

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**

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Mr. Twilegar submits this Reply to the State's Answer Brief. Mr. Twilegar will not reply to every argument raised by the State. However, Mr. Twilegar neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply. Mr. Twilegar expressly relies on arguments made in his Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

ARGUMENT IN REPLY

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 argument in this case essentially boils down to three contentions: that counsel made strategic decisions not to delve into extraneous issues that were inconsistent with the defense theory at trial; that trial counsel's cross examination of the medical examiner was sufficient; and that the evidence presented in postconviction is merely speculation. The State's arguments are inaccurate and flawed because they discount the significance of the fact that this was an entirely circumstantial case. The State emphasizes this Court's conclusion that

...all [Twilegar's] hypothesis [of innocence], 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...

Twilegar v. State, 42 So. 3d 177, 189-90 (Fla. 2010). Based upon this Court's conclusion that the analysis of Mr. Twilegar's hypothesis of evidence turns upon this single evidentiary fact, evidence that Thomas was not killed at the same spot where he was buried would call into question the State's theory and lend reasonableness to Mr. Twilegar's hypotheses of innocence. Specifically, this evidence would lend support to another individual's involvement, including the hypotheses that Thomas's wife or girlfriend killed him or that drug dealers were responsible for his death. Contrary to the State's steadfast position that the evidence presented in postconviction did not fit into the defense theory that someone other than Mr. Twilegar committed the crime, when viewed within the framework of the "single evidentiary fact," it fits squarely within the defense theory.

At the evidentiary hearing, the State oversimplified the defense theory as "Mark didn't do it" and McLoughlin acquiesced on cross examination. But counsel's testimony was contradictory. In fact, McLoughlin also testified that he 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. McLoughlin testified that he felt any deficiencies in Hamilton's autopsy was something which fit in well with their theory that the crime occurred somewhere other than the grave site and that law enforcement had zeroed in on Mr. Twilegar to the exclusion of other leads. (PC-R. 2669).

Defense counsel had an obligation to challenge these evidentiary facts and to hold the State to their burden to disprove every reasonable hypothesis of innocence. The most critical aspect of that obligation meant providing an exhaustive investigation and effective challenge to each and every link of the forensic evidence the State relied upon in support of their circumstantial theory of the case. The State's argument fails to take into account that while counsel may have provided challenges to some of that evidence, that does not render counsel's performance sufficient for purposes of *Strickland v. Washington*, 466 U.S. 668 (1984) and the Sixth Amendment.

Counsel had a duty to conduct a reasonable investigation which he failed to perform in this case. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable, professional judgments support the limitations on investigation. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). Trial counsel failed to adequately investigate the forensic evidence in the case despite the fact that he was alerted to 'red flags' that made further investigation necessary. *See, e.g. Wiggins v. Smith*, 539 U.S. 510, 521 (2003) ("In assessing the

reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further"). McLoughlin had a duty to make reasonable investigations into the forensic evidence or instead make reasonable decisions to support making particular investigations unnecessary. *Id.* Given the significance of the forensic evidence to the critical facts relied upon by the State at trial and found by this Court that "Thomas had been shot in close proximity to the grave site because he died within minutes of being shot and he was still alive when buried and he had inhaled soil that was consistent with the grave site soil" *Twilegar*, 42 So. 3d at 189, McLoughlin's limited investigation was not reasonable. McLoughlin's investigation into the mitigation consisted of consultation with one expert. Nothing more. Following consultation with this expert counsel failed to conduct any further investigation. His decision to limit the extent of his investigation was not supported by reasonable professional judgment.

While counsel is not required to call expert witnesses on every issue, here, where the evidence was entirely circumstantial in nature it was incumbent upon counsel to retain and utilize expert assistance in challenging all aspects of it. While McLoughlin did retain Dr. Spitz, he failed to adequately prepare and consult with him. Notes from McLoughlin's files bear this fact out. Counsel had questions regarding deficiencies in the autopsy. Spitz had questions regarding the number of

wounds and the location of shotgun pellets. (PC-R. 2676). There were also questions about the defects to the neck and its origin. McLoughlin notes also reflect that he had questions regarding the sand in the nose and mouth and Dr. Hamilton's procedures for examining and documenting her work. (PC-R. 2680-81). Dr. Spitz questioned the distribution and trajectory of the pellets and Dr. Hamilton's failure to properly x-ray certain locations throughout the victim. (*Id.*). The record establishes that numerous areas of concern loomed with the forensic evidence the State was relying upon to convict Mr. Twilegar.

The State harps on the fact that counsel hired Dr. Spitz in support of the argument that Mr. Twilegar is unable to establish deficient performance. Yet, what the State ignores is that despite hiring Dr. Spitz, counsel did nothing to adequately prepare for the challenges to the forensic evidence at trial. Counsel testified in postconviction that he was the "science guy" on the case yet he failed to even attend the deposition of Dr. Spitz. This, despite being lead counsel and having been primarily responsible for retaining and consulting with him. The effect that his absence had is plainly evident in the transcripts of Dr. Spitz's deposition in which his answers are devoid of many of the areas of concern which McLoughlin and Dr. Spitz had noted during their consultations. When confronted with this fact in postconviction, McLoughlin readily admitted that there was a "disconnect" between his notes of his consultations and Dr. Spitz's deposition. (PC-R. 2744). He was

unable to provide any explanation for this. Most alarmingly, following Dr. Spitz's deposition and the "disconnect," McLoughlin failed to obtain any additional experts. Contrary to the State's argument, McLoughlin was incapable of providing anything that could support a reasonable trial strategy to excuse his sitting idly by on his hands following Dr. Spitz's deposition.

The deposition of Dr. Hamilton further corroborates that the areas of concern contained in McLoughlin's notes were part of the defense's theory for attacking the State's case at trial. McLoughlin asked Dr. Hamilton about each of the areas of concern listed in his notes.¹ (PC-R. 3796-3832). McLoughlin focused on the issue of migration of the sand and the additional injury to the left shoulder/chest area. It is evident from the deposition that McLoughlin was targeting deficiencies in the autopsy. The deficiencies in Dr. Hamilton's autopsy and her identification of the number of injuries all went to supporting reasonable hypotheses of innocence that Mr. Twilegar was not responsible by showing that the State and law enforcement unreasonably zeroed in on Mr. Twilegar after a less than thorough investigation. It also would have lent support to McLoughlin's belief and concern, after years of

¹ McLoughlin inquired into areas such as: the injury to the neck; lack of x-rays of extremities; the presence of sand in the lungs; the fractured hyoid bone; procedures for examination of the mouth, nose, and throat; collection of sand found in the victim; the number of pellets found in the victim; the trajectory of the pellets; and alternate theories of how the sand may have migrated into the victim's body. (PC-R. 2688-92).

experience with Dr. Hamilton, that she was susceptible to law enforcement influence. (PC-R. 2667). Inexplicably, however, McLoughlin failed to employ this as part of the defense strategy at trial.

Essentially, the State would have this Court believe that despite evidence demonstrating McLoughlin believed all of these issues worthy of inquiry during Dr. Hamilton's deposition, when it came time to cross examine her at trial he simply no longer believed they had merit. This, also despite the fact that his purported reason for not doing so, because it didn't fit into the defense theory of the crime that "Mark didn't do it" had always remained the same throughout his preparation for trial. To the extent the State asserts that McLoughlin did not want to present evidence that the victim had been shot multiple times or demonstrated additional injuries as this might indicate the victim had been tortured and in pain, the State has imputed its own judgment for that of trial counsel. In fact, when asked if additional gunshot wounds or the injury to the neck could have meant the victim was tortured, trial counsel responded: "As we speak, yes" (PC-R. 2727). This response does not indicate a reasoned strategy decision at the time of trial, but rather post hoc rationalization as to why counsel did not do something.

The State's argument, and McLoughlin's purported reasoning for failing to adequately cross examine the medical examiner or present his own expert, defy logic and are simply not credible. The evidence presented at trial and in postconviction

establishes that McLoughlin simply dropped the ball. No reasonable strategy can be attributed to McLoughlin's failure to present a viable challenge to the State's forensic evidence where there existed no direct evidence linking Mr. Twilegar to the crimes. The evidence presented in postconviction challenging the deficiencies in the autopsy and Dr. Hamilton's conclusions is consistent with the trial attorney notes and questioning of Dr. Hamilton at deposition. Most importantly, it is also consistent with the theory of defense at trial.

The "disconnect" was also evident in the cross examination of Dr. Hamilton at trial. The State argues, and the postconviction court below found, that McLoughlin was not deficient for failing to utilize an expert at trial where the cross examination at trial effectively elicited what counsel argued to the jury. (Answer at 36). However, the record at trial and in postconviction refutes this point. The record of Dr. Hamilton's cross examination is a scant five pages of transcript. (R. 495-500). McLoughlin wanted to just "ask a few quick questions." (R. 495). With those "few quick questions" he failed to provide meaningful inquiry into the deficiencies in the autopsy, the cause of death, or the identification of additional injuries. His cross examination failed to effectively develop any of the issues that had been raised during his consultations with Dr. Spitz or during Dr. Hamilton's deposition. Specifically, McLoughlin failed to provide any inquiry into the deficiencies in Dr. Hamilton's autopsy and how they impacted her findings and refuted the State's

circumstantial theory of the crime. He failed to inquire into Dr. Hamilton's failure to properly document reflection of the scalp.² He failed to challenge her as to her procedures for dissection of the nose, mouth, and larynx. And he failed to question her as to her failure to provide both written and photographic documentation of the sand which was recovered. (PC-R. 2802).

While he inquired into the issue of the presence of sand in the victim's airway, he was not successful in establishing that it could have entered through some means other than inhalation.³ McLoughlin failed to question her about the absence of sand in the victim's lungs. The jury was left to hear that there was sand found in the victim's air passageway leaving them with only one possible scenario: that he was buried alive. In fact, that is precisely what the State argued to Mr. Twilegar's jury. Regarding her opinion as to where the murder occurred, McLoughlin was only

² When confronted in postconviction with the fact that her autopsy report did not note reflection of the scalp Dr. Hamilton explained that she had in fact conducted the procedure but had noted it on the back of one of the pages of the autopsy report. (PC-R. 2766). Dr. Hamilton relied upon abbreviations on that back page indicating that she had weighed the victim's brain. In order to discern that she had performed the procedure it was therefore necessary for someone to find that back page, decipher her abbreviations, and then deduce from the fact that she weighed the brain and that the reflection of the scalp had therefore been performed.

³ The circuit court in postconviction erroneously found that McLoughlin had succeeded in doing so. However, review of Dr. Hamilton's testimony plainly shows that she conceded only that it may have been possible for the victim to have inhaled the sand while lying face down on a pile of uneven sand. (R. 497-98).

capable of eliciting from Dr. Hamilton that a sample of the sand “may have” been tested to compare with soil at the grave site and that it “may have” been used to determine a location of the murder. (R. 496). His cross examination also failed to inquire into Dr. Hamilton’s failure to conduct x-rays of all the victim’s extremities. The failure to perform this task was significant because there was disagreement over the number of injuries and the proximity at which the victim may have been shot. As Dr. Haddix explained in postconviction, x-rays of the extremities were critical to determining whether the wounds located on the lower bicep area of the right arm were the result of shotgun blasts or something else. (PC-R. 2558-59, 2589-90). X-rays would have provided the ability to determine if additional pellets were located in those areas. However, Dr. Hamilton failed to perform this task. When asked about this in postconviction her reasoning for not doing so was simply that she didn’t think it was necessary to do so in this case because it is only done in “certain situations.” (PC-R. 2754).

The State’s assertion that McLoughlin was successful in obtaining concessions through cross examination is simply not supported by the record at trial. (R. 495-99). The record of Dr. Hamilton’s testimony establishes that her answers were begrudgingly vague and equivocal. The record at trial reflects that they were nothing remotely close to sufficient to alleviate the need for counsel to call his own expert witness at trial. (Answer at 38). In short, counsel’s “few quick questions” were

just that.

The testimony provided by the experts in postconviction was not speculative as the State argues. (Answer at 36). In fact, Dr. Hamilton conceded to many of the same facts as Dr. Haddix. Dr. Haddix testified that the absence of 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). Dr. Hamilton agreed that she had not found sand in the victim's lungs. (PC-R. 2803). She conceded that the grave site contained water and that she could not rule out the possibility that the sand may have entered the air passageway via passive migration from the receding water tables. (PC-R. 2801). This testimony, contrary to the State's argument, is vastly different than that which was elicited by McLoughlin on cross examination at trial and far from "speculative."

The same is true with respect to the number of injuries to the victim's body. Dr. Haddix's testimony as to the multiple injuries was in no way speculation. Dr. Haddix was able to point to evidence of multiple injuries to the victim's body and testified in postconviction that there were definitely two shotgun wounds suffered by the victim.⁴ (PC-R. 2558). The circular area of tissue loss on the left upper chest

⁴ Dr. Haddix noted that there was evidence indicating a possible third shotgun wound

corresponded to defects found in the victim's clothing. (Def. Ex. #11, PC-R. 2562-63). She noted that there was also tissue loss on the lower right bicep region which had occurred antemortem. (PC-R. 2558-59, 2589-90). The reason she was unable to definitively state whether the tissue loss in the lower bicep area of the right arm was the result of a shotgun wound was 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).

Likewise, Dr. Hamilton conceded in postconviction that the defect to the left shoulder area of the victim's body corresponded to defects in the victim's outer shirt and undershirt. She conceded that she could not discount that something antemortem had happened to the body in that area, confirming she had indicated that fact in her deposition prior to trial. (PC-R. 2809). Tellingly, when questioned on the injury to the right bicep region of the victim's body, Dr. Hamilton conceded in postconviction that an x-ray would have assisted her in determining the cause of the tissue disruption in that area. (PC-R. 2807). Any argument that Dr. Haddix's testimony on this subject is speculative only then further establishes the deficiencies in Dr. Hamilton's autopsy.

but could not determine the third injury definitively.

Swanepoel's testimony was also not speculative. He based his testimony on review of the autopsy, photographs of both the victim and the clothing worn by the victim, and physical inspection and chemical testing of the clothing. His findings were supported by his review of the clothing indicating defects consistent with multiple gunshot defects and multiple pellet holes. Swanepoel's testimony was also in part based upon the results of chemical testing performed on the two articles of clothing. The results of the Sodium Rhodizonate test had detected traces of lead on both shirts in the area of the defects on the right shoulder. (PC-R. 2641). Pink reactions noted from Agent Soto's bench notes also indicated a chemical reaction on the front of the shirt consistent with heavy metal residue from firearms discharge. (PC-R. 2644). His determination of the presence of multiple gunshot wounds on both items of clothing were supported by the results of the testing. (PC-R. 2646). Contrary to the State's argument, his testimony and conclusions were far from speculative.

In deeming Haddix's and Swanepoel's testimony as speculative, the State also ignores Yolanda Soto's testimony both at trial and in postconviction corroborating evidence of additional gunshot injuries. When asked whether she was able to discern any cause to the damage to the shirt and undershirt on direct at trial Soto testified:

A: There were multiple holes and **two large holes on both the shirt and the t-shirt which could have been made by the discharge of a firearm.**

Q: Did the shirt and the undershirt appear to have similar holes or damages spots, if the shirt and the

undershirt were worn in the regular manner of the tags being in the back of the neck and, in the case of the button down shirt, its buttoning down the front?

A: Yes

(R. 1314) (emphasis added). Soto's testimony on direct clearly indicates that she believed there to be two distinct large holes. However, on cross examination McLoughlin failed to inquire into the issue of multiple injuries, instead focusing solely on the issue of identification of the murder weapon from ballistics information. (R. 1323-28). McLoughlin asked nothing regarding corresponding defects to the victim's clothing or the issue of identification of additional gunshot wounds.⁵

This argument is further corroborated by Soto's findings following testing in postconviction. Soto stated in her deposition that given the results of the testing and her review of the clothing there was nothing that would preclude her from forming an opinion that there were multiple shotgun areas; answering that if asked "[she] would have to say yes." (Def. Ex. #36, p. 51-52). She indicated that in her experience it would not be likely to see corresponding defects to multiple areas of an outer shirt and undershirt from simple tears. (Def. Ex. # 36, p. 52). She also confirmed that she identified similar corresponding defects on both shirts on the right back shoulder and

⁵ In as much as McLoughlin failed to make any form of inquiry into these areas on initial cross examination Mr. Twilegar maintains it supports his claim that McLoughlin was deficient for purposes of the Sixth Amendment.

the left front chest areas. (Def. Ex. #36, p. 53). Her conclusions regarding the number of shotgun injuries were in no way predicated upon determination of the range of fire nor were they precluded by not having the actual murder weapon. Her testimony at trial and the answers given in her deposition support Mr. Twilegar's experts' opinions offered in postconviction and were in no way speculative.

In further characterizing Mr. Twilegar's experts' opinions as speculative, the State emphasizes the lower court's skewed analysis of Swanepoel's and Haddix's assessment of the distribution of pellets in the victim's head. 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). Her opinion regarding the range of fire was based on the recovery of a shotcup 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). From his review of these materials Swanepoel agreed with Dr. Haddix's assessment that the pellets located in the back of the victim's head were not 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).

In rejecting this opinion, the circuit court relied on the trial testimony of Yolando Soto indicating that without the shotgun it was impossible to determine the

distance between the shooter and the victim. The State argues that Haddix's and Swanepoel's testimony regarding the range of fire is speculative without testing on the actual murder weapon. Yet, in the same breath the State makes argument that evidence of the shotgun cup lodged in the victim's back conclusively supports its theory that the victim was shot at close range execution style. What is clear from the State's argument is it is undisputed that the shot to the victim's back right shoulder was at close range. Therefore, the circuit court's conclusion as to the impossibility of the spread of pellets from one shot is erroneous.

During trial the State inquired for purposes of determining how the wadding from a shotgun shell may have arrived in the victim:

Q: Miss Soto, with the wadding being found in the body of the victim, does that indicate that the victim was shot at close range?

A: **I would say at close range. It appears to be close range.**

(T. 1326)(emphasis added). Dr. Hamilton confirmed that due to a number of factors, including the wadding found in the wound that the shot occurred at close range and even estimated, one to three or four feet. (T. 477-79). It certainly was the State's theory that the shot occurred at close range. It was only in response to questions regarding a more specific range that Soto indicated she would need the firearm to do testing to determine "range." (T. 1327-28).

If the shotcup lodged in the victim's upper right back was conclusive to the

finding that the blast had occurred at close range, it is not only corroborative of Hamilton's and Swanepoel's conclusions, but also serves to further discredit Dr. Hamilton's opinions as to the origin of the additional injuries on the left side of the body. Such a finding as to proximity would also be consistent with Haddix's testimony regarding the "gap" present between the dispersion of pellets in the victim's body indicating the presence of multiple gunshot wounds. (Def. Ex. #17 and #19; P-CR. 2558, 2562). Should the State's argument regarding the issue of range of fire be taken to its logical extreme, it only further discredits their theory of the crime and lends further support to the experts presented by Mr. Twilegar in postconviction.

Trial counsel's testimony in postconviction establishes the prejudice which Mr. Twilegar suffered. McLoughlin's testimony regarding his failure to more thoroughly challenge Dr. Hamilton and present his own expert are implausible. He testified in postconviction that the case against Mr. Twilegar was "purely circumstantial." (PC-R. 2663). His purported theory was to "challenge everything." (PC-R. 2665-66). His plan was to establish alternate theories of the crime, including the theory that it had been drug related. (Id.). Any deficiencies in the autopsy performed by Dr. Hamilton was something which he felt fell squarely within the theory that law enforcement had predetermined Mr. Twilegar had committed the crime to the exclusion of all other leads and that the crime had not occurred at the grave site. (PC-R. 2669).

Contrary to the State's argument, and McLoughlin's acquiescence in postconviction, none of the evidence offered by Mr. Twilegar in postconviction is inconsistent with his purported theory of defense at trial. Evidence of inconsistencies and deficiencies in Dr. Hamilton's autopsy, challenges to her theory regarding the inhalation of sand and whether the victim was buried alive, and evidence supporting the presence of additional shotgun injuries all would have provided the necessary challenges to the sufficiency of the State's evidence. Challenging and impeaching the credibility of the forensic evidence would have impacted not just Dr. Hamilton's findings, but would have left Spencer's Hartman's testimony to stand alone.

In an attempt to emphasize the testimony of Hartman, the State takes issue with the argument that Dr. Hamilton was a lynchpin of their case. (Answer at 45). It overlooks that the single evidentiary fact relied on by this Court and the State in rejecting Mr. Twilegar's hypothesis of innocence is two-fold: Thomas was killed and buried at the same spot outside Twilegar's tent where Twilegar had been allegedly seen digging a hole earlier. Dr. Hamilton's testimony established critical pieces of their circumstantial theory of the crime that the victim was killed and buried at the same location. The State's theory as to cause of death, manner of death, the timeline of events, and its theory as to premeditation and aggravation were all established primarily through Dr. Hamilton's work and testimony.

The State argued these points in closing argument to the jury:

The defendant in this case, Mark Twilegar, committed first degree murder when he shot David Thomas in the back with a shotgun, stole his money, and buried him alive.

How do we know that Dave Thomas was buried alive? Dr. Hamilton, the Medical Examiner, testified that David Thomas died from a shotgun wound. She also testified that he would have died within minutes of being shot. She testified that when she did the autopsy, she found in his laryngeal cavity white clotted sand. The only way for that clotted sand to get into the laryngeal cavity, she testified, was through active ventilation, which means breathing it into the lungs. He was alive when he was in the dirt.

While he was in that ground, he was alive, he was breathing in the dirt, and he was struggling.

We also know that the shotgun wound, that the victim died from, was in the upper back. You saw photographs of it. There was testimony to it. There was plastic wadding that was located within the muscle of the upper back.

The pattern of the pellets within the body was from right to left and downward, which is consistent with the shooter standing over the victim when the trigger was pulled.”

(T. 2114-28).

The State consistently relied upon her testimony and autopsy report as the definitive forensic evidence on each of those issues at trial, yet now in postconviction attempts to diminish their significance in lieu of other evidence which it argues is

equally or more significant.

However, the State's reliance upon Spencer Hartman's testimony for purposes of establishing that Mr. Twilegar was responsible for burying the victim at the gravesite is simply not credible. 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 the digging. Further, his testimony was that he "thought he heard digging noises" but that he did not directly see Mr. Twilegar doing anything because his view was obstructed. He admitted that upon hearing what he thought were digging noises he turned around and walked to the front of the house out of view of the backyard. It was not until Hartman said Mr. Twilegar came out to the front of the house that he actually spoke with him. Hartman never asked Mr. Twilegar whether he was digging a hole nor did he ever actually see him doing so. This should also be considered with the fact that Mr. Twilegar was widely known to live in a tent outdoors in that backyard and was often required to dig holes in the absence of access to a bathroom. Hartman's testimony is questionable at best and the State's reliance upon it to establish the fact that the victim was murdered and buried at the grave site is speculative. Hartman's testimony standing alone would be insufficient to rebut every

reasonable hypothesis of innocence.

The State improperly attempts to discount the evidence presented in postconviction under the argument it is more harmful than helpful. (Answer at 40). However, the State, and the circuit court below, fail to recognize that evidence which might be considered a double-edged sword is an issue left squarely for the jury's consideration to determine. *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). Evidence of multiple injuries and deficiencies in the autopsy casts doubt on the State's theory. That evidence was critical for the jury to consider when determining whether the State had carried its burden. The State, as well as trial counsel, fail to recognize the ability of that evidence to cast reasonable doubt on the State's circumstantial case. Trial counsel's failure to present this evidence cannot be squared with his own purported trial strategy or his obligation under the Sixth Amendment to insure that the State carry its burden to disprove every hypothesis of innocence. The evidence in postconviction establishes that any reason provided by McLoughlin for failing to present this evidence is not objectively reasonable given the circumstances and the State's theory of the crime. The State's reliance upon this argument to discount to irrelevance the evidence in postconviction is unavailing.

Any argument that it was reasonable to forgo challenging the State's forensic evidence regarding deficiencies in the autopsy and issues relating to the number and

types of injuries so as to limit potentially negative information improperly overlooks the constitutional requirements for effective representation in a circumstantial case. McLoughlin's testimony in postconviction that he refrained from presenting various challenges to the State's forensic evidence on these grounds demonstrates not only his deficient performance but also his failure to comprehend the State's burden and the impact which such evidence can have on creating reasonable doubt. McLoughlin's decision to limit presentation of evidence based upon pure speculation as to how he thought the jury might receive it is not objectively reasonable nor does it permit the jury to function in its role as the trier of fact. The State's argument that McLoughlin's failure to present such evidence because of any negative impact it may had on the jury cannot be resolved with the mandate of *Porter*.

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). The State's case was wholly circumstantial in nature. Evidence that trial counsel's expert Dr. Spitz, or another forensic pathologist or ballistics expert, could have provided was critical for purposes of presenting a viable defense as well as impugning the State's theory of the crime. The record at trial and in postconviction establishes that trial counsel was deficient for failing to effectively cultivate and utilize this evidence at trial to challenge the State's forensic evidence. Trial counsel's failure to effectively challenge the forensic

evidence severely prejudiced Mr. Twilegar

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.

The State fails to specifically address Mr. Twilegar's arguments that the public records proceedings below were neither full nor fair. Despite what this Court set out to do with the promulgation of Fla. R. Crim. P. 3.852 and the initial assertions by this Court that the rule would not unconstitutionally invade a capital postconviction defendant's rights to production of public records, it has served to do just that in this case. So, while the State asserts that this Court has previously upheld the constitutionality of Rule 3.852, Mr. Twilegar contends that it is the manner in which the rule has been applied to the public records requests in his case that is unconstitutional.

The State has failed to specify even one demand or argument below that didn't meet the relevancy requirements of R. 3.852, instead repeating in conclusory fashion the language of the rule. Mr. Twilegar detailed several of the instances in which he set forth relevance, set forth limiting time frames and set forth with specificity only a limited number of individuals for which he was seeking records. The State does not address this.

Further, the State merely recites case law without any application of those principles to Mr. Twilegar's case or a demonstration of how his demands were overly broad, unduly burdensome and not relevant. Relying on *Walton v. State*, 3 So. 3d 1000 (Fla. 2009) for the notion that the "relevancy requirement is not satisfied simply because collateral counsel asserts that it is." (Answer Brief at 66) Mr. Twilegar did not simply assert that the records requested were relevant without further explanation as the State's reference might indicate. Rather, Mr. Twilegar argued below and in his initial brief numerous details of relevancy. (Initial Brief at 82-84) Each of the claims detailed were believed to have existed as was born out in the claims in his initial motion. Contrary to the State's assertions and the lower court's findings, Mr. Twilegar was not fishing, but seeking records to support his articulated issues.

The commentary to the ABA Guidelines for the Appointment and Performance in Capital Cases explains just how relevant the impeachment of witnesses is and the necessity of an adequate investigation to accomplish that. Trial counsel "must be able to challenge zealously the prosecution's evidence and experts through effective cross-examination," therefore trial counsel's obligation necessarily includes "scrutinizing the backgrounds of potential prosecution witnesses." American Bar Association Guidelines For The Appointment and Performance Of Defense Counsel In Death Penalty Cases 1.1, p. 924, 926 (2003).

“Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.” *See* Commentary Guideline 10.7. Further, the Guidelines emphasize the importance of investigating all evidence, whether “testimonial, forensic or otherwise” *see id.* at 1.1, p. 926, which also includes obtaining any underlying data. *See* Commentary on Guideline 10.7.

The theme within the guidelines is clearly not one of limitation, but demands using all available resources to obtain information from all sources. Pretrial, one of those sources is the process of discovery. The same obligations apply to postconviction counsel and require reinvestigation of individual witness backgrounds, among other things. By denying wholesale access to public records, where the public records process is the equivalent of discovery pretrial, ties postconviction counsel’s hands.

Without a meaningful opportunity for discovery, virtually no defendant would be granted collateral relief. 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). Access to public records has been unconstitutionally restricted in this case. This case should be remanded for full and fair consideration of Mr. Twilegar’s public records demands and disclosure of the requested public records as it comports with Fla. R. Crim. P. 3.852.

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

Both the circuit court below and the State fail to recognize that under Fla. R. Crim. P. 3.851(f), the factual allegations of the constitutional claims pled by Mr. Twilegar in his Rule 3.851 Motion were required to be accepted as true. Evidentiary development was warranted in Mr. Twilegar's case where there existed facts that were in dispute regarding jurors' non-disclosure of information relevant to their jury service. The circuit court was required to accept as true the factual allegation that had counsel been aware of the jurors non-disclosed criminal history, he would have utilized peremptory challenges to strike the jurors from service at trial. The circuit court's summary denial, and the State's argument in response supporting that determination, are without record support and contrary to this Court's previously established precedent. *See Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996); *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989).

Mr. Twilegar was entitled to an evidentiary hearing on his motion for postconviction relief unless: (1) the motion, files, and records in the case

conclusively showed that he was not entitled to any relief; or (2) the motion or particular claims were legally insufficient. *See Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000). Mr. Twilegar's claim of juror misconduct pled facts which were not refuted by the motions, records, and files in his case and stated legally cognizable grounds for postconviction relief.

Both the State and the circuit court below have attempted to improperly interject their subjective judgment on the merits of Mr. Twilegar's claim rather than accepting the allegations as true as required. Mr. Twilegar was entitled to an evidentiary hearing at which he would have been given the opportunity to present testimony in support of his Rule 3.851 Motion. Both the circuit court and the State erroneously apply the standard for granting evidentiary development and attempt to discount Mr. Twilegar's factual allegations based upon improper judgment determinations. When the facts pertaining to jurors Delgado and Campitelli's prior criminal history are taken as true, along with the factual allegation that had counsel been aware of the information he would have challenged the jurors for cause or exercised peremptory strikes due to the nature of the jurors' criminal charges and their relevance to the theory of defense, it is clear that the record does not positively refute Mr. Twilegar's claim. Evidentiary development is warranted.

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 August 4th, 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.

/s/ Suzanne Keffer
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (1), Florida Rules of Appellate Procedure.

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