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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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Any claims not argued are not waived and Mr. Matthews relies on the merits of his Initial Brief.

STATEMENT OF THE CASE AND FACTS

Any misstatements or misapprehensions in the State's recitation of the facts will be addressed in turn in the body of the argument. Otherwise, Mr. Matthews relies on his original Statement of the Facts to support his arguments herein.[1]

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.

[1] The State, in its Answer Brief, questions whether this Court has jurisdiction over this appeal, since Mr. Matthews was granted a new penalty phase by the trial court. State's Answer Brief (SAB) 13. This argument is a red herring. The order on appeal is not an interlocutory order (as are all the cases cited by the State), but a final order from post-conviction proceedings pursuant to Fl. R. Crim. P. 3.851. Pursuant to Fl. R. Crim. P. 3.851(f)(8), "[a]ny party may appeal a final order entered on the defendant's motion for rule 3.851," within 30 days of the rendition of the order. Further, Fl. R. App. P. 9.140(b)(1)(D) provides that a defendant may appeal "orders denying relief under Florida Rule of Criminal Procedure… 3.851." Further, the rules of appellate procedure state that death cases are reviewed directly by the Florida Supreme Court. Fl. R. App. P. 9.030(a)(1). Also, the State is still pursuing death against Mr. Matthews. Finally, there are other cases pending before this Court, in the same procedural posture, where the State has not raised this baseless claim. *See Kocaker v. State*, SC17-1975. This is the appropriate venue for these claims.

Further, this appeal is not premature, as it was filed within thirty days of the lower court issuing its final order denying relief as to the guilt phase claims. Failure to appeal at this time would have resulted in a potential waiver of his guilt phase issues. The State's argument is without merit.

The State wrongly asserts that the fingerprint evidence discovered in post-conviction is irrelevant and not newly discovered evidence which would warrant a new trial. State's Answer Brief (SAB) 14.

The State's theme at trial was that the murders were committed "because he (Mr. Matthews) wanted a wallet." TR 20:2020. "[W]e can tell and we know that this wallet, this wallet, was stolen prior to Mr. Zoeller getting killed." *Id.* "So we know he went there, he took the wallet, and then he killed them." TR 20:2021. The State argued to the jury that the theft of the wallet formed the basis for both premeditation and felony murder in this case. The stealing of the wallet is the sole evidence of motive, and goes to the heart of the State's case. Thus, whose fingerprints on the wallet are far from irrelevant.

The fingerprint evidence is important because it impeaches Wagner's trial testimony and undermines the State's theory of the case. 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 – not Mr. Matthews. 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 supports the claim that Mr. Matthews killed Zoeller in self-defence, and did not steal the wallet.

The latent prints discovered in the wallet 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, but instead held for a period of time as Mr. Wagner went through the contents of the wallet he stole.

The State argues that the fingerprint evidence is irrelevant because the fingerprints were located on a Post-it note inside the wallet, rather than on the wallet itself, and that it does not explain how the bag ultimately arrived at the place where Mr. Matthews was ultimately found. SAB 21.

First, the fingerprint evidence indicates that the contents of the wallet were examined by someone other than the victim. The only fingerprint identified on the items was that of Mr. Wagner.

Second, Mr. Kenneth Zercie, the fingerprint expert who testified in post-conviction, testified that the wallet itself was not conducive to the retention of fingerprints because of the material it was made from. PC 311. Due to the porous leather material the wallet was made from, fingerprints were not retained on the

wallet itself. *Id.* Any and all fingerprint evidence developed in this matter came from the contents of the wallet, which were individually examined. PC 312-13. Other prints were developed on the items, but were not of comparable quality. PC 461-62.

Wagner's prints on the contents of the wallet are important because at trial, he denied ever touching the wallet or having any contact with it. TR 16:1288, PC 511-12. The wallet was discovered by police in a Dr. Seuss bag that also contained Mr. Matthews' t-shirt and correspondence addressed to Justin Wagner from a girlfriend. Wagner testified at trial that he entered and left Theresa Teague's house at various points after the crime, including when police were present. PC Ex. 65. Police located the Dr. Seuss bag in Ms. Teague's house. Wagner had as much access to that house as Mr. Matthews did after the deaths of Donna Trujillo and Kirk Zoeller. Also, Wagner testified at a deposition that Zoeller had approached him on the night of the murder and told him Zoeller had money. PC 6681.

Further, Mr. Matthews told police shortly after his arrest that he gave his shirt to "Jit" (Wagner). 19:1876. He did not know what happened to the shirt. 19:1877. The shirt Mr. Matthews was wearing during the incident was located in the Dr. Seuss bag with the wallet. All of these items were located in a bag that contained intimate personal items that actually belonged to Wagner. Wagner had access to the house

and clearly had items of his own inside the bag. None of the evidence at trial firmly established that the bag belonged to Mr. Matthews.

The State claims that the fingerprint evidence is irrelevant and would not undermine evidence of Mr. Matthews' guilt and his admission that he killed Zoeller.[2] SAB 21. This argument is mistaken, because it ignores that Mr. Matthews stated he killed Zoeller *in self-defense*. When assessing newly discovered evidence, the credibility of the statements by the defendant or confessions must be evaluated in light of the newly discovered evidence. *See Floyd v. Vannoy*, 894 F.3d 143, 157 (5th Cir. 2018). Mr. Matthews has always maintained that he was attacked by Zoeller and that he stabbed Zoeller in self-defense. The lack of fingerprint evidence tying Matthews to the wallet, and instead implicating Wagner in its theft, wholly undermines the credibility of Wagner's testimony and the State's theory of prosecution. In light of the fingerprint evidence, Mr. Matthews' assertion that he did not take the wallet now is backed by objective physical evidence.

The State's theory of prosecution is premised on the idea that this was a robbery, or theft, gone wrong. Demonstrating that someone other than Mr. Matthews touched and went through the wallet is significant because it undermines the State's theory. Further, the State's case against Mr. Matthews relied heavily on the eyewitness testimony of Wagner. It is clear from the evidence presented in post-

[2] The State implies that this evidence would be inadmissible, which is incorrect.

conviction that Wagner was dishonest at trial. 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.

Even prior to trial, Wagner lied to police. 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, Wagner was willing to lie and to say whatever was needed in order to avoid being arrested or charged with the deaths of Trujillo and Zoeller. Wagner testified he never touched the wallet, however, the evidence found during post-conviction shows that not only did Wagner touch the wallet, but that he also spent time rifling through its contents. Based on the fact that the wallet was found in a bag with personal letters written to him, it is reasonable to infer that Wagner stole the wallet during the struggle that occurred between Mr. Matthews and Zoeller. Finding the fingerprint bolsters Mr. Matthews' statement that he did not take the wallet, thus eliminating any motive or support for a first degree murder conviction.

The State also relies heavily on the circuit court's rationale for denying this claim, however, 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.

Further, the evidence from both trial and post-conviction undermines the State's theory of prosecution. The State argued at trial that Mr. Matthews committed the murder to steal money. If there is no evidence that Mr. Matthews stole the wallet, 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.

The circuit court found that the newly discovered evidence of Wagner's fingerprints met prong one of the *Jones*[3] standard. PC 7341. The circuit court erred in concluding that this evidence did not meet prong two. As explained above, the fingerprint evidence is significant and of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So. 2d 512 (Fla. 1998). In considering the effect of the newly discovered evidence, the court must conduct a cumulative

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[3] *Jones v. State*, 709 So. 2d 512 (Fla. 1998).

analysis of all the evidence so there is a "total picture" of the case and "all the circumstances of the case." *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013), citing *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999). 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 him so as to give rise to a reasonable doubt as to his culpability and would probably produce an acquittal at a re-trial. *Id.* at 778, citing *Jones*, 709 So. 2d at 522.

Mr. Matthews has always maintained that he was attacked by Zoeller and that he stabbed Zoeller in self-defense. The jury in this case never heard that there was evidence of Wagner handling the wallet or his admissions that he lied to them. The lack of fingerprint evidence tying Matthews to the wallet and instead implicating Wagner in its theft, wholly undermines the credibility of Wagner's testimony and the State's theory of prosecution. This is also the type of evidence a jury should have heard. The evidence presented in post-conviction is of "such nature that it would probably produce an acquittal or a retrial." *Swafford* at 778, citing *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). 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).

II. Trial counsel was ineffective for failing to investigate and locate the fingerprint evidence.

The State argues that trial counsel was not ineffective for failing to hire a fingerprint expert who would have found Wagner's fingerprint. SAB 15. This is not accurate. Trial counsel failed to properly review the evidence and investigate the case.

The prosecution's entire case rested on the theory that Mr. Matthews stole Zoeller's wallet and this was his 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.").

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 expert 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 trial counsels' decision to not involve Mr. Craig at all 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 investigating, or properly reviewing, the physical evidence in this case.

Additionally, Mr. Nielsen testified that there were "no investigative leads to follow" with respect to the guilt phase. PC 221. Although Mr. Nielsen looked at the physical evidence, it was only 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.

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 v. Washington*, 466 U.S. 668, 696 (1984).

"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).

None of the fingerprint evidence was presented to Mr. Matthews' jury. This evidence is vital to the weighing of Wagner's testimony and to his credibility. Trial counsel did not investigate the evidence, because their main focus was on the mitigation investigation. PC 394. Trial counsel was deficient in failing to present this evidence to the jury in order to corroborate Mr. Matthews' version of events with physical evidence. This prejudiced Mr. Matthews, because his jury was not

privy to this information. Trial counsel's failure to hire 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 prejudicial to 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.

III. The trial court erred in summarily denying Mr. Matthews' claims of ineffective assistance of counsel. Trial counsel's failures 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.

The trial court denied various claims of ineffective assistance of counsel. The State asserts that the trial court was correct. SAB 23. However, 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 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"). "Post-conviction 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 and 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).

In denying an evidentiary hearing on these claims, 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 is required to make its prejudice determination based on the totality of the evidence, and not in a piecemeal fashion. The trial court denied Mr. Matthews' claims in exactly that manner.

The analysis of these claims are 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 various claims, 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*, 246 So. 3d 253, 264 (Fla. 2018), citing *Pineda v. State*, 805 So. 2d 116, 117 (Fla. 4th DCA 2002). The trial court erred in summarily denying these claims.

Further, the trial court held that the claims were insufficiently pled. This is not accurate. The claims were pled with specificity, as required by Fl. R. Crim. P. 3.851(e) (2014).[4] "[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 these claims.

Mr. Matthews raised trial counsel's failure to investigate and consult with forensic experts, and to properly cross-examine the state witnesses. The trial court only allowed certain claims and portions of claims to proceed forward. 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

[4] 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).

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 trial court addressed these claims in a piecemeal fashion which 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 summary denial of these claims was error.

Below, the claims that were summarily denied will be addressed in turn.

A. Trial counsel was ineffective for failing to investigate the crime and utilize the assistance of experts, such as a crime scene expert or a medical examiner.

The State attempts to paint these claims as failures to use specific experts, however, the State misapprehends the claim. Trial counsel made inadequate investigations and failed to use experts to assist him in investigating and preparing Mr. Matthews' case. There are two specific examples of this occurring in Mr. Matthews' case: (1) the failure to use a crime scene examiner to help explain, clarify, and demonstrate corroborative evidence to support Mr. Matthews' claims of self-defense; and (2) the failure to employ a medical examiner to refute the medical examiner's trial testimony.

Had the trial court granted an evidentiary hearing on this claim, the type of testimony the forensic experts would have provided are facts and scientific

observations that directly undermine the State's theory at trial. The testimony that would have been provided by these experts supports Mr. Matthews' allegations of self-defense and refutes the evidence presented at trial.[5] 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 responding Daytona Police 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 Trial 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

[5] 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).

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 area. *Id*. This would have supported Mr. Matthews' testimony at trial and helped provide objective forensic support 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.

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 would 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 in the bedroom. 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. Trial counsel was ineffective in failing to investigate the crime scene and hire an expert. This failure prejudiced Mr. Matthews.

Further, had trial counsel hired a medical examiner, trial counsel could have refuted some of the exaggerations made by the State's medical examiner at trial. 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.

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 medical examiner's testimony at trial 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. This failure prejudiced Mr. Matthews.

It was error below to deny an evidentiary hearing on these matters, and this Court and it was error to summarily deny the claim.

B. 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.

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. 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.

Further, 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.[6]

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);

[6] The State also mocked Mr. Matthews' ability to see Ms. Trujillo's dead body and called him a "Cyclops." TR20:2032.

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*, 246 So. 3d 253, 264 (Fla. 2018), citing *Pineda v. State*, 805 So. 2d 116, 117 (Fla. 4th DCA 2002).

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. Due to the summary denial, evidentiary development of these claims 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.

IV. Trial counsel was deficient in failing to properly investigate and assess Mr. Matthews' mental health and mental state at the time of the crime.

Trial counsel for Mr. 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. In its reply, the State mistakenly asserts that this is an attempt to use a diminished capacity defense. SAB 29. This is a way for the defense to offer an explanation as to Mr. Matthews' state of mind. It is also a way for trial counsel to front load the mitigating factors and present a cohesive defense to the jury and prepare the jury for the theme at a possible penalty phase. Defense counsel are encouraged, under the ABA guidelines, to present themes that can be presented consistently through both the first and second phases of the trial. *See* Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11 (2003). "Ideally, 'the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.'" *Id.* Using mental health during the guilt phase is not the same thing as raising a diminished capacity defense. Instead, it simply contextualizes Mr. Matthews' reactions and versions of events.

As described in Mr. Matthews' initial brief, Mr. Matthews has neurological deficits and clear abnormalities in language comprehension, signs of perseveration, and indications of frontal lobe issues, including memory deficits. PC 1269. The

neurological testing indicated damage in the left hemisphere. PC 1272. The neurological testing revealed that a person with Mr. Matthews' deficits could "without much provocation, they just fly off the handle." PC 1298. The damage that was found by the various tests equates with difficulties in perception during times of stress and duress. PC 1301. Mr. Matthews 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.*

Also, Mr. Matthews' brain damage interacts with his mental health issues. PC 1303. Dr. Gur, a neuropsychologist, 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. This is the case for Mr. Matthews.

People with brain damage inherently cannot control their impulses. Further, they overreact to any sign of potential danger and misinterpret and misperceive acts

of aggression towards them. In this matter, Mr. Matthews consistently asserted that Zoeller attacked him and that he wrestled the knife away and protected himself by slashing at Zoeller. He also stated that he blacked out. Based on Dr. Gur's analysis, it is clear that this was not a premeditated murder, robbery, or burglary, but a death 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, 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.

V. 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.

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 State contends that Mr. Matthews was not prejudiced by Ms. Boehmler's inclusion on the jury because Mr. Matthews testified. SAB 30. What is important about Ms. Boehmler's ambivalence regarding Mr. Matthews' right to remain silent (TR 11:647) is that fact she indicated that she may not be able to follow the law. Trial counsel was concerned enough that they attempted to raise a cause challenge against Ms. Boehlmer but the trial court denied the challenge for cause. TR11:686. Trial counsel failed to use 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. At post-conviction, Mr. Matthews was prepared to present trial counsel's notes regarding jury selection which 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.

In addition, another juror, Ms. Anselmo told the trial court that her nine year old niece was raped and murdered, and that she leaned towards the death penalty. TR 14:1024-26; TR 13:899. 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.

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 preserve 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.

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.

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.

The State claims that trial counsel was not deficient for failing to address potential jurors' sentiments and/or biases with respect to the issues of race, substance abuse, and the drug culture in general. SAB 35. This is incorrect.

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. Further, although drug use and drug culture featured prominently in the facts of the case, trial counsel did not address these issues.[7]

There was testimony in post-conviction regarding the norms of capital litigation. 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*.

Further, attorneys are trained to inquire about racial bias. PC 365. 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

[7] 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.

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).[8] Prevailing norms require counsel to be aware of a jury's potential prejudices against their client. Jury selection is the only opportunity to flesh out the jury's feelings and educate the jury on any stereotypical beliefs that they might hold.

Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able to impartially to follow the court's

[8] 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.

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 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 the 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. *See Patrick v. State*, 246 So. 3d 253 (Fla. 2018).

VII. Cumulative error.

Mr. Matthews stands on his argument in the initial brief that the errors in this case 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. 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).

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

As previously stated and acknowledged in Mr. Matthews' initial brief, this claim was raised below and stipulated as being premature. It was necessary to raise it here to preserve the claim for federal review. *In Re: Provenzano*, 215 F.3d 1233 (11th Cir. 2000).

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 Lisa-Marie Lerner, Asst. Atty. General, lisamarie.lerner@myfloridalegal.com, capapp@myfloridalegal.com, on this 29th day of October, 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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