None of these exceptions exist in the instant case. As such, Shelton's hearsay statements would not have been admissible under the state of mind exception.

Shelton's hearsay statements would not have been admissible under the declaration against penal interest exception to the hearsay rule either. There is nothing about victim Thomas' statement that he was going to meet with drug dealers that was against his penal interest. A meeting with drug dealers, in and of itself, would not expose victim Thomas to "criminal liability." See Florida Statute Section 90.804(2)(c); Naylor v. State, 51 So. 3d 589, 590 (Fla. 3d DCA 2010) (deceased victim's statement that arresting officer had "his back" with other police officers and "dealers" was not admissible as it did not tend to expose the victim to criminal liability). As such, Shelton's hearsay statements would not have been admissible under this exception. Trial counsel cannot be ineffective for failing to present inadmissible evidence. Owen v. State, 986 So. 2d 534, 746 (Fla. 2008). Likewise, trial counsel cannot be deemed ineffective of failing to secure a ruling by the trial court as trial counsel cannot be ineffective for failing to raise a non-meritorious issue. Johnson v. State, 903 So. 2d 888, 899 (Fla. 2005). Summary denial was appropriate.

Finally, even if counsel could be deemed ineffective, Twilegar did not establish prejudice. The statements went solely to the victim's character and did not undermine any of the evidence presented which established that Twilegar was responsible for victim Thomas' murder. Twilegar simply was not and is not entitled to any relief under Strickland. The judgment of the postconviction court must be affirmed.

ISSUE II

THE PUBLIC RECORDS CLAIM

Twilegar asserts his rights under the constitution were compromised as he was being denied access to public records. Twilegar raised this claim in his motion for postconviction relief below. (PCR 10/1956-63). The postconviction court found that Twilegar's claim failed as a matter of law, and denied relief. In pertinent part the court found:

> 3. As to Claim 1, Defendant argues that Fla. Stat. § 119.19 and Fla. R. Crim. P. 3.852 are unconstitutional both facially and as applied to him because the defense has been denied access to public records in the possession of state agencies. Defendant argues that, in requiring him to demonstrate that a public records demand is not overly broad or unduly burdensome, section 119.19 and rule 3.852 violate his due process rights and impermissibly restrict his access to public records. However, in In re Amendment to Florida Rules of Criminal Procedure, 683 So. 2d 475, 475-476 (Fla. 1996), the Florida Supreme Court rejected this argument, writing "[w]e specifically address the comments of those who are concerned that

> the rule will unconstitutionally limit a capital postconviction defendant's right to production of public records pursuant to article I, section 24, Florida Constitution, and chapter 119, Florida Statutes (1995). We conclude that the rule does not invade those constitutional and statutory rights." *See also* Wyatt v. State, 71 So. 3d 86, 110-111 (Fla. 2011). This portion of Claim I fails as a matter of law.

(PCR 10/1822-23).

First, as argued by the State below, the claim was properly summarily denied because the instant claim does not constitute a challenge to the judgment and sentence imposed, and thus is not properly brought in a Rule 3.851 motion. (PCR 9/1681). Foster v. State, 400 So. 2d 1, 4 (Fla. 1981).

Moreover, any claim that Florida Rule of Criminal Procedure 3.852 is unconstitutional because it impermissibly restricts access to public records is without merit and was properly summarily denied as this Court has specifically stated that this argument is without merit. Soon after promulgating Rule 3.852, this Court rejected the argument raised here in In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production, 683 So. 2d 475, 475-76 (Fla. 1996). This Court again rejected the arguments that the rules requirements unconstitutionally restrict access to public records, explaining:

> **Without resorting to any case law for support, Wyatt essentially argues that Florida Rule of Criminal Procedure 3.852 and section 27.7081, Florida Statutes (2006), unconstitutionally restrict his right to public-records access under the Florida and United States Constitutions because both provisions impermissibly mandate that his demand for public records not be "overly broad or unduly burdensome" and that he make his own search for records. We disagree.**
>
> Section 27.7081 and rule 3.852 pertain only to the production of records for capital postconviction defendants. *See* § 27.7081(13), Fla. Stat. (2009); Fla. R. Crim. P. 3.852(a)(1). **These provisions do not prevent a capital defendant from making postconviction public records requests. . . . This Court has "consistently held that a defendant must plead with specificity the outstanding public records he seeks to obtain." *Rodriguez v. State*, 919 So 2d 1252, 1273 (Fla. 2005). As the Court has acknowledged, "rule 3.852 'is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief.'" *Moore*, 820 So. 2d at 204 (quoting *Glock v. Moore*, 776 So. 2d 243, 253 (Fla. 2001)). . . . Requiring that a capital defendant's additional request be timely made after a diligent search and that this request not be overly broad or unduly burdensome places a reasonable restriction on access to these records.** . . . This is because a capital defendant's additional request follows the State agencies' initial delivery to the repository. We conclude the requirement that a defendant make a diligent search through records already produced and narrow his or her request to provide adequate notice to the agency from which he or she seeks information is reasonable in the context of capital postconviction claims. . . .

Wyatt v. State, 71 So. 3d 86, 110-111 (Fla. 2011) (footnote omitted)(emphasis supplied).

Because Twilegar's legal claim has been squarely rejected, it is without merit and was properly summarily denied.

To the extent Twilegar claims the trial court erred in denying his public records demands, this Court should deny relief. Twilegar appears to take exception to the lower court requiring him to establish that the additional records requested were relevant to the subject matter of the postconviction proceedings. Since this finding is entirely consistent with Rule 3.852, no relief is warranted. The denial of public record requests are reviewed under an abuse of discretion standard. Dennis v. State, 109 So. 3d 680, 689 (Fla. 2012). Here, Twilegar's requests were overly broad, unduly burdensome, and not relevant to a colorable claim for postconviction relief. As such, the postconviction court did not abuse its discretion.

As the lower court recognized it was clear from Twilegar's arguments that he was seeking to "discover" if possible claims exist, rather than requesting records relevant to a colorable claim for postconviction relief. Furthermore, the court properly recognized Twilegar's multiple requests for "all" or "any and all" documents was not proper. (PCR 5/966-77).

This Court has held that trial courts do not abuse their discretion in denying requests for additional public records that are overly broad and unduly burdensome. See Moore v. State, 820 So. 2d 199, 204 (Fla. 2002). This Court has also upheld the denial of a request for additional public records where the

requests sought general information to "research and discover" post conviction claims that a defendant had no specific basis for believing actually existed. Johnson v. State, 804 So. 2d 1218, 1224 (Fla. 2001). This Court has also held that requests that seek "any and all" records are overly broad and unduly burdensome. Mills v. State, 786 So. 2d 547, 551-52 (Fla. 2001). This Court has noted that the requirement that defendants specify the additional records they are seeking and show that they have some relevance to a colorable post conviction claim is intended to ensure that requests for additional public records are not used for "fishing expeditions." See Glock v. Moore, 776 So. 2d 243, 253 (Fla. 2001). Here, the lower court properly denied Twilegar's requests because they were such a fishing expedition made in an overly broad and unduly burdensome manner without any showing of relevancy to the case. See Muhammad v. State, 132 So. 3d 176, 200 (Fla. 2013) (observing this Court has "long acknowledged" public records procedure is not intended to authorize a "fishing expedition" for records "unrelated to a colorable claim for postconviction relief"). Moreover, the relevancy requirement is not satisfied simply because collateral counsel asserts that it is. See Walton v. State, 3 So. 3d 1000, 1010-11 (Fla. 2009) (stating that in order to support a 3.852(i) request, the defendant "must explain, at a minimum, how that

information would lead to evidence"). Although Twilegar appears to suggest he was denied access to his medical records, the State notes he did receive such records. Initial Brief at pp. 80-81. (PCR 5/889; 10/1863-64). In fact, postconviction counsel indicated on the record, the records were received. (PCR 11/2075, 2088-92).

Twilegar also contends that it was error to deny his request for additional records pertaining to lethal injection. In Valle v. State, 70 So. 3d 530, 547-49 (Fla. 2011), this Court addressed in detail public records requests from CCRC-South, the **identical requests** as in the instant case, and found that Valle had "failed to establish how the production of such records relates to a colorable Eighth Amendment challenge." Valle, 70 So. 3d at 548. (PCR 5/983-92). Based on Valle, it is clear that Twilegar's demands for additional public records were properly denied as Twilegar did not demonstrate that his demands were relevant to any colorable postconviction claim. Valle, 70 So. 2d at 547-49; see also Chavez v. State, 132 So. 3d 826, 830 (Fla. 2014) (court did not abuse discretion in denying lethal injection requests where this Court previously considered same requests in another case); Pardo v. State, 108 So. 3d 558, 565-66 (Fla. 2012) (court did not abuse its discretion in denying lethal injection requests where requests were similar to those

in Valle, and relevancy was not established).

Lastly, the lower court's order recognizes this Court in Valle made it clear that all the documents to which Twilegar is entitled have been filed in the repository and that capital defendants are not entitled to fishing expeditions in pursuit of speculative claims. (PCR 5/983-92). Indeed, as the method of execution and the 2011 protocol was upheld by this Court in Valle and all of the documents resulting from the extensive evidentiary hearings on the issue were available at the repository, the request for additional records was nothing more than a fishing expedition which is impermissible and correctly denied. See Walton, 3 So. 3d at 1013-14 (noting that the production of public records regarding lethal injection will not lead to a colorable claim for relief because the challenge to the constitutionality of lethal injection has been fully considered and rejected by the Florida Supreme Court); Sims v. State, 753 So. 2d 66, 70 (Fla. 2000). Twilegar's constitutional challenge was properly summarily denied, and the postconviction court did not abuse its discretion in denying additional public records demands. Twilegar is not entitled to any relief.

ISSUE III

THE JUROR MISCONDUCT CLAIM

The postconviction court summarily denied this claim. This Court reviews the propriety of such rulings *de novo*. Henyard v. State, 992 So. 2d 120, 125 (Fla. 2008). Such a review confirms that the court correctly rejected this claim without an evidentiary hearing. When evaluating claims that were summarily denied without a hearing, this Court will affirm where the claim was legally insufficient, should have been raised on direct appeal, or is refuted by the record. Jackson v. State, 127 So. 3d 447, 460 (Fla. 2013).

Twilegar asserts that jurors Delgado and Campitelli, by failing to disclose prior criminal charges during voir dire, violated his due process rights and rendered his trial unreliable. The postconviction court found this claim was procedurally barred. Moreover, the postconviction court properly found Twilegar failed to establish he was entitled to a new trial as he alleged. Additionally, Twilegar's related Brady[23] and Giglio[24] claims were likewise summarily denied as he failed to establish any violation. (PCR 10/1825-28, 1837-39). Relief was

[23] Brady v. Maryland, 373 U.S. 83 (1963).

[24] Giglio v. United States, 405 U.S. 150 (1972).

properly denied and should be affirmed.[25]

In denying postconviction relief, the trial court found the claim was procedurally barred as it could have been raised on direct appeal under Elledge v. State, 911 So. 2d 57 (Fla. 2007). A substantive claim of juror misconduct raised in postconviction proceedings is procedurally barred. Indeed, in Diaz v. State, 132 So. 3d 93, 104-06 (Fla. 2013), this Court found no error in summarily denying the defendant's "motion to interview jurors, summarily denying his juror misconduct claim, and denying his claim that he was deprived of a trial by an impartial jury due to Williams' failure to disclose" finding Diaz could have sought juror interviews after trial and raised the issue on appeal, hence the claims were procedurally barred in postconviction litigation. See also Troy v. State, 57 So.3d 828, 838 (Fla. 2011) (finding substantive claims of juror misconduct were procedurally barred as they "could have and should have been raised on direct appeal"); Elledge v. State, 911 So. 2d 57, 77-

[25] Twilegar appears to take issue with the order below stating the court "conflated" the juror claim. Initial Brief at p. 89. However, he never sought clarification or rehearing below. As such, any claim regarding the court's order is waived. Baptiste v. State, 995 So. 2d 285, 301-02 (Fla. 2008); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978); Holland v. Cheney Bros., Inc., 22 So. 3d 648, 649-50 (Fla. 1st DCA 2009). The State notes here that allegations relating to jurors Delgado and Campitelli were raised in Twilegar's Issue III, IV, and V of his motion for postconviction relief below. (PCR 10/1970-73, 2012-19).

78 n.27 (Fla. 2005) (same); Happ v. Moore, 784 So. 2d 1091, 1094 n.3 (Fla. 2001); Brown v. State, 755 So. 2d 616, 637 (Fla. 2000). The claim is procedurally barred and was properly summarily denied.[26]

Even if the instant claim was not procedurally barred, Twilegar would still would not be entitled to relief. While the trial court found the claim procedurally barred, it also reviewed the matter under De La Rosa v. Zegueira, 659 So. 2d 239 (Fla. 1995) and found Twilegar's evidentiary hearing presentation wanting as neither materiality nor actual bias was proven. Twilegar takes issue with the postconviction court's ruling finding he did not meet his burden under De La Rosa. Contrary to Twilegar's assertions, summarily denial was proper.

As the postconviction court found:

> 8. **As to Claim III,** Defendant argues that jurors Mr. Delgado and Mr. Campitelli committed juror misconduct when they failed to disclose criminal histories, and that counsel was ineffective in failing to ask additional questions to uncover the prior convictions. **Defendant believes this misconduct entitles him to a new trial as a matter of law. Specifically, Defendant alleges that Mr. Delgado failed to disclose a 1986 charge of failure to redeliver a hired vehicle, 1991 charges of disorderly intoxication and resisting an officer without violence, a 1993 charge of disorderly conduct, and**

[26] In fact, this Court stated in Elledge that "any substantive claim of juror misconduct" was barred even though the defendant was claiming the facts were outside the record and needed to be developed. Elledge, 911 So. 2d at 77-78 n.27.

1996 charges of possession of cocaine and DUI Defendant concedes that Mr. Delgado disclosed a 2006 traffic violation (Trial transcript pp. 118-119). Defendant alleges Mr. Campitelli failed to disclose a 1999 charge of DUI (Trial transcript pp. 173-174). Information is considered concealed for purposes of testing for juror misconduct due to concealment of information where the information is squarely asked for and not provided. Wiggins v. Sadow, 925 So. 2d 1152 (Fla. 4th DCA 2006). In order to establish juror concealment, the moving party must demonstrate, among other things, that the voir dire question was straightforward and not reasonably susceptible to misinterpretation. *See* Tran v. Smith, 823 So. 2d 210 (5th DCA 2002). Mr. Delgado and Mr. Campitelli were asked if they had any involvement in the criminal justice system such as being a victim or accused of a crime (Trial transcript p. 109). Regardless of the reason, Mr. Delgado and Mr. Campitelli did not disclose their criminal histories.

9. **Nondisclosure of litigation information does not mandate automatic new trial. Generally, a new trial will not be granted due to a juror's nondisclosure of facts, unless those facts are considered material. Murray v. State, 3 So. 3d 1108, 1121-1122 (Fla. 2009).** Nondisclosure is considered material if it is so substantial that, if the facts were known, the defense likely would peremptorily exclude the juror from the jury. Id. **Even if material, the discovery of nondisclosure will warrant a new trial only if (1) the facts are relevant to the juror's service; (2) they were intentionally concealed on voir dire; and (3) the complaining party's failure to discover the concealed facts was not due to his own lack of diligence. Id., citing De La Rosa v. Zegueira, 659 So. 2d 239, 241 (Fla. 1995).** The test is not simply whether information is relevant and material in general, but whether it is "relevant and material to jury service in the case." Roberts ex rel. Estate of Roberts v. Tejada, 814 So. 2d 334 (Fla. 2002), quoting De La Rosa v. Zegueira, 659 So. 2d at 241. Even if the State is imputed with knowledge of the charges years prior to trial in 2006, the charges were not material or relevant. The charges were remote in time.

> Remoteness in time is one aspect to consider in determining the impact, if any, of a juror's prior exposure to the legal system on his present ability to serve in a particular case. Roberts, 814 So. 2d at 342, citing Leavitt, 752 So. 2d at 732 (Fla. 3d DCA 2000) (concluding that the juror's undisclosed collection claim, which had arisen more than ten years previously, was not material); D'Amario, 732 So. 2d at 1146 (Fla. 2d DCA 1999) (determining that undisclosed litigation regarding collection claims which occurred almost twelve years prior to the present lawsuit were remote and not material), quashed on other grounds, D'Amario v. Ford Motor Co., 806 So. 2d 424 (Fla. 2001); Bernal, 580 So. 2d at 316 (determining that the plaintiff was entitled to a new trial where a juror failed to disclose that he had been a defendant in a personal injury case one year previously). **Further, that the jurors were defendants in a DUI or other cases would not imply bias or sympathy for the State which in all likelihood would have resulted in the use of a peremptory challenge.**
>
> fn1. The record also indicates that Mr. Campitelli stated he had hearing problems, and when asked if he had been able to hear everything during voir dire, responded "A little bit. Not too much" (Trial transcript pp. 364-365). If the prosecutor had turned away from him when she asked the panel if they had a criminal history, he may not have heard that question.
>
> **10. Despite the nondisclosure of the two felony and three misdemeanor charges occurring between seven and twenty years prior, the charges were not material or relevant to Mr. Delgado's service on the jury for the murder trial of Defendant. Despite nondisclosure of the DUI charge, this charge was not material or relevant to Mr. Campitelli's service on the jury for the murder trial of Defendant. Defendant has failed to demonstrate that juror misconduct occurred....**

(PCR 10/1826-27)(emphasis supplied).

Upon review of claims that a defendant was denied a fair

trial where a juror withheld information, this Court has held that, "in the absence of evidence the defendant was not accorded a fair and impartial jury or that his substantive rights were prejudiced by the participation and misconduct of the unqualified juror, he is not entitled to a new trial." State v. Rodgers, 347 So. 2d 610, 613 (Fla. 1977). In Lowrey v. State, 705 So. 2d 1367 (Fla. 1998), this Court recognized an exception for cases in which a juror was under prosecution by the same State Attorney's Office at the time of his jury service. However, the Court made clear that it did "not overrule Rodgers; [it was] simply carving out an exception based on the unique circumstances presented." Lowrey, 705 So. 2d at 1370. The allegations in the instant case fall far short of meeting the Lowrey standard.

Unlike the facts in Rodgers where relief was denied even though the allegedly biased juror actually spoke to the prosecutor about his case during the service on the jury, there is nothing to support a contention that either of these jurors were under prosecution and there is nothing to support a contention that either were under prosecution by the State Attorney prosecuting Twilegar's case at the time of trial.

Again, while Twilegar makes conclusory allegations he offers no claim that he has evidence that any actually biased

juror sat on his jury. For the same reasons this Court denied relief in Lugo v. State, 2 So. 3d 1 (Fla. 2008), this claim was properly summarily denied. As this Court explained:

> When trial counsel for Lugo conducted group voir dire, he did not inquire if any of the other jurors had also inadvertently failed to include on their questionnaire altercations, whether reported to the police or whether charges were actually filed. Here, it appears that charges were never pursued against the deliveryman involved with juror Schlehuber, and therefore, at best, an ambiguity may exist which was not explored.
>
> Lugo is not entitled to a new trial under a *De La Rosa* analysis based upon the failure of juror Schlehuber to disclose the altercation at work. This asserted nondisclosure was simply immaterial and irrelevant to jury service in Lugo's case, and the failure to disclose was attributable, in part, to the lack of diligence of trial counsel.
>
> Under the "actual bias" standard articulated by this Court in Carratelli, Lugo has similarly failed to demonstrate that he is entitled to relief. In Carratelli, we explained:
>
> > A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk*, 446 So. 2d at 1041. Therefore, actual bias means bias-in-fact that would prevent service as an impartial juror. *See United States v. Wood*, 299 U.S. 123, 133–34[, 57 S. Ct. 177, 81 L.Ed. 78] (1936) (stating, in a case involving a statute permitting government employees to serve as jurors in the District of Columbia, that the defendant in a criminal case still has the ability during voir dire to "ascertain whether a prospective juror ... has any bias in fact which would prevent his serving as an impartial juror"). Under the actual bias standard, the

> defendant must demonstrate that the juror in question was not impartial—i.e., that the juror was biased against the defendant, and *the evidence of bias must be plain on the face of the record*.
>
> 961 So. 2d at 324 (emphasis supplied). Our analysis with regard to the *De La Rosa* standard defeats any assertion by Lugo that a biased juror actually served on the jury. As we have noted, the trial court engaged in an extended venire discussion to assure that the status of a juror as a crime victim would not impact his or her ability to fairly and impartially adjudicate the guilt or innocence of Lugo with regard to the charged crimes. Juror Schlehuber did not indicate that he would be unable to set aside any of his past experiences if he were selected to serve on Lugo's jury. In *Carratelli*, we held that the defendant failed to demonstrate actual prejudice where the challenged juror explained during voir dire that he could be fair, listen to the evidence, and follow the law. *See id.* at 327. Lugo similarly has failed to demonstrate that juror Schlehuber was actually biased against him. *See id.* at 324. Accordingly, he is not entitled to relief under *Carratelli*.
>
> In light of the foregoing, we conclude that Lugo is not entitled to a new trial and we deny relief on this claim.

Lugo, 2 So. 3d at 15-16.

Both jurors who allegedly failed to give a complete answer to the inquiry are, nevertheless, qualified to serve on the jury. None of the allegations presented shows that an unqualified or biased juror served. Twilegar's claim that a juror with a prior DUI or possession of cocaine conviction could be biased against Twilegar is based upon nothing more than speculation. Denial of relief was appropriate. Maharaj, 778 So.

2d at 951. Furthermore, the charges at issue were remote in time, and were not relevant or material to jury service in a first-degree murder case where the victim was shot, robbed, and the defendant fled the State. See Foster v. State, 132 So. 3d 40, 63 (Fla. 2013) (conviction of non-violent offense does not suggest bias against a defendant pleading not guilty in a death penalty case); Johnston v. State, 63 So. 3d 730, 739 (Fla. 2011) (juror's position as a prior defendant in criminal matter makes bias against capital defendant especially unlikely); Lugo, 2 So. 3d at 13-16 (juror's failure to disclose that he had been a victim of a violent battery was not relevant and material to his service on capital defendant's case).

Here, the lower court correctly determined that the jurors charges were not relevant and material to Twilegar's case. As this Court has previously stated, "[a] juror's nondisclosure of information during voir dire warrants a new trial if it is established that the information is relevant and material to jury service in the case, the juror concealed the information during questioning, and failure to disclose the information was not attributable to counsel's lack of diligence." Lebron v. State, 799 So. 2d 997, 1014 (Fla. 2001); see also Hampton v. State, 103 So. 3d 98, 112-13 (Fla. 2012) (finding that defendant failed to allege prima facie argument for actual prejudice based

on juror's failure to disclose his arrest and prosecution for loitering and possession of drug paraphernalia).

In the instant case, the charges 7-20 years before Twilegar's trial for first-degree murder were not "material" so as to require a new trial. The juror's nondisclosure of these charges certainly would not have given rise to a valid cause challenge, and any claim trial counsel would have sought to peremptorily exclude the jurors is speculative. Moreover, Twilegar does not allege sufficient facts to show that he was not accorded a fair and impartial jury or that his substantive rights were prejudiced by either juror's service. Instead, he merely asserts that counsel might have learned grounds to challenge the jurors for cause or if that failed then he could have exercised a peremptory challenge. "Postconviction relief cannot be based on speculation or possibility." Maharaj, 778 So. 2d at 951; compare Chester v. State, 737 So. 2d 557 (Fla. 3d DCA 1999) (in prosecution for lewd and lascivious assault on a child, a juror's failure to disclose that she was sexually abused as a child was material as it would have provided a valid challenge for cause). Because this claim is procedurally barred and Delgado and Campitelli's charges were not relevant or material their service on the jury in the instant case, this

Court should affirm the lower court's denial of this claim.[27]

Twilegar also makes a conclusory allegation that to the extent the State knew or should have known and failed to disclose the information related to juror Campitelli, it violated Brady v. Maryland, 373 U.S. 83 (1963). His only offer of proof in support of this claim is that juror Campitelli had an arrest and conviction in 1999 and 2000 in Lee County. He claims by mere virtue of the fact that the conviction for this second degree misdemeanor 7 years prior to the trial would have been prosecuted by the same office, the State was on notice that this juror had neglected to mention his prior history. This unsupported allegation not only defies logic, it does not support a claim for relief.

In Brady, the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad

[27] Twilegar takes issue with the court's denial of his motion to interview jurors. Initial Brief at p. 88 However, Twilegar simply refers to his motion, cites its denial and fails to brief this claim. As such, this claim is waived. Bryant v. State, 901 So. 2d 810, 827-28 (Fla. 2005); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990). Notwithstanding, this claim is procedurally barred and without merit as Twilegar simply asserted speculative and conclusory allegations that were insufficient to justify juror interviews. (PCR 9/1653-56, 1662-69; 10/1931-35); see Diaz, 132 So. 2d at 105; Foster, 132 So. 2d at 65-66.

faith of the prosecution." Brady, 373 U.S. at 87. The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. United States v. Bagley, 473 U.S. 667, 682 (1985). In order to establish a Brady violation, a defendant must prove the following:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Melendez v. State, 718 So. 2d 746, 748 (Fla. 1998).

In the instant case, Twilegar cannot establish any of the prongs necessary for establishing a Brady violation. He cannot establish: (1) that Campitelli's DUI is "favorable" to him; (2) that trial counsel "did not possess the evidence nor could he obtain it himself with any reasonable diligence;" (3) that the prosecution "suppressed" favorable evidence; and (4) there is "a reasonable probability" that the outcome of the proceedings would have been different had the DUI been disclosed. Even assuming that defense counsel decided to strike Campitelli, the

jury would have nevertheless convicted Twilegar of the charged crimes given the evidence of his guilt. See Diaz, 137 So. 3d at 105-06 (denying Brady claim where defendant failed to show evidence was favorable to him and he was prejudiced and noting claim defendant would have stricken juror not persuasive); Breedlove v. State, 580 So. 2d 605, 607 (Fla. 1991) (denying a Brady claim based on imputed knowledge of criminal activity where defense failed to establish materiality).

Likewise, the claim that the State violated Giglio v. United States, 405 U.S. 150 (1972), is without legal or factual support. In order to establish a Giglio violation, a defendant must show: (1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material. If there is a reasonable probability that the false evidence may have affected the judgment of the jury, a new trial is required. Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1997) (*citing* Giglio v. United States, 405 U.S. 150, 154 (1972), and Routly v. State, 590 So. 2d 397 (Fla. 1991)). Twilegar has failed to cite to any case applying Giglio to jurors' answers during voir dire. Even assuming that Giglio applies to potential jurors' answers made during voir dire, as argued above materiality was not established. See Foster, 132 So. 3d at 64 (where defendant failed to establish materiality

Giglio claim fails). This procedurally barred and meritless claim was properly summarily denied. The judgment of the postconviction court must be affirmed.

ISSUE IV

THE VOIR DIRE CLAIM

Twilegar claims that his trial counsel failed to provide constitutionally effective assistance during voir dire. This Court reviews the propriety of such rulings *de novo*. Henyard, 992 So. 2d at 125. Such a review confirms that the trial court correctly rejected these claims without an evidentiary hearing.

In order to obtain an evidentiary hearing on a postconviction claim of ineffective assistance of counsel, a defendant must specifically allege both deficient performance and prejudice. Ponticelli, 941 So. at 1104; Nelson, 875 So. 2d at 583. Claims that are based upon speculation or contain only conclusory allegations are insufficient and should be summarily denied. Maharaj, 778 So. 2d at 951; Ragsdale, 720 So. 2d at 207. Where the postconviction motion lacks sufficient factual allegations, or where the alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Hamilton, 875 So. 2d at 591. See also Doorbal, 983 So. 2d at 485 (claims of ineffective assistance of counsel

must comply with the pleading requirements enunciated by this Court). As will be seen, the claims challenged in this issue were insufficiently pled, and summary denial was proper and must be affirmed.

I. Failure To Adequately Conduct Voir Dire

Regarding Twilegar's claim counsel was ineffective during voir dire, the postconviction court found:

> 11. **As it relates to Defendant's claim that counsel was ineffective in failing to discover Mr. Delgado and Mr. Campitelli's prior charges, postconviction relief based on a lawyer's incompetence with regard to the composition of the jury is reserved for a narrow class of cases where prejudice is apparent from the record and a biased juror actually served on the jury. See Lugo v. State, 2 So. 3d 1, 15-16 (Fla. 2008); Jenkins v. State, 824 So. 2d 977 (Fla. 4th DCA 2002). Defendant did not point to anything in the record that would support the conclusion that a biased juror actually served on his jury.** Nor did the Court find any record evidence to support such a conclusion. To the extent Defendant is claiming the jury would have reached a different verdict had counsel exercised peremptory challenges to remove these two jurors, such a claim is pure speculation that does not rise to the level needed to establish ineffective assistance of counsel. Nelson v. State, 73 So. 3d 77, 85 (Fla. 2011). **Defendant has failed to allege any facts that, if true, would establish either prong of Strickland. Therefore, sub-claim III(a) will be denied.**

(PCR 10/1827-28)(emphasis supplied).

Here, because the lower court was reviewing only a claim of ineffective assistance of counsel Twilegar had to establish deficient performance and prejudice under Strickland. Thus, he

had to show that no reasonable lawyer would not have sought to examine these jurors further, that even if further questioning would have revealed information beyond what both jurors admitted to, that no reasonable lawyer would have kept these jurors and that he was prejudiced by their presence on the jury.

First, a claim that counsel was ineffective for failing to "follow-up" on questioning to establish grounds for a for-cause challenge has been held to be legally insufficient because such a claim can be based on nothing more than conjecture. Solorzano v. State, 25 So. 3d 19, 23 (Fla. 2DCA 2009) (*citing* Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002)) (holding that when the record does not show a reasonable basis to assert a for-cause challenge, a claim by the defendant that more information would have been forthcoming had counsel properly followed up with further questioning is mere conjecture and thus is not a legally sufficient claim for postconviction relief); Davis v. State, 928 So. 2d 1089, 1118 (Fla. 2005) (holding that allegations that counsel was ineffective for failing to "follow up" with certain jurors in an effort to rehabilitate them to avoid cause challenges by the State was legally insufficient because the allegations were based on nothing but conjecture). Further, as the Second District Court of Appeal noted in Solorzano, to the extent that a defendant claims that "further questioning might

have led counsel to use his peremptory challenges in a different manner, the claim is also based on pure speculation that will not support an ineffective assistance of counsel claim. Solorzano, 25 So. 3d at 23; see also Johnson v. State, 921 So. 2d 490, 503-04 (Fla. 2005) ("'To show prejudice, Johnson argues that [defense counsel] could possibly have learned more about the jurors' views and used his peremptory challenges in a different manner to obtain a more defense-friendly jury. Such speculation fails to rise to the level of ineffective assistance under Strickland.'").

Furthermore, while Twilegar argues that counsel should have made inquiry of the jurors about potential criminal history, it is well recognized that such jurors are likely more favorable to the defense. See Johnston v. State, 63 So. 3d 730, 736-738 (Fla. 2011) (rejecting a claim of ineffective assistance of counsel and noting that keeping jurors with criminal histories can be a reasonable trial tactic).

Twilegar has offered nothing more than mere conjecture that further questioning would have revealed any information or that the failure to conduct further questioning constituted deficient performance. Moreover, he simply cannot establish that no reasonable lawyer would not have kept these two jurors, let alone that it was unreasonable to not have subjected them to

further questioning to determine if any of the jurors had further contact with the criminal system.

Moreover, this Court has held that to establish prejudice, a defendant must establish that a juror was actually biased based on the standard set forth in Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007). Twilegar has made no such showing. Instead, he merely asserts that counsel might have learned grounds to challenge the jurors for cause or if that failed then he could have exercised a peremptory challenge. To support his claim of prejudice he merely speculates that the jurors may have been biased. This speculation fails to rise to the level of "prejudice" needed to establish an ineffective assistance of trial counsel claim. Nelson v. State, 73 So. 3d 77, 85 (Fla. 2011); Maharaj, 778 So. 2d at 951.

Accordingly, this claim was properly summarily denied because Twilegar did not establish prejudice or show that a truly biased juror sat. Having failed to allege prejudice and offer proof beyond mere speculation that a biased juror sat, Twilegar is not entitled to relief. The judgment of the postconviction court must be affirmed.

II. Failure To Object To The Death Qualification Of The Jury

Regarding Twilegar's claim trial counsel failed to object

to the death qualification of his jury, the postconviction court found:

> 12. As to sub-claim III(b), Defendant argues that counsel was ineffective for conceding to a death qualified jury despite the fact that Defendant waived the jury for the penalty phase.
>
> Defendant contends that research demonstrates that death qualification of a jury results in a jury more predisposed to convict, as death qualification tends to exclude particular demographics such as women and African Americans, and excludes jurors with certain ideological beliefs, resulting in a jury which harbors pro-prosecution beliefs. Defendant acknowledges that "there is no constitutional infirmity in the 'death qualification' of a jury in a capital case." However, he asserts this is not a claim regarding the constitutionality of the death-qualification of the jury, but rather a claim of ineffective assistance of counsel "for insisting that the jury be instructed as to the seriousness of the penalty and acquiescing to the State's procedure to exclude jurors opposed to the death penalty, in the face of the State originally arguing that no such instruction was necessary."
>
> 13. The record indicates that the trial court stated "since we are not going to need to death qualify this jury, I presume the only question ... to be asked then would be ... whether they would be able to return a verdict knowing that the death penalty is ... possible ... " (Trial transcript p. 45). The State objected, believing there was no purpose to that inquiry as the Defendant had waived a jury for the penalty phase (Trial transcript pp. 30-42; 45-46). The trial court believed that the jury should know "that this is a case that potentially carries the death penalty" but if both parties were unanimous "I obviously would be swayed by that" (Trial transcript p. 47). Trial counsel believed that the jury "should know the seriousness of the case" (Trial transcript p. 47). The trial court and parties subsequently discussed exactly what the jury would be told, and what follow up the parties would be permitted (Trial

transcript pp. 62-64). The State believed that if the jury were informed about the issue and asked if they could nonetheless return a guilty verdict if the evidence supported it, that the law required the State to follow up with further questioning of any juror who said they could not (Trial transcript pp. 66-71). The trial court maintained its stated decision that the jury would be informed and asked the question, and the parties could "follow-up however you like" (Trial transcript p. 72).

14. In its response, the State counters that the record reflects this was a strategic decision Defendant's counsel made after researching the matter and thoroughly discussing and debating the issue with the trial court and opposing counsel. Accordingly, as a strategic decision, "the action is virtually unchallengeable," because it amounts to nothing more than a disagreement that Defendant's current counsel had with his trial counsel's decision. Furthermore, the State contends that Defendant's claim of prejudice in the form of a more pro-prosecution jury is speculative and insufficient to warrant relief, because mere lack of opposition to capital punishment does not mean that an individual favors capital punishment. The State notes that similar claims have been repeatedly rejected by the Florida Supreme Court as speculative. Dougan v. State, 470 So. 2d 697, 700 (Fla. 1985); Davis v. State, 928 So. 2d 1089, 1118 (Fla. 2005); and Ferrell v. State, 29 So. 3d 959, 974 (Fla. 2010).

15. The jury in this case was not fully death qualified, as the jurors were not asked, for instance, about their ability to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances. Notably, Defendant concedes in his motion that this was a strategic decision on the part of his trial counsel, therefore no hearing is necessary to determine that issue. Strategic decisions made by trial counsel do not constitute ineffective assistance of counsel if alternative decisions had been considered and rejected, and counsel's decision was reasonable when viewed under the norms of professional conduct. Buzia v. State, 82 So. 3d 784,

794 (Fla. 2011). **The record reflects that this was not a spur of the moment decision, but rather a reasoned, thoughtful decision by counsel after extensive discussion with the trial court and with opposing counsel about the various ways in which to proceed. That postconviction counsel disagrees with the strategy employed by trial counsel does not mean trial counsel was ineffective. *See* Nelson v. State, 73 So. 3d 77, 86 (Fla. 2011) (noting that an attorney cannot be deemed ineffective merely because another attorney may disagree with the strategic decision).** Even if the jury was not informed that the death penalty was a possible sentence, or asked about whether they could render a guilty verdict if it was, Defendant cannot demonstrate prejudice. It is pure speculation that a jury not so informed would have found the Defendant not guilty under the same facts and evidence as were presented in this case, thus there is no reasonable probability of a different outcome.

16. Postconviction relief based on a lawyer's incompetence with regard to the composition of the jury is reserved for a narrow class of cases where prejudice is apparent from the record and a biased juror actually served on the jury. *See* Lugo v. State, 2 So. 3d 1, 15-16 (Fla. 2008); Jenkins v. State, 824 So. 2d 977 (Fla. 4th DCA 2002). Defendant did not point to anything in the record that would support the conclusion that a biased juror actually served on his jury. Nor did the Court find any record evidence to support such a conclusion. Further, Defendant was present during jury selection, and failed to object to the jury before it was sworn (Trial transcript pp. 366, 396). Defendant may not stand silent while an alleged error occurs, then, when an undesirable verdict is rendered against him, attempt to use his silence to subsequently attack his conviction. *See, e.g.*, Trotter v. State, 576 So. 2d 691 (Fla. 1990). To the extent that Defendant references research that death qualification creates a jury predisposed to convict, no such research has been found binding upon the courts by the Florida Supreme Court. As Defendant has not demonstrated that any such research was conducted by an independent organization neutral of any motive of bias pro-defense or pro-prosecution, the

> Court does not find such research persuasive. **Defendant has failed to allege any facts that, if true, would establish either prong of Strickland. Therefore, sub-claim III(b) will be denied.**

(PCR 10/1828-31)(emphasis supplied).

Twilegar asserts that the death qualification of the jury prejudiced him and could have been avoided but for counsel's deficient performance.

Prior to trial, Twilegar waived the presentation of mitigation and a penalty phase jury. (T. 1/41). During a pretrial jury instruction conference, trial counsel requested that the jurors be instructed on the possible penalty. The State objected, opining that it would be prejudicial to the State as it would create a jury that is more likely to find Twilegar not guilty. (T. 1/36). The trial court disagreed, stating, "[i]n practicality, it's my belief that the jury should know that this is a case that potentially carries the death penalty, and will probably allow that to be brought to them either by counsel or by the Court. I don't know what Defense counsel's position is. If both of you are unanimous in your agreement that this possibility should not even be mentioned, then I obviously would be swayed by that." (T. 1/47). Trial counsel then reaffirmed that, "I believe that the jury should know the seriousness of the case. And, honestly, I read Judge Eaton's book a couple of

times, more than a couple times, and if he thought that was an appropriate question, I'll [] rely on the wisdom of Judge Eaton." (T. 1/47).

After a break for lunch, the State told the court that it had researched the matter and that if the court was going to tell the jury that death was a possible penalty then the law required the jury to be death qualified because jurors would be subject to be stricken based on their answers and Twilegar and State had rights that needed to be addressed. (T. 1/66, 69-71). The trial court then stated that it was going to ask the question and allowed that counsel could follow up however they chose. (T. 1/72).

When the venire convened, the court instructed them as follows:

> Okay. Now, murder in the first degree is a capital offense in Florida, and that is why persons are selected for the jury. The penalty for first-degree murder in Florida is either death, or life in prison without the possibility of parole.
>
> The death penalty only becomes a possible penalty under certain circumstances. In some cases, if, and only if the jury returns a verdict of guilty for murder in the first degree, the jury will reconvene for the purpose of rendering an advisory recommendation as to the sentence of death or life -- as to whether the sentence of death or life in prison should be imposed.
>
> Now, not all first-degree murder cases require a jury involvement in determining the penalty. This is one of

> those cases. The Court alone will determine the penalty to be imposed, if the defendant is found guilty.
>
> Now, many people have strong feelings about the death penalty, both for it and against it. The fact that you may have such feelings does not disqualify you to serve as a juror, as long as you are able to put those feelings aside and apply the law as I have instructed you. So, in light of all that, the question I want to pose to you is: If the evidence supports it, can you return a verdict of guilty, knowing that the death penalty is a possible penalty?

(T. 1/86).[28]

The record reflects that this was a strategic decision which was thoroughly discussed and debated with the court and opposing counsel and was made after counsel had researched the matter and made a reasoned decision. See Hannon v. State, 941 So. 2d 1109, 1138 (Fla. 2006) (when it is obvious from the record that trial counsel's action or inaction is a tactical decision, no evidentiary hearing is necessary). Indeed, Twilegar's claim amounts to no more than disagreement with trial counsel's strategy and this is insufficient for relief. See Occhicone, 768 So. 2d at 1048.

Furthermore, even if he could get past the fact that

[28] The State notes that in Chamberlain v. State, 881 So. 2d 1087, 1096-97 (Fla. 2004), this Court, in a first-degree murder case in which the State is seeking the death penalty and the defendant has waived a penalty-phase jury, held it was within the court's discretion to tell the jury that a conviction may result in imposition of the death penalty.

counsel had thoroughly researched the matter and made his decision that he wanted the jurors informed about the potential sentence over the State's objection that it was prejudicial to the State, Twilegar **did not and cannot establish prejudice.** The only prejudice that he asserts is that counsel's acquiescence to the removal of jurors who could not find Twilegar guilty knowing death was a possible option resulted in a jury that was more prosecution prone.[29] This contention is highly speculative and as such, the lower court properly denied relief. Ferrell v. State, 29 So. 3d 959, 974 (Fla. 2010); Davis, 928 So. 2d at 1118. The judgment of the postconviction court must be affirmed.

III. Failure To Object To The State's Systematic Exclusion Of Women From The Jury

Regarding Twilegar's claim counsel was ineffective for

[29] In Spinkellink v. Wainwright, 578 F.2d 582, 595 (11th Cir. 1978), the court opined:

> []Being not opposed to capital punishment is not synonymous with favoring it. Individuals may indeed be so prejudiced in respect to serious crimes that they cannot be impartial arbiters, but that extreme is not indicated by mere lack of opposition to capital punishment. The two antipathies can readily coexist; contrariwise either can exist without the other; and, indeed, neither may exist in a person. It seems clear enough to us that a person or a group of persons may not be opposed to capital punishment and at the same time may have no particular bias against any one criminal or, indeed, against criminals as a class; people, it seems to us, may be completely without a controlling conviction one way or the other on either subject. We think the premise for the thesis has no substance.

failing to object to the exclusion of women from the jury, the lower court held:

> 16. As to sub-claim III(c), Defendant argues that trial counsel was ineffective for failing to object to the State's use of preemptory challenges to systematically exclude women from the jury. Defendant contends that the State took the position that male jurors needed to "'toughen up,"' but that women jurors should be excused if jury service would cause great anxiety, and that this change in position shows the State was impermissibly excluding jurors based on gender. The central function of peremptory challenges is to allow both parties to exclude jurors the party believes will be most partial toward the other side. Hayes v. State, 94 So. 3d 452, 459 (Fla. 2012) (internal citations omitted). Use of peremptory challenges is limited in that they may not be used to exclude prospective jurors due to race, ethnicity, or gender. Id. at 460. Gender is a valid basis for an objection to the exercise of a peremptory strike. Welch v. State, 992 So. 2d 206, 211 (Fla. 2008). When a party objects to the use of a peremptory strike on gender grounds, the party must allege that the juror belongs to a specific gender group and request a gender-neutral reason to support the strike. If the objecting party complies with these requirements, the court must ask the striking party to explain the reason for the strike. Id. at 211-12. At this point, the burden shifts to the striking party to establish a gender-neutral explanation for the strike. Id. at 212. The court should sustain the strike if the explanation given by the striking party is gender-neutral and the court believes that it is not a pretext. The court should focus on the genuineness of the explanation, not its reasonableness. Melbourne v. State, 679 So. 759, 764 (Fla. 1996). Johnson v. State, 27 So. 3d 761, 763 (Fla. 2d DCA 2010). **The record shows that while the State struck or moved to strike for either cause or peremptory challenge approximately 13 women from the jury, the defense struck or moved to strike seven women, and stipulated with the State on three other women being stricken from the panel. For those strikes for which the State provided reasoning, that reasoning**

was because the prospective juror stated they could not find the Defendant guilty knowing the death penalty was a possibility (Trial transcript pp. 368, 399-400). Even had trial counsel objected, this reason was gender neutral as well as a valid basis for removing the prospective juror, and there is no reasonable probability that the trial court would not have found that reason genuine.

17. Postconviction relief cannot be granted on claims of failure to object to peremptory strikes unless the error resulted in a jury that was not impartial. Yanes v. State, 960 So. 2d 834, 835 (Fla. 3d DCA 2007) (*citing* Carratelli v. State, 915 So. 2d 1256 (Fla. 4th DCA 2005)). **Defendant has proffered no evidence of impartiality on the part of the jury nor made any such assertion in his motion. To the extent that the Defendant argues the State's change in position regarding male and female jurors indicates motive to exclude women from the jury, this argument is speculation.** It appears from the record that the prosecutor's "'toughen up"' comment was a joke, and was not taken seriously (Trial transcript pp. 384, 385, 394). Regardless, there is a difference between a prospective juror who is merely squeamish, and one whose significant other's experience on a jury during a month long murder caused her such anxiety that she dreaded sitting on one herself and would be too distracted to pay proper attention (Trial transcript pp. 372-373, 384-385, 393-394). Since the jury consisted of both men and women from the community, Defendant's claim he was denied a jury that was a fair cross section of the community lacks merit. Further, Defendant was present during jury selection, and failed to object to the jury before it was sworn (Trial transcript pp. 366, 396). Defendant may not stand silent while an alleged error occurs, then, when an undesirable verdict is rendered against him, attempt to use his silence to subsequently attack his conviction. *See, e.g.*, Trotter v. State, 576 So. 2d 691 (Fla. 1990). **Defendant has failed to allege any facts that, if true, would establish either prong of Strickland. Therefore, sub-claim III(c) will be denied.**

(PCR 10/1831-33)(emphasis supplied).[30]

The State asserted below that this claim was procedurally barred. (PCR 9/1703). While the court properly denied the claim as Twilegar failed to establish a claim under Strickland, the State reasserts the claim is barred. See Melton v. State, 949 So. 2d 994, 1013-14 (Fla. 2006); Reaves v. State, 826 So. 2d 932, 936 n.3 (Fla. 2002).

Here, to establish deficiency, Twilegar must prove that counsel's performance was unreasonable. To establish prejudice, Twilegar must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Carratelli, 961 So. 2d at 320 (*quoting* Strickland, 466 U.S. at 694). In establishing the standard for postconviction relief, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding *whose result is being challenged*." Carratelli, 961 So. 2d at 322, (*quoting* Strickland,

[30] The postconviction court properly concluded the State's strikes against those who did not favor the death penalty was appropriate. See Morrison v. State, 818 So. 2d 432, 443-44 (Fla. 2002) (State may properly exercise its peremptory challenges to strike prospective jurors who are opposed to the death penalty, but not subject to challenge for cause as both parties have the right to peremptorily strike those inclined against their interests).

466 U.S. at 696) (emphasis in original). In the context of a claim of prejudice in jury selection, the proceeding "whose result is being challenged" is the trial. Carratelli, 961 So. 2d at 322. Thus, to obtain relief, Twilegar had to do more than just show that women were excluded or even that if a challenge to the prosecutor's use of peremptory challenges had been made that it might have been successful. He had to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. He did not make such a showing.

An ineffective assistance of counsel claim challenging the failure to challenge the striking of jurors as a violation of State v. Neil, 457 So. 2d 481 (Fla. 1984) faces a large hurdle. In Jones v. State, 10 So. 3d 140, 141-42 (Fla. 4DCA 2009), the Fourth District Court of Appeal reaffirmed their prior holding in Jenkins v. State, 824 So. 2d 977, 984 (Fla. 4th DCA 2002), holding:

> . . .[W]e do not see how the claim of a lawyer's failure to raise a *Neil* objection could ever be the basis for post-conviction relief for incompetence of counsel. Unlike the situation where a biased juror served on a jury, the failure of a lawyer to raise a *Neil* challenge does not mean that the jury was biased. The state might have acted in bad faith in exercising its peremptory challenges, but the jury trying the case might have been simon-pure in its objectivity and ability to follow the law. In such a situation, there can be no showing that counsel's failure to assert a

> *Neil* challenge had any effect on the defendant's ability to receive a fair trial. Thus, there can be no prejudice sufficient to support post-conviction relief.

The Jones court explained that even if the language from Jenkins was arguably dicta, it was consistent with Carratelli v. State, 961 So. 2d 312 (Fla. 2007) and supported the denial of a postconviction claim that counsel was ineffective for failing to object to the State's exercise of peremptory strikes against two Hispanic jurors. Accord Yanes v. State, 960 So. 2d 834, 835 (Fla. 3DCA 2007) (concluding that postconviction relief cannot be granted in this context unless the lawyer's error resulted in a jury that was not impartial).

Not only did Twilegar not allege that he did not have an impartial jury, the record shows that Twilegar was present during jury selection and had a chance to speak to counsel. The record shows that Twilegar indicated he was "fine" with the jury that was finally selected. (T. 2/396; 3/405-06). This claim was properly summarily denied. The judgment of the postconviction court must be affirmed.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Twilegar postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Suzanne Myers Keffer, Chief Assistant CCRC (**keffers@ccsr.state.fl.us**) and to Scott Gavin, Staff Attorney (**gavins@ccsr.state.fl.us**), Office of the Capital Collateral Regional Counsel – South, One East Broward Blvd., Suite 444, Fort Lauderdale, Florida 33301, on this 25th day of June, 2014.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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