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IN THE SUPREME COURT OF FLORIDA

Case No. 13-2169

Lower Tribunal Case No. 03-CF-2151

MARK TWILEGAR,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Twilegar's motion for post-conviction relief following an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court

"T"—trial transcripts on direct appeal to this Court

"Supp. R." -- supplemental record on direct appeal to this Court;

"PC-R" -- record on the 3.851 appeal to this Court.

"Supp. PC-R." – supplemental record on the 3.851 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Twilegar has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Twilegar, through counsel, accordingly urges that the Court permit oral argument.

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INTRODUCTION

Mark Twilegar was convicted and sentenced to death upon a theory of the crime which consisted entirely of circumstantial evidence. The State's theory of the events that transpired was constructed upon inference pyramided on top of inference. Despite the fact that there was not one single piece of evidence conclusively linking Mr. Twilegar to the murder of David Thomas, he was found guilty and sentenced to death. Suspicion rather than proof beyond a reasonable doubt ruled at trial.

The State presented evidence establishing, at best, that Mark Twilegar was a man of peculiar habits with a nomadic existence and a history of transgressions with the law. Mark had led a life with a colored history, surrounded by people with equally colored pasts and equally questionable behavior. Including the victim himself.

Mark had moved to Ft. Myers sometime in February or March 2002 in search of work and a place to live. Initially he lived with his niece Jennifer Morrison and her boyfriend David Twomey. After a couple of weeks, however, he left and set up camp at a local campground nearby. (T. 1335). Twomey eventually introduced Mark to Shane MacArthur and McArthur got permission from his in laws, Sandra and William Hartman, for Mark to live in a field behind the residence that MacArthur lived in with his wife at 412 Miramar Road. (T. 1337). In lieu of

rent, Mark performed odd jobs at the house and helped with landscaping. (T. 936, 940; 979-80, 994, 995-96, 1052-53). He lived in a tent with no running water or toilet facilities. (T. 1006-07, 1055-56). His basic possessions included a television, a VCR, a couch, and a shotgun for protection. (T. 941, 945, 1019-1020, 1022).

In the Spring of 2002, Mark was introduced to Dave Thomas through Morrison and Twomey. (T. 1339). Mark began doing handiwork for Thomas shortly thereafter, installing a door and building a deck around a hot tub. (T. 592-592). With the money he earned from his handyman work and whatever he was able to supplement that with through sales of marijuana, Mark was able to provide for the basic needs of his frugal lifestyle.

David Thomas was an educated lawyer, a slumlord of several rental properties, and a collector of expensive cars. However, like Mark, Thomas also had a colorful history, including a brush with the law in which he was charged with conspiracy to murder his estranged wife. Thomas was married to Mary Anne Lehman but was carrying on affairs with other women, one of whom was Valerie Bisnett. He carried multiple phones and often made large cash transactions at his bank. Despite the fact that he was not actively practicing law, he was unusually flush with cash. Tenants in some of the rental properties he owned noted that he was always jumpy, wired, sniffling often, and gaunt. The tenants also noted his

sketchy business practices, in some instances accepting sexual favors in lieu of back rent.

In the days leading up to Thomas's disappearance, Thomas's behavior was suspicious and erratic. Thomas hired Mark to go with him to Alabama to build a deck on the house he owned there. (T. 594). The two traveled there together in Thomas's truck on August 2, 2002. (T. 593). On August 6, 2002, Thomas went to his bank and withdrew $25,000 in twenty dollar bills. (T. 677). Thomas also spoke with a neighbor, Michael Shelton, and told him that he was going back to Florida to conduct a transaction with drug dealers. That same day he withdrew the money, Thomas rented a red dodge Neon from Thrifty Car Rental. (T. 721-22, 725, 728). Later that day at around 3:00 p.m. Bea Crawford, Thomas' next door neighbor in Alabama, recalled seeing Thomas and Mr. Twilegar together. Thomas then drove back to Ft. Myers in the rental car rather than the pickup he drove to Alabama.

Upon his return to Ft. Myers Thomas checked into a motel under Valerie Bisnett's name rather than his own. (T. 749, 751). Thomas never told his wife that he was back in town. The next day, August 7, 2002 Thomas visited Bisnett at her workplace where they made plans to meet at the hotel room he had stayed the previous night. (T. 753, 788, 790). Bisnett went to the hotel at the agreed upon meeting time but Thomas never showed. She stayed the night and tried calling Thomas's cell phone but got no answer. (T. 756). The next morning Bisnett left the

hotel and took Thomas's belongings, including a bag containing multiple checkbooks, multiple cell phones and other personal items. She tried calling him again but to no avail. On Saturday August 10, 2002, Bisnett finally reported Thomas missing to police. She did not immediately turn over the bag of personal items left behind by Thomas.[1]

Mary Ann Lehman, Thomas's wife last spoke to him on August 7, 2002. (T. 598). They made arrangements to speak the next day but Thomas never answered her calls. (T. 599). She eventually called police on August 12, 2002 and was informed that a missing persons report had already been filed by Bisnett. (T. 602-03). On August 14, 2002 Lehman closed the bank account in Montgomery, Alabama. At the time of her closing the account it contained $111,510.90 in cash. (T. 632). Lehman traveled to their house in Alabama and changed the locks and removed the answering machine tapes. (T. 607). Lehman was never aware that Thomas had deposited some $26, 000 in cash as recently as January of that year, nor did she know that he transferred $20,000 that same month. (T. 631).

Thomas's rental car was found on August 13, 2002 in a remote area of Lehigh Acres in Fort Myers. (T. 861, 863, 873). It had been intentionally burned

1 On August 15, 2002 Bisnett rented a house and resumed living with her estranged husband. (R. 770). She paid roughly $1,100 in cash for rent and initial deposit. On August 20, 2002 when she eventually turned over Thomas's bag to police, there was no money inside the bag. According to Bisnett, the bag had not ever contained any money. (R. 774).

and from the looks of the remains had occurred roughly 24 hours before it was found. (T. 882, 893, 895, 884). Of particular note from the remains were a gun found under the passenger seat, shell casings from a handgun, and a key ring with keys. (T. 896-97, 899; 896, 915; 914-15). Interestingly, the front driver's seat had been partially folded backwards to give a taller person more room to drive. (T. 877).

After returning to Fort Myers from Alabama, Mark left his campsite at 412 Miramar Road because his mother was unhappy with the living situation with his niece, Jennifer Morrison. Mark was still evading police for a warrant in Missouri so he traveled to a campsite in Tennessee and began residing there while trying to avoid arrest for the warrant. Mark was apprehended for the outstanding warrant during a traffic stop where he was also arrested for possession of a methamphetamine lab found in the trunk of the car in which he was riding. He remained in custody until he was extradited back to Florida for trial in Thomas's murder.

Prior to trial the defense attempted to suppress receipts of purchases that had been found in an unidentified brief case obtained at Mark's campsite in Tennessee. The State's theory was that these receipts established a chain of inference proving that Mark had robbed and killed Thomas for money. The State argued that Mr. Twilegar had motive to kill Thomas because of the large amount of cash he had

been carrying on their return to Florida. Mark was an opportunist who saw his chance to fleece Thomas of a large amount of cash and took the opportunity to do so. Thomas had been shot in the back by Mark and then buried alive in a hole dug right beneath the tent Mark had been living in at 412 Miramar Road. The State argued Mark then fled town, spending the cash haphazardly on new camping items, cars, and other living expenses.

The reality, however, was that the State's theory was inherently flawed. In fact, the jury agreed that the evidence was insufficient to prove robbery, indicating on a special verdict form that they were not convicting Mark on a felony murder theory based on robbery of the victim. If Mark did not commit a robbery of the victim, what was his motive?

Because the State's case was entirely circumstantial, the defense at trial was to "challenge everything" in the hopes that they could establish a reasonable hypothesis of innocence. Defense counsel retained a forensic pathologist, Michael Spitz, to review the autopsy. The defense also wanted to present evidence of Thomas's prior troubles with the law, his erratic behavior, and the suspect financial transactions prior to the time of his disappearance. But the wheels came off that defense quickly. Just prior to the start of trial the defense lost the motion to suppress the receipts from the Tennessee campsite. The State's motion in limine to keep out evidence of Thomas's prior criminal history and other questionable areas

of Thomas's background was granted. Inexplicably, defense counsel opted to not call Dr. Spitz as a witness. Nothing was presented to challenge the autopsy findings other than a brief cross examination of Dr. Hamilton. Nothing was presented to prove beyond a reasonable doubt that Thomas was shot at the grave site where he was found. The issue of whether Thomas was actually alive and breathing prior to his burial was not properly challenged.

Nothing established conclusively that Mr. Twilegar was responsible for digging the hole where Thomas was buried. Spencer Hartman, was the only witness to allegedly have observed Mr. Twilegar digging a hole at the 412 Miramar Road site. Hartman's testimony established only that the digging took place sometime between June or July 2002 and September 2002 (T. 1008, 1017, 1024), leaving this Court to conclude that it "*probably*" took place on August 7, 2002. Nothing established the actual date of Thomas's disappearance and death, the digging of the grave site, or the actual date that Thomas was buried.

Despite a theory to "challenge everything," trial counsel failed to present a defense which rigorously challenged the sufficiency of the State's circumstantial case. Because trial counsel failed to effectively draw the jury's attention to the inconsistencies in the State's theory of the crime and the lack of sufficiency of evidence, Mr. Twilegar's jury was never provided with the appropriate context in which to evaluate the State's case as to guilt and aggravation.

STATEMENT OF THE CASE

On April 3, 2003 Mr. Twilegar was indicted for one count of first-degree murder, either by premeditated design or in the course of a robbery, in the death of David Thomas. (R. 12). Mr. Twilegar's trial began on January 16, 2007. Following closing arguments on January 26, 2007, Mr. Twilegar was found guilty of one count of first-degree murder. (R. 1106).

Prior to trial, Mr. Twilegar waived presentation of mitigating evidence (R. 339-42) and waived the penalty phase jury. (R. 679, 1247-1251). The penalty phase was conducted on February 16, 2007. At the instruction of Mr. Twilegar, the defense remained silent. On February 19, 2007 the *Spencer* hearing was held. On August 14, 2007 the court sentenced Mr. Twilegar to death, finding two aggravating circumstances[2], no statutory mitigating circumstances and four nonstatutory mitigating circumstances[3].

Mr. Twilegar timely appealed his convictions and sentences to this Court.

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[2] The Court found that the following aggravating circumstances were established: (1) the capital felony was committed for pecuniary gain (great weight); (2) the capital felony was committed in a cold, calculated and premeditated manner (CCP) (great weight).

[3] The Court found the following non-statutory mitigating circumstances: (1) the defendant had a disadvantaged and dysfunctional family background and childhood (little weight); (2) the defendant had received a limited formal education in that he had completed only the seventh grade (little weight); (3) the defendant had abused drugs as a teenager (very little weight); (4) the alternative punishment to death is life in prison without parole (significant weight).

(R. 1926-27). This Court affirmed Mr. Twilegar's convictions and sentences on January 7, 2010. *Twilegar v. State*, 42 So. 3d 177 (Fla. 2010). Mr. Twilegar's motion for rehearing was denied on August 9, 2010 and the mandate was issued August 25, 2010. On November 8, 2010 Mr. Twilegar filed his Petition for Writ of Certiorari in the United States Supreme Court. The petition was denied on February 22, 2011.

On February 7, 2012, Mr. Twilegar timely filed his initial motion for postconviction relief. (PC-R. 1089-1202). Amended motions were filed thereafter on October 1, 2012 and December 26, 2012. (PC-R. 1848-1612; 1951-2029). At the case management conference held October 26, 2012, all claims except claim III(d) were denied evidentiary development. (PC-R. 1821-1841).

The circuit court conducted an evidentiary hearing on July 15-17, 2013. At the hearing the court heard testimony and received evidence related to Mr. Twilegar's claim of ineffective assistance of counsel for failure to utilize an expert in forensic pathology, failure to effectively cross examine the medical examiner and failure to adequately challenge the State's wholly circumstantial case. Following the hearing, Mr. Twilegar's post-conviction claims were denied on September 27, 2013. A notice of appeal was timely filed on October 28, 2013. (PC-R. 3199-3200). This appeal is properly before this Court.

STATEMENT OF THE FACTS

A. Trial

Dr. Rebecca Hamilton, the chief medical examiner for District 21, performed the autopsy of David Thomas on September 27, 2002. Her report indicated that Thomas had been shot one time in the upper back from a shotgun. (T. 456, 460, 484, 3189). Hamilton described the body as being in a severe state of decomposition which hindered her ability to examine the body and determine an accurate timetable of death. (T. 460, 468-69). Hamilton explained that she had found sand in the larynx and trachea and this lead her to opine that Thomas had been alive when he was buried. (T. 489, 490-91). She further concluded that Thomas would have died within minutes of being shot because the pellets pierced Thomas's aorta and lung. (T. 480, 491, 500). Her opinion as to the cause of death was a shotgun wound to the thorax. (T. 492). Because she did not take samples of the sand for comparison, there was no way for her to tell if the sand was from the grave site where the body was found. (T. 496). She was also unable to provide an opinion on the amount of time the body had been buried, noting that burying a body can accelerate decompositional changes. (T. 491, 495).

During closing argument the State reiterated the circumstantial theory of Mr. Twilegar's guilt to the jury. (T. 2117-2124). Most significantly the State argued the forensic evidence supported their theory of the crime. The State argued to the jury

that Hamilton's testimony had demonstrated Thomas had been buried alive. (T. 2126). Hamilton testified that she found white sand in the laryngeal cavity and that the only way for this to have occurred was through active respiration. (T. 2127). The State referenced a picture from the grave site where one of Thomas's legs was slightly raised as being supportive of this conclusion. (Id.). The State argued that Hamilton's testimony regarding the pattern and trajectory of the bullets supported their theory that Thomas had been shot from behind and then buried alive in the grave site. (T. 2128).

B. Postconviction

Dr. Terri Haddix is a pathologist, specializing in forensic pathology and neuropathology. (PC-R. 2544-45). After reviewing the autopsy report, evidence and photographs, a report by FDLE analyst Yolanda Soto, the deposition and trial testimony of Dr. Hamilton, and the deposition of Dr. Spitz (PC-R. 2553-55), Dr. Haddix's opinions fell into four categories: the number of shotgun wounds to the deceased, interpretation of additional injuries found on the victim, deficiencies in the autopsy, and the issue of sand in the airway. (PC-R. 2556).

Dr. Haddix opined that there were a minimum of two, possibly three, shotgun wounds suffered by the victim. Haddix had no issue with the shotgun wound on the upper right back as documented by Dr. Hamilton. (PC-R. 2556). However, in addition to that wound she believed it was clear by looking at the x-

rays taken at the autopsy that there existed two distinct clusters of shot pellets within the body on the right side of the victim's body and the left side of the chest. (Def. Ex. #17 and #19; P-CR. 2558). Dr. Haddix noted the "gap of anything in between" the two clusters as being "quite compelling that we are dealing with two different shotgun injuries in those areas." (PC-R. 2562). Adding to this conclusion was a circular area of "tissue loss" on the left upper chest that corresponded to the defects found on the victim's clothing. (Def. Ex. #11, PC-R. 2562, 2563). Drawing upon the radiographic evidence, examination of the defects to the upper left chest, and the corresponding defects in the clothing, Dr. Haddix disagreed with Dr. Hamilton's characterization of the additional injuries as being associated with decomposition. (PC-R. 2565).

Dr. Haddix was unable to definitively state whether the tissue loss from the injury to the right arm, including the right front shoulder and lower bicep region side, was the result of a shotgun wound because there were no x-rays taken of the extremities of the victim. Despite this fact, Dr. Haddix opined that the injuries to the right arm were antemortem (PC-R. 2558-59, 2589, 2590). Had x-rays been taken she would have been able to determine if there was a collection of pellets in that area indicating an additional shotgun blast. (PC-R. 2559).

Dr. Haddix also detailed the numerous deficiencies in the autopsy. Dr. Hamilton's report had failed to provide anything describing the nature of the

defects or any detailed examination of the clothing. (PC-R. 2566). Such a practice is standard in the field and necessary when dealing with traumatic injuries to the body. (PC-R. 2566). There was also an absence of x-rays of the entirety of the victim's body. (PC-R. 2567). These x-rays are essential in instances where an examiner is trying to determine injuries or recover a projectile. (PC-R. 2567). In cases dealing with decomposing bodies, this practice is particularly important and standard in the field. (PC-R. 2567).

Dr. Hamilton's report also failed to document whether the victim's scalp had been reflected. This procedure was critical in this case given the x-rays of the victim's head and neck area showed pellets located at both the base of the neck as well as much further up on the head. (Def Ex# 17 and #19, PC-R. 2569). The autopsy report noted an area of discoloration behind the right ear but Dr. Haddix was unable to discern the cause of the defects due to any documentation that the scalp had been reflected. (PC-R. 2570). Based upon review of the x-rays and the autopsy report, Dr. Haddix opined that the pellet wounds in the upper region of the victim's head were not compatible with expected range of fire from the shotgun wound to the back right shoulder. (PC-R. 2571). Further supporting this opinion was the fact that a shotcup was recovered from the back right shoulder wound, indicating the gunshot wound was suffered at close proximity, probably only a couple of feet. (PC-R. 2571-72).

The autopsy report also failed to include any photographic documentation of the internal organs. (PC-R. 2573). While somewhat "variable" within the field, Dr. Haddix testified such procedures are performed in roughly ninety five percent of the cases which she had encountered. (PC-R. 2573). In cases with decomposing bodies and the increased potential for missing wounds, such procedures become all the more necessary in offering assistance and guidance in how to direct the examination. (PC-R. 2574).

Dr. Haddix found deficiencies with Dr. Hamilton's interpretation of the injury located on the left side of the victim's neck. Photographs taken at the autopsy demonstrated an irregular shape wound, oblong and oval in nature. (Def. Ex# 15, P-CR. 2575-76). Dr. Hamilton had not been able to determine definitively whether the wound occurred antemortem and had suggested it could potentially be the result of decomposition. (PC-R. 2576). However, the injury had a much deeper area of tissue change than typically associated with decomposition and that it was unusual to have such a discrete area of tissue injury attributable only to decomposition. (PC-R. 2577). Dr. Haddix believed the injury had indeed occurred antemortem. (PC-R. 2577, 2591). In her review of the materials she received she found no indication of any signs of diseased tissue in the victim which would have contributed to accelerated decomposition of the injury to the neck area. (PC-R. 2600).

Corresponding with the injury to the left side of the neck, the victim also suffered a fractured left hyoid. Dr. Hamilton's autopsy report also failed to photographically document that injury. (PC-R. 2579-80). Dr. Haddix also believed that it was possible that the hyoid fracture was related to whatever produced the injury to the left side of the neck. According to Dr. Haddix, "potentially, something like a shot cup" could have caused the corresponding hyoid fracture and injury to the left side of the neck. (PC-R. 2580). Because of the lack of photographic documentation Dr. Haddix was unable to provide any further definitive opinion as to the cause of that fracture. (PC-R. 2580).

The fourth area of deficiency dealt with Dr. Hamilton's procedures for documentation and preservation of the sand found in the victim's laryngeal cavity and her opinions as to its origin. Here again, the autopsy lacked proper photographic documentation. (PC-R. 2581). Dr. Hamilton's examination of the mouth area was limited to a simple visual inspection upon opening, failing to provide any documentation in her report as to whether she found any wet sand in that area. (PC-R. 2581-82). Dr. Haddix found it hard to reconcile Dr. Hamilton's finding of sand in the laryngeal cavity and trachea yet nothing worthy of notation in the mouth. (PC-R. 2582). Because Dr. Hamilton had failed to properly document this portion of the autopsy Dr. Haddix was once again operating with incomplete information. (PC-R. 2582).

The fact that Dr. Hamilton's report had indicated she did not find sand in the victim's lungs was "certainly an issue." (PC-R. 2582). Typically when there is inhalation of dry sand it is deposited in the lungs itself. (PC-R. 2582). However, there are other circumstances where sand can be deposited in the lungs through passage of water rather than inhalation. (PC-R. 2582-83). While unable to definitely opine whether that occurred in this case, given the pooling of water she had seen in photographs of the grave site, Dr. Haddix wondered whether passive migration may have occurred from the changing levels of the water table. (Def Ex #20, PC-R. 2583).

As part of her work on this case Dr. Haddix collaborated/consulted with firearms expert Jaco Swanepoel. (PC-R. 2599). Mr. Swanepoel reviewed photographs, reports, and physical evidence. (PC-R. 2616). Specifically, he evaluated reports generated by the State's medical examiner dealing with examination and interpretation of the clothing recovered from the victim. (PC-R. 2617).[4] As part of this work he suggested two chemical tests be performed on the clothing, a modified Greiss test and a Sodium Rhodizonate test. (PC-R. 2618). The Greiss test is conducted to test for the presence of nitrites, which are the remnants of the combustion process from discharging of firearms. (PC-R. 2619). The

[4] The victim was found wearing a Town Craft multi-colored shirt and a white Fruit of the Loom undershirt.

Sodium Rhodizonate test is aimed at liberating lead particles from the garments in order to further determine the presence of heavy metals resulting form the discharge of a firearm. (PC-R. 2619-20).

Mr. Swanepoel was not permitted to perform the testing but was allowed to travel to the Florida Department of Law Enforcement to physically examine the articles of clothing and then later, observe via monitor the testing of both garments in a separate room. (PC-R. 2621, 2638). Both articles of clothing were covered in sand, dirt, grime, and possibly decompositional fluid and blood. The condition of clothing inhibited Swanepoel's examination and evaluation of the evidence. (PC-R. 2622). Following visual examination he was able to determine there were multiple defects in both pieces of clothing that could be attributable to gunshot discharge. (PC-R. 2624). The plaid, multi-colored shirt contained large defects on the left chest area and the right shoulder arm portion, as well as a large defect on the back right shoulder. (PC-R. 2624). There were also several small holes, consistent with notes from FDLE Analyst Yolanda Soto's 2003 report, that could be attributable to shotgun pellets penetrating the clothing items. (PC-R. 2624-25).

From the visual examination Swanepoel was able to confirm several areas which had been photographed by Soto in her 2003 report. (Def. Ex. 22, pg. 10-11). The first area was a defect to the right sleeve of the plaid shirt. (PC-R. 2626). A second photograph in Soto's report corresponded with a larger defect he found on

the left shoulder and a smaller defect found just below that on the front of the shirt. (PC-R. 2626). Tearing visible in the second photograph, depicting defects to the front of the shirt's left side, was consistent with shotgun wounds made in close proximity. (PC-R. 2626-27).

Swanepoel's review of the undershirt also revealed defects on the right sleeve and left chest area which corresponded with those on the outer shirt. (PC-R. 2627). These were consistent with Soto's 2003 report. Smaller pins were present from work conducted by the previous examiner and Swanepoel testified these were possibly representative of single pellet penetrations of the garment. (PC-R. 2628). Review of a photograph depicting a large defect on the back of the undershirt, along with smaller holes similar to those found on the front of the shirt, corresponded with his observations. (PC-R. 2628). His review of the photographs demonstrated defects to the back right shoulder of the outer shirt along with defects to the front right sleeve. (PC-R. 2629). Photographs also depicted Soto's collection of pellets embedded in the neck area of the undershirt and defects to the left chest area. (PC-R. 2631).

From his review of the photographs and clothing, Swanepoel did not believe the defects, specifically those he opined to be pellet holes, found in the right front sleeve of the outer shirt were attributable to the larger gunshot wound on the upper right back shoulder. (PC-R. 2634-35). The shot cup imbedded in the victim's upper

right back shoulder corroborated that the gunshot sustaining that injury had been at close proximity. (PC-R. 2635). Swanepoel explained this was significant because it would be hard for something traveling en masse and entering the right back shoulder to also be responsible for creating single spread out pellet holes on the front part of the rest of the shirt. (PC-R. 2635).

From review of the autopsy x-rays of the head, chest, and abdomen, Swanepoel was able to discern a pattern pellet distribution in the victim's head. (Def. Ex#17; PC-R. 2636-37). He did not believe these were attributable to the defect suffered in the upper right back shoulder. (PC-R. 2636). Based upon their distribution, Swanepoel believed that the pellets were the result of two different gunshot wounds. (PC-R. 2636).

Swanepoel was also present at the FDLE lab to observe testing performed on the clothing by Analyst Yolanda Soto. (PC-R. 2638). His review of Soto's report from the testing did not find any deficiencies in her testing methods or procedures. (PC-R. 2639). The result of the Greiss Test failed to detect any indication of nitrates on either shirt. Swanepoel did not find this surprising given the state of the shirts and the conditions they were buried under. (PC-R. 2640). The Sodium Rhodizonate test had detected traces of lead on both shirts around the defect on the right back shoulder. (PC-R. 2641). Along with that positive result, Swanepoel also noted Soto's bench notes and report indicated a light pink reaction on Items 18-1

and 18-2, which are the defects on the front of the shirt. (PC-R. 2642). This reaction indicated to him that something had occurred as a result of the chemical testing on that area, most likely as a result of heavy metal residue generated from firearms discharge. (PC-R. 2644). Ultimately, the results of both the Greiss and Sodium Rhodizonate tests did not change his opinion as to the presence of multiple gunshot defects on both items of clothing. (PC-R. 2646).

Neil McLoughlin is an assistant public defender in Ft. Myers and has been practicing law since 1986. (PC-R. 2655). At the time of his appointment to Mr. Twilegar's case, the case was roughly six months old and not much investigation had yet been done. (PC-R. 2660). McLoughlin's sole focus of investigation was concerned with guilt phase preparation. (PC-R. 2661).

McLoughlin described the State's case against Mr. Twilegar as "purely circumstantial." (PC-R. 2663). The defense strategy was to "challenge everything." (PC-R. 2665-66). McLoughlin was attempting to develop alternate theories of the crime, including that the victim Dave Thomas was involved with drug dealers who were responsible for his death. (PC-R. 2666). To establish this theory, it was important to show that the shooting did not occur at the grave site. (PC-R. 2666). McLoughlin believed one piece of critical evidence that supported this theory was the burnt rental car found out by Lehigh Acres. (PC-R. 2666).

With respect to the State's forensic evidence McLoughlin explained that he had previous experience working with the medical examiner Dr. Rebecca Hamilton, having deposed her several times and becoming quite familiar with her practices. (PC-R. 2666-67). From his prior experience with Hamilton he believed one area of concern was her susceptibility to law enforcement influence and their routine presence at her autopsies. (PC-R. 2667). Any deficiencies in Hamilton's autopsy was something which McLoughlin felt fit in well with their theory that law enforcement had zeroed in on Mr. Twilegar to the exclusion of other leads including that the crime occurred somewhere other than the grave site. (PC-R. 2669).

Prior to deposing Hamilton, McLoughlin consulted with his appointed expert Dr. Daniel Spitz. (PC-R. 2669). McLoughlin provided Spitz with materials to review including a copy of the autopsy report, a certificate of death, a criminal investigation report, and photographs. (Def. Ex# 27, PC-R. 2663). Following review of the initial materials, McLoughlin sent a second packet of information to Dr. Spitz containing additional photographs from the medical examiner's office depicting views of the injury to the left shoulder. (Def. Ex# 28, PC-R. 2674). McLoughlin sent the additional photos because there were questions as to the number of the victim's injuries and whether there was an injury to the left shoulder. (PC-R. 2675). McLoughlin also provided Dr. Spitz with x-rays of the

upper left chest. (Def Ex#30, PC-R. 2676). McLoughlin was concerned about the fact there were gunshot pellets in so many different areas of the victim's body. (PC-R. 2676). He believed the x-rays were important to establishing how many wounds there were, why there were pellets in certain areas, and to determine how the actual x-ray itself was taken, i.e. was the body face up or face down. (PC-R. 2677).

During their consultations the primary areas of discussion between Spitz and McLoughlin concerned the defect in the neck and whether it had occurred via blunt force trauma or by decomposition, the origin of the sand in the larynx, and the length of time it took the victim to die. (PC-R. 2679). The notes from those discussions in the trial attorney files confirmed his concerns regarding deficiencies in the autopsy. (Def. Ex# 32, PC-R. 2680-81). One area of concern noted was Hamilton's failure to properly document and examine the sand found in the victim's air passageway. (PC-R. 2681). Another area of concern was Hamilton's failure to examine the head despite the presence of pellets in various spots throughout the cranium. (PC-R. 2681-82). The notes also reflected that McLoughlin had concerns about the issue of random pellets, the time of death, and length of time the victim was buried. (PC-R. 2682-83). While McLoughlin was able to recall asking Dr. Spitz about the potential for other ways the sand could have traveled into the air passageway other than inhalation, he was unable to recall

what, if anything, Dr. Spitz had told him. (PC-R. 2685-86). Finally, his notes reflect that he was concerned whether the large hole in the left side of the neck was possibly premortem. (PC-R. 2686).

During the deposition of Dr. Hamilton, McLoughlin believed, based on having done "thousands and thousands" of depositions that he went "right down the list" of his concerns during his questioning. (PC-R. 2688). Areas Hamilton was asked about at the deposition included: the injury to the neck, the fracture of the hyoid bone, the number of pellets, the lack of x-rays of the extremities, the trajectory of the pellets, the examination of the mouth, nose and throat, the presence of sand in the lungs, the collection of sand found in the victim, and alternate theories of how the sand may have migrated into the victim's body. (PC-R. 2688-2692). McLoughlin recalled that the deposition reflected that Hamilton did not believe the collection of sand in the air passageway could have occurred through passive water flow. (PC-R. 2692). No inquiry was made, however, as to how she came to this conclusion or whether she had done any research to support that opinion. (PC-R. 2692-93). McLoughlin did not conduct any research of his own on this topic despite the fact he had never encountered it before in a previous trial. (PC-R. 2693).

McLoughlin also recalled that it was Hamilton's opinion that the defect found on the left shoulder/chest area was the result of decomposition. (PC-R.

2694). He could not recall whether Hamilton had attempted to match up that defect to any corresponding defects in the clothing found on the victim. (PC-R. 2694). Ultimately, Dr. Hamilton conceded during her deposition that the defect to the left shoulder/chest does support an antemortem injury. (PC-R. 2696). While he considered the prospect of performing testing on the clothing, he believed that the "general consensus" was that it had been wet too long to perform any chemical analysis. (PC-R. 2694). He believed that he had consulted with Dr. Spitz about this issue but conceded that Dr. Spitz was not a firearms expert. (PC-R. 2695). No motion was filed to appoint a firearms expert and he was not able to recall whether any testing had been performed by the FDLE. (PC-R. 2696).

During cross-examination at trial, McLoughlin did not inquire about the multiple injuries or potential for multiple gunshots, the migration of sand through the rise and fall of water tables, and the failure to collect the number of pellets. (PC-R. 2697). McLoughlin explained that no inquiry was made about the number of injuries because he didn't feel it would have been "relevant to our theory that Mark didn't do it." (2697). Instead the focus was on "the sand, and whether he was buried alive." (PC-R. 2697). McLoughlin conceded that the jury did hear that the victim was in fact buried alive. (PC-R. 2698).

McLoughlin also explained that his failure to cross examine Hamilton about the lack of x-rays of the extremities was due to the fact that he didn't feel it was

"relevant because Mark wasn't' the one who did it" and he didn't want to just throw things on the wall just for the heck of it." (PC-R. 2699). Despite being a circumstantial evidence case, McLoughlin did not feel the need to challenge the State's theory as to how the murder happened. (PC-R. 2699).

He was unable to recall any specific reasoning or strategy purpose for why he failed to ask Dr. Hamilton about the possible migration of the sand through the rise and fall of the water table. (PC-R. 2699-2700). The two primary points he recalled wanting to cover with respect to time of death were when the victim died and how long he was in the ground. (PC-R. 2701). However, Hamilton provided only a broad range of time, "somewhere between two and six weeks. " (PC-R. 2701). He was uncertain upon what she based that opinion other than her "personal experience" with decomposition. (PC-R. 2701). McLoughlin recalled that he had asked whether burying the body would accelerate decomposition and she had indicated it would. (PC-R. 2702). McLoughlin was unaware that this answer was inaccurate, only that "off the top of [his] head, it would depend upon the environment that it was in." (PC-R. 2702).

McLoughlin remembered asking Hamilton about the issue of where the victim was killed because "the car was found out in Lehigh burned" and that it would have fit into the defense's theory challenging the State's theory of the case. (PC-R. 2703). In conjunction with that defense, McLoughlin recalled speaking

with Dave Twomey several times prior to trial. (PC-R. 2703). He recalled notes from his trial attorney files indicating that Twomey had seen Thomas after the time period in which Valerie Bisnett had reported last seeing Thomas alive. (Def. Ex# 34, #35, PC-R. 2706, 2708). McLoughlin intended on calling Twomey to testify but was unable to do so when Twomey showed up to court "high as heck." (PC-R. 2708). He could not remember, however, whether he asked for a continuance, only that Twomey had made comments which gave him reservations about calling him to testify under any circumstances. (PC-R. 2708). McLoughlin believed he proffered the information to the court but upon reflection of the record noted that he had misspoken and stated that Twomey's testimony would have been that he saw the victim *prior* to his disappearance. (PC-R. 2710).

McLoughlin recalled that co-counsel Philadelphia Beard's closing at trial focused on the theme that police had zeroed in on Mr. Twilegar and neglected to pursue all other possible avenues of investigation. He agreed the deficiencies in Hamilton's autopsy and Twomey's statements that he saw Thomas alive after the State's proposed window of death "very much" fit into their theory of defense. (PC-R. 2712-13). He also agreed that the issue regarding the collection of sand could have assisted in challenging whether Thomas had in fact been buried alive (PC-R. 2713). McLoughlin believed that the lack of blood at the burial site and the

evidence of multiple injuries to the victim would have supported the theory that the victim was killed elsewhere. (PC-R. 2713-14).

On cross-examination McLoughlin conceded that had he attempted to inquire into the issue of whether Thomas had multiple gunshot wounds it could have also supported the argument that the victim was alive and suffered pain in between the multiple gunshots. (PC-R. 2726). He believed such information would have potentially permitted the State to more effectively argue the heinous, atrocious, and cruel aggravator. (PC-R. 2727). He also agreed that if he had attempted to establish that the hole in the victim's neck indicated some type of additional wound it could have also supported the argument that the victim was tortured before he was killed. (PC-R. 2726). He agreed with the State that the evidence of the victim's fractured hyoid bone could have established that the victim was strangled. (PC-R. 2727).

On re-direct McLoughlin was not able to provide any explanation for the limitations he placed on his cross examination of Hamilton. (PC-R. 2742-43). He was unable to provide any justification for the disconnect between the notes of his consultations with Dr. Spitz and the questions asked during the deposition, and those that were asked at trial. (PC-R. 211). Despite the fact that his notes from his consultations with Dr. Spitz contained numerous issues with Hamilton's work, McLoughlin agreed Dr. Spitz's deposition did not accurately reflect those

concerns. (PC-R. 2744).

During her testimony at the evidentiary hearing in postconviction Dr. Hamilton stated that she did in fact reflect the scalp during the autopsy of Thomas and that such a procedure was standard of all victims that come into their office. (PC-R. 2752, 2753). She likewise confirmed that she had dissected all the organs, removing them, weighing them and describing their condition in her report. (PC-R. 2753-54). X-rays of the body were taken but none of the extremities. (PC-R. 2754). She explained that the main reason they would take x-rays would be to determine specific injuries or if they were looking for specific characteristics that would help with identification. (PC-R. 2754). Only in "certain situations" would they actually perform x-rays of the extremities. (PC-R. 2754).

Hamilton described that one of the x-rays taken indicated a shotgun wound to the upper right back, just below the shoulder. (Def. Ex# 17, PC-R. 2755-57). She opined that several white dots on the x-ray located on the upper back of the head were consistent with pellet markings originating from the same gunshot wound to the upper right back. (2PC-R. 2756-57). She described the pellets on the back of the neck and head as "stray pellets" that were consistent with the "billiard ball" effect, where upon entering a target pellets disperse as they come into contact with other objects. (PC-R. 2757). She based this opinion upon her experience

performing autopsies since 2002 and roughly a hundred and fifty or so dealing specifically with shotgun wounds. (PC-R. 2758).

Hamilton agreed that when conducting an autopsy there are basic procedures and practices that are routinely followed in every autopsy. (PC-R. 2764). However, she stated that there are variations that are dependent upon the facts of any given case. (PC-R. 2764-65). While she did conduct a reflection of the scalp in this case, she failed to note it in her report. (PC-R. 2766). She testified that documenting this procedure was not routinely done in their office. (PC-R. 2766). Despite this fact, she contended it was still possible to discern that she had performed the procedure in this case by reference to handwritten notes she took on the back of one of the pages of her autopsy report that indicated the weight of the brain. (PC-R. 2766). She explained that it was routine for her and others in her office to transcribe handwritten notes on the backs of pages in an autopsy report. (PC-R. 2766). She conceded, however, that while her abbreviation "BRA" in the report stood for "brain," this was not the standard abbreviation in the field. (PC-R. 2792). Nothing in the report indicated that, aside from weighing the brain, she performed any other examination of the skull or contents of the head. (PC-R. 2793). Despite this fact, Hamilton testified she could still be certain such an examination was performed because it was an "automatic procedure" they do in all cases and so by inference it must have been performed in this case. (PC-R. 2793).

The injuries traveling up the back of the neck and the right side of the head were reflected in Hamilton's injury section of her report. (PC-R. 2793-94). Based upon review of the pellet wounds to the back of the head, her opinion was that they were consistent with coming from the shotgun wound to the back right shoulder. (PC-R. 2794). However, she is not a firearms expert, nor did she consult with one in this case. (PC-R. 2794). Regardless of whether her opinion conflicted with that of a trained firearms expert she would not change her opinion. (PC-R. 2796). Hamilton based her opinion regarding the origin of the pellets in the back of the neck and head "on all cases of shotguns that I have personally witnessed or done." (PC-R. 2796). She was unable to testify, however, as to how many cases she had encountered at the time of the autopsy back in 2002 when she had only been practicing for approximately five years. (PC-R. 2796).

After surgically removing the voice box and examining the laryngeal cavity, Dr. Hamilton was able to locate the presence of wet clotted sand (PC-R. 2759), but failed to photograph and collect the wet sand she located in the victim's laryngeal cavity. (PC-R. 2797). Hamilton noted that she was cognizant of the possibility for passive flow of the sand into the airways but ruled it out because she was unable to find any connection to the defect in the neck area and the laryngeal cavity. (2PC-R. 2798-99). She also considered the possibility of the victim having inhaled sand as a result of it being dumped on top of him while in the grave. However, she

discounted this theory based upon photographs from the crime scene which she believed showed the victim in a left lateral recumbent position. (PC-R. 2799-2800). She was not certain whether the pictures depicted whether the victim's mouth was open while in the grave but based upon her "gut feeling" it was not. (PC-R. 2800). She agreed that the grave did contain water but ruled out passive flow of the sand through the mouth and nasal cavity because in her opinion the physical property of wet sand would not be very migratory (PC-R. 2800). She believed it was possible that the sand could have migrated into the airway with the rising and receding of the water tables. (PC-R. 2801).

During her examination of the victim's mouth, Hamilton pulled out the victim's dentition and was able to notice wet sandy material. (PC-R. 2802). Her inspection of this area was not noted in her report. (PC-R. 2802). During her deposition prior to trial she stated specifically that she did not actually look for sand in the mouth or nasal cavity. (PC-R. 2803). When confronted with this discrepancy in postconviction she confirmed that she had not examined the nasal cavity and that her "examination" of the victim's mouth consisted of her sticking her hand in to pull out his detention. (PC-R. 2803). She confirmed there was no sand in the victim's lungs. (PC-R. 2803). The finding of debris in the airway is not uncommon in drowning cases where water carries debris into the victim's airway. (2PC-R. 49).

Hamilton also noted a hole in the left side of the victim's neck in her autopsy report. (Def. Ex# 11; PC-R. 2760). Hamilton opined that the injury to the left side of the victim's hyoid bone was the result of blunt force trauma that corresponded with the "ovoid opening" also on the left side of the victim's neck. (PC-R. 2805). However, she was not sure if this opening was the result of decompositional changes or unidentified traumatic injury because she did not have enough information. (PC-R. 2761, 2805). She opined that there was no way for the sand that had been located in the laryngeal cavity to have migrated through the hole in the neck into the laryngeal cavity because there was no break in the integrity of the anatomical structure of the larynx and surrounding area. (PC-R. 2761-62).

She explained that her failure to take x-rays of all the extremities was partly because she was able to include the shoulder area that she observed in the x-rays of the thorax and torso. (PC-R. 2806). Adding to this factor, Hamilton noted, was also the fact that the other wounds were without any concentration of pellet or any radial pink foreign object such as gunshot or some other instrument. (PC-R. 2806). She opined that the pellets she did observe in the x-rays of the thorax and torso corresponded to the defect in the right back shoulder. (PC-R. 2806). Her observation of the two injuries on the right arm and left shoulder/chest of the body led her to conclude they were possible decompositonal changes without any underlying colors and therefore she did not feel the need to continue on downwards

and take x-rays of the upper extremities. (PC-R. 2806). She was not able to determine with any certainty if the injury to the left shoulder was in fact the result of decomposition or antemortem injury. (PC-R. 2806).

Hamilton characterized the injury to the upper right arm as an "odd shape, kind of vertically orient, ovoid defect of the right upper arm…" (Def. Ex# 13; PC-R. 2807). She dismissed the defect in the lower bicep area of the right arm and "didn't even consider [it] a defect," failing to even attribute it to postmortem change. (PC-R. 2807). However, she conceded an x-ray would have assisted her in confirming precisely what the tissue disruption was but that she didn't perform one because the injury didn't "even alert [her] radar" that the area could be an additional gunshot wound. (PC-R. 2807). She also did not believe tissue damage to the left chest area was "even an injury." (PC-R. 2808). She had no explanation for what it was attributable to, speculating that it was possibly simply decomposition or "defect." (Def. Ex# 11; PC-R. 2808). She did not believe that it had any specific characteristic of a certain type of wound but noted that the x-ray of the torso did correspond to that area. (PC-R. 2808).

She had no specific recollection whether she inspected the victim's clothing to see if any defects corresponded with those found on the victim's body. (PC-R. 2808). While she stated that performing such a procedure was "usually" done, there were no notes documenting it had been performed in this case. (PC-R. 2809).

She confirmed that there were corresponding defects to the left shoulder area of both the under and outer shirts and the victim's body. (PC-R. 2809). She agreed that those material defects could possibly be indicative of a wound and that she had conceded as much in her deposition prior to trial. (PC-R. 2809-10).

SUMMARY OF ARGUMENT

Mr. Twilegar was denied effective assistance of counsel at guilt phase when trial counsel failed to effectively utilize a forensic expert to challenge the State's circumstantial evidence at trial. Trial counsel unreasonably failed to utilize competent expert assistance to provide a reliable adversarial testing of the circumstantial evidence relied upon to sentence and convict Mr. Twilegar to death. Trail counsel unreasonably failed to present readily available evidence in support of Mr. Twilegar's theory of defense.

In denying wholesale his request for public records the circuit court improperly denied Mr. Twilegar his constitutional and statutory right to access to public records. The circuit court's denial Mr. Twilegar's demands for additional public records filed pursuant to Fla. R. Crim. P. 3.852(g) and (i) improperly interpreted the standard for production of records in postconviction. The court's denial of Mr. Twilegar's right to access to public records in postconviction violates

the spirit and the letter of Rule 3.852 and its role as the means for discovery in postconviction.

Evidence of juror misconduct discovered in postconviction establishes that the outcome of Mr. Twilegar's trial is unreliable. Information obtained through investigation in postconviction establishes two jurors failed to disclose material criminal history information during voir dire. The jurors non-disclosure of material information which was relevant to jury service justifies a new trial as a matter of law. The lower court's summary denial of this claim was in error as Mr. Twilegar made a facially sufficient claim that required factual determination. Because the files and records did not refute his claim, he is entitled to evidentiary development and relief thereafter.

The circuit court erred in summarily denying all but one of Mr. Twilegar's claims for postconviction relief without receiving the claims as true as required by Fla. R. Crim. P. 3.851. The court's order summarily denying the claims failed to provide adequate analysis or attachment of the relevant records refuting the claims. Mr. Twilegar is entitled to an evidentiary hearing on these claims.

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. TWILEGAR'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND DURING THE GUILT PHASE OF HIS TRIAL FOR FAILING TO ADEQUATELY CHALLENGE THE STATE'S WHOLLY

CIRCUMSTANTIAL CASE AND FAILING TO EFFECTIVELY PRESENT EVIDENCE IN SUPPORT OF THE THEORY OF DEFENSE

The State's case was "purely circumstantial" and according to defense counsel their strategy was to "challenge everything." (PC-R 2655). Yet, despite the fact that no direct evidence linked Mr. Twilegar to the crime scene or death of David Thomas, and the fact that there was evidence supportive of alternate theories of the crime, defense counsel failed to effectively investigate, develop, and present that information at trial. Defense counsel unreasonably failed to challenge critical portions of the State's case. The cavalier disregard of evidence that was readily available regarding multiple gunshot wounds, alternate theories of the location of the crime, and plausible explanations as to the origin of the sand in victim's laryngeal cavity was objectively unreasonable and contradictory to the theory set forth by the defense at trial. The resulting prejudice is that Mr. Twilegar was denied effective representation at the guilt phase of his trial.

Trial counsel's performance pre-trial and at guilt phase was constitutionally ineffective as measured by *Strickland v. Washington*, 466 U.S. 668 (1984). Contrary to counsel's "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process" *Strickland*, 466 U.S. at 668 (citation omitted), counsel failed to effectively investigate, prepare, and present forensic evidence challenging the State's circumstantial theory of the crime. Had

counsel provided effective assistance the outcome of Mr. Twilegar's trial would have been different. *Johnson v. Sec'y DOC*, 643 F. 3d 907, 928-29 (11th Cir. 2011) Mr. Twilegar established both deficient performance and prejudice which undermined the adversarial testing process at trial.

Presentation of evidence of alternate theories of the crime is never more crucial then in a circumstantial evidence case. Where the only proof of guilt in a criminal trial is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. *Davis v. State*, 90 So.2d 629 (Fla.1956); *Mayo v. State*, 71 So.2d 899 (Fla.1954); *Head v. State*, 62 So.2d 41 (Fla.1952). In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false. *McArthur v. State*, 351 So. 2d 972, 976 (Fla. 1977); citing *Mayo v. State*; *Holton v. State*, 87 Fla. 65, 99 So. 244 (1924). Counsel's duty, therefore, was to present evidence of reasonable hypotheses of innocence so as to shift the burden to the State to disprove them to be false. Such a strategy would have been entirely consistent with McLoughlin's testimony in postconviction that their objective was to "challenge everything."

I. TRIAL COUNSEL FAILED TO CHALLENGE THE STATE'S FORENSIC EVIDENCE

Despite the fact that trial counsel argued this was a case where numerous leads and avenues of investigation went ignored and unexplored, counsel neglected to present all of the readily available evidence challenging the State's theory of the crime. Rather than present all the available evidence to support every reasonable hypothesis of innocence, counsel elected not to, instead chalking it up as not relevant to their theory that Mr. Twilegar did not commit the crime. (PC-R. 2699). Counsel's rational ignores that evidence regarding Hamilton's failure to adequately investigate, document, and collect evidence, as well as challenging the credibility of her findings, would have supported the defense theory that the State's case was based entirely on speculation. Defense counsel unreasonably disregarded readily available evidence regarding multiple gunshots, alternate theories indicating the crime did not occur at the gravesite, plausible explanations for how the sand travelled to the victim's laryngeal cavity, and numerous deficiencies in the autopsy. Had counsel presented this evidence, reasonable doubt would have been cast on the State's timeline of events and its version of when and where the murder occurred. If the State's theory on these points falls apart, then so too does its theory on who committed the crime. Mr. Twilegar's was simply not a case where the particular circumstances of the crime were consistent with only one possible conclusion. *Cf. Dewey v. State* , 186 So. 224 (1938) (accused's pretrial story that

wife's death caused by single self inflicted gunshot wound totally discredited by proof that two shots had been fired).

Counsel's explanation that he failed to capitalize upon any one of these areas because he didn't "want to throw stuff against the wall" is not reasonable in light of the circumstantial nature of the case, nor is it reasonable in light of his initial testimony that the defense strategy was to "challenge everything." No reasonable tactical strategy can be ascribed to such a decision to forgo the opportunity to challenge such vital pieces of evidence where doing so in each instance would shift the burden to the State to disprove.

Trial counsel had a duty to investigate, develop, and present evidence rebutting the State's forensic evidence, or exposing the lack thereof. In capital cases, use of experts, not only to present evidence during the guilt/innocence phase of trial, but also for consultation pretrial, was common practice for defense counsel in 2007. According to the guidelines for trying capital cases published by the American Bar Association, counsel should secure the assistance of experts where it is necessary to rebut any portion of the prosecution's case at the guilt innocence phase of trial. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.2(B). While there is no per se rule requiring counsel to hire their own expert to rebut expert testimony offered by the State in every instance, in cases where the State's theory of the case is based primarily upon

circumstantial evidence, often times "the best strategy can be to present evidence that there is simply too much doubt in the State's theory of the case for the jury to convict." *See Harrington v. Richter*, 131 S. Ct. 770, 791 (2011). In cases where the courts have reviewed claims of ineffective assistance of trial counsel for failing to utilize forensic experts, courts routinely have looked to factors such as trial counsel's effectiveness in cross examining the State's expert and counsel's overall effectiveness throughout the entirety of the trial. *Id*.; *see also Crain v. State*, 78 So. 3d 1025 (Fla. 2011)

While in *Crain* this Court failed to find trial counsel ineffective for failing to call an expert witness in forensic pathology, it declined to do so because the record reflected a comprehensive challenge of the State's forensic expert during cross examination and at deposition. Here, trial counsel failed in his obligation to comprehensively cross examine the medical examiner presented by the State. The failure to do so stood in stark contrast to the detailed challenge conducted by counsel during the deposition of the medical examiner. Trial counsel, Neil McLoughlin, was unable to provide any plausible explanation for the contradiction.

The trial attorney files and records establish that prior to trial McLoughlin had questions regarding deficiencies in the autopsy. After providing Dr. Spitz with relevant background information (Def. Ex# 28, PC-R. 2674; Def Ex#30, PC-R.

2676; Def Ex#31, PC-R. 2677), McLoughlin consulted with Dr. Spitz on several occasions. The notes from those discussions reveal several areas that McLoughlin could have challenged Dr. Hamilton on during cross examination.

These notes indicate trial counsel was concerned with the number of wounds and the location of shotgun pellets in different areas, one area specifically being the left shoulder (PC-R. 2676). McLoughlin was concerned with the defect in the neck and whether it had occurred via blunt force trauma or by decomposition. Dr. Spitz had also found that the sand in the victim's airway was "possible but unusual" (PC-R. 2679-80, 2682). McLoughlin himself questioned whether there was sand in the mouth or nose. These notes reflect questions about deficiencies in the autopsy regarding Dr. Hamilton's failure to properly document and examine the sand and her failure to examine the head despite the presence of pellets in various locations throughout the cranium (PC-R. 2680-81). Both Dr. Spitz and McLoughlin questioned the distribution and trajectory of the pellets and McLoughlin was concerned with the time of death, and length of time the victim was buried. (PC-R. 2682-83). Regarding the issue of migration of the sand, McLoughlin recalled asking Dr. Spitz but was unable to remember what Dr. Spitz may have told him. (PC-R. 2685).

Overall, McLoughlin's notes reveal a complete disconnect between his ongoing consultation with Dr. Spitz and answers provided by Dr. Spitz during his

deposition. The notes of McLoughlin's consultations with Dr. Spitz are contradictory to his position in the deposition that he did not take issue with Dr. Hamilton's autopsy, aside from her failure to document the sand. McLoughlin was unable to offer any explanation for this disconnect between these notes and Dr. Spitz's deposition. (PC-R. 2744). Most likely this was because despite being the self-described "science guy" on the defense team and having previous experience working with Dr. Spitz, McLoughlin failed to attend the deposition, instead relegating it to co-counsel Beard.

Regardless of the disconnect between the consultation with Dr. Spitz and his answers during his deposition, the deposition of Dr. Hamilton demonstrates that McLoughlin still viewed the concerns reflected in his consultation notes as worthy of attack. During her deposition Dr. Hamilton was asked about issues dealing with the injury to the neck, the fracture of the hyoid bone, the number of pellets, the lack of x-rays of the extremities, the trajectory of the pellets, her examination of the mouth, nose and throat, the presence of sand in the lungs, the collection of sand found in the victim, and alternate theories of how the sand may have migrated into the victim's body. (PC-R. 2688-92). Dr. Hamilton opined that she did not believe it could have occurred through passive migration (PC-R. 2692). McLoughlin failed to inquire, however, as to how she came to this conclusion or whether she had done any research to support that opinion. (PC-R. 2692-93). Despite never encountering

this particular area of forensics, McLoughlin did not conduct any research of his own on the topic. (PC-R. 2693).

During the deposition, Dr. Hamilton also opined that the defect found on the left shoulder/chest area was the result of decomposition. (PC-R. 2693-94). However, after questions about the corresponding defects in the outer and under shirts, Dr. Hamilton conceded that it was a possible antemortem injury (PC-R. 2696). Despite this answer, and the fact that McLoughlin felt any deficiencies in the autopsy fit in well with their theory that the crime occurred somewhere other than the grave site, he never pursued this line of questioning during cross-examination at trial. The deficiencies in her determination of the number of injuries fell squarely within the defense theory that the investigation zeroed in on Mr. Twilegar and neglected to pursue all other possible avenues of investigation, yet counsel opted to do nothing with it.

The circuit court's finding that McLoughlin adequately cross examined Dr. Hamilton is not supported by the record at trial and in postconviction. Dr. Hamilton was arguably the most critical State witness at trial. She was the Chief Medical Examiner and, outside of FDLE Analyst Yolanda Soto, was the primary means for the introduction of the State's forensic evidence at trial. Her significance to the State's case is evidenced by the fact that she was the first witness to testify.

Her testimony was relied upon by the State to establish premeditation, the manner and cause of death, and aggravation.

McLoughlin's cross examination of Dr. Hamilton was paltry at best. It lasted a mere five pages of trial record. (R. 495-500). Although she was the State's primary witness for introduction of forensic evidence, McLoughlin failed to thoroughly subject her to the crucible of cross examination. The paucity of the examination is evident from counsel's remarks at the beginning of the cross examination where he stated that he had "just a few quick questions." (R. 495). He asked Dr. Hamilton one question each regarding her ability to determine the time of death and the length of time the body had been buried. (R. 495). No additional questions were asked about either topic. Nothing was asked by McLoughlin as to how her inability to determine either fact impacted her findings or how it may have raised doubt as to the State's theory of the crime. Nothing was asked by McLoughlin regarding issues that had been raised during his consultations with Dr. Spitz and at Dr. Hamilton's deposition regarding areas such as the deficiencies in the autopsy, identification of additional injuries, or her conclusions as to the cause of death.

Most significantly, McLoughlin's cross examination regarding the presence of sand in the victim's airway was deficient. Contrary to the record, the circuit court found that McLoughlin was successful in establishing that the sand could

have entered the victim's body through some means other than inhalation. (PC-R. 2971). That finding, however, is incorrect. McLoughlin was only capable of establishing that the victim could have inhaled the sand while laying face down on uneven, sandy ground. (T. 497-98).

A careful reading of the record establishes that Dr. Hamilton's answers were equivocal at best. (T. 497-98). Dr. Hamilton testified that even under the circumstances presented by McLoughlin she would still not expect to find sand in the larynx and trachea. She was adamant that she cannot state with any reasonable degree of medical certainty that if the victim had been laying flat down on sand that he would have inhaled the quantity of sand that was found or that it would be as deep in the larynx and trachea. The only concession she makes, if any, is that it would "make more sense" if there had been uneven ground present. Even under Mcloughlin's proposed scenario, the victim would have still been alive. She provided nothing definitive or confirmatory that under the circumstances presented in the victim's death she believed passive migration was responsible for the sand in the airway. In contrast to the cirucit court's finding, the record does not reflect that counsel effectively established the issue of possible passive migration after the victim had died.

The circuit court's finding that Mr. Twilegar is unable to establish prejudice with regard to the issue of the sand is likewise unsupported by the record at trial

and in postconviction and attempts to discount to irrelevance the impact it had on challenging the State's case. The issue of the sand was significant in several respects. Dr. Hamilton's failure to collect and preserve the sand was critical because it further established the deficiencies in her autopsy. It served as additional evidence challenging her methods and procedures, as well as the credibility of her findings. Evidence of the sand was relied upon by Dr. Hamilton, and the State, for the argument that the murder had been premeditated and that the victim had been buried alive. The State made this a feature of its case at both guilt and penalty phase. It undoubtedly influenced the jurors in their consideration of guilt and aggravation. Challenging the evidence of the sand was critical to providing alternative theories of how the crime happened and raising reasonable doubt as to the State's circumstantial evidence. The circuit court overlooks that evidence of the sand was not only relevant to determining where the victim was killed in order to establish Mr. Twilegar was not responsible (PC-R. 2971), but in providing yet additional evidence challenging the State's entire theory of the crime. The circuit court's finding entirely misses this point. Evidence of the sand, and Dr. Hamilton's failure to properly examine, document, and preserve it for comparison, was critical to directly attacking the sufficiency of the evidence linking Mr. Twilegar to the crime and not just the issue of the location of where it occurred. Effective challenges to each link in the State's circumstantial theory of the crime were

critical for the impact they would have on establishing reasonable doubt as to the entirety of the State's case. Trial counsel's failure to effectively draw this information out and present it to the jury in support of their theory of defense rendered his performance deficient for purposes of *Strickland.*

Furthermore, McLoughlin's testimony regarding their strategy for presentation of evidence vacillated and was at times contradictory. The circuit court's reliance upon his testimony is misplaced because he was not credible. His purported theory of defense was to challenge every piece of circumstantial evidence the State was presenting in support of its theory of the crime. (PC-R. 2665). Yet, despite acknowledging this fact, he also testified that he didn't want to "just throw things on the wall just for the heck of it." (PC-R. 2699). He believed challenging the State's theory as to how the murder happened might present a double edged sword which could produce more harm than good. (PC-R. 2699). *Stretching his memory* he thought he may not have wanted the jury to think that "besides being shot he was beaten and mutilated" and instead was "trying to focus on whether, uh - - about the sand and whether he was buried alive." (PC-R. 2697). But McLoughlin failed to effectively challenge Dr. Hamilton on the issue of the sand. His testimony amounted to nothing more than post-hoc rationalization of errors in the attempt to characterize them under the guise of reasonable strategic decisions.

In its order denying relief the circuit court relied upon McLoughlin's testimony that it had been a strategic decision to not cross-examine or impeach Dr. Hamilton regarding the issue of additional gunshot wounds or wounds consistent with "strangulation" in order to keep potentially negative information from the jury's consideration. (PC-R. 2970).[5] The circuit court found this decision was not unreasonable as it was an attempt to limit additional evidence that could have supported the heinous, atrocious, and cruel aggravator. (PC-R. 2970). However, that determination is not supported by the weight of the evidence presented at both trial and in postconviction.

In determining that counsel's purported strategy to limit the negative information was reasonable, the circuit court entirely misunderstood the significance that evidence of additional injuries would have had at the guilt phase. Dr. Hamilton's underestimation is significant because it calls into question where the casings are for the additional shotgun firings. If the victim was shot at the grave site, arguably the casings would have been found there as well. Yet, no spent casings were found on or near the body. Of course, movement of the body could have dislodged the other cups. This theory gains credibility when considered

[5] Contrary to the trial court's order, at no time at trial or in postconviction has there been any testimony or evidence that the wound to the victim's neck and the corresponding fracture of the hyoid bone were the result of strangulation. Evidence presented in postconviction established only that there were questions regarding whether the defect was the result of blunt force trauma or decomposition.

along with the fact that the victim was missing one shoe. If the victim was killed at the grave site, where are the additional casings and his shoe? Each of these factors detract from the reasonableness of counsel's purported strategy in a circumstantial evidence case. Both the circuit court and trial counsel overlooked this critical aspect of Dr. Hamilton's underestimation of the number of shots.

Further calling into question the reasonableness of counsel's concerns that evidence of additional injuries would be considered "torture" (PC-R. 2697), the jury actually heard that the hyoid fracture was caused by manual blunt trauma (T. 487). It cannot be said that Hamilton's findings regarding the number of injuries and the interpretation of the wounds were not relevant to establishing Mr. Twilegar's guilt. As evidenced by his files and notes, McLoughlin believed this to be true as he remained concerned with the forensic evidence throughout pretrial. Hamilton's report and testimony went directly to establishing premeditation, the cause of death, and the manner in which the victim died.

Both McLoughlin and the circuit court failed to consider that when evidence might be considered a double-edged sword, and certainly here it could be where the information of multiple injuries cast doubt on the State's theory, the determination of which way the evidence cuts must rest with the jury. *See Porter v. McCollum*, 558 U.S. 38 (2009); *Sears v. Upton*, 130 S. Ct. 2359 (2010); and *Smith v. Cain*, 132 S. Ct. 627, 630 (2012). While *Porter* dealt with wholesale

discounting of powerful mitigation, the same reasoning applies here to trial counsel's discounting to irrelevance and considering only the harmful effects of evidence that the autopsy should have revealed multiple shotgun wounds. Here, trial counsel failed to consider the ability of such evidence to cast a reasonable doubt on the State's wholly circumstantial case.

While strategic decisions do not constitute ineffective assistance if alternate courses are considered and rejected, it is axiomatic that if the decision to forgo an alternate course of action is unreasonable no valid strategy can be attributed to it. Dr. Hamilton's autopsy and her report were the lynchpin of the State's case as to both guilt and aggravation. Because the case against Mr. Twilegar was entirely circumstantial, counsel did indeed have the obligation to "challenge everything" to ensure the State carry its burden to disprove every reasonable hypothesis of innocence. The circuit court's determination that it was reasonable for McLoughlin to forgo challenging the forensic evidence on issues relating to the number and type of injuries so as to limit potentially negative information from reaching the jury entirely overlooks defense counsel's obligations in raising a constitutionally adequate defense in circumstantial cases.

The reality, however, and that which is borne out by the record at trial and in postconviction is that no reasonable strategy can be attributed to McLoughlin's failure to effectively challenge the deficiencies in the State's forensic evidence.

The circuit court entirely fails in its assessment of McLoughlin's effectiveness in cross-examining Dr. Hamilton and his effectiveness in challenging the State's circumstantial case throughout the entirety of the trial. *See Harrington v. Richter*, 131 S. Ct. 770, 791 (2011); *see also Crain v. State*, 78 So. 3d 1025 (Fla. 2011). While counsel is not ineffective for failing to present evidence damaging to the defense, (PC-R. 2971), counsel does have an obligation to provide effective assistance by way of presenting a viable defense and challenging the State's case on each and every element of the charged offenses. That is what is contemplated by the Sixth Amendment and is what is required to render the trial a reliable adversarial testing. That obligation is never more vital than in a circumstantial case such as the State's case was here.

Trial counsel was obligated to ensure the State carry their burden to disprove every reasonable hypothesis of innocence; to effectively "challenge everything." That obligation cannot square with McLoughlin's subsequent conflicting testimony that he elected to forgo presenting evidence challenging the State's theory of the crime as part of a reasonable strategic decision. Limitations to challenges to the State's evidence in a circumstantial case based upon nothing more than pure conjecture as to how the jury would receive that evidence cannot be attributed to a reasonable strategic decision. The circuit court improperly relies upon that determination in failing to find deficient performance. (PC-R. 2970).

The record in postconviction establishes that significant areas of concern merited further inquiry beyond merely Dr. Hamilton's inability to determine an exact time and place of death and the sand in the laryngeal cavity. (PC-R. 2697). The circuit court ignores that Mr. Twilegar did in fact establish the additional questions that counsel should have asked along with their significance to the theory of defense. McLoughlin confirmed in postconviction that nothing that Dr. Spitz had told him during their consultations would have prevented him from cross examining Dr. Hamilton on the areas of concern that he felt could be challenged. (PC-R. 2742-43). Despite this fact, the cross-examination at trial is devoid of many of the major areas of concern reflected in counsel's notes from those consultations. McLoughlin's questions regarding the origin of the sand in the airway focused only on one alternative method for the sand being deposited in the airway, which still necessarily required inhalation. Additionally, McLoughlin admitted that he could have cross examined Dr. Hamilton on the issue of reflection of the scalp, distribution of pellets as seen in the x-ray, the issue of multiple injuries, and the defect on the neck area. He also conceded that he should have pressed Dr. Hamilton on her conclusions regarding the presence of sand and that no sand was found in the lungs. (PC-R. 2744).

Similar to her answers in her deposition, Dr. Hamilton confirmed in postconviction that there were in fact corresponding defects to the left shoulder

area of both shirts and the victim's body. (PC-R. 2809). She agreed that those material defects could possibly be indicative of a wound and that she had conceded as much in her deposition prior to trial. (PC-R. 2810). Despite the fact that she stated she could not render conclusions in her report that weren't supported to a reasonable degree of medical certainty, her testimony regarding the additional injuries would have come out at trial had trial counsel effectively cross examined her.

Similarly, Mr. Twilegar established that the sand in the air passageway was an issue warranting further inquiry at trial. Significantly, Dr. Hamilton confirmed that she had failed to find any sand in the victim's lungs. (PC-R. 2803). She agreed that the grave did contain water. She could not, rule out the possibility that the sand migrated into the airway with the rising and receding of the water tables. (PC-R. 2801). She testified that in her experience this was not uncommon in drowning cases where water can carry debris into a victim's airway. (PC-R. 2804).

The evidence presented by Mr. Twilegar in postconviction through Dr. Terri Haddix and Jaco Swanepoel confirms multiple shotgun wounds and deficiencies in the autopsy itself. Dr. Haddix opinions fell into four categories: the number of shotgun wounds to the deceased, interpretation of additional injuries found on the victim, deficiencies in the autopsy, and the issue of sand in the airway. (PC-R. 2556). There were a minimum of two, possibly three, shotgun wounds suffered by

the victim, based in part upon the radiographic evidence and the defects to the clothing. Dr. Haddix also found Dr. Hamilton's interpretation of the injury located on the left side of the victim's neck to be inaccurate. Because of the characteristics of the injury, Dr. Haddix believed the injury had indeed occurred antemortem. Furthermore, there were numerous deficiencies in the autopsy including failing to x-ray the extremeties and the absence of photographic documentation of the internal findings. Finally, Dr. Haddix took issue with Dr. Hamilton's procedures for documentation and preservation of the sand found in the victim's laryngeal cavity and her opinions as to its origin. Dr. Haddix found it hard to reconcile Dr. Hamilton's finding of sand in the laryngeal cavity and trachea yet nothing worthy of notation in the mouth or in the lungs. Dr. Haddix considered passive migration of the sand may have occurred from the changing levels of the water table.

Mr. Swanepoel also confirmed that he believed there were multiple gunshot injuries to the victim. His findings were supported by his review of the clothing indicating defects consistent with multiple gunshot defects and multiple pellet holes. Ultimately, the results of the chemical tests performed in postconviction by FDLE did not change his opinion as to the presence of multiple gunshot defects on both items of clothing.

The record in postconviction also establishes that not only are Dr. Hamilton's report, conclusions and trial testimony refuted by Dr. Haddix and Mr.

Swanepoel, but so too are her postconviction explanations for any deficiencies in her autopsy and testimony. Despite testifying that there are basic procedures and practices routinely followed in every autopsy in order to permit later review of those findings (PC-R. 2764), Dr. Hamilton was unable to provide any credible explanation as to why her report and autopsy do not reflect adherence to that principle.

With respect to the issue of reflection of the scalp, Dr. Hamilton testified in postconviction that she had performed this task but that she does not routinely document the procedure in every case. (PC-R. 2766). Dr. Hamilton relied on her abbreviations on the back of one of the pages of her report indicating she had weighed the brain to then deduce she had first reflected the scalp. (PC-R. 2766). The significance of this procedure was critical in this case given the decompositional state of the victim's body and questions regarding the exact number of injuries and origin of those injuries. Her testimony that one had to literally deduce that the reflection of the scalp was performed by referencing an abbreviation on the back of a page on her report listed "BRA" and a corresponding weight completely cuts against the notion of following standard procedures and generally accepted practices in the field of forensic pathology. This was an area McLoughlin could have capitalized on to establish that Dr. Hamilton's autopsies

do not follow the generally accepted standards and practices within the field of medical examiners.

Additionally, McLoughlin could also have capitalized on the fact that even if Dr. Hamilton had performed the reflection of the scalp she did not properly examine and document it in the effort to determine the origin of the shotgun pellets found in the back of the victim's head. This was not a trivial issue. Dr. Haddix also noted that the autopsy report commented specifically about an area of discoloration behind the right ear but it was impossible for her to discern the cause of those defects because based upon her review of the autopsy report, the scalp had not been reflected. (PC-R. 2570). Dr. Haddix testified that the pellet wounds in the upper region of the victim's head could not be compatible with expected range of fire from the shotgun wound to the back right shoulder. (PC-R. 2571). Further supporting her opinion regarding the range of fire was the fact that a shotcup was recovered from the back right shoulder wound, indicating that that gunshot wound was suffered at close proximity, probably a "couple [of] feet or so". (PC-R. 2571-72).

Swanepoel confirmed that from his review of the autopsy x-rays of the head, chest, and abdomen, he agreed with Dr. Haddix's assessment of the pellets in the back of the head. In his opinion these pellets were not attributable to the defect suffered in the upper right back shoulder. (PC-R. 2636). As a result, he believed

that the pellets were the result of two different wounds. (PC-R. 2636). Despite the fact that Dr. Hamilton did not consult with a firearms expert, she testified that she wouldn't change her opinion regardless of whether it conflicted with that of a trained firearms expert. (PC-R. 2796). She believed a firearms expert is only trained in examining ammunitions and weapons, not pattern of injury. (PC-R. 2796). However, Swanepoel explained, part of his training and work with ballistics requires him to deal with wound ballistics, trajectory reconstruction, internal ballistics, and external ballistics to be in a position to "make some interpretations" regarding gunshot wounds. (PC-R. 2605). Therefore, Dr. Hamilton's misconception of the importance of a firearms expert and the necessity when perfecting a global approach to an autopsy would have been challengeable on cross-examination.

The circuit court's determination that McLoughlin was not deficient for failing to call a firearms expert ignores Swanepoel's testimony. The distance between the shooter and the victim was not the only issue to be determined through forensic firearms analysis. (PC-R. 2972). Significantly, interpretation of the number and types of wounds refuted the State's theory that the victim had only been shot once in the back at close range. Evidence of distribution of pellets throughout areas of the victim's back, neck, and cranium went to establishing multiple shots. This evidence refutes the State's theory as to premeditation and

indicates something more was happening. The circuit court's finding that the testimony from any firearms expert at trial would have been speculative entirely overlooks these points. Additionally, given that the manner in which the victim was shot was relied upon by the State to support the aggravator of cold, calculated, and premeditated, trial counsel left the State's case in aggravation virtually unchallenged. Contrary to the court's finding, the experts presented by Mr. Twilegar in postconviction were not testifying about a mere "possibility" regarding distance and range.

Mr. Twilegar also established that trial counsel could have cross-examined Dr. Hamilton regarding deficiencies in x-raying the entirety of the body. The only explanation that Dr. Hamilton provided for not conducting x-rays of the extremities of the victim was that she didn't think they were necessary in this case. However, as Dr. Haddix explained, given the nature of the defects on the body and the degree of decomposition, it was imperative that additional x-rays of the extremities of the body be taken to discern the number of shots the victim actually suffered or to rule out other injury. (PC-R. 2567). X-rays are essential in instances where an examiner is trying to determine injuries or recover a projectile. (PC-R. 2567). Dr. Haddix was unable to definitely state whether the tissue loss in the lower bicep area of the right arm was the result of a shotgun wound because of the fact that there were no x-rays taken of the extremities of the victim. (PC-R. 2559).

Had x-rays been taken, Dr. Haddix would have been able to determine if there was a collection of pellets in that area indicating an additional shotgun blast. (PC-R. 2559).

Dr. Hamilton also dismissed the defect in the lower bicep area of the right arm and "didn't even consider [it] a defect." (PC-R. 2807). However, she conceded an x-ray would have assisted her in confirming precisely what the tissue disruption was but that she didn't perform one because the injury didn't "even alert [her] radar" that the area could be an additional gunshot wound. (PC-R. 2807). Her non-chalant dismissiveness would have been thoroughly assailable on cross-examination. The failure to perform this task had severe ramifications. It not only limited any subsequent examiner's ability to review Dr. Hamilton's work and reach their own determinations as to the number of shotgun wounds, but also trial counsel's ability to effectively challenge yet another portion of the State's circumstantial case.

Any argument that such a strategy was reasonable because of the notion that evidence of additional gunshot wounds would only enhance the State's case in aggravation is unavailing. Dr. Haddix indicated that she thought that the victim would have lived not much more than two minutes, however she clarified that her opinion is based on the injuries that are documented. Had the other injuries been more appropriately explored and documented, she believes that time frame could

potentially be shortened. (PC-R. 2598-99). Had McLoughlin cross-examined Dr. Hamilton on the other injuries and the deficiencies in her autopsy in documenting those injuries, the jury would have heard that the time frame was potentially shortened. This would have cast a reasonable doubt on whether the victim was in fact buried alive and called into doubt one of the more tortuous aspects of the State's case. It cannot be said that the jury did not consider the State's theory that the victim was still alive when buried. It can only be surmised that this inaccurate and highly prejudicial testimony was relied upon by the jury in reaching its determination of guilt.

Dr. Hamilton also failed to conduct a complete dissection of the nose, mouth, and laryngeal cavity during the autopsy. She failed to provide both written and photographic documentation of the sand which was recovered. (PC-R. 2802). Standard procedure in the field of forensic pathology when a substance is found in an air passageway is to examine the cavities for additional foreign substances. Further, where foreign substances are recovered, standard practice is to retain those substances to further analyze and review them. Here, where there were issues concerning the recovery of sand from the victim's airway, standard procedure would have been to investigate further and more thoroughly.

While Dr. Hamilton testified during direct examination at trial that these were "extra procedures" (T. 491-92), McLoughlin allowed the testimony to go

unchallenged. Given the facts of this case they were far from extra in any conceivable way. The idea that the victim had been shot execution style and then subsequently buried alive was undoubtedly the most sensational evidence the State relied upon to secure the conviction and death sentence. That Dr. Hamilton referred to procedures that would have established alternate theories as to how the sand arrived in the passageway as "extra" is not only disingenuous but entirely misleading given the evidence in this case. Such inconsistencies and deficiencies in procedure could have been relied upon by counsel in support of the argument challenging the State's theory that the migration of sand into the victim's air passageway had occurred only through inhalation. As Dr. Hamilton noted in postconviction, she could not rule out the possibility that there was passive migration of sand due to the shifting water tables found in that area. (PC-R. 2801).

With respect to the hyoid bone, Dr. Hamilton testified that she believed it was attributable to blunt force trauma but was unable to state definitively because she did not have enough information. (PC-R. 2805). Dr. Hamilton discounted the proximity of the defect on the left side of the victim's neck and instead maintained that injury was due to decomposition. Dr. Haddix agreed with this assessment regarding the hyoid bone, but additionally opined that she disagreed with Dr. Hamilton's interpretation of the corresponding injury on the left side of the victim's neck. (PC-R. 2576). From her review, she explained that it was unusual

to find such a discrete area of tissue injury attributable only to decomposition and as a result she believed it had occurred antemortem. (PC-R. 2577). Dr. Haddix also believed that it was possible that the hyoid fracture was related to whatever produced the injury to the left side of the neck. According to Dr. Haddix, "potentially, something like a shot cup" could have caused the corresponding hyoid fracture and injury to the left side of the neck (PC-R. 2580). This possibility would have countered any notion of torture that was evoked by testimony that the victim suffered blunt force trauma. Because of the lack of any photographic documentation, Dr. Haddix was again unable to provide any further opinion as to the cause of the injury. (PC-R. 2580).

Trial counsel's failure to thoroughly challenge the State's forensic evidence severely prejudiced Mr. Twilegar at trial. The record in postconviction establishes there was a plethora of readily available evidence counsel could have presented to effectively challenge the State's case. The cirucit court's denial of relief discounts to irrelevance the evidence presented in postconviction and discounts the significance which challenges to deficiencies in the forensic evidence could have had on the State's circumstantial theory of the crime. The court's order fails to address the effect this evidence would have had on Mr. Twilegar's jury. *See Porter v. McCollum*, 130 S. Ct. 447, 455 (2009). The focus is not on what the trial judge believed but what the jury could have gleaned from this information. *Porter v.*

McCollum, 130 S. Ct. at 455; *see also Light v. State*, 796 So. 2d 610 (Fla. 2nd DCA 2001)(judge is not examining whether he believes the evidence presented as opposed to contradictory evidence, but whether the nature of the evidence is such that a reasonable jury may have believed it.).

Had counsel effectively challenged the State's forensic evidence there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Postconviction experts established the numerous deficiencies in the forensic evidence presented at trial and its impact in disproving the State's theory of the crime. Review of the autopsy report established that Dr. Hamilton's autopsy was deficient in failing to follow generally accepted procedures. She failed to properly document and photograph numerous areas on the victim and this severely questioned the credibility of her opinions as to the number and type of wounds the victim suffered. Her incomplete dissection of the larynx and trachea, and her failure to retain a sample of the sand for later comparison, compromised her conclusions as to the origin of the sand found in the victim's air passageway.

The circuit court erroneously determined that Mr. Twilegar is incapable of proving prejudice because the information presented in postconviction would not have established he was not the person who committed the crime. (PC-R. 2971). The circuit court order improperly attempts to place the burden on Mr. Twilegar to

prove his innocence at trial. The State had the obligation of proving every element of the offense beyond a reasonable doubt, as well as refuting every possible hypothesis of innocence. To effectively challenge the forensic evidence trial counsel only needed to raise reasonable doubt as to the State's rendition of the crime. Evidence of the deficiencies in Dr. Hamilton's work and conclusions would have provided the necessary challenges to the sufficiency of the State's evidence. Impeaching the credibility and veracity of the forensic evidence would have impacted not just Dr. Hamilton's findings but every piece of circumstantial evidence linking Mr. Twilegar to the crime.

The circuit court also erroneously relied upon this Court's opinion on direct appeal. In denying relief the circuit court noted:

> 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. 2d at 189-190.

(PC-R. 2971-72). The court's reference here to the direct appeal opinion is improper. It establishes that the court failed to determine the effect the evidence

presented at trial and in postconviction would have had on Mr. Twilegar's jury for purposes of *Strickland* prejudice analysis. This Court's opinion on direct appeal would not have been something which the jury would have had before it during their deliberations at trial. This is also notwithstanding the fact that on direct appeal this Court did not have before it the evidence which has now been presented. The circuit court's reliance upon the opinion in rejecting Mr. Twilegar's claim of ineffective assistance of counsel is therefore improper.

Moreover, this Court's reliance upon testimony from trial that Mr. Twilegar was seen digging a hole at the exact spot where the victim was buried only underscores the prejudice from counsel's failure to effectively challenge the forensic evidence. Hartman's testimony was less than credible, stating only that he "thought he heard digging noises." He never actually saw Mr. Twilegar digging anything. Also, it was widely known that because Mr. Twilegar lived in a tent outdoors he often was required to dig holes in lieu of the fact he had no bathroom facilities. That the Court relies upon this questionable testimony to establish the "single evidentiary fact" it finds irreconcilable with any of Mr. Twilegar's hypotheses of innocence further demonstrates the prejudice he suffered from counsel's failure to effectively challenge and present forensic evidence in support of alternate theories that the victim was not murdered at the gravesite.

Trial counsel's deficiencies in failing to utilize other additional evidence at his disposal which would have assisted in challenging the State's circumstantial theory of the crime must also be considered in evaluating prejudice. One of the critical areas of the State's case which the defense could have drawn upon to illustrate inconsistencies in the forensic evidence and tie it together with additional evidence dealt with the timeline of the crime. Prior to trial, defense counsel had statements and the deposition of a witness, Dave Twomey, who provided evidence challenging the State's timeframe of the crime. While McLoughlin testified he did try to call Twomey as a witness at trial, he was unable to do so when Twomey showed up under the influence. (PC-R. 2708). Despite the fact that he could have asked for a continuance or proffered the information regarding Twomey seeing the victim outside the timeline of death posited by the State, the record reflects that counsel did neither. (PC-R. 2709). The circuit court finding to the contrary is refuted by the record.

Instead, counsel merely proffered that Twomey saw Dave Thomas "some time prior to his- his disappearance…and that Dave Thomas told him that '[y]ou didn't see me. If anybody asks, you didn't see me.'" (T. 2099). McLoughlin made this proffer despite the fact his notes and a transcribed telephone call indicate that Twomey made additional statements in which he insisted on seeing Thomas around town several times **after** the alleged date of the crime (Def. Ex# 34, #35,

PC-R. 149, 151-52). McLoughlin failed to accurately advise the court based on the information he had. This testimony would have created a reasonable doubt as to the theory and time of death asserted by the State.

Here, the record established at trial and in postconviction that counsel was deficient in failing to reasonably and effectively utilize an expert in forensic pathology, failing to effectively cross examine the medical examiner, and ultimately failing to adequately challenge the State's wholly circumstantial case. Given that the State's case was entirely circumstantial, the significance of the non-presented evidence that Dr. Spitz, or some other forensic expert, could have presented, along with the assistance they could have provided for purposes of cross examination of Dr. Hamilton, cannot be understated. As evidence by the information and arguments detailed above, Mr. Twilegar was prejudiced by counsel's deficiencies.

II. TRIAL COUNSEL FAILED TO PRESENT THE TESTIMONY OF MICHAEL SHELTON. THE LOWER COURT ERRED IN SUMMARILY DENYING THIS PORTION OF MR. TWILEGAR'S CLAIM.

Trial counsel rendered deficient performance at trial when they failed to follow up on a pretrial motion in limine filed by the State upon which the Court had reserved ruling. By failing to obtain a ruling on the motion or attempting to call Michael Shelton as a witness at trial, defense counsel all but acquiesced to the

State's objection to critical witness testimony necessary to support Mr. Twilegar's theory of defense. The resulting prejudice was that Mr. Twilegar was denied the opportunity to present a critical statement made by the victim just prior to his disappearance which supported an alternative theory of who committed the crime.

Defense counsel listed Michael Shelton as a potential witness. On January 12, 2007, the State filed a motion in limine seeking to prohibit "any and all reference to allegations the victim in the present matter was involved in the sale and/or use of narcotics" and any "statement of Michael Shelton reference (sic) hearsay statement by victim David Thomas to Michael Shelton, specifically that David Thomas was either involved with drugs and/or wanted by drug dealers." (R. 749-750). After a hearing, the court reserved ruling, stating "…I'm going to have to see something ahead of time, but—yeah, I'll continue to reserve on that." (T. 716). Trial counsel did nothing further to readdress this issue with the court pretrial or during the course of trial. Trial counsel did not call Mr. Shelton as a witness or, at a minimum, proffer his statement. There is no reasonable strategy for failing to obtain a complete ruling on the State's motion in limine.

Shelton's testimony was relevant to the defense theory that Thomas' death was the result of his involvement in illegal drug activity. Shelton had provided statements to the defense that on August 6, 2002 Thomas had told Shelton that "he was going to Ft. Myers to meet with some drug dealers." Shelton also indicated

that Thomas was hiding out from drug dealers and that Thomas had recently withdrawn approximately $20,000 from the bank.

Fla. Stat. § 90.803(3)(a) allows a statement of the declarant's then existing state of mind to prove or explain acts of subsequent conduct of the declarant. A statement offered under this statute is also an exception to the general rule against admission of a victim's state of mind in a criminal case. Such statements are admissible only where "there is other sufficient evidence to draw the inference that the act or plan was executed." *Penalver v. State*, 926 So. 2d 1118, 1127 (Fla. 2006). Corroboration is a necessary predicate to admission of the statement into evidence. The lower court overlooked this exception and failed to evaluate whether the necessary corroboration existed despite the fac that MR. Twilegar had alleged the necessary corroboration in his motion (PC-R.).[6] Had trial counsel effectively presented this corroborating evidence in companion with the supporting case law they would have been able to effectively establish the foundation for admission of Shelton's testimony into evidence. Counsel failed to make any attempt to do so during the course of trial.

[6] Rental car receipts, records that he checked in to a Motel 6 in Fort Myers, the testimony of Valerie Bisnett , and the eventual discovery of his body in Fort Myers all provide support that Thomas did indeed travel to Fort Myers as he indicated he would to Shelton. Such evidence clearly demonstrates that Thomas' conduct leading up to the time of his disappearance was in fact consistent his comments to Shelton just days before.

While arguing the merits of the motion defense counsel cited to *State v. Huggins*, 889 So. 2d 743 (Fla. 2004) in support of admission of Thomas' statements under the state of mind exception to the hearsay rule. (T. 707). The Court further noted that "[o]ne of the few things I remember from my law school evidence class was the idea that if a person says I'm going to Miami tomorrow, that that's an exception to the hearsay rule about something." (T. 708) The trial court was receptive to argument that Thomas' statements fell within the exception. However, counsel made no further attempt to secure a ruling favorable to Mr. Twilegar. Contrary to the lower court's conclusion, had counsel done so, Shelton's testimony would have been admissible under *Huggins*, as well as other supporting case law. *See also Penalver v. State ,* 926 So. 2d 1118 (Fla. 2006*);Monlyn v. State ,* 705 So. 2d 1 (Fla. 1997).

Sufficient evidence also supported admission of Shelton's statement under the statement against interest exception to the hearsay rule.[7] Thomas's statements confirming his participation and intention to further engage in illicit drug activity were admissions of guilt which subjected him to criminal liability. The test for admissibility under this section is (1) whether the declarant is unavailable, and if so (2) whether the statements are relevant, (3) whether the statements tend to

[7] *See* Fla. Stat. § 90.804(2)(c); Weinstein, Evidence §§ 804(b)(3)[01]–[03]; McCormick, Evidence §§ 316 to 320; 5 Wigmore, Evidence §§ 1455–1477 (3d ed. 1940)

inculpate the declarant and exculpate the defendant, and (4) whether the statements are corroborated. *Masaka v. State*, 4 So. 3d 1274, 1279 (Fla. Dist. Ct. App. 2009); citing *Voorhees v. State,* 699 So.2d 602, 613 (Fla.1997). If admissible, it is within the jury's province to determine the weight to afford such statements.

The statements also bore strong indicia of reliability and are corroborated by other evidence based upon the surrounding circumstances. Most significantly, Thomas's statements were individually self incriminatory. *See Williamson v. United States*, 512 U.S. 594 (1994). As this Court has noted, only those declarations or remarks within a statement that are individually self incriminatory are included within the exception as a statement against penal interest. *Masaka v. State*, 4 So. 3d 1274 (Fla. 2d DCA). Additionally, as noted above, Thomas's subsequent conduct following his conversation with Shelton was in accord with his statement. Evidence presented at trial established that Thomas did indeed travel back to Fort Myers. Likewise, Shelton's knowledge regarding Thomas' large withdrawal of money just prior to the crime was also corroborated by testimony provided at trial by witnesses Tamara Williamson, the Alliant Bank teller (T. 672) and Valerie Bisnett who testified she saw a large amount of cash in Thomas's wallet when he visited her at work on August 7th.(T.754).

Finally, the additional bank records of Thomas' extended account activity from Alliant Bank provided further substantiation of Shelton's statement. (T. 1956-

64). The bank records demonstrated a similar pattern of questionable conduct, specifically the practice of depositing and removing large sums of money for an extended period of time. The bank records would have corroborated both the underlying facts of Shelton's statement as well as Mr. Twilegar's theory of defense that Thomas' death was the result of his illicit drug activity. Furthermore, had counsel been effective in tying this corroborative information together and admitting Shelton's statement into evidence, it would have substantiated the relevance of Thomas's Alliant bank statements from March 2002 to August 2002 and from October 2001 through January 2002.

Due to counsel's ineffectiveness, Mr. Twilegar was denied the opportunity to present relevant, credible evidence which directly supported his theory of defense. Whether through exception to the hearsay rule via admission against interest or state of mind, Florida evidentiary rules provided Mr. Twilegar the avenue in which to introduce Shelton's testimony into evidence. Trial counsel's failure to make any attempt to do so hindered their ability to introduce all the available evidence at their disposal and present a complete theory of defense. Had such evidence been presented there is a reasonable probability that the outcome of Mr. Twilegar's trial would have been different.

"Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by

the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). When these facts as alleged by Mr. Twilegar in his Rule 3.851 motion are as accepted as true, *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989), it is clear that the record does not positively refute Mr. Twilegar's claims. The lower court failed to cite to any portion of the record to refute Mr. Twilegar's claim, instead merely concluding that the evidence would not have refuted the evidence presented of Mr. Twilegar's guilt. The lower court ignored that the only evidence of Mr Twilegar's guilt was based upon inference stacked upon inference. There was no direct evidence linking Mr. Twilegar to the crime. Shelton's testimony, in conjunction with the Alliant Bank records, was further support for the defense's alternate theory. Mr. Twilegar is entitled to an evidentiary hearing.

ARGUMENT II

MR. TWILEGAR WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING LAW BECAUSE HE WAS DENIED ACCESS TO PUBLIC RECORDS.

Public records requests are an important tool for capital collateral counsel to pursue while investigating constitutional claims to be raised in a Rule 3.851 motion. *State v. Kokal*, 562 So. 2d 324 (Fla.1990); *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990); *Jennings v. State*, 583 So. 2d 316 (Fla. 1991). Public records requests and production are the starting point to a thorough, competent review of a

capital proceeding in postconviction. As a result of public records requests, a number of capital collateral defendants received collateral relief.[8] Certainly, it is in the public interest to have valid constitutional claims discovered and relief granted when warranted. It increases the public's confidence in the reliability of a judgment and sentence and ultimately when an execution is carried out in the State of Florida. *See White v. State*, 664 So. 2d 242, 245 (Fla. 1995) (Anstead, J., dissenting). Thus, collateral counsel, this Court, the circuit court and state agencies bear an enormous burden in order to insure the reliability of capital proceedings.

In 1996, in an effort to streamline the postconviction discovery process, this Court first proposed Rule 3.852 to govern the procedure for providing capital defendants in collateral proceedings the means of obtaining public records. *See In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production*, 673 So. 2d 483 (Fla. 1996). Subsequently following the publication of the proposed rule and a comment period, this Court undertook to

[8] *See e.g. Roman v. State*, 528 So. 2d 1169 (Fla. 1988); Gorham v. State, 597 So. 2d 782 (Fla. 1992); *Garcia v. State*, 622 So. 2d 1325, 1330 (Fla. 1993); Young v. State, 739 So. 2d 553 (Fla. 1999); *Roger v. State*, 782 So. 2d 373 (Fla. 2001); *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001); *Cardona v. State*, 826 So. 2d 968 (Fla. 2002); *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004); *Floyd v. State*, 902 So. 2d 775 (Fla. 2005); *Johnson v. State*, 44 So. 3d 51 (Fla. 2010); *Swafford v. State*, – So. 3d – (Fla. November 7, 2013).This list is not exhaustive, but provided merely to show example of the many cases which have received relief.

address objections to the proposed rule when it formally adopted the rule. There, this Court wrote:

> We 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.

In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production, 683 So. 2d 475, 475-76 (Fla. 1996). Justice Anstead, joined by Justices Grimes and Kogan, wrote in a special concurrence:

> As a practical matter, and for this rule to work as we hope, capital defendants should utilize this rule to conduct all discovery, including the discovery that was previously conducted pursuant to chapter 119, and the State and its agencies should respond to their obligations to provide discovery in accord with the spirit of Florida's open records policy. As noted by the majority opinion, **this rule in no way diminishes the right of an individual Florida citizen, including a capital defendant, to access to public records pursuant to article I, section 24, Florida Constitution, and chapter 119, Florida Statutes (1995).** Trial courts must be mindful of our intention that a capital defendant's right of access to public records be recognized under this rule**. If there is any category of cases where society has an interest in seeing that all available information is disclosed, it is obviously in those cases where the ultimate penalty has been imposed.** In these proceedings, we have received many assurances of cooperation. **For example, the State and its agencies have indicated they will essentially follow an "open**

> **file" policy.** However, both sides have cited instances of adversary system abuses where gamesmanship and partisanship have worked to unreasonably delay the underlying proceedings or to obstruct the release of information. The intent of this rule is to eliminate these practices. While the trial court will have the supervisory responsibility to see that there is an orderly flow of information under the scheme we have devised**, the ultimate success or failure of this rule will largely rest on the voluntary and good faith efforts of the parties to resist the pressures of partisanship.**

Id. at 477 (emphasis added).

In 1998, the Florida Legislature created a records repository for public records in capital cases and repealed the version of Rule 3.852 then in effect. Accordingly, this Court established a special committee charged with promulgating a new Rule 3.852 in light of the creation of the records repository. A few months later, this Court adopted a new Rule 3.852 on an emergency basis. *Amendments to Florida Rules of Criminal Procedure -- Rule 3.852 (Capital Postconviction Public Records Production) and Rule 3.993 (Related Forms)*, 723 So. 2d 163 (Fla. 1998). When this Court finalized the revised Rule 3.852 following a comment period, this Court wrote:

> We intend for this rule to **serve as a basis for providing to the postconviction process all public records that are relevant or would reasonably lead to documents that are relevant to postconviction issues.** We emphasize that it is our strong intent that there be efficient and diligent production of all of the records **without objection** and without conflict....

Amendments to Florida Rules of Criminal Procedure -- Rule 3.852 (Capital Postconviction Public Records Production) and Rule 3.993 (Related Forms), 754 So. 2d 640, 642-43 (Fla. 1999)(emphasis added).

In denying wholesale all of Mr. Twilegar's requests for public records, the circuit court completely guts the principles adopted by this Court in *State v. Kokal* and *Provenzano v. Dugger*, and which served as the underlying basis for the promulgation of Rule 3.852. The circuit court, based on the objections of numerous state agencies, has misconstrued the language in Rule 3.852 to obliterate Mr. Twilegar's constitutional and statutory rights to public records. The substance of Rule 3.852, the right of access to public records, has been reduced to meaninglessness.

Mr. Twilegar timely filed Demands for Additional Public Records pursuant to Florida Rules of Criminal Procedure Rule 3.852 (g) and (i) on April 21, 2011. The demands sought records pertaining to the investigation of Mr. Twilegar's postconviction motion from numerous state agencies.[9] Objections to Mr.

[9] Office of the State Attorney, Twentieth Judicial Circuit (SAO); Lee County Sheriff's Office (LCSO); Division of State Fire Marshal-Bureau of Fire and Arson Investigations; Florida Department of Law Enforcement (FDLE); Florida Department of Law Enforcement-Medical Examiner's Commission; the Office of the Attorney General; the Department of Corrections (DOC); the Office of the Medical Examiner, District 21; Department of Agriculture and Consumer Services; Judicial Qualifications Commission; Department of State-Division of

Twilegar's demands were filed by the SAO, LCSO, FDLE, FDLE-Medical Examiner's Commission and DOC. Likewise, DOC, the Office of the Attorney General, the Office of the Governor and FDLE objected to providing records concerning the State's method of lethal execution. Public records demands to the remaining agencies were resolved either by compliance or because no records existed.

The circuit court held a hearing on Mr. Twilegar's demands and the agencies' objections on October 7, 2011, subsequently sustaining all objections and denying in whole Mr. Twilegar's demands for additional public records. (PC-R. 965-993) Despite lengthy argument at the October 7 hearing as to the relevance of the records sought and the postconviction claims to which they pertain, the Court found in almost every instance that:

> [Mr. Twilegar] failed to show that the records were relevant to a specified existing claim for postconviction relief, failed to show the records are relevant to the subject matter of the postconviction proceeding, or that the records sought are reasonably calculated to lead to the discovery of admissible evidence. It is clear from [Mr. Twilegar's] arguments that he is seeking to discover if

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Elections; and Tice Fire Department. On the same date, Mr. Twilegar also sent Demands for Additional Public Records pursuant to Fla. R. Crim. P. Rule 3.852(i) relating to records concerning the State's method of execution to the Department of Corrections, the Office of the Attorney General, the Office of the Governor and the Florida Department of Law Enforcement. Those demands were amended and resent on July 7, 2011.

> possible claims exist, such as impeachment of witnesses at trial, rather than records to support a colorable claim for postconviction relief.

(PC-R. 965-993). The circuit court's reasoning is troubling because Mr. Twilegar had yet to file his initial postconviction motion and was well within the one year time limit to do so. Requiring Mr. Twilegar to articulate an existing claim,[10] before he is required to file his initial postconviction motion flies in the face of reason and ignores that the initial capital postconviction public records process is precisely for discovery and investigation. Under this reasoning, Mr. Twilegar, or any capital defendant, would never be entitled to public records until after a complete motion had been filed. The wholesale denial of the additional public records requests under Rule 3.852(g) and (i) is unconstitutional as applied in this case.

This Court considered and rejected concerns that the rule would unconstitutionally restrict access to records. *In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod.*, 683 So. 2d 475, 476 (Fla. 1996). Despite this Court's rejection of those concerns and Justice Anstead's concurring words of caution, Mr. Twilegar has been unconstitutionally

[10] In both his demands and at the public records hearing on October 7, 2011, Mr. Twilegar articulated that he was investigating claims of ineffective assistance of counsel, claims pursuant to *Brady v. Maryland* and juror misconduct claims, among others.

restricted access to records. The promise that was made to this Court of an open file policy has been forgotten by state actors who no longer wish to carry the burden of open government. *In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production*, 683 So. 2d at 477

Rather than comply with an open file policy, the agencies sought to sidestep their duties and responsibilities by filing blanket objections, ranging from arguments that the records are not relevant to the records requested or are overly broad and unduly burdensome. However, while neither the facts nor the rules and law supported the objections, the circuit court upheld the objections. In almost every instance, the court simply repeated the same grounds for denial with respect to each agency. No real consideration of the information sought in the demand occurred, nor was there any true consideration of the arguments made at the public records hearing.

Specifically, the circuit court found Mr. Twilegar's demands in each instance to be overly broad and unduly burdensome due to use of the language "any and all" and "regardless of form." (PC-R. 969, 971, 974, 976, 982). These terms were refined both in the language that followed in the demand and in argument made at the public records hearing. Mr. Twilegar, argued, for example, that with respect to his demand to the Department of Corrections, that beyond the initial use of the term "any and all" the request for records was quite detailed

asking for the records relating to "control and/or treatment" and requesting his own medical records. Mr. Twilegar pointed out that the demand to DOC only requested his own records. (PC-R. 884-885). When DOC clung to its insistence that use of the any and all language was not specific as required by the rule (PC-R. 885), the circuit court seemed to understand that the specifics came in what followed, even suggesting deleting the "any and all." (PC-R. 885). The demands for each of the agencies objecting, FDLE, SAO and LCSO were equally detailed.

Moreover, many of the demands requested information on limited individuals directly involved in the investigation and/or prosecution of Mr. Twilegar. With respect to FDLE, Mr. Twilegar sought records for the victim David Thomas and his wife Marianne Lehman. At the public records hearing, Mr. Twilegar explained that Thomas had previously been investigated by FDLE for conspiracy to commit the murder of his wife. (PC-R. 906-906). The demands to FDLE with respect to analysts that conducted serology work and firearms examination were also limited to a few individuals and to a limited time period of two years, which corresponded to the time frame of the work on Mr. Twilegar's case. (PC-R. 911-14) Again, the circuit court seemed to understand the limited nature of the demands confirming that Mr. Twilegar was only interested in laboratory protocols which related to the analysis that was done in this case. (PC-R. 916). When FDLE was asked if this provided more specificity, FDLE,

exemplifying the gamesmanship inherent in these objections, indicated there was no need to get to a point where "we are trying to work out an agreement here." (PC-R. 916).

Similarly, at the public records hearing arguments relating to the relevance of requested records was further refined. For example, Mr. Twilegar requested records from the FDLE Medical Examiner's Commission specific to Dr. Rebecca Hamilton, the pathologist who performed the autopsy and testified at trial. Mr. Twilegar argued at the public records hearing that he was specifically searching for any professional complaints, sanctions and /or disciplinary actions which go directly to her credibility at the trial. Mr. Twilegar had a constitutional right to confront witnesses. Mr. Twilegar further stated that impeaching the autopsy itself was at issue. (PC-R. 900). This was not a fishing expedition as Mr. Twilegar in fact filed a claim in his initial postconviction motion that the autopsy was deficient and that Dr. Hamilton failed to follow standard procedures when conducting the autopsy. (PC-R. 1951-2029). Of course, how would many of the agencies, particularly DOC and FDLE, of which records were requested, be in a position to determine relevancy of the demands when they have not been involved in the substantive litigation of Mr. Twilegar's case? The same holds true for the circuit court judge who did not preside over the trial. It is Mr. Twilegar's assessment of relevance that is important.

Furthermore, Fla. R. Crim. P. 3.852 (g) and (i) do not only require that the records requested are relevant to a pending postconviction proceeding. Rather, the rule also provides that the records requested appear reasonably calculated to lead to the discovery of admissible evidence. *See* Fla. R. Crim. P. 3.852 (g)(C) and (i)(C). At the hearing, Mr. Twilegar repeatedly argued that the requested records related to claims that he was pursuing for his initial Rule 3.851 motion, including whether there was a valid waiver of the presentation and investigation of mitigation (PC-R. 885); the mental health and competency of Mr. Twilegar as both pertain to the waiver or to ineffective assistance of counsel at the penalty phase (PC-R. 880, 885); deficiencies in the autopsy (PC-R. 900); juror misconduct (PC-R. 902, 905); alternate theories of the crime and additional suspects (PC-R. 906); failure to follow protocols and whether analysts protocols were produced at trial (PC-R. 917); and impeaching witnesses that testified at trial (PC-R. 854, 856, 866, 900, 924, 929). Mr. Twilegar requested records from the SAO and LCSO on several witnesses that testified at trial to determine if the State had offered the witnesses any favor in return for their testimony or had withheld information favorable to Mr. Twilegar with respect to those witnesses. (PC-R. 856-57, 929, 931, 932). Without a meaningful opportunity for discovery, virtually no defendant would be granted a new trial for violations of *Brady v. Maryland.* *See Johnson v. State*, 44 So. 3d 51, 53 (Fla. 2010), as revised on denial of reh'g (Sept. 2, 2010)(new trial

granted based on handwritten notes by the prosecutor that revealed that the jail-house snitch acted as an agent of the police); *Mordenti v. State,* 894 So. 2d 161, 168 (Fla. 2004)(new trial granted because the State withheld evidence that could have been used to impeach the star witness); *Banks v. Dretke*, 540 U.S. 668, 684-85 (2004)(new trial granted after federal district court granted access to prosecutor files). In fact, at trial there was an issue with respect to witness Jennifer Morrison as to whether she had gained assistance with her child support arrears and the outstanding arrest warrants associated with the arrears in exchange for her testimony. (PC-R. 932).

Mr. Twilegar was convicted and sentenced to death upon a theory of the crime which consisted entirely of circumstantial evidence. In an entirely circumstantial evidence case where no direct evidence linked Mr. Twilegar to the crime scene or death of David Thomas and there was evidence supportive of alternate theories of the crime, it was crucial for trial counsel to investigate and impeach witnesses presented by the State and challenge the forensic evidence, or lack thereof, which was presented. The public records requested below went directly to the postconviction theory trial counsel failed to fulfill his obligations to adequately challenge the State's circumstantial case. Mr. Twilegar met his burden and the circuit court erred in denying wholesale all of the demands filed pursuant to Rule 3.852 (g) and (i).

Furthermore, the circuit court denied Mr. Twilegar's demands for public records pertaining to the State's method of execution based on its interpretation that this Court has foreclosed any entitlement to public records and any colorable claim on the constitutionality of lethal injection in *Valle v. State*, 70 So.3d 530 (Fla. 2011). The continued denial of public records places Mr. Twilegar in a catch-22: if he is prohibited from conducting his own investigation and discovery, then he can never obtain sufficient evidence to mount a claim or to demonstrate that his claim is different from that in other capital postconvcition cases.

With respect to the requests pertaining to lethal injection, the circuit court also denied access to records based on a determination that production of the records Mr. Twilegar sought would be overly broad and unduly burdensome, concluding that some of these materials had already been provided to CCRC-South in other litigation. The circuit court incorrectly states that the requests covered an extended period of time. These demands were narrowly tailored to cover a limited period of time, in most instances two years. This two year period narrowly focuses on the time frame in which the DOC first decided to switch drugs. These findings are factual in nature, yet no evidence was provided to demonstrate what had been previously provided or how the production would be overly broad and unduly burdensome. Mr. Twilegar met his burden under Rule 3.852(i) and is entitled to the records he sought.

When Rule 3.852 was promulgated this Court wanted to find a way to orderly administer the disclosure of public records. The current interpretation of public records laws cannot be what this Court intended unless the orderly administration in capital cases means that a capital defendant is not entitled to any records. By the denial of access to public records pertinent to his case, Mr. Twilegar is being denied his rights to due process and equal protection of the law.

ARGUMENT III

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. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING THIS MERITORIOUS CLAIM

Mr. Twilegar alleged in his Rule 3.851motion that juror misconduct affected the outcome of his trial and violated his right to due process and a right to a fair trial. Mr. Twilegar's allegations were based on his discovery during postconviction that jurors, Anthony Campitelli and Jose Delgado, failed to disclose, during voir dire, material criminal history information relevant to their jury service. At trial, the court and both parties emphasized the purpose of voir dire and the importance of truthfulness to the venire. (T. 82-84, 97, 104, 294). The State explained to the jurors the general background information they were expected to provide, including whether they, their friends, or family had any involvement with

the criminal justice system and whether the individual was a victim, witness, or an accused (T. 109). It is "abundantly clear from the transcript of the voir dire proceedings that no person sufficiently perceptive and alert to act as a juror could have sat through voir dire without realizing that it was... [his or] her duty to make known to the parties and the court" that he or she had a criminal history. *Young v. State*, 720 So. 2d 1101, 1103 (Fla. 3rd DCA 1998) (quoting *Mobil Chemical Co. v. Hawkins*, 440 So. 2d 378, 381 (Fla. 1st DCA 1983), review denied, 449 So. 2d 264 (Fla. 1984).

Despite being asked to disclose whether he had any involvement with the criminal justice system, Mr. Delgado responded that he had not been in trouble. (T. 118) When asked specifically if he had any involvement at all with the criminal justice system, he answered "Traffic tickets." (T. 118). Mr. Delgado explained that he had simply paid the traffic tickets on a couple of occasions, but went to court once and paid $600.00 for "an invalid tag or something." (T. 119). Mr. Delgado reiterated that he had not had any serious problems. (T. 119). However, Florida criminal history records indicate that Mr. Delgado has the following history:

1986 – Failure to redeliver a hired vehicle, a felony

1991 – Disorderly Intoxication, a misdemeanor
Resisting Officer/Arrest Without Violence, a misdemeanor

1993 – Disorderly Conduct, a misdemeanor

1996 – Cocaine Possession, a felony
Traffic Offense, DUI

2006 – Nonmoving Traffic Violation[11]

Likewise, Mr. Twilegar discovered and pled in his Rule 3.851 motion that Anthony Campitelli was untruthful during voir dire. When asked if he had any involvement with the criminal justice system, Mr. Campitelli responded "No" (T. 174). However, Mr. Twilegar has learned that Mr. Campitelli was arrested for driving under the influence in 1999. Mr. Campitelli was found guilty of Second Degree Misdemeanor DUI in 2000.

Mr. Twilegar filed a motion for leave to interview jurors. (PC-R. 1653-56). The circuit court denied that motion on December 14, 2012 (PC-R. 1931-35). The court's denial of the motion was in error where Mr. Twilegar had made a *prima facie* showing of misconduct (PC-R. 1653-56; 1931-35).

A juror's false response during voir dire which results in the non-disclosure of material information relevant to jury service, justifies a new trial as a matter of law. *See De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995). *De La Rosa* outlines

[11] The criminal history records discovered by Mr. Twilegar during postconviction indicate that the nonmoving traffic violation was a violation of Florida Statutes § 320.261, attaching a registration license plate not assigned, occurring in Lee County. This would seem to be the "invalid tag or something" which he chose to disclose during voir dire.

the three part test to utilize in determining whether a juror's non-disclosure of information during *voir dire* constitutes grounds for a new trial:

> First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

De La Rosa v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995). In determining materiality, the court must evaluate whether the non-disclosed facts were substantial and important so that if the facts were known, trial counsel "may have been influenced to peremptorily challenge the juror from the jury." *Palm Beach County Health Dept. v. Wilson*, 944 So. 2d 428, 430 (Fla. 2006)*(*citing *Roberts ex rel. Estate of Roberts v. Tejada,* 814 So. 2d 334 (Fla. 2002)). There are several factors to consider in determining the impact of a juror's exposure to the legal system including, but not only, remoteness in time, the character and extensiveness of the litigation and the juror's posture in the litigation. *Id.* Despite the fact that Mr. Twilegar made detailed factual allegations which if taken as true would establish materiality under *De La Rosa*, and which are not refuted by the record, the lower court summarily denied his claim without an evidentiary hearing.[12]

[12] At the outset, it seems the circuit court has conflated two separate juror claims in summarily denying Mr. Twilegar's substantive juror misconduct claim. Mr. Twilegar pled a substantive juror misconduct claim (Claim IV of his Rule

Satisfying the second prong of *De La Rosa*, the lower court concluded that both Mr. Delgado and Mr. Campitelli did not disclose their criminal histories. (PC-R. 1826). However, the remainder of the lower court's analysis is in error. Pursuant to Fla. R. Crim. P. 3.851(f)(5)(A)(i), an evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *See also* Amendments to Fla. R. Crim. P. 3.851, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"). *See also Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims

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3.851 motion) and a claim that trial counsel was ineffective for failing to adequately conduct voir dire as he failed to discover the criminal histories of jurors Delgado and Campitelli (Claim III(a) of his Rule 3.851 motion)(See Argument). In its order addressing the ineffectiveness claim, the circuit court addresses the juror non-disclosure under the three prong test of *De La Rosa*. The court ultimately found that, with respect to both claims, the "Defendant failed to allege any facts that, if true, would establish either prong of *Strickland*." (PC-R. 1828) The lower court's disposal of these claims is confusing to say the least, as *Strickland* is not the appropriate standard by which to analyze a substantive juror misconduct claim based on a juror's non-disclosure. However, in his order denying Claim IV, the instant juror misconduct claim, the circuit court cross referenced its response to Claim III. Mr. Twilegar will rely on the Court's response to Claim III and its denial of the jurors' non-dislcosure under *De La Rosa* articulated there.

involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

Whether either juror's non-disclosure is material or relevant to his jury service in this case is a disputed issue of fact. The lower court made no citation to the record to refute Mr. Twilegar's allegations, merely dismissing the non-disclosure as immaterial due to remoteness in time. In doing so, the lower court ignored the totality of the circumstances of the convictions: remoteness in time is not the only consideration. Mr. Twilegar alleged in his motion below that aside from the complete lack of truthfulness, the 1996 arrest for cocaine possession and DUI is relevant and material to Mr. Twilegar's case where trial counsel was asserting a defense that the victim was heavily involved in drugs and drug dealing. A juror with a history of cocaine possession would lend particularized knowledge or bias to his review of the testimony and evidence. Additionally, a juror with a charge for cocaine possession could reasonably express bias against Mr. Twilegar for being involved in drug dealing particularly if he overcame his own issues with drugs and favorably resolved his own case. In fact, Mr. Delgado pled guilty and received an adjudication withheld with credit for time served for 19 days in the county jail. The lower court failed to consider the nature of the criminal charges that were not disclosed.

The lower court further determined that the fact "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 the peremptory challenge." (PC-R. 1827). Mr. Twilegar alleged just the opposite. Had trial counsel known one juror was arrested and prosecuted for cocaine possession and known of another juror's criminal history, he would have moved to strike both for cause. If not successful, trial counsel would have used his peremptory challenges to excuse these individuals from the jury. Nothing in the record refutes this allegation, nor did the lower court cite to any portion of the record to support its opposite opinion. The lower court's conclusion was just that: an opinion unsupported by any portion of the record. What trial counsel would or would not have done with the non-disclosed information is a matter for evidentiary development.

The lower court also denied Mr. Twilegar's claim of juror misconduct as procedurally barred since it should have been raised on direct appeal, relying on *Elledge v. State*, 911 So. 2d 57 (Fla. 2005). Here, because both jurors in question concealed critical information, Mr. Twilegar was not aware of the criminal histories of Jurors Delgado and Campitelli until the initial investigation during postconviction. Until he discovered the jurors' criminal histories, Mr. Twilegar did

not know these jurors were untruthful. As such, Mr. Twilegar could not have raised the jurors' untruthfulness on direct appeal. [13]

However, if trial counsel could have or should have known of the jurors' criminal histories such that it could have been raised on direct appeal, then so too should the State be imputed with that knowledge. The Cape Coral Police Department was responsible for arresting and charging Mr. Campitelli. The Office of the State Attorney for the Twentieth Judicial Circuit prosecuted him for the crime. Thus, it would have had constructive knowledge of the arrest since it was responsible for Mr. Campitelli's subsequent prosecution. The failure to disclose this information was a violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995). The prosecution is under a duty to disclose to the defense evidence that is both "favorable to the accused and material either to guilt or punishment." *United States v. Bagley*, 473 U.S. 667, 674 (1985) (citing *Brady* 373 U.S. at 83-87 (1963)). The State failed to disclose this information during voir dire or later at trial and it affected Mr. Twilegar's ability to have a fair trial.

[13] In finding that Mr. Twilegar could have raised his substantive juror misconduct claim on direct appeal, the lower court is implying a lack of diligence on Mr. Twilegar's part. Such a finding would necessarily require a finding that trial counsel and/or direct appeal counsel was deficient for failing to discover the misconduct. *See* Argument IV, infra.

The State's failure to correct Mr. Campitelli's misstatement or inform trial counsel of the material facts surrounding his arrest and disposition of his charges for driving under the influence of alcohol was a violation of *Giglio v. United States*, 405 U.S. 150 (1972) which recognized that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary standards of justice." Pursuant to *Giglio*, the threshold for proving prejudice is more "defense friendly." False evidence is deemed 'material' if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury." *Guzman v. State*, 868 So.2 d 498 (Fla. 2003). In instances where the prosecutor is found to have used false testimony or failed to correct testimony which he/she later learns is false, the burden is upon the State to prove that the presentation of that false testimony was harmless beyond a reasonable doubt. *Bagley* at 680 n.9.

Mr. Twilegar raised the substantive juror misconduct claim at the first opportunity in his initial postconvcition motion. Furthermore, this Court has certainly reviewed substantive juror misconduct claims on postconviction review where the underlying facts were unknown at the time of direct appeal. *See e.g. Lugo v. State*, 2 So. 3d 1 (Fla. 2008); *Foster v. State*, 2013 WL 5659482 (2013). Mr. Twilegar's juror misconduct claim is not procedurally barred.

The material facts that Mr. Delgado and Mr. Campitelli withheld rendered Mr. Twilegar's trial structurally flawed and he was prejudiced by their presence on his jury. The facts pertaining to jurors Delgado and Campitelli must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively refute Mr. Twilegar's claims and at the very least an evidentiary hearing is required.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. TWILEGAR'S MERITORIOUS CLAIMS OF INEFFECTIVE ASSISSTANCE OF COUNSEL DURING VOIR DIRE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Twilegar sought an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851 for all claims requiring a factual determination. Pursuant to Fla. R. Crim. P. 3.851(f)(5)(A)(i), an evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *See also* Amendments to Fla. R. Crim. P. 3.851, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"). *See also Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual

determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

"Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record." *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). A court's decision whether to grant an evidentiary hearing is subject to de novo review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

As set forth below, Mr. Twilegar's rule 3.851 motion and its amendments pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively refute Mr. Twilegar's claims and that an evidentiary hearing is required.

I. Failure to Adequately Conduct Voir Dire

At trial, the court and both parties emphasized the purpose of voir dire and the importance of truthfulness to the venire. (T. 82-84, 97, 104, 294) The State further explained to the jurors the general background information they were expected to provide, including whether they or their friends or family had any

involvement with the criminal justice system and whether the individual was a victim, witness, or an accused (T. 109).

When asked specifically if he had any involvement at all with the criminal justice system, Mr. Delgado answered "Traffic tickets" (T. 118), reiterating that he had not had any serious problems (T. 119). Trial counsel conducted no additional voir dire of Mr. Delgado's criminal history and/or background. Had counsel pursued Mr. Delgado's vague response that he had not had any "serious" problems, counsel would have learned that Mr. Delgado actually had extensive involvement with the criminal justice system at the time of voir dire, including a 1996 charge for felony cocaine possession and DUI.[14] Discovery of Mr. Delgado's felony charge for cocaine possession, would have prompted a reasonable attorney to question him further regarding the extent of his drug usage and whether he had undergone any treatment.

Likewise, when asked if he had any involvement with the criminal justice system, Anthony Campitelli responded "No" (T. 174). Although Mr. Campitelli indicated no previous involvement with the court system in his response to the State, further questioning by trial counsel would have revealed that Mr. Campitelli was arrested for driving under the influence in 1999. Counsel similarly conducted no further *voir dire* of Mr. Campitelli.

[14] *See* Argument III.

Because trial counsel failed to question Jurors Delgado and Campitelli, he had no knowledge of their criminal history. Trial counsel had a duty to preserve Mr. Twilegar's right to a fair and impartial jury. A reasonable attorney would have moved to strike for cause a juror with charges for cocaine possession and driving under the influence. If a cause challenge failed, a reasonable attorney would have exercised a peremptory challenge. Where trial counsel was asserting a defense that the victim was heavily involved in drugs and drug dealing, no reasonable attorney would have sat a juror with a history of cocaine possession which might lend particularized knowledge or bias to his review of the testimony and evidence. The same is true for Mr. Campitelli particularly given that the same agency prosecuting Mr. Twilegar would also have prosecuted Mr. Campitelli. A reasonable attorney would have inquired further as to whether Mr. Campitelli's involvement with the State Attorney's Office and law enforcement had an impact on his ability to be fair and impartial.

Trial counsel's lack of questioning regarding the criminal histories and backgrounds of the jurors constitutes ineffectiveness under *Strickland v. Washington*, 466 U.S. 558 (1984). Mr. Twilegar was prejudiced when a jury was empanelled who had not been thoroughly questioned regarding their backgrounds and any outside influences and bias and where their non-disclosrue was directly related to the alternate theory of defense.

II. Failure to Object to the Death Qualification of the Jury

Prior to the start of the trial, Mr. Twilegar moved to waive the jury for the penalty phase (T. 30). After extensive argument on the motion (T. 30-41), the Court conducted a colloquy of Mr. Twilegar affirming his decision to waive the jury for the penalty phase (T. 41-42). During the investigation of Mr. Twilegar's postconviction claims, trial counsel confirmed that waiving the jury at the penalty phase was a strategy aimed at preventing the jury from being death-qualified. Inexplicably, and without any reasoned consideration of the consequences, trial counsel agreed with the court that "the jury should know the seriousness of the case" (T. 47). As a result, the State was able to assert its position that the jury must be death qualified. (T. 66, 69-71). In what can only be seen as an effort to expedite matters, trial counsel conceded that jurors who initially answered that they could not return a guilty verdict if death was a possible penalty were "out the door" while jurors who answered positively could be addressed through peremptory or other motions for cause (T. 72). Trial counsel was ineffective for conceding to a death qualified jury despite the fact that this jury would not be deciding penalty.

Despite the fact that the lower court found trial counsel's decision to be "reasoned, thoughtful" and not spur of the moment because it was born out of "extensive discussion" with the trial court and the State, as alleged by Mr.

Twilegar in his Rule 3.851 motion, this was not a well reasoned or thought out decision. The record does not reflect that counsel contemplated informing the jury of the possible penalty prior to the hearing on Mr. Twilegar's motion to waive the jury, nor does it reflect that trial counsel conducted any research on the issue. To the extent the lower court believes Mr. Twilegar conceded that the death qualification of the jury was strategic, the lower court has misunderstood Mr. Twilegar's allegations. Mr. Twilegar argued in his motion that the only strategy decision counsel made was to waive the jury for the penalty phase of trial. (PC-R.1973) That decision was rendered pointless by counsel's insistence that the jury be instructed as to penalty. (PC-R. 1973-74)

There simply can be no reasonable strategy for allowing the jury to be instructed that death was a possible penalty where that instruction led to the death qualification of a jury that would not be deciding penalty. Here, where trial counsel advised his client to waive the penalty phase jury to avoid the empanelling of a conviction prone jury, trial counsel never should have insisted that the jury know the "seriousness of the case" as it led to counsel's unreasonable acquiessence to a procedure whereby all jurors who expressed concerns about the penalty were excluded.

As a result of trial counsel's unreasoned acquiescence, Mr. Twilegar's alleged in his Rule 3.851motion that the jury was predisposed to convict, that the

death qualification process results in the exclusion of certain demographics particularly African Americans and women[15] and that death qualified excludes are hostile to the insanity defense, mistrustful of defense attorneys, and less concerned with the possibility of erroneous convictions. *See* Richard Salgado, *Tribunals Organized to Convict: Searching for A Lesser Evil in the Capital Juror Death-Qualification Process in United States v. Green*, 2005 B.Y.U. L. Rev. 519, 529 (2005). (PC-R. 1974-76). Overall, death-qualified juries are pro-prosecution and tend to harbor "pro-prosecution beliefs. *See* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. St. L.J. 769, 779 (2006).(PC-R. 1976-77) In Mr. Twilegar's case many of the jurors expressed these beliefs openly in front of the entire venire (T. 295-296; 357-359).

[15] Significantly, in Mr. Twilegar's case, the record demonstrates that the death qualification of the jury did indeed result in the State's exclusion of a disproportionate amount of women. Based on their beliefs with respect to the death penalty, the State challenged for cause six jurors, five of which were women. (T. 368, 382-83,387-88, 399-400). Based on trial counsel's objection to the cause challenge, the Court did not grant the challenge with respect to Juror Wolf, but the State exercised a peremptory challenge to excuse her (T. 387-88). Two additional jurors, Jurors Jenkins and Juror Staples, both women, expressed difficulty in reaching a guilty verdict given that the death penalty was a possibility, but ultimately believed they could follow the law. The State peremptorily struck both jurors (T. 372, 380). Jurors Kathleen Smith, Debra Dunkins and Christie Lawrence, all women who expressed opposition to the death penalty, were excused for cause reasons related to medical appointments or scheduling issues.

Death qualification of the jury presents a further concern: "[D]eath qualification's homogenization of the jury decreases accuracy in fact-finding" Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. St. L.J. 769, 780 (2006)(citations omitted). Interestingly, "[w]ith a homogenous jury, whichever explanation seems most intuitively likely to one will seem most intuitively likely to all, and the alternative -- even if the alternative is the accurate explanation – may never even be considered, simply because no juror were able to see it as a real possibility." *Id.* The concerns regarding a homogenous jury are particularly troubling in a circumstantial evidence case as this.

Beyond the overwhelming statistical data that trial counsel had an obligation to be aware of for purposes of representing his client's interest and the fact that the trial court and the State provided ample opportunity for counsel to take a position consistent with his client's interests, the simple fact remains that the penalty for a crime has absolutely no bearing on whether a defendant is guilty or not guilty. Trial counsel permitted the guilt phase jury to be pulled out of that well-established jury trial model. Mr. Twilegar's guilt phase jury thought about the punishment of death when they deliberated because the Court and the parties condoned that conduct. Trial counsel not only failed to prevent it, but advocated for it. Mr. Twilegar is entitled to an evidentiary hearing.

III. Failure to Object to the State's Systematic Exclusion of Women From the Jury

The State in the instant case made gender classifications in choosing the guilt phase jury, exercising preemptory challenges to systematically exclude women from the jury in a quantifiable and provable manner. Mr. Twilegar's allegations are not refuted by the record. Mr. Twilegar was prejudiced by counsel's ineffectiveness because his right to a jury chosen based on a constitutionally valid assessment of their relevant qualifications was violated.

The United States Supreme Court has held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality. *J.E.B v. Alabama ex Re. T.B.*., 511 U.S. 127, 129 (1994) Accordingly, this Court has held that "the Equal Protection Clause of our federal constitution prohibits gender-based peremptory challenges," *Abshire v. State*, 642 So. 2d 542, 544 (Fla. 1994), and the defendant's right to an impartial jury under Article I § 16 of the Florida Constitution. *See State v. Neil*, 457 So. 2d 481, 486 (Fla.1984). In addition to the Fourteenth Amendment guarantee of equal protection, the Sixth Amendment right to a fair trial prohibits the exclusion of women from juries. *See Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975); *J.E.B.*, 511 U.S. at 134. Furthermore, "individual jurors themselves have a right to nondiscriminatory jury selection," which "extends to both men and women." *J.E.B.*, 511 U.S. at 140-41. State

actions implicating those myriad provisions, such as the State's actions in the instant case, must face intense and multilayered scrutiny.

The level of scrutiny that must be applied is exceedingly high and its inquiry hypersensitive to the prohibition against the use of preemptory challenges by the State to exclude women from juries. The circuit court was obligated to inquire into whether the State's systematic exclusion of female jurors in this case served the State's constitutional obligation to provide and Mr. Twilegar's constitutional right to receive a fair trial. *See J.E.B.*, 511 U.S. at 136-37. Were there reasons for the exclusions of female jurors in this case compelling enough to survive the heightened scrutiny to which they are subject? In short, the State must have had extremely important justifications to support its actions which, on their face, reflect a methodical exclusion of women from the jury. Due to trial counsel's ineffectiveness, the State's actions did not face the required scrutiny.

It is critical to recognize that in inquiring into the State's justifications for its actions in this case "[t]he fact that several women were [ultimately] seated as jurors is of no moment, for as we have previously said 'number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate.'"*Abshire v. State*, 642 So. 2d at 544-45. It is about the State's efforts and its use of its strikes, not its level of success. Thus, the court, as the lower court does here (PC-R. 1833), cannot conclude that regardless of the

State's justifications there was no harm done because several women ended up on the jury. The lower court's finding that, since the jury consisted of both men and women, Mr. Twilegar's claim lacks merit, is impermissible. The court cannot avoid inquiring into the State's justifications and must grant relief unless those justifications are profoundly compelling. "A [gender-neutral] justification for a peremptory challenge cannot be inferred" by this Court in that manner. *State v. Slappy*, 522 So. 2d 18, 21 (Fla. 1988).

In *Abshire*, comments of the assistant state attorney that suggested a possible desire to exclude women from the jury were sufficient to require a reversal. *See* 642 So. 2d at 544. On the face of this record, it is obvious the State was trying to seat as few women jurors as possible. All but two of the State's peremptory challenges were for women. During the selection of the initial jury panel, the State struck peremptorily Lindsey Buis (T. 369), Sharon Staples (T. 372), Christi Newkirk (T. 377), Sarah Jenkins (T. 380), Anita Anderson (T. 381), Julie Porter (T. 383), Martha Wolf (T. 388) and Colleen Grabow (T. 390). Trial counsel failed to object and made no request for a gender-neutral justification. The lower court references two cause challenges made by the State to find that the State's peremptory strikes likewise would have been gender-neutral. Based on the State's challenges for cause of jurors Dionne Humphreys and Geraldine Green because they could not find Mr. Twilegar guilty knowing the death penalty was possible,

the lower court concluded that that there is no reasonable probability the trial court would not have found that reason genuine. This analysis is impermissible. The trial court cannot infer a gender-neutral justification for peremptory challenges based on the State's reasoning for making a cause challenge. *See Id.* Moreover, there is nothing in the record reflecting that those women that were peremptorily stricken expressed the same views about the death penalty as the two that were challenged for cause.

The State went so far as to initiate a sort of negotiation with defense counsel after the venire had already been selected in a last ditch attempt to exclude yet another woman from the jury. (T. 390-91). Trial counsel accepted the panel (T. 391). The State, having exhausted all of its peremptory challenges, negotiated another cause challenge to strike Sandra Ramseth (T. 393-94). The trial court was correct, when it indicated the State's sudden change in position with respect to Ms. Ramseth did not "square" with its initial opposition to trial counsel's cause challenge because Ms. Ramseth had an overwhelming sense of dread and anxiety at the thought of sitting on a capital jury (T. 373). Nor did the State's change of heart "square" with its position with respect to Juror Mark Zell. Mr. Zell indicated that he could not stand the sight of blood (T. 158) and would have difficulty looking at photographs in the trial. When trial counsel moved for cause on the basis that Mr. Zell would not be able to look at the evidence (T. 384), the State

responded "Our contention is that Mr. Zell would have to toughen up a little bit" (T. 373). After its change of position with respect to Ms. Ramseth, the State still refused to agree to a cause challenge for Mr. Zell despite the fact that his reasons for not wanting to be on the jury were more extreme than Ms. Ramseth including potentially becoming sick from looking at the evidence. The State's negotiation can only be seen as an attempt to limit the number of women on the jury. In fact, a male juror moved into the available seat left vacant by the removal of Ms. Ramseth.

The lower court dismisses the State's comments directing that Mr. Zell would have to "toughen up" as a joke. (PC-R. 1833) In the absence of gender neutral reasons provided on the record, the "joking" may be interpreted as an excuse to keep the male juror and distinguish his anxiety from that of Ms. Ramseth's. Nonetheless, whether the parties were joking over Mr. Zell's "squeamishness," as the lower court called it, or not, there was disparity of treatment between Mr. Zell and Ms. Ramseth which can only be attributed to the State's discrimination against female jurors. The lower court's attempt to diminish Mr. Zell's anxiety to mere squeamishness, is not supported by the record. Rather, Mr. Zell would become sick or pass out at the sight of blood and as a result he would not be able to look at the photographs. (T. 384-85) There is nothing in the record to indicate how the State distinguished between the degree of anxiety

presented by the two jurors. The record does reflect that trial counsel moved to have both jurors excused for cause, the State did not agree until it had exhausted its peremptory challenges and saw the opportunity to move another male juror onto the jury.

Further, the lower court ignored that when choosing alternates, the State exercised all of its peremptory challenges on women: Shirley Perras (T. 399), Susan Anthony (T. 401) and Caroline Hawkins (T. 402). Again, trial counsel failed to object and failed to request any justification for the gender based strikes. Ultimately, one woman remained as an alternate because the State had used all of its peremptories.

Batson v. Kentucky establishes that the harm from a constitutional error in jury selection is the infringement of the defendant's and juror's rights themselves, and thus Mr. Twilegar need not establish that the excluded jurors would have found him not guilty. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (citations omitted). As described above, gender, like race, is an unconstitutional basis on which to select jurors. The harm resulting from selecting jurors on the basis of race is to the defendant's right to a fair jury, the right of jurors to serve on juries, and the community's interest in fair jury selection. The prejudice to Mr. Twilegar is presumed by the *risk* that the proceedings will be prejudiced by the

discriminatory jury selection process. *J.E.B.*, 511 U.S. at 140. Trial counsel failed to alleviate the risk of prejudice by failing to object to the discriminatory practice.

The files and records of this case do not conclusively refute the State's systematic exclusion of women from Mr. Twilegar's jury, nor does it offer any strategic reason for trial counsel's failure to object and compel gender neutral justification. Likewise, the record provides no profoundly compelling gender-neutral justification for the State's peremptory challenges. Mr. Twilegar is entitled to an evidentiary hearing and relief thereafter.

IV. CONCLUSION

The Defendant has the right to effective assistance of counsel on voir dire. *See Thompson v. State*, 796 So. 2d 511 (Fla. 2001); *see also Miller v. Webb*, 385 F. 3d 666 (6th Cir. 2004). "Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial." 2003 ABA Guidelines, (quoting Stephen B. Bright, *Preserving Error at Capital Trials*, THE CHAMPION, Apr. 1997, at 42-43.).

As this Court has noted "[v]oir dire is an essential part of any first-degree murder trial in which the death penalty is sought. *Johnson v. State*, 921 So. 2d 490, 503 (Fla. 2005). In the trial of a case, the jury selection and *voir dire* examination are just as critical to the outcome of the case as the presentation of the evidence. The change of a *single juror* in the composition of the jury could change the result.

Ter Keurst v. Miami Elevator Company, 486 So. 2d 547 (Fla. 1986) (Adkins, J. dissenting). This rings even more true in a circumstantial evidence case.

The files and records of this case do not conclusively refute trial counsel's ineffective assistance of counsel during voir dire, nor does it offer any strategic reason for trial counsel's failure to reasonably conduct voir dire. Mr. Twilegar is entitled to an evidentiary hearing and relief thereafter.

CONCLUSION

For the reasons argued in Mr. Twilegar's Motion to Vacate Judgments of Convictions and Sentence, the amendments thereto, the arguments and evidence presented at the evidentiary hearing, and the arguments herein, Mr. Twilegar is entitled to relief in the form new trial and/or a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished on this day March 31st, 2014 via electronic service to Katherine Diamandis, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607-7013 at capapp@myfloridalegal.com; and katherinediamandis@myfloridalegal.com.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

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