IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 18-9

DOUGLAS BLAINE MATTHEWS
Appellant,

v.

STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Matthews' motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal from Mr. Matthews' trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The post-conviction record on appeal shall be referred to as "PC" followed by the page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Douglas Matthews has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Douglas Matthews, through counsel, respectfully requests this Court grant oral argument.

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STATEMENT OF THE CASE

Procedural History

On February 28, 2008, Douglas Matthews was charged by indictment with two counts of first degree premeditated and felony murder, as well as armed burglary. Mr. Matthews' trial began with jury selection on May 17, 2010. Testimony was taken on May 19 through May 24, 2010. Mr. Matthews was convicted of first degree premeditated murder and felony murder for Kirk Zoeller, of the lesser included offense of manslaughter for Donna Trujillo, and of armed burglary. His penalty phase lasted only two days. The jury recommended death by a vote of 10 to 2 on May 28, 2010. The *Spencer*[1] Hearing took place on August 5, 2010. On August 12, 2010, the trial court sentenced Mr. Matthews to death on the one count of premeditated murder and felony murder for Kirk Zoeller, to 15 years for the lesser included offense of manslaughter for Donna Trujillo, and to life imprisonment for the armed burglary. All three sentences were to run consecutive to one another.

On direct appeal, the Florida Supreme Court affirmed Mr. Matthews' convictions and sentence of death. *Matthews v. State*, 124 So. 3d 811 (Fla. 2013). The United States Supreme Court denied certiorari on December 2, 2013. *Matthews v. Florida*, 134 S. Ct. 683 (2013).

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

Mr. Matthews timely filed a Motion to Vacate Judgments of Conviction and Sentence. The evidentiary hearing on that motion took place during the week of December 7, 2015, and had to be bifurcated in order for the trial court to hear evidence regarding PET[2] scans. The conclusion of the new evidentiary hearing was scheduled for March 22, through March 24, 2016. Prior to resumption of the evidentiary hearing, the Supreme Court of United States issued *Hurst v. Florida*, 136 S.Ct. 616 (2016). Mr. Matthews moved to amend his 3.851 motion to add a *Hurst* claim on February 8, 2016. This motion was granted and on March 11, 2016, Mr. Matthews filed his second amended motion. The lower court conducted the second part of the evidentiary hearing on March 22–23, 2016. The lower court granted in part and denied in part Mr. Matthews' Second Amended 3.851 Motion on December 5, 2017. This timely appeal follows. Mr. Matthews is specifically appealing the denial of Claims I and III through VI in his Second Amended Motion, but not appealing the granting of relief as to Claim VII, which was Mr. Matthews' *Hurst* claim.[3]

STATEMENT OF FACTS

[2] Positron emission topography.

[3] The State has not filed a cross appeal and are not contesting the grant of *Hurst* relief. Mr. Matthews does not concede that he received effective assistance of counsel at his penalty phase, but since the State is not challenging the grant of a new penalty phase, he agrees those issues are moot and thus are not raised in this Court.

Douglas Matthews has consistently maintained that he never killed Donna Trujillo and that that he acted in self-defense against Kirk Zoeller. Because trial counsel failed to independently investigate Mr. Matthews' guilt phase and mitigation issues, potential pretrial motions, and other issues, his jury was deprived of a full and accurate understanding of Mr. Matthews' psychological issues, brain damage, and a childhood marred by abusive male relationships, substance abuse and wrongfully being the family scapegoat for all of the family issues. Further, the jury did not hear vital evidence that undermines the State's theory of prosecution and which would have supported Mr. Mr. Matthews' defense of self-defense.

Facts of the Crime:

On the evening of February 20, 2008, the Daytona Beach Police Department responded to the apartment of Donna Trujillo and discovered Kirk Zoeller sitting outside in front of the open apartment door. *Matthews v. State*, 124 So. 3d 811, 812 (2013). He was unresponsive and covered in blood. *Id*. Inside the apartment, Trujillo was found on the bed in the bedroom, deceased. *Id*. Acting on a tip, police arrived at the home of Theresa Teague and discovered Mr. Matthews in the bedroom. *Id.* After executing a search warrant for Teague's home, police found a Dr. Seuss bag that contained a bloody shirt in a clear plastic bag and Zoeller's wallet. *Id*. Mr. Matthews gave a statement to the police. Mr. Matthews told law enforcement that Zoeller had killed Trujillo and attacked Mr. Matthews over drugs. *Id*. Mr. Matthews

stated that he had killed Zoeller in self-defense. *Id*. Mr. Matthews was arrested and later indicated on two counts of first-degree premeditated murder and one count of burglary of a dwelling. *Id*. at 813.

Jury Selection:

Trial counsel, during jury selection, never once asked the venire any questions regarding their feelings on drug use or about any racial biases. Once a jury was empaneled, trial counsel then proceeded, during their opening statement during the guilt phase, to talk about the drug culture that Mr. Matthews was involved in and how the victims, witnesses and Mr. Matthews himself were involved in either the drug trade, drug use or both. TR15:1137-38. "You're going to hear about a pretty rough lifestyle, one that none of you, of course, are used to or would want to be in, but it's life on the streets out there." TR15:1138. Trial counsel also characterized the victim's apartment as a "trap house." TR 15:1137. However, when the State, based on the defense's opening remarks, further explored Mr. Matthews' involvement with drugs, the defense objected and claimed the issue was prejudicial and requested a mistrial. TR 16:1252. The request for a mistrial was denied. *Id*.

The Trial:

During the guilt phase, the State argued that Mr. Matthews committed the murders in order to rob Trujillo and Zoeller, and claimed that Mr. Matthews stole Zoeller's wallet. TR 20:2020-21. The State's main evidence came from the

testimony of Justin Wagner. Justin Wagner sold drugs from Trujillo's apartment and was present when the murders occurred. *Matthews v. State*, 124 So. 3d 811, 813 (2013). Justin Wagner testified that he was at the residence, sitting on the futon, getting high and just "chilling," and everyone else – Zoeller, Trujillo and Mr. Matthews -- were in Trujillo's bedroom. TR 16:1269. Wagner testified that a few minutes later, Zoeller came running out of the bedroom, with Mr. Matthews right behind him, stabbing Zoeller. Wagner testified that he stood up and ran out of the apartment. TR 16:1272. Wagner also claimed that he left all of his belongings and a large quantity of drugs at the apartment. TR 16:1274. Wagner testified that he saw Mr. Matthews remove his shirt, roll it up, and place it into a plastic bag after the crime. TR 16:1286. This was purportedly the same shirt and plastic bag that police found in a Dr. Seuss bag that also contained Zoeller's wallet and correspondence addressed to Justin Wagner from Wagner from Wagner's girlfriend. Wagner denied taking or touching Zoeller's wallet. TR 16:1288.

To counter this evidence, Mr. Matthews testified on his own behalf and the defense entered into evidence his statement to police. Mr. Matthews testified that he had acted in self-defense. *Matthews*, 124 So. 3d at 814. He testified that he had been doing drugs on the day of the crime and that he went to the apartment with Justin Wagner to trade cocaine for morphine pills. *Id*. Mr. Matthews testified that Trujillo and Zoeller started arguing and they went into the bedroom together, while

he stayed in the living room with Wagner. *Id*. Shortly thereafter, Zoeller came out of the bedroom and started a fight with Mr. Matthews over drugs. *Id*. Zoeller had a knife and attacked Mr. Matthews. *Id*. At one point during the confrontation, Mr. Mr. Matthews had Zoeller pinned to the kitchen wall and saw Trujillo's body. *Id*. At that point, Mr. Matthews became afraid for his life and wrestled the knife away from Zoeller. *Id*. Zoeller kicked Mr. Matthews and Mr. Matthews stated that he blacked out, snapped, and started swinging at Zoeller with the knife. *Id*. After the fight, and in a daze, he dropped the knife. *Id*. Mr. Matthews denied placing his shirt into the Dr. Seuss bag or taking and placing Zoeller's wallet in the Dr. Suess bag. TR 19:1761. Mr. Matthews told the police that he had given his shirt to Wagner. TR 19:1876.

The jury found Mr. Matthews guilty of first degree premediated and felony murder for Zoeller, of the lesser included offense of manslaughter for Trujillo, and of armed burglary. *Matthews*, 124 So. 3d at 814.

At the penalty phase, the State presented evidence of Mr. Matthews' two prior robbery convictions. *Id*. The defense presented the testimony of several of Mr. Matthews' family members and two expert witnesses, a psychiatrist and a neuropsychologist. *Id*. The jury recommended a sentence of death by a vote of 10-2. *Id*. at 815. The trial court followed the jury's recommendation and sentenced Mr. Matthews to death. *Id*.

Facts Developed in Post-Conviction:

During the post-conviction proceedings, Mr. Matthews moved to have the following pieces of physical evidence examined for fingerprints: the Dr. Seuss bag (Trial Exhibit 22); the plastic bag that contained the Sean John t-shirt (Trial Exhibit 23); and Zoeller's wallet and its contents, which included Zoeller's Driver's license, a card from the Department of Veterans Affairs, a card from Southern Commerce Bank, a Half-Fare Photo Identification card, Zoeller's social security card, two Wellcare cards, a Benefit Security card, a Medicare card and a Unicare card (Trial Exhibit 25).

At trial, the State argued that Mr. Matthews committed the crime in order to steal Zoeller's wallet. TR 20:2020-21. As noted above, the State's main evidence came from the testimony of Justin Wagner. Wagner said he saw Mr. Matthews roll his shirt up into a plastic bag after the crime. TR 16:1286. This was purportedly the same shirt and plastic bag that the police found in a Dr. Seuss bag with Zoeller's wallet and correspondence addressed to Wagner. At trial, Wagner denied taking Zoeller's wallet. TR 16:1288.

The circuit court, after hearing argument, granted Mr. Matthews' Motion to Allow Fingerprint Testing of Evidence on December 2, 2014. Mr. Matthews' expert, Kenneth Zercie, performed the testing and testified during the evidentiary hearing about his findings. Mr. Zercie owns a private consulting business called Forensic

Consultants of New England, and is a practitioner in residence at the University of New Haven, Southern Connecticut State University and Middlesex Community College. PC 450. Mr. Zercie provides assistance, for either the defense or the prosecution, with the review of evidence, specifically in the areas of document examination, latent fingerprint analysis, crime scene reconstruction, photography, and photo imaging. PC 451. Prior to his current work, Mr. Zercie worked for over forty years in the field of criminal justice, law enforcement, and in forensic laboratories. *Id*. He is the retired director of the Connecticut State Police Forensic Science Laboratory, Division of Scientific Services. PC 452. He has testified, and been previously accepted as an expert, in the area of latent fingerprint examination in multiple states, including Florida. PC 453. He has testified over 400 times in court. *Id*.

Mr. Zercie had an opportunity to view some of the physical evidence in this case to determine if it was viable for testing. PC 457. The items he reviewed included: the plastic bag; Zoeller's wallet; the contents of the wallet; and a Dr. Seuss back pack and its contents. *Id*. Mr. Zercie opined that the items could be tested and participated in the testing with the Volusia County Sheriff's Department. PC 457-58. Two latent prints were developed from an object inside the wallet. PC 461. These prints were found on a yellow Post-It note inside Zoeller's wallet and were deemed to be of identifiable quality. *Id*. Both Mr. Zercie and the Sheriff's office

concluded these prints belonged to Justin Wagner. PC 461-62. Other prints were developed on the items, but were not of comparable quality. *Id.* The identified latent prints were from Wagner's middle and ring fingers from his left hand and were deemed contact prints. PC 461-63. A contact print is made by coming into contact with an object, in this case a piece of paper, with sufficient pressure to exude the residue from the pores onto the surface of the object. PC 463. Mr. Zercie testified that due to the lack of smearing of ridge detail, the person, more than likely, held the object. *Id.* "[I]t looked like a direct contact with no movement." PC 464. Mr. Zercie further testified that none of the latent prints found belonged to Douglas Matthews. PC 465. Latent prints could not be developed from some items, like the wallet and Dr. Seuss bag, because the materials those items were made from are not conducive for latent prints. PC 467-68.

Wagner, the sole witness to the crime in this case, testified at the evidentiary hearing. Wagner testified that he used to "hang out" with Mr. Matthews. PC 500. Wagner recalled that he testified at trial, but could not remember if he was a state witness.[4] *Id.* He remembered giving a deposition, but could not otherwise recall talking to the defense attorneys. PC 501-02. At the time of trial, Wagner was involved in two incidents with his now ex-wife, but was not arrested for those

[4] Wagner was called as a state witness. TR 16:1246.

incidents until after he testified at trial.[5] PC 502-03. One incident was a domestic violence episode and the other was for grand theft of a dwelling. *Id*. He pled guilty to those charges after Mr. Matthews' trial. PC 504. During the period of time that he was a witness in Mr. Matthews' case, Wagner continued to use drugs and admitted in post-conviction his issues with his ex-wife stemmed from drug use. PC 504-05. Wagner admitted that during Mr. Matthews' trial he was "a wreck," contrary to his testimony that he was doing well at trial.[6] PC 505 & TR 16:1295. Wagner also admitted that he was not close to the victim, Zoeller, which also contradicted his trial testimony.[7] PC 534-35 & TR 16:1303.

Wagner testified that after the crime, but before trial, he gave two recorded statements to police. PC 506. During his first statement, Wagner recalled that a female detective gave him a voice stress analysis test, but he did not remember ever learning that he failed that test.[8] PC 507. Wagner was subsequently questioned a

[5] At trial, Wagner testified that he was not charged for the domestic violence incident and that his wife was taking a class to get the charges dropped. TR 16:1317-18.
[6] At trial, Wagner testified that he was married, in college and owned his own painting business and testified "I'm doing good." TR 16:1295.
[7] At trial, Wagner testified that Zoeller, also known as "Rooster," was his friend. TR 16:1303.
[8] The complete statement was entered into evidence during the evidentiary hearing and is labelled as Defense Exhibit 65, Lodged in Lower Court, DVD-R MATTHEWS EXHIBITS 2 OF 3 EXHIBIT 29.

second time by police.[9] During his second statement, Wagner was confronted with the results of the voice stress analysis test which indicated deception. PC 1197. The audio recording of Wagner's second statement was played during the evidentiary hearing. PC 510-11. Wagner identified his voice on the tape. PC 511.

Wagner testified that during his second statement, the police pressured him for details regarding the murders. The police asked Wagner if he and Mr. Matthews had planned to "pull a lick" and if it went wrong. PC 510. Wagner, in response to the detective, stated "[i]f you want me to say that to save my ass, I will."[10] PC 511.

Wagner further admitted during the hearing that when he said that, he was being accused of committing or participating in the crime and was confronted by the police for his lack of candor. *Id*. He felt scared and intimidated.[11] PC 521. "Pretty much whatever they wanted to know, I would tell them." PC 527. Wagner also testified that he hoped, "when I told them everything, they were going to let me off and not give me a drug charge." PC 528. He wanted to get out and get high "because he was getting sick." *Id*.

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[9] The complete statement was entered into evidence during the evidentiary hearing as Defense Exhibit 66, Lodged in Lower Court, CD-R80 WAGNER JAIL STATEMENT MATTHEWS EXHIBITS 3 OF 3 EXHIBITS 30-32.

[10] Police confronted Wagner, due to his dishonesty, and asked him if he and Mr. Matthews planned to "pull a lick" and if it went wrong. PC 510.

[11] This is consistent with Wagner's trial testimony where he admitted to being scared and that he was being dishonest with the police. TR 16:1299. Wagner testified he was afraid of getting in trouble. *Id*.

Wagner testified that he recalled telling the jury that he never took the victim's wallet or touched it. PC 511-12. While in prison for another unrelated case, Wagner testified that he learned his fingerprints were found on a Post-It note inside Zoeller's wallet. PC 512. A detective came out to speak to him about the fingerprints. PC 530. Wagner testified at the evidentiary hearing that he did not touch the wallet or its contents. PC 512. Wagner testified that he does not know how his prints "wound up" on the Post-It note, and that any explanation he came up with was simply a guess. PC 533, 537. However, any guess, explanation, or rationalization made in post-conviction stands as a contradiction from his original trial testimony. *See* TR 16:1288. Wagner continued to deny that he had handled the wallet or its contents. PC 512.

Finally, Officer Kera Cantrell testified regarding the voice stress analysis test given to Wagner. Officer Cantrell works for the Daytona Beach Police Department on patrol. PC 1192. Prior to that she worked as a detective in the same police department and was known as Detective Kera Shore at the time she became involved in Mr. Matthews' case. *Id*. In February 2008, Officer Cantrell was certified to conduct computer voice stress analysis (CVSA). PC 1193. Voice stress analysis detects stress in a person's vocal chords. *Id*. Officer Cantrell testified that she was not involved in any other way in the investigation of Mr. Matthews. PC 1194.

Officer Cantrell testified detectives use CVSA when they think, or there is an allegation, that someone is involved in a crime, even though they deny it. *Id*. In order to conduct the analysis, certain questions are asked to establish a baseline. PC 1195. In two of the questions, the person being analyzed is specifically instructed to lie in order to establish the difference between a truthful answer and a lie. *Id*. Even when a person is stressed, according to Officer Cantrell, there will be a difference between the lie and the truth. PC 1203-04. A lie will indicate a higher level of stress. PC 1204. This process was used in her analysis with Wagner. PC 1196. The detectives on the case also gave Officer Cantrell specific questions to ask that were case related. *Id*. These questions are asked to see if someone is involved with a case or not. *Id*. Officer Cantrell testified Wagner failed the voice stress analysis test. PC 1197. She was not subpoenaed for deposition. *Id*. She never spoke with trial counsel and did not testify at trial. PC 1198.

With respect to the defense teams' investigation of the guilt phase claims, the evidence adduced at the evidentiary hearing was as follows: Mr. Craig, the investigator for Mr. Matthews' case, testified that to his recollection, he did not investigate Justin Wagner. PC 395. He did not obtain a criminal history or interview Wagner. *Id*. Mr. Craig testified that the investigation of guilt phase claims was exceedingly limited. *Id*. When asked about viewing the evidence, Mr. Craig testified that he never viewed the evidence and recalled that a meeting had been

scheduled, but did not take place, however, it was normal practice in a capital murder investigation to review the evidence. PC 396.

Mr. Dowdy, one of Mr. Matthews' trial attorneys, testified that he did not investigate Wagner, but may have looked at his prior record. PC 331. Mr. Dowdy testified that Mr. Nielsen conducted most of the guilt phase investigation and used Stephen Craig as his investigator.[12] PC 330.

Mr. Nielsen, Mr. Matthews' lead trial attorney, testified that the investigation of witness Justin Wagner consisted of a deposition and criminal record check. PC 211. According to Mr. Nielsen, Wagner was Mr. Dowdy's witness and thus it was his responsibility to prepare for that witness. PC 213. Mr. Nielsen did review Wagner's statements to the police. PC 212-3 and TR 1:109. Mr. Nielsen testified that cross-examining Wagner on his statement, "I'll say anything to you to save my ass," would have been "a pretty good thing to ask someone. Yes." PC 216. Yet, he acknowledged that he failed to cross examine Wagner on that. There were no notes in Mr. Nielsen's file regarding any attempts to speak with Detective Cantrell regarding her voice stress analysis test of Wagner. PC 265-66. When asked if finding Justin Wagner's fingerprints on the contents of the wallet would have helped

[12] Prior to Mr. Nielsen and Mr. Dowdy working on the case, Mr. Matthews was represented by Melissa Souto. Ms. Souto, now a circuit court judge, in lieu of testifying at the evidentiary hearing, submitted an affidavit. *See* PC 2572-74. Ms. Souto represented Mr. Matthews from April 24, 2008 to July 9, 2008 and did not meet with Mr. Matthews or do any substantive work on his case. *Id*.

his theory of defense at trial, Mr. Nielsen agreed that the fingerprint, "would support [Mr. Matthews'] proposition. Yes." PC 268.

Mr. Nielsen's theory of defense in the case was self-defense. PC 203. According to Nielsen, with respect to investigating this theory of defense, he stated that there were "no investigative leads to follow." *Id*. Mr. Nielsen viewed the physical evidence in the case to get phone numbers from the pockets of the clothes because Mr. Matthews had asked for them. PC 207. He stated that he viewed the evidence between January 25, 2010 and May 10, 2010, when trial began. PC 208-09. Mr. Nielsen did not have any notes in his trial notebook regarding looking into a crime scene expert. PC 211. With respect to any forensic testing of the evidence, Mr. Nielsen stated that he did not "know if it was something to be considered." PC 266. However, he stated that he felt "the blood evidence supported his position."[13] PC 267. He also believed that the physical evidence was consistent with the theory of self-defense (PC 310) but, forensic testimony at the trial undermined this.[14] TR 19:1816-44.

[13] Much of the blood evidence was elicited from Detective Kay, who testified that he "is not a blood expert." TR 19:1827.

[14] Mr. Nielsen attempted to elicit from Detective Kay that Mr. Matthews had marks on his body, however, Detective Kay testified that the marks were not slices or true stab wounds from a fight, and they were not red or oozing. TR 19:1832.

Adam Tebrugge, an ACLU[15] staff attorney and adjunct professor of law at Thomas Cooley Law School, testified during the post-conviction proceedings about the prevailing norms regarding the guilt phase investigation of a death penalty case. Mr. Tebrugge stated that one important thing for capital defense attorneys to do is to visit the crime scene, even if there is a time lapse between the crime and the visit. PC 368. It is particularly important to visit the scene in a self-defense case because there could be evidence to corroborate the defendant's version of events or challenge another witness's version of events. *Id*. He also testified that consulting with experts, like an expert in bloodstain pattern interpretation, is important because a lot of information could be gained that is frequently at issue in self-defense cases. PC 369. It is also important for a defense attorney to review the physical evidence in a case. *Id*.

Mr. Tebrugge also testified regarding the prevailing norms on conducting a forensic examination of the evidence. First, it is important to review the work done by the State and also to consult with an expert to see if further testing of the evidence is necessary, such as for fingerprints. PC 371.

Mr. Tebrugge testified regarding the investigation into state witnesses. He recognized that in Florida, lawyers have the opportunity to conduct depositions, collect criminal histories, and collect a witness's prior statements, which should be

[15] American Civil Liberties Union.

done in any homicide case. PC 373. Mr. Tebrugge testified that it is important for an attorney to listen to all recorded statements by all witnesses to determine if there are inconsistencies in their statements. *Id*. It is also important to review court files and prior convictions of a witness to see if the witness is obtaining a benefit for his/her testimony or if the information could lead to other cross-examination material. PC 373-74. Mr. Tebrugge testified that in capital cases it is important, with a major witness, to not just rely on the state to gather the prior convictions of a witness but that there should be further investigation done by defense counsel. PC 374.

SUMMARY OF ARGUMENT

Trial counsel was ineffective because they failed to properly investigate Mr. Matthews' case, failed to review the evidence, failed to hire experts to assist in the review of the evidence, and did not adequately challenge the State's case against Mr. Matthews. Had trial counsel properly investigated Mr. Matthews' case and/or challenged the State's evidence against him, there is a reasonable probability that Mr. Matthews would have been convicted of a lesser offense or acquitted.

Further, the trial court erred in summarily denying Mr. Matthews' guilt phase claims.

STANDARD OF REVIEW

The standard of review is *de novo*. *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000). Under *Strickland*,[16] ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

ARGUMENT

ARGUMENT I: Newly discovered evidence that Justin Wagner's fingerprints are on an item inside the victim's wallet so weakens State's the case against Mr. Matthews that it would probably produce an acquittal and/or a life sentence at retrial.

Under Florida and federal law, there are two requirements needed for relief based on newly discovered evidence. First, the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that defendant or his counsel could not have known them by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So. 2d 512 (Fla. 1998).[17] The *Jones* standard is also applicable where the issue is whether a life or death sentence should have been imposed. *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992) (internal quotations and citations omitted). *See also Jones v. State*, 591

[16] *Strickland v. Washington*, 466 U.S. 668 (1984).
[17] The federal court standard is similar to that which applies in Florida. *See U.S. v. Meeks*, 742 F.3d 838 (11th Cir. 2014) and *U.S. v. Johnson*, 596 F.2d 147, 148 (5th Cir. 1979).

So. 2d 911, 914-15 (Fla. 1991); *Robinson v. State*, 707 So. 2d 688, 691 n.4 (Fla. 1998); Fla. R. Crim. P. 3.851(d)(2)(A).

When addressing this claim, this Court "must evaluate all the admissible newly discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial." *Swafford v. State*, 125 So. 3d 760, 767 (Fla. 2013), citing *Jones v. State*, 709 So. 2d 512, 522 (Fla. 1998); *see also Aguirre-Jarquin v. State*, 202 So. 3d 785 (Fla. 2016). "If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence." *Swafford* at 767 (Fla. 2013), citing *Jones v. State*, 591 So. 2d 911, 915 (Fla.1991). The Due Process Clause of the Federal Constitution and the Eighth Amendment provide that when relevant evidence that would probably produce an acquittal has not been presented because it could not have been discovered, a capital defendant has a right to a new trial.

The circuit court found that the newly discovered evidence of Justin Wagner's fingerprints met prong one of the *Jones* standard. PC 7341. The circuit court erred in concluding that this evidence did not meet prong two.

Fingerprint testing was conducted during post-conviction and fingerprints were found on the evidence tested. Two latent prints were developed from the Post-It note found inside Zoeller's wallet (PC 461) and were deemed to be of identifiable

quality. *Id.* The prints were submitted for comparison. Other prints were also developed, but were not of comparable quality. *Id.* Mr. Zercie and the Sheriff's office concluded that the latent prints found inside Zoeller's wallet belonged to Justin Wagner. PC 461-62. The latent prints were from Wagner's middle and ring fingers from his left hand. PC 462. The two prints were determined to be contact prints. PC 462-63. A contact print is made by coming into contact with an object, in this case a piece of paper, with sufficient pressure to exude the residue from the pores onto the surface of the object. PC 463. The lack of smearing of ridge detail indicates that the person, more than likely, held the object. *Id.* "[I]t looked like a direct contact with no movement." PC 464. 464. In other words, it was not slid, pushed, or handled briefly.

This evidence is important because it impeaches Wagner's trial testimony and undermines the State's theory of the case. Justin Wagner was the sole "eyewitness" to the crime and the State heavily relied on his version of events to establish the basis of their case for murder. At trial, the State argued that Mr. Matthews committed the crime in order to steal Zoeller's wallet and that he succeeded in stealing the wallet. TR 20:2020-21. To support this, Wagner testified that he never took the wallet, implying that it was Douglas Matthews who stole it. TR 16:1288. Wagner claimed that he was at the victim's residence, getting high and just "chilling." TR16:1269. He claimed that he saw Zoeller came out of the bedroom running, with Mr. Matthews

right behind him stabbing Zoeller, and that he got up and ran out of the apartment. TR 16:1272. Wagner also claimed that he left all of his belongings, including drugs, at the apartment. TR 16:1274. Wagner testified he saw Mr. Matthews remove his shirt, roll it up, and place it into a plastic bag after the crime. TR 16:1286. This same shirt and plastic bag was discovered by police in a Dr. Seuss bag that also contained Zoeller's wallet and correspondence addressed to Justin Wagner. At trial, Wagner adamantly denied taking Zoeller's wallet. TR 16:1288.

Wagner's fingerprints on the Post-It note located inside Zoeller's wallet demonstrates that Wagner's version of events is false. The fingerprint evidence indicates that Wagner stole the wallet and examined its contents. This evidence undermines the State's assertion that the theft of the wallet was Mr. Matthews' motivation for the crime, and instead supports Mr. Matthews' statements that he did not take the wallet and did not examine its contents. The fingerprint evidence affirms Mr. Matthews' killed Zoeller in self-defence and did not steal the wallet.

All of the evidence detailed above was unknown at the time of Mr. Matthews' trial. The results of the fingerprint testing were disclosed on February 26, 2015 – five years after Mr. Matthews was convicted. The trial court correctly found that this evidence was newly discovered and that Mr. Matthews satisfied prong one of the *Jones* standard. PC 7341. However, the trial court erred in concluding that Mr. Matthews did not meet the second prong. In assessing all of the evidence described

above, and the evidence Mr. Matthews presented at his post-conviction evidentiary hearing, as well as the evidence at trial, Mr. Matthews did establish that the fingerprint evidence weakened the State's case against the defendant so as to give rise to a reasonable doubt as to his culpability and would probably produce an acquittal at a re-trial. *Swafford v. State*, 125 So. 3d 760, 778 (Fla. 2013), citing *Jones v. State*, 709 So. 2d 512, 522 (Fla. 1998).

The State's case against Mr. Matthews relied heavily on the eyewitness testimony of Justin Wagner. It is clear from the evidence presented in post-conviction that Wagner was dishonest at trial. Once the police had him in custody, Wagner gave two recorded statements. PC 506. During his second recorded statement to police, Wagner was confronted by the police with a proposed theory of the crime and he told the detective, "[i]f you want me to say that to save my ass, I will." PC 511. He testified in post-conviction that: "[p]retty much whatever they wanted to know, I would tell them." PC 527. In other words, he would lie.

Wagner also testified that he hoped, "when I told them everything, they were going to let me off and not give me a drug charge." PC 528. He wanted to get out and get high "because he was getting sick." *Id*. Wagner had ample motive to lie and deny taking Zoeller's wallet, because he did not want to go to jail or be accused of a crime, and readily admits he would have said *anything* to gain that result. *See* PC 527. Wagner admitted that at the time of the trial, he was still a drug user and lied

about his life circumstances in front of the jury. PC 511, 527-28. This is all evidence and testimony that was not presented to Mr. Matthews' jury and goes to the weighing of Wagner's testimony and assessment of his credibility. Mr. Matthews' jury was not privy to this information and Mr. Matthews is entitled to a new trial to have the jury hear this new evidence.

The trial court misapprehended the evidence presented at the post-conviction hearing. The trial court claimed that Wagner provided a plausible explanation for how his fingerprints were on the Post-It note. PC 7330. However, at the post-conviction hearing, Wagner admitted he could not recall touching the Post-It and admitted that anything he said would be speculation at best. PC 533, 537. The trial court's factual finding that Wagner supplied a plausible explanation for his fingerprints is not supported by the record.

The State argued at trial that Mr. Matthews committed the murder to steal money. If there is no evidence of robbery of the wallet by Mr. Matthews, then there is no felony murder, as the State would be unable to prove intent for the purposes of the burglary charge. Without the theft of the wallet, the State would be unable to argue and prove burglary, felony murder and premeditated murder. The State could not show a plausible motive.

Mr. Matthews' version of events that he was attacked by Kirk Zoeller and acted in self-defense, and the lack of fingerprint evidence tying Matthews to the

wallet and instead implicating Wagner in its theft, wholly undermines the credibility of Justin Wagner's testimony and the State's theory of prosecution. As such, it is probable that if a jury heard this evidence Mr. Matthews would be acquitted on a re-trial and/or convicted of a lesser charge than first degree murder. *See Swafford v. State*, 125 So. 3d 760 (Fla. 2013) and *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014).

ARGUMENT II: Trial counsel's failure to conduct a reasonable investigation and consult forensic experts, including a fingerprint expert, was deficient performance which fell below prevailing norms. Counsel's failure prejudiced Mr. Matthews to the extent that confidence in the outcome is undermined.

Trial counsel rendered deficient performance in this case by failing to consult with or hire a fingerprint expert in order to examine the physical evidence submitted to the jury and present evidence that corroborated Mr. Matthews' version of events at trial.

At trial, the State argued that Mr. Matthews committed the murders in order to rob Zoeller of his wallet. TR 20:2020-21. The main evidence for the State of what occurred at the residence came from the testimony of Wagner. Wagner testified at trial that he did not touch or take Zoeller's wallet. The State argued during trial that Mr. Matthews stole Zoeller's wallet and that this was his motive for killing Zoeller and Trujillo. The theft of Zoeller's wallet was also the underlying basis for the burglary charge.

Fingerprint testing conducted in post-conviction revealed suitable fingerprints found on an object in the wallet. Two latent prints found on a yellow Post-It note

were deemed to be of identifiable quality and these prints were submitted for comparison. PC 461. Both Mr. Zercie and the Sheriff's office concluded the developed prints belonged to Justin Wagner. PC 461-62. The latent prints were from Wagner's middle and ring fingers from his left hand. PC 462. The prints that were found were contact prints. PC 462-63. A contact print is made by coming into contact with an object, in this case a piece of paper, with sufficient pressure to exude the residue from the pores onto the surface of the object. PC 463. Mr. Zercie testified that the lack of smearing of ridge detail, indicates that the person, more than likely, held the object. *Id*. "[I]t looked like a direct contact with no movement." PC 464. In other words, it was not slid or pushed or handled briefly. This fingerprint evidence contradicts Wagner's trial testimony and undermines the State's theory of the case. Trial counsel rendered deficient performance by failing to hire a fingerprint expert to examine the physical evidence in Mr. Matthews' case.

The prosecution's entire case rested on the theory that Mr. Matthews stole Zoeller's wallet and this was the motive for the murder. The State had no evidence of premeditation and had trial counsel hired a fingerprint expert, he could have challenged the prosecution's robbery theory. *See Lee v. State*, 899 So. 2d 348 (Fla. 2nd DCA 2005) (counsel was deficient when he failed to "reasonably and promptly" investigate the circumstances surrounding the crime and medical evidence supporting the State's theory of events); *see also State v. Fitzpatrick*, 118 So. 3d 737

(Fla. 2013). *See also* Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 (2003) ("counsel should … aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.").

In light of Wagner's denial of taking or touching Zoeller's the wallet and his testimony that he left everything behind and took nothing from the house, his fingerprint on items inside the victim's wallet is significant. The State argued that Mr. Matthews must have stolen the wallet and placed it in the Dr. Seuss bag with his bloody shirt after the crime. This new evidence clearly indicates that Wagner offered false testimony at trial as to who took the wallet, since the fingerprint was located on a Post-It note *inside* the wallet. Furthermore, in the Dr. Seuss bag along with the wallet and shirt, was a letter addressed to Justin Wagner from his then-girlfriend. This evidence clearly undermines the State's theory of prosecution and motive for the crime, and bolsters Mr. Matthews' version of events - that Wagner was the person who took the wallet and placed the shirt and the wallet in the Dr. Seuss bag, along with his own personal belongings. Mr. Matthews was prejudiced by trial counsel's failure to present this evidence.

This case is similar to *Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011). In *Elmore*, trial counsel was found ineffective for failing to investigate the state's forensic evidence. *Id.* at 865. A fingerprint lifted from a blood smeared toilet was

collected but misreported as being unidentifiable. *Id*. at 803. Trial counsel was found deficient for failing to test and counter the DNA evidence presented at trial. *Id.* at 855-56. "[C]ounsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id*. at 857. "A healthy skepticism of authority, while generally advisable, is an absolute necessity for a lawyer representing a client charged with capital murder." *Id*. "Elmore's lawyers disregarded their professional obligation to investigate critical prosecution evidence, thereby engendering 'a breakdown in the adversarial process that our system counts on to produce just results.'" *Id*. at 861, citing *Strickland*, 466 U.S. at 696.

"Because Elmore's lawyers' investigation into the State's forensic evidence never started, there could be no reasonable strategic decision either to stop the investigation or to forgo use of the evidence that the investigation would have uncovered." *Id*. at 864. The same can be said of the alleged investigation in Mr. Matthews' case. There is no articulated reason given by trial counsel as to why they did not further investigate the fingerprint or other physical evidence in this case. "It flouts prudence to deny that a defense lawyer should try to look at [forensic evidence] he knows the prosecution will cull for [inculpatory] evidence, let alone when the [forensic evidence] is sitting in the [prosecutor's office], open for the asking." *Rompilla v. Beard,* 545 U.S. 374, 389 (2005).

Trial counsel knew or should have known that Zoeller's wallet would be a key feature of the State's case. The State proceeded on a felony murder theory and argued that Mr. Matthews committed the murders in order to steal Zoeller's wallet. Thus, trial counsel had a duty to examine this key piece of evidence which was used to convict his client, however, trial counsel did not even take the first step of viewing the physical evidence for the purpose of coming up with a theory of defense or consulting with a confidential forensic expert to see if testing the wallet for fingerprints was possible. Trial counsel ignored pertinent avenues for investigation of which he should have been aware. This is deficient performance. *See Porter v. McCollum*, 558 U.S. 30 (2009).

Trial counsel testified that in regards to forensic testing, he did not "know if it was something to be considered." PC 266. In other words, he did not conduct a proper investigation and sought no expertise to assist him. This cost Mr. Matthews dearly at trial. Furthermore, it is evident from the testimony of trial counsel's investigator, Stephen Craig, that trial counsel's focus was on the penalty phase and not investigating Mr. Matthews' guilt phase issues. Mr. Craig testified that it was Mr. Nielson's and Mr. Dowdy's decision to not involve Mr. Craig completely in the guilt-phase. PC 421. Although there were some guilt phase issues to investigate, Mr. Craig testified that the defense's primary focus was for him to begin the mitigation investigation. PC 394. This decision was made without having actually

investigated or properly reviewing the physical evidence in this case.

This is further supported by Mr. Nielsen's testimony, with respect to investigating the defense, that there were "no investigative leads to follow." PC 221. Mr. Nielsen simply viewed the evidence in order to get phone numbers from the pockets of the clothes Mr. Matthews' was wearing because Mr. Matthews had asked for them, not for the purpose of reviewing the evidence in order to test the State's theory or come up with possible defense theories. PC 207.

The prejudice to Mr. Matthews' was trial counsel's failure to undercut the State's felony murder theory. If there is no robbery of the wallet by Mr. Matthews, then there is no felony murder. Second, the State would have been unable to prove intent for the burglary charge. Without the motive of stealing the wallet, the State would be unable to argue and prove burglary, felony murder, and premeditated murder. Trial counsel's failure prejudiced Mr. Matthews' by depriving him of evidence that would have created reasonable doubt and corroborated his claims of self-defense, resulting in an acquittal or conviction of a lesser charge.

The fingerprint evidence discovered in post-conviction also would have further undermined the trial testimony of Justin Wagner. It is clear from the evidence presented in post-conviction that Wagner was dishonest at trial. Wagner, during his second statement to police, was accused of being involved in the crime and Wagner told the detective, "[i]f you want me to say that *to save my ass, I will*." PC 511

(emphasis added). He testified in post-conviction that: "[p]retty much whatever they wanted to know, I would tell them." PC 527. Wagner also testified that he hoped "when I told them everything, they were going to let me off and not give me a drug charge." PC 528. He wanted to get out and get high "because he was getting sick." *Id*. Wagner also had ample motive to lie about taking the wallet because he did not want to go to jail or be accused of a crime, and readily admits he would have said anything to gain that result. *See* PC 511, 527-28. He admitted that at the time of the trial, he was still a drug user and lied about his life circumstances in front of the jury. PC 504-05. The fingerprint evidence would have provided defense counsel with a fruitful avenue to cross examine and undermine Wagner's trial testimony.

None of this evidence was not presented to Mr. Matthews' jury. This evidence is vital to the weighing of Wagner's testimony and to his credibility. There was no guilt phase investigation made by the defense, because the main focus of the lawyers was on the mitigation investigation. PC 394. Mr. Matthews' jury was not privy to this information which prejudiced him. Trial counsel was deficient in failing to present this evidence to the jury and further corroborate Mr. Matthews' version of events with physical evidence. Trial counsel's failure to engage and consult with a fingerprint expert was deficient performance below prevailing norms. Furthermore, because a jury never heard this evidence, their evaluation of Wagner's credibility was incomplete and this prejudiced Mr. Matthews. Had the jury heard this evidence,

there exists a reasonable probability that Mr. Matthews would have been convicted of a lesser offense or acquitted.

ARGUMENT III: The trial court erred in summarily denying Mr. Matthews' claim that trial counsel's failed to conduct a reasonable investigation and consult forensic experts, specifically a crime scene expert and a medical examiner. This was deficient performance which fell below prevailing norms. Counsel's failure prejudiced Mr. Matthews to the extent that confidence in the outcome is undermined and the trial court erred in not allowing Mr. Matthews to develop this at an evidentiary hearing.

In Mr. Matthews' initial 3.851, Mr. Matthews alleged that trial counsel was ineffective for failing to consult with experts, specifically a crime scene expert and a medical examiner. This portion of the claim was summarily denied by the trial court.[18] PC 2383. The trial court erred in summarily denying this portion of Mr. Matthews' claim. During the case management conference, Mr. Matthews made a facially sufficient claim that required further factual development. An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *Owen v. State*, 986 So. 2d 534 (Fla. 2008); *Amendments to Fla. Rules of Crim. P. 3.851, 3.852, & 3.993*, 772 So. 2d 488, 491

[18] The trial court granted an evidentiary hearing on only a portion of this claim. Mr. Matthews was allowed to present evidence regarding trial counsel's failure to consult with a fingerprint expert, but denied as to trial counsel's failure to consult with other forensic experts. It should be noted that the trial judge in this matter had not seen the motion or the state's response until the hearing held to address these matters ("…I am seeing them for the first time."). PC 7659-60. The trial court, without further hearing or review, and without knowing if he had a copy, denied Mr. Matthews' motion for rehearing ("But if you're expecting me to enter an order, I would just deny it without further hearing…."). PC 7658.

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"). "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).

The type of testimony the forensic experts would have provided at the evidentiary hearing are facts and scientific observations that directly undermine the State's theory at trial. The claim alleged in Mr. Matthews' motion involved disputed issues of fact and was not positively refuted by the record. 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*, 684 So. 2d at 728. A trial 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).

The testimony that would have been provided by these experts supports Mr.

Matthews' defense of self-defense and refutes the evidence presented at trial.[19] For example, Mr. Matthews, in his statement to police and later at trial, stated that when he was struggling with Zoeller in the kitchen area near the bedroom he could see Trujillo's body and tell something was wrong. TR 19:1753-54; 1756-57. The State, to counter Mr. Matthews, put on evidence from the officers that this was not possible. TR 15:1165, 1183. Officer Dane testified she could not see into the bedroom from the kitchen and only saw Trujillo when she stood in the doorway. TR 15:1165, 1183. However, photographs of the crime scene, specifically State's Exhibit 5, contradict Officer Dane's testimony. TR 15:1219.

Had the trial court allowed Mr. Matthews to present the testimony of Barie Goetz, an experienced crime scene examiner, the trial court and this Court would have discovered that there was a crime scene photograph, taken from the angle Mr. Matthews described, that depicts Trujillo's body as being visible from the area in the kitchen described by Mr. Matthews. *See* PC 2399-2400; *see also* State's Trial Exhibit 5. Mr. Goetz specifically stated that the angle is the same as Mr. Matthews described and based on his review, you could clearly see the body from the kitchen

[19] Mr. Matthews submitted affidavits by two experts, Mr. Barie Goetz and Dr. Daniel Spitz, in support of the denied portions of Claim IC. The affidavits contained the testimony these experts would have given at an evidentiary hearing. Since the trial court chose to summarily deny this portion of the claim, the statements in the affidavits must be accepted as true, to the extent they are not refuted by the record. *See Nordelo v. State*, 93 So. 3d 178 (Fla. 2012); *see also Franqui v. State,* 59 So. 3d 82, 95 (Fla. 2011) and *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999).

area. *Id*. This would have supported Mr. Matthews' testimony at trial and helped lend credibility to his self-defense theory and his denial that he murdered Trujillo.

Mr. Goetz further opined that the crime scene photographs reveal bloodstain patterns in the kitchen area on appliances, cabinets, the floor, and walls opposite of the entryway into Trujillo's bedroom. The patterns created by the bloodstains indicate that a physical struggle occurred in that area and then moved towards the front door area where there is a significant amount of blood. PC 2399. The physical evidence, as captured by the crime scene photographs, does not support Wagner's testimony regarding the death of Zoeller.

Wagner testified that he heard a commotion in Trujillo's bedroom, almost like there was a struggle in that bedroom. TR 16:1270. He further testified that Zoeller ran out of the bedroom, already bloody. TR 16:1272. Wagner claimed at trial that there was no struggle in the kitchen/living room area. *Id*. He claimed that Zoeller ran out of the bedroom and almost fell in Wagner's lap as he sat on the futon. *Id*.

An examination of the evidence collected by police and the crime scene photographs reveal that there is no evidence of a violent struggle in the bedroom as Wagner described. PC 2398. The bloodstain pattern evidence, in Mr. Goetz's opinion, indicates that there was no bloodletting struggle between two standing individuals in the bedroom. *Id*. If there had been a struggle between two standing individuals in the bedroom, there should have been bloodstain patterns such as

spatter, castoffs and dripping blood that would indicate a bloodletting struggle between two standing individuals. *Id*.

Similarly, Detective Robert Kay, the crime scene investigator for the Daytona Beach Police Department, testified at trial concerning blood spatter in the bedroom finding that there was really no blood spatter on the floor, and nothing on the walls of the bedroom. TR 17:1460. In addition, there were no physical indications of a violent struggle. TR 17:1461. This evidence directly contradicts Wagner's testimony and an expert opinion would have assisted the defense immeasurably in explaining these issues to the jury. However, trial counsel failed to do so.

In post-conviction, Mr. Matthews also consulted with Dr. Daniel Spitz, a medical examiner, to refute the trial medical examiner's testimony. The medical examiner testified at trial that the wounds on the victims were consistent with the same knife being used on both victims. TR 18:1704. The State reiterated this point during its closing arguments. TR 20:1948. The medical examiner also claimed that the wound pattern was unusual because both victims were stabbed in the head and neck. TR 18:1707-08. The State used this evidence to argue in closing argument that the same perpetrator committed both homicides. TR 20:1948. In actuality, had the defense hired and consulted with a forensic expert, they would have been adequately prepared to properly cross examine the medical examiner at trial. The defense could have brought out testimony that while the wounds may indicate a

similar weapon was used on both victims, the wound patterns do not indicate who the perpetrator was, and whether the victims were definitively killed by the same person. Because the defense did not cross-examine the medical examiner in an effective manner, this allowed the State to make an argument that the evidence and science did not support.

Dr. Spitz opined that the wound patterns did not indicate who the perpetrator was or whether both victims were definitely killed by the same person or even if the same knife was used. PC 2394. According to Dr. Spitz, what the wound patterns did indicate, particularly with respect to Zoeller, is that there had been a struggle and movement with his wounds and that the wounds were caused during the course of an altercation. *Id*. Moreover, Dr. Spitz opined that Zoeller's wounds were consistent with Mr. Matthews' description of "swinging" at Zoeller. *Id*. The autopsy report clearly indicated that Zoeller suffered both stab wounds and incised wounds, which are more commonly described as slash-type wounds. *Id*.

Had trial counsel consulted with a medical examiner, trial counsel would have been able to refute the evidence presented at trial. Further, they would have learned that the testimony given at trial by the medical examiner exceeded the scope of science. *See* PC 2394. Had trial counsel consulted with a confidential medical examiner, such as Dr. Spitz, this expert would have provided counsel not only with a clear refutation of the State's evidence, but also would have prevented the jury

from being misled by false testimony which exceeded the scope of known scientific knowledge.

In conclusion, consultation with a crime scene analyst and a medical examiner would have assisted trial counsel in cross examining the police, evidence technician, and medical examiner in order to elicit corroborating testimony and/or impeach and discredit the State's version of events. Trial counsel rendered deficient performance by failing to hire a crime scene reconstruction expert to review the conclusions of law enforcement with respect to the layout and sequence of events of the crime scene and to assist in the cross-examination of other scene technicians or law enforcement personnel. *See Lee v. State*, 899 So. 2d 348 (Fla. 2nd DCA 2005) (counsel was deficient when he failed to "reasonably and promptly" investigate the circumstances surrounding the crime and medical evidence supporting the State's theory of events); *see also State v. Fitzpatrick*, 118 So. 3d 737 (Fla. 2013). The trial court, when evaluating these claims, must also consider "whether cross-examination of the State's expert brings out the expert's weaknesses and whether those weaknesses were argued to the jury." *State v. Reichmann*, 777 So. 2d 342, 354 (Fla. 2000) (internal citations omitted); *see also* Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 (2003) ("counsel should … aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic

evidence.").

In denying an evidentiary hearing on this claim, Claim IC, the trial court misapprehended the law. The *Strickland* analysis regarding prejudice requires the petitioner to "show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). "To establish prejudice, a petitioner must 'show [ ] that counsel's errors were so serious as to deprive the defendant of a fair trial.'" *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Prejudice is established when 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. (internal citations omitted). Further, under *Williams v. Taylor*, 529 U.S. 362 (2000), the trial court was required to make its prejudice determination based on the totality of the evidence, and not in a piecemeal fashion. However, the trial court denied the claim in exactly that manner.

The analysis of this claim is meant to be a fact based inquiry and no fact based inquiry can be made without an evidentiary hearing to flesh out the facts. In order for the trial court to fully evaluate the claim, testimony from trial counsel is necessary as to why they did not consult with forensic experts. Generally, when applying *Strickland*, "an evidentiary hearing is required to conclude that action or inaction was a strategic decision." *Patrick v. State*, 2018 WL 2976307 *7 (Fla. June

14, 2018), citing *Pineda v. State*, 805 So. 2d 116, 117 (Fla. 4th DCA 2002). The trial court erred in summarily denying this claim.

Further, the trial court held that the claim was insufficiently pled. This is not accurate. The claim was pled with specificity, as required by Fl. R. Crim. P. 3.851(e) (2014).[20] "[T]o the extent there is any question as to whether a rule 3.851 movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required." *Walker v. State*, 88 So. 3d 128, 135 (Fla. 2012). An evidentiary hearing should have been conducted on the entirety of this claim. Mr. Matthews raised this claim as trial counsel's failure to consult with forensic experts, and the trial court only allowed evidence regarding the finger print examiner to proceed forward. The trial court addressed this claim in a piecemeal fashion is a violation of *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000). The trial court's partial summary denial of this claim was error.

ARGUMENT IV: Trial counsel was deficient in failing to investigate and properly cross-examine the State's witnesses and the trial court erred in summarily denying the claim without evidentiary development.

[20] Mr. Matthews filed his 3.851 motion in 2014, thus the 2014 version of Rule 3.851 applies in this matter. The version of the rule at the time the trial court made its ruling does not apply. Pursuant to 3.851(a) (2015), the rule "shall apply to all post-conviction motions filed on or after January 1, 2015." Furthermore, "[m]otions pending in that date are governed by the version of this rule if effect immediately prior to that date." Fl. R. Crim. P. 3.851(a) (2015).

Trial counsel rendered deficient performance by failing to properly investigate and cross-examine key witnesses at trial and challenge their testimony. At trial, key testimony regarding the crime was provided by Justin Wagner. Wagner specifically provided critical information to the police and the jury as to what had occurred at the time of the crime. Furthermore, trial counsel failed to properly impeach Wagner and confront him on his inconsistent statements to the police, including the fact that police told him he failed a voice stress test and was lying.

During Wagner's initial videotaped statement to law enforcement, he denied having any knowledge about the offense, and then changed his story multiple times. PC 6666; *see also* Defense Exhibit 65 & 66. This prompted detectives to summon another officer to conduct a voice-stress analysis test which Wagner failed. *Id*. After law enforcement informed Wagner of the results of the voice stress analysis test, Wagner told the police another version of the crime. He was then arrested for drug possession. *Id*. In a subsequent interview with police, Wagner pleaded with police that he will say whatever they want -- "if it saves my ass, I will." PC 510. Counsel never confronted Wagner with these inconsistencies, this video or his statement which clearly indicates Wagner's willingness to fabricate a story to placate police. Trial counsel had access to these statements, yet never confronted Wagner about the statements and never cross-examined him or presented this evidence to the jury at trial. Failing to confront Wagner regarding his statement to police that he would say

anything they wanted him to say was prejudicial because Wagner had a clear bias and motivation to lie during Mr. Matthews' trial and the jury never heard this evidence.

Second, trial counsel was also aware that Wagner had criminal charges pending at the time of Mr. Matthews' trial. Yet, counsel failed to rebut Wagner's assertion at trial that he was doing well, even after Wagner implied that his criminal past was behind him, when clearly that was not the case.[21] Additionally, trial counsel failed to adequately investigate Wagner's prior criminal history. The prejudice was counsel's inability to impeach Wagner with his prior felony convictions and crimes of dishonesty. Mr. Nielsen testified that his investigation of Wagner was limited to taking his deposition and conducting a criminal record check. PC 211. Mr. Nielsen testified it was Mr. Dowdy's responsibility to question Wagner at trial and thus he should have prepared for that witness. PC 213. Mr. Dowdy testified that he did not investigate Wagner, but may have looked at his prior criminal record. PC 331. If so, he would have had the investigator run Wagner's background. *Id*. Mr. Dowdy testified that he relied on the State to get the number of certified convictions for Wagner - he did no independent investigation. PC 332. Mr. Dowdy testified that if he had known Wagner had criminal charges pending at the time of Mr. Matthews'

[21] Wagner admitted in post-conviction that he was still on drugs during the trial and going in and out of jail. PC 504. "I just kept on going on drugs, and it just never worked, so I never got a chance to really straighten my life up." PC 505.

trial, he would have asked Wagner if he was trying to get favorable treatment from the State in exchange for his testimony against Mr. Matthews. PC 333. Mr. Craig, the trial investigator, testified that to his recollection, he did not investigate Justin Wagner at all. PC 395. Mr. Craig did not obtain a criminal history of or interview Wagner. *Id*.

Wagner testified at trial that he did not have a pending charge for domestic violence. TR 16:1317-18. He testified that he was married, in college, and owned his own painting business. TR 16:1295. "I'm doing good." *Id*. This testimony was false and trial counsel was ineffective for failing to impeach Wagner's statements. Had trial counsel investigated Wagner's criminal background he would have known that Wagner was facing serious criminal charges for domestic violence, burglary, and grand theft. Instead, Mr. Matthews' jury never heard this information, and thus could not use it when evaluating the weight and credibility of Wagner's testimony.

At the post-conviction hearing, Wagner testified that he was involved in two incidents with his now ex-wife, but was not arrested for those incidents until after he testified at trial. PC 502-03. One incident was a domestic violence episode and the other was for grand theft of a dwelling. *Id*. Wagner pled guilty to these charges after Mr. Matthews' trial. PC 504. During the period of time that he was a witness in Mr. Matthews' case, Wagner continued to use drugs and admitted his issues with his now ex-wife stemmed from drug use. PC 504-05. Wagner admitted that he was

"a wreck" during the trial, in contrast to his trial testimony where he testified he was doing well at trial. PC 504-05. Had trial counsel conducted a proper investigation into the background of the State's main witness and the sole eyewitness to the crime itself, they would have discovered that Wagner lied about his pending domestic violence charges.

Had counsel rendered reasonably competent performance, trial counsel would have been able to cross examine the state's witnesses to refute their testimony and been able to present expert testimony corroborating Mr. Matthews' version of events. Trial counsel's failure prejudiced Mr. Matthews by depriving him of evidence that would have created reasonable doubt by impeaching the State's key witnesses and corroborating Mr. Matthews' claims of self-defense.

Finally, trial counsel failed to investigate and properly impeach the law enforcement officers who testified at trial. Officer Penny Dane was one of the first responders to the crime scene. The State heavily relied on her testimony in its closing arguments to rebut Mr. Matthews' claims of self-defense. The State argued that Mr. Matthews' self-defense explanation was impossible because based on Officer Dane's observations, it was impossible for Mr. Matthews to have seen the body of Trujillo lying on the bed the way he described. However, a crime scene photograph taken at the angle where Mr. Matthews claimed to have seen the body proves that he could have clearly seen Trujillo lying on the bed. Trial counsel had

the crime scene photograph in his possession and failed to use it to impeach Officer Dane. The prejudice is clear as the State made Officer Dane's testimony a feature of their closing arguments. This failure is compounded by trial counsel's failure to hire a crime scene reconstruction expert, as argued *supra*.

The trial court erred in summarily denying this claim. Mr. Matthews asserted a facially sufficient claim that required further factual development. An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *Owen v. State*, 986 So. 2d 534 (Fla. 2008); *Amendments to Fla. Rules of Crim. P. 3.851, 3.852, & 3.993*, 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"). Generally, when applying *Strickland*, "an evidentiary hearing is required to conclude that action or inaction was a strategic decision." *Patrick v. State*, 2018 WL 2976307 *7 (Fla. June 14, 2018), citing *Pineda v. State*, 805 So. 2d 116, 117 (Fla. 4th DCA 2002). The trial court erred in summarily denying this claim.

Specifically here, summary denial in this matter was not appropriate because the *Strickland* inquiry is a two-pronged inquiry which requires evidentiary and testimonial development regarding both deficient performance and a showing of prejudice. In order for this Court to fully evaluate the claim, testimony from trial counsel was necessary as to why they did not adequately investigate and conduct a

constitutionally adequate cross-examination of the witnesses. Due to the summary denial, that evidentiary development was not possible. Denial of an evidentiary hearing on this claim deprived Mr. Matthews of his due process rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and the corresponding provisions of the Florida Constitution.

ARGUMENT V: Trial counsel was deficient in failing to properly investigate and assess Mr. Matthews' mental health and mental state at the time of the crime and the trial court erred in summarily denying the claim without evidentiary development.

Trial counsel for Douglas Matthews failed to provide their mental health experts with adequate information in order for them to make accurate diagnoses which would have further supported trial counsel's theory of the case. Due to this failure, the defense did not present evidence that would have negated the element of premeditation.

Dr. Jeffrey Danziger was hired by trial counsel in order to provide a mental health diagnosis in preparation for the penalty phase of Mr. Matthews's capital trial. TR 23:2325. Dr. Danziger was asked specifically to conduct an evaluation to assess Mr. Matthews' competency to stand trial. Dr. Danziger met with Mr. Matthews only one time. TR 23:2328. Dr. Danziger was given a copy of Mr. Matthews' Forsyth mental health records, which counsel entered into evidence during the penalty phase. TR 23:2329-30. Dr. Danziger's testimony was not used in the guilt phase, only in the penalty phase.

During the post-conviction process, Dr. Cunningham evaluated Mr. Matthews, spoke with his family, and reviewed extensive amounts of records related to Mr. Matthews.[22] Dr. Cunningham testified that research shows childhood trauma changes the chemistry, electrical activity, and physical architecture of the brain. PC 978. "The effect of chronic stress in childhood is not just a contribution to personality and psychological disorders. It's changing the hardware that the person is going to make choices and decisions with from now on." PC 978. Dr. Cunningham testified the influence of the family environment on a child's social development lasts a lifetime, and that in Mr. Matthews' case, there was inadequate bonding with his parents. PC 996. "[T]his is the most significant damage that can be done to the developing psyche of a child." PC 1001. Dr. Cunningham testified that research demonstrates secure parental attachment is fundamentally important to the psychological development and welfare of the child. *Id*. When a child has secure bonding, that child "forms a stable identity, the capacity to regulate their emotions, empathy and capacity for empathy and responsible social behavior." *Id*. When bonding is not present, those capabilities are damaged and then can be "displayed in personality disturbance and behavior disturbance." *Id*. Parental neglect is

[22] This testimony was allowed because it went to the claims regarding mitigation and trial counsel's failure to properly evaluate Mr. Matthews. However, this testimony is also relevant to Mr. Matthews' guilt phase claims because it explains how his brain damage and psychological issues could have affected his state of mind at the time of the crime.

considered to be more psychologically damaging than physical abuse. PC 1024. Children who are emotionally neglected have a marked increased risk for psychological disorder, behavior problems, and violent and criminal behaviors, both in childhood and adulthood. PC 1025. Essentially, when there is emotional neglect and trauma, it "fractures the psychological foundation that everything else is built on." PC 1002. The adult expression of that damage is criminality. *Id*.

Mr. Matthews fits this profile and has a long history of mental health issues. He was placed on antidepressant medication at the age of eight or nine. PC 1074. He would cut himself and cut words into his leg at the age of nine or ten, and attempted to hang himself with an electrical cord, a sign of having suffered traumatic experiences and neglect, and the beginnings of some personality disturbance. PC 1074-75. When a child acts out in this manner, "they are taking the disturbance in their nervous system and the trauma they've experienced, and they are acting that psychological trauma out in their behavior." PC 1076.

Mr. Matthews continued to suffer from his disorders[23] throughout his trial, as demonstrated by his pre-trial jail records. PC 1077. Mr. Matthews' jail records

[23] Dr. Danziger, at trial, diagnosed Mr. Matthews with bipolar disorder, based upon the jail records and his interaction with Mr. Matthews. TR 23:2369. The jail diagnosed Mr. Matthews with schizoaffective disorder, as well as a psychotic disorder not otherwise specified. PC 1076-77. The jail records noted that Mr. Matthews suffered from auditory and visual hallucinations. PC 1078. The jail doctors had prescribed Mr. Matthews with Risperdal and Depekene. TR 23:2371.

reveal that Matthews' experienced racing thoughts, mood swings, sleep disturbance, saw things moving in the periphery of his vision, and kept his back to the wall. *Id*. While in the county jail, Mr. Matthews was diagnosed with schizoaffective disorder which is a combination of a mood disorder and thought disorder, or psychotic disturbance. *Id*. It is not something that suddenly develops due to the stress of incarceration. *Id*. Mr. Matthews was also diagnosed with antisocial personality disorder, which arises out of hereditary predispositions, birth injuries, inadequate attachment and bonding, traumatic exposures, and other factors. PC 1079.

Although Mr. Matthews received some treatment, the treatment was not sufficient or complete. PC 1084. The mental health professionals at the county jail had no knowledge of Mr. Matthews' mood disorder predisposition or the cross-connection between his mother's mental health treatment and Mr. Matthews' treatment. *Id*. The doctors were unaware of Mr. Matthews' familial substance abuse history. *Id*. They were also unaware of the inadequate bonding, maternal emotional neglect, or that Mr. Matthews had been supervised by a drug abusing, sexually abusive, violent teenage stepfather. PC 1084-85. No adequate history was ever taken because the family was always in crisis mode. PC 1088. The quality of the treatment and the interventions were minimal. PC 1088-89.

As a result of counsel providing their mental health experts with little to no guidance and/or information regarding Mr. Matthews, coupled with an incomplete

mitigation investigation, trial counsel wholly failed to present, in the guilt-phase, an accurate picture of Mr. Matthews' mental state at the time of his crime, which is relevant to his self-defense claim. Had a proper mental health assessment of Mr. Matthews been done and the experts given jail records which show that Mr. Matthews suffered from bipolar disorder and schizoaffective disorder with paranoid aspects, trial counsel could have used this to explain and bolster Mr. Matthews' claim of self-defense. Schizoaffective disorder and bipolar disorder can alter a person's perceptions of a situation and this could have assisted trial counsel in explaining why Mr. Matthews reacted to the threat from Kirk Zoeller in the manner he did. This would have been invaluable information for a jury when assessing guilt. Trial counsel's failure prejudiced Mr. Matthews by depriving him of evidence that would have created reasonable doubt and corroborated his claims of self-defense.

Furthermore, evidence developed in post-conviction proves that Mr. Matthews has brain damage. Dr. Ruben Gur, a clinical neuropsychologist and professor at the University of Pennsylvania, who testified in post-conviction regarding his evaluation and testing of Mr. Matthews,[24] stated that Mr. Matthews has neurological deficits and that there were clear abnormalities in language

[24] This testimony was allowed, as it went to the claims regarding mitigation and trial counsel's failure to properly evaluate Mr. Matthews. However, this testimony is also useful because it explained how his brain damage could have affected his state of mind.

comprehension, signs of perseveration, and indications of frontal lobe issues, including deficits in memory. PC 1269. In Mr. Matthews' case, an MRI[25] and PET scan were performed and Dr. Gur reviewed the results. PC 1272. The neurological testing indicated damage in the left hemisphere. *Id*. The MRI results revealed Mr. Matthews' frontal temporal areas showed abnormally reduced volume on the left. PC 1282. These results are clinically significant findings, meaning that the findings were more than two standard deviations from the values of an average brain. PC 1282-83. MRI results explain what was seen on the behavioral imaging, that the damage/deficits are mostly on the left side and it involves the areas that would handle language comprehension, memory, and verbally mediated executive functions. PC 1283. The brain volume was reduced in areas that are responsible for important behavioral domains. *Id*.

Dr. Gur also testified that a PET scan shows metabolic function in the brain. PC 1284-87. In Mr. Matthews' PET images, the most striking features were reduced metabolism in the amygdala, hippocampus, and the corpus callosum, which is the body of nerve fibers that connects the two hemispheres of the brain. PC 1294. The hippocampus, which is a seahorse shaped structure in the brain, is a primitive brain organ that simply asks, "[h]ave I seen this before? Have I experienced this before?" PC 1256-57. The hippocampus has access to the memory storage in order to answer

[25] Magnetic resonance imaging.

those questions. PC 1257. The amygdala is an almond-shaped structure that is intertwined with the hippocampus and is also a primitive organ. PC 1258. It controls "flight or fight" responses and connects with the frontal lobe, which is basically the brakes – or impulse control -- for the brain. PC 1258-59. Other striking features that the PET scan revealed that the frontal and parietal cortex had increased and abnormal activation. PC 1295. The higher activation, although bilateral, appeared more abnormal on the right side. *Id.*

What this means behaviorally is that normally people with this damage "look lackadaisical. They look like they could [not] care less about anything. They look placid. And then without much provocation, they just fly off the handle." PC 1298. The parts that are overactive, like the frontal lobe, attempt to compensate for the areas that are not as active, in this case the amygdala and the hippocampus. *Id.* When the amygdala and hippocampus suddenly become hyperactive due to stress, the frontal lobe will actually become hypoactive, or not as active, and become unable to "brake" or stop the behavior. PC 1298-99. According to Dr. Gur, with the type of deficits that neuropsychological testing revealed, this type of brain dysfunction is already anticipated. PC 1299. Neuropsychological testing is sensitive to damage in the thinking brain. *Id.* What the scans assist with is seeing damage in the subcortical parts of the brain. PC 1300.

For Mr. Matthews, in terms of behavior, the damage that was found by the

various tests equates with difficulties in perception during times of stress and duress. PC 1301. He would be "very vulnerable to acting without being able to consider the big picture, the real legal, or moral, or ethical meaning and implications of his behavior." PC 1302. In other words, he would have difficulty in controlling his behavior. *Id*. Although the damage can be classified as mild to moderate, because of the specific regions of the brain implicated, there is an effect on a person's life and behavior. *Id*. People with frontal lobe damage, such as Mr. Matthews, tend to respond well to structured environments, because it takes away the anxiety of having to make decisions. PC 1302-03. In Mr. Matthews' case, his brain damage also interacts with his mental health issues. PC 1303. Dr. Gur testified that people, like Mr. Matthews, who have both brain damage and mental illness, are endangered - brain damage compromises the brain further and makes any mental illness worse. PC 1304. If the same brain is exposed to drugs, such as marijuana or alcohol, the brain becomes further compromised and those drugs affect the frontal lobe and adversely affect a person's behavior and how they respond to stressors and threats. PC 1304-05.

People with brain damage inherently cannot control the impulses in their heads. Further, they overreact to any sign of potential danger. In this matter, Mr. Matthews consistently asserted that Zoeller attacked him and that he wrestled the knife away and protected himself by slashing Zoeller. He also stated that he blacked

out. Based on Dr. Gur's analysis, it is clear that this was not a premeditated murder, or robbery, or burglary, but one that arose out of an inability of Mr. Matthews to control his behavior after seeing a potentially exaggerated threat. Had trial counsel properly explored Mr. Matthews' mental health history and adequately prepared their experts with complete information, they would have been able to use this information to rebut the State's theory of premeditated murder.

The Sixth Amendment requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001). Counsel rendered deficient performance when he failed to ensure an adequate and meaningful mental health examination. *Ponticelli v. State*, 941 So. 2d 1073, 1095 (Fla. 2006); *Sochor v. Florida*, 833 So. 2d 766, 722 (Fla. 2004). The trial court erred in summarily denying this claim. The *Strickland* inquiry is a two-pronged inquiry which requires evidence and testimony regarding both deficient performance and a showing of prejudice. In order for the trial court to fully evaluate the claim, testimony from trial counsel was necessary as to why they did not adequately investigate and assess Mr. Matthews' mental health and mental state at the time of the crime. Denial of an evidentiary hearing on this claim deprived Mr. Matthews of his due process rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and the corresponding provisions of the Florida Constitution.

ARGUMENT VI: Trial counsel's failure to properly investigate and address potential jurors' sentiments and/or biases regarding race, drug use and drug sales was deficient performance which fell below prevailing norms. Counsel's failure prejudiced Mr. Matthews to the extent that one or more objectionable jurors sat on his panel and confidence in the outcome is undermined.

Trial counsel rendered deficient performance during jury selection by failing to investigate and address potential jurors' sentiments and/or biases with respect to the issues of race, substance abuse, and the drug culture in general. The trial court found that trial counsel, "to some extent" questioned potential jurors regarding racial biases. PC 7327. This is inaccurate and unsupported by the record. During jury selection, trial counsel never asked the venire any questions regarding their feelings on the subject of racial bias. Mr. Nielsen testified that he did not ask the venire questions about Mr. Matthews' race because he did not think the case involved racial issues. PC 220. Mr. Nielsen testified, "just because you have a, quote, 'Caucasian victim and a mixed race defendant' does not mean that race is involved in the case." *Id*. Mr. Nielsen acknowledged that it could be important to know the venire's views on race. PC 219-20.

Trial counsel also failed to question the venire regarding their views on drug use, even though during trial counsel's opening remarks to the venire he spoke about the drug culture that Mr. Matthews was involved in and how the victims, witnesses, and Mr. Matthews himself, were involved in either the drug trade, drug use or both. TR 15:1137-38. "You're going to hear about a pretty rough lifestyle, one that none

of you, of course, are used to or would want to be in, but it's life on the streets out there." TR 15:1138. Further, the defense described the victim's apartment as a "trap house." TR 15:1137. Later, the State expanded on this issue and explored Mr. Matthews' involvement with the drug culture, at that point the defense objected and claimed the discussion of this matter was too prejudicial and requested a mistrial. TR 16:1252. Had the defense properly vetted the jury, this issue would not have been problematic, especially since it was an issue defense counsel raised.

Mr. Nielsen testified as to how he conducted voir dire. Although Mr. Nielsen testified that it would be important to ask the potential jury about drug culture (PC 219), the trial transcript reveals he did not. TR 7-14. As he stated when testifying, "if I didn't do it, I'll accept that." PC 219. The trial court's findings to the contrary that Mr. Nielsen questioned the jury on this issue are clearly erroneous and not supported by the record.

Mr. Tebrugge testified regarding the prevailing norms in capital litigation. He testified that attorneys in capital cases are trained to ask prospective jurors about any experiences they may have had with drug abuse, or if a close family member or friend has addiction issues. PC 367. The reason it is so important to obtain this information is because jurors believe that drug use is a very bad fact that aggravates a crime. *Id*. The concern is that a juror with those feelings might be more likely to return a verdict of death if drug use was part of the evidence. *Id*. Mr. Tebrugge also

testified that capital defense attorneys spend a lot of time being trained on how to conduct jury selection in order to identify jurors who will be hostile to defense arguments, sympathetic, or neutral. PC 364-65. One of the issues that can crop up in capital trials are issues of racial bias. PC 365. Attorneys are trained to make inquiry about possible racial biases or prejudices that prospective jurors may have. PC 366. Attorneys are trained that it is important to do so where the race of the defendant and the race of the victims are different. *Id.*

Drug use and race were issues in this case because Mr. Matthews is biracial and the victims were white. The history of capital punishment in this country is intimately bound up with its history of race relations. *See* American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.10.2 -C, Voir Dire and Jury Selection, (2003) at Commentary Section (internal citations omitted). It is trial counsel's duty to determine whether discrimination is involved in the selection process or whether potential jurors have racial biases. *Id.* Attorneys should not rely on gut instinct that the jury does not harbor feelings of prejudice. "The right to a jury trial guarantees the criminal accused a fair trial by a panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "The risk that racial prejudice may have infected petitioner's capital sentencing is unacceptable in light of the ease with which that risk, being especially serious in view of the finality of the death sentence, could have been

minimized." *Turner v. Murray*, 476 U.S. 28, 28 (1986).[26] Prevailing norms require counsel to be aware of a jury's potential prejudices against their client. Jury selection is the only opportunity to flush out the jury's feelings and educate the jury on any stereotypical beliefs that they might hold.

Jury selection in a capital case is very important and critical. "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. U.S.*, 451 U.S. 182, 188 (1981) (plurality opinion). Counsel should have devoted substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, and planning a strategy for voir dire. *See* American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.10.2-C, Voir Dire and Jury Selection, (2003) at

[26] In *Turner*, the defendant was given a new sentencing because the judge did not allow the lawyers to voir dire regarding racial prejudice. The Court found that "there was an unacceptable risk of racial prejudice infecting the capital sentencing proceeding, and the inadequacy of the voir dire requires that his death sentence be vacated. This unacceptable risk arose from the conjunction of three factors: *the fact that the crime charged involved interracial violence*, the broad discretion given the jury under Virginia law at the sentencing hearing, and the special seriousness of the risk of improper sentencing in a capital case." *Turner v. Murray*, 476 U.S. 28, 28 (1986) (emphasis added). It is clear that interracial violence is an important factor to take into consideration in a capital case.

Commentary Section. The case law is clear that jurors cannot make their life-death decision on the basis of the crime itself -- no matter how horrific. *See, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984).

Defense counsel has a duty to educate a jury and to probe into a potential juror's biases. The failure of trial counsel to educate the jury resulted in one or more objectionable jurors on his panel. Had trial counsel properly questioned and educated the jury, there exists a reasonable probability that Mr. Matthews would have been convicted of a lesser offense or acquitted. Trial counsel's failure to ask questions regarding drug use, drug culture, and race was deficient performance below prevailing norms. The trial court's findings are not supported by the record and its ruling denying this claim is in error.

ARGUMENT VII: Trial counsel failed to preserve for appeal the trial court's denial of a cause challenge on one juror and trial counsel allowed that juror to be seated on the jury. Counsel's failure to strike the juror prejudiced Mr. Matthews to the extent that an objectionable juror sat on his panel and confidence in the outcome is undermined.

The trial court summarily denied this claim and the summary denial was error. Trial counsel rendered deficient performance during jury selection by failing to strike and properly preserve for appeal the denial of the cause challenge against juror Boehmler. Venirewoman Boehmler expressed during voir dire ambivalence regarding whether she could follow the law regarding Mr. Matthews' right to remain silent. TR 11:647. She specifically indicated that it could affect her verdict if the

defendant chose not to testify. *Id*. She was never properly rehabilitated either by counsel or the trial court on this issue. Trial counsel attempted to raise a cause challenge against Ms. Boehlmer but the trial court denied the challenge for cause. TR11:686. Trial counsel failed to attempt to remove the venirewoman via a peremptory challenge or properly preserve the cause challenge for appeal. Instead, trial counsel accepted the jury and Ms. Boehlmer was accepted and sworn in as a juror. TR 14:1088-91. Neither the State nor the Defense had exhausted their peremptory challenges. TR 14:1085. Mr. Matthews was prepared to present trial counsel's notes regarding jury selection clearly indicate that trial counsel meant to exclude Juror Boehlmer due to concerns about her ability to follow the law. In fact, trial counsel made notes that she "can't follow law" and was not paying attention. *See* Nielsen's Voir Dire Notes, PC 6711. Also, it is clear from the record that Ms. Boehlmer told the attorneys that she felt uncomfortable sitting in judgment of another and was uncertain if she could actually do so. TR 8:223. Trial counsel failed to strike the juror, accepted the panel, and seated a juror whom trial counsel believed was objectionable.

Another juror, Ms. Anselmo, expressed that she used to be against the death penalty, but now leaned more towards it. R13:899. She also told the trial court that her nine year old niece was raped and murdered. TR 14:1024-26. Trial counsel failed to adequately question this juror regarding these incidents and made no

attempt to use a peremptory challenge. Ms. Anselmo was ultimately seated as a juror.

If there is any ground for reasonable doubt regarding whether a venire member can render an impartial verdict based solely on the evidence and the law, the venire member should be excused for cause. *Darr v. State*, 817 So. 2d 1093 (Fla. 2nd DCA 2002), citing *Hill v. State*, 477 So. 2d 553, 555 (Fla. 1985). Although a trial court can elicit "a positive response from the venire on this issue, this Court noted that '[i]t is difficult for any person to admit that he is incapable of being able to judge fairly and impartially.'" *Darr* at 1094, citing *Singer v. State*, 109 So. 2d 7, 24 (Fla. 1959). "[A] jurors statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him [or] from other evidence that he is not possessed of a state of mind which will enable him to do so." *Id*.

The preservation of a challenge to a potential juror requires more than one objection. When a trial court denies or grants a peremptory challenge, the objecting party must renew and reserve the objection before the jury is sworn. *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007). "By not renewing the objection prior to the jury being sworn, it is presumed that the objecting party abandoned any prior objection he or she may have had and was satisfied with the selected jury." *Id*. "Under *Strickland*, to demonstrate prejudice a defendant must show that there is a

reasonable probability-one sufficient to undermine confidence in the outcome-that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In the context of the denial of challenges for cause, such prejudice can be shown only where one who was actually biased against the defendant sat as a juror." *Id*. at 324. This happened in Mr. Matthews' case. Jurors Boehmler and Anselmo were actually biased against Mr. Matthews and sat on his jury.

The answers given by jurors Boehlmer and Anselmo indicated their bias and inability to follow the law in this matter. The comments demonstrated evidence of an actual bias that amounted to "something more than a mere doubt about the juror's impartiality." *Patrick v. State*, 2018 WL 2976307 *6 (Fla. June 14, 2018), citing *Mosley v. State*, 209 So. 3d 1248, 1265 (Fla. 2016). Because of trial counsel's deficient performance, at least one juror who was not competent or possessed of the state of mind to hear this matter fairly and follow the law, was allowed to be seated as a juror and had rendered a verdict in Mr. Matthews' case. Had trial counsel either preserved their objection for direct appeal properly or used a peremptory challenge, which they still had available, there exists a reasonable probability that the outcome of the trial would have been different in that he would have been acquitted and/or he would have received a life sentence.

Summary denial in this matter was not appropriate because the *Strickland* inquiry is a two-pronged inquiry which requires evidence and testimony regarding

both deficient performance and a showing of prejudice. In order for the trial court to fully evaluate the claim, testimony from trial counsel was necessary as to why they did not strike jurors Boehlmer and Anselmo for cause. Denial of an evidentiary hearing on this claim deprived Mr. Matthews of his due process rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and the corresponding provisions of the Florida Constitution.

ARGUMENT VIII: The cumulative effect of the errors tainted Mr. Matthews' trial.

Douglas Matthews did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth and Fourteenth Amendments. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Matthews' guilt phase, when considered as a whole, virtually dictated a guilty verdict. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Mr. Matthews' guilt phase. The errors as claimed in this brief are hereby specifically incorporated into this claim and include: ineffective assistance of counsel at the guilt and penalty phases; failure to ensure adequate mental health evaluation; and all others listed and presented at the evidentiary hearing. These errors cannot be harmless. Under Florida case law, the cumulative effect of these

errors denied Mr. Matthews his fundamental rights under the Constitution of the United States and the Florida Constitution. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Ray v. State*, 403 So. 2d 956 (Fla. 1981); *Taylor v. State*, 640 So. 2d 1127 (Fla. 1st DCA 1994); *Stewart v. State*, 622 So. 2d 51 (Fla. 5th DCA 1993); *Landry v. State*, 620 So. 2d 1099 (Fla. 4th DCA 1993).

ARGUMENT IX: Mr. Matthews' Eighth Amendment right against cruel and unusual Punishment will be violated as Mr. Matthews may be incompetent at the time of execution.

This claim was raised below and stipulated as being premature. Further, the trial court found that "[t]his issue is not ripe." PC 7342. However, it is necessary to raise it here to preserve the claim for federal review. *In Re: Provenzano*, 215 F.3d 1233 (11th Cir. 2000). Mr. Matthews suffers from brain damage, as well as mental illness. His already fragile mental condition could only deteriorate under the circumstances of death row causing his mental condition to decline to the point that he is incompetent to be executed.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Matthews relief on his 3.851 motion. This Court should order that his convictions be vacated and remand the case for a new trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Ilana Mitzner, Asst. Atty. General, Ilana.mitzner@myfloridalegal.com, capapp@myfloridalegal.com, on this 16th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210**.**

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