IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2267

GEORGE JAMES TREPAL,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

TODD G. SCHER
Litigation Director
Florida Bar No. 0899641
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3RD AVE., SUITE 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR PETITIONER

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Trepal was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions, death sentence and other sentences, as well as the affirmance of those convictions and sentences, violated fundamental constitutional guarantees. This petition challenges all of Mr. Trepal's convictions and sentences, both capital and non-capital.[1] Citations to the Record on the Direct Appeal shall be as (R. page number). All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

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[1]On direct appeal, this Court stated that Mr. Trepal had not challenged his non-capital convictions. Trepal v. State, 621 So. 2d 1361, 1363 n.2 (Fla. 1993). This was erroneous. Mr. Trepal's Initial Brief specifically stated as to Issue #1, "Phraseology of the argument in this section focuses on the conviction for First Degree Murder, but is equally applicable to all charges for which Appellant was convicted." Trepal v. State, No. 77,667, Initial Brief of Appellant at 21 n.1. The conclusion to Mr. Trepal's brief requested the Court "to grant a Judgment of Acquittal as to all charges." Id. at 109.

REQUEST FOR ORAL ARGUMENT

Mr. Trepal requests oral argument on this petition.

PROCEDURAL HISTORY

Mr. Trepal was indicted by the grand jury in the Tenth Judicial Circuit, Polk County, Florida, on April 5, 1990, for one count of first-degree murder, several counts of attempted first-degree murder, poisoning food or water, and tampering with a consumer product. Jury trial commenced January 7, 1991. At the close of the four-week trial, the jury found Mr. Trepal guilty of all counts. The penalty phase took place on February 7, 1991, the day after the guilty verdict, and the jury recommended death by a vote of nine to three. On March 6, 1991, the Court sentenced Mr. Trepal to death. This Court affirmed, with two justices dissenting. Trepal v. State, 621 So. 2d 1361 (Fla. 1993), cert. denied, 114 S. Ct. 892 (1994).

Mr. Trepal filed his initial Rule 3.850 motion on June 16, 1995, and an amendment thereto on March 21, 1996.[2] An evidentiary hearing was conducted on some claims in October, 1996, and an order denying relief was entered on November 6, 1996. Following the denial of rehearing, a timely notice of appeal was taken to this Court.

On April 15, 1997, the Office of the Inspector General of the United States Department of Justice issued a report (OIG Report) with findings regarding various practices at the FBI Crime Laboratory and serious deficiencies noted in various cases in which the FBI Crime

[2]In the interim, Mr. Trepal filed an interlocutory appeal regarding public records. Trepal v. State, 704 So. 2d 498 (Fla. 1997).

Laboratory and its scientists were involved. Part of the OIG Report addressed Mr. Trepal's case.

On June 20, 1997, Mr. Trepal sought, and this Court granted, a relinquishment of jurisdiction to investigate and file a second Rule 3.850 motion based on the OIG Report. Mr. Trepal thereupon filed a second Rule 3.850 motion. The circuit court held an evidentiary hearing[3] and then issued an order denying relief on October 26, 2000. Mr. Trepal timely filed a notice of appeal, which was consolidated with the first 3.850 appeal. Trepal v. State, No. SC89710.

CLAIM I

THE STATE WAS ERRONEOUSLY ALLOWED TO INTRODUCE TESTIMONY BASED SOLELY ON HEARSAY TO ESTABLISH A LINK BETWEEN MR. TREPAL AND THE BROWN BOTTLE, AND THIS COURT ERRED IN FAILING TO ADDRESS THIS ISSUE ON DIRECT APPEAL, OR APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO RAISE IT PROPERLY.

The State's position at Mr. Trepal's trial was that Mr. Trepal had put Thallium I Nitrate into Coke bottles which were then introduced into the Carr house. The State contended that a brown bottle found in Mr. Trepal's garage, known as sample Q206, contained Thallium I Nitrate and that Coke bottles found in the Carr house also contained Thallium I Nitrate (R. 4193-94). This theory depended upon the testimony of FBI chemist Roger Martz, who testified that Q206 contained Thallium I Nitrate (R. 3561-63), and that the Coke bottles contained thallium nitrate, but that there was no way to determine whether the thallium was in the form of Thallium I Nitrate or

[3]The hearing was bifurcated, having been stayed during another interlocutory appeal. Trepal v. State, 754 So. 2d 702 (Fla. 2000).

Thallium III Nitrate (R. 3556-59).[4] Because Martz could not identify the form of thallium in the Cokes, the State's theory also depended on the testimony of a Coca-Cola chemist, Frederick Reese, who conducted tests to determine if various forms of thallium would dissolve in Coke without changing its appearance (R. 3402). Reese determined that Thallium Sulfate, Thallium Maleanate and Thallium I Nitrate went into solution in Coke without changing its appearance, but that Thallium III Nitrate turned Coke a muddy color (R. 3405-06).[5]

To link Mr. Trepal to Thallium 1 Nitrate, the State presented evidence regarding Mr. Trepal's prior involvement in a methamphetamine lab. The only reason this evidence was admissible was the State's contention that it demonstrated that Mr. Trepal knew

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[4]It is now known that Martz's testimony about the contents of both the Coke bottles and the brown bottle was perjured, inaccurate, and misleading, as is explained in the pending appeal of Mr. Trepal's Rule 3.850 proceedings. Indeed, the postconviction judge, after an exhaustive evidentiary hearing, found that "Martz's conduct at trial was outrageous and shocking" (2PCR. 2682), and that while "there is a possibility that the substance is in fact thallium I nitrate, the court declines to so find" (Id. at 2680). Moreover, at the hearing, Martz himself acknowledged telling the OIG investigators that, as to sample Q206, his results were "debatable" (Id. at 3013). Dr. Frederic Whitehurst, whose testimony and opinions were found "highly credible" by the postconviction judge (2PCR. 2678), opined at the evidentiary hearing that he could not, to a reasonable degree of scientific certainty, conclude that thallium I nitrate was in Q206 (Id. at 3431).

[5]On direct appeal, this Court stated that the evidence at trial was "that of the chemical forms of thallium that exist, only one form can be introduced into Coca-Cola without producing noticeable changes in the drink." Trepal, 621 So. 2d at 1364. However, Reese clearly testified that when he put Thallium Sulfate and Thallium Maleanate in Coke, "The product looked the same" (R. 3405). Moreover, as proven at the postconviction hearing, records of the testing performed by the Coca-Cola company also revealed that other substances aside from thallium nitrate caused no visible changes in Coke.

how to manufacture Thallium 1 Nitrate. The State's position appeared to be that Mr. Trepal either manufactured the Thallium 1 Nitrate found in Q206 or had that material left over from his prior involvement in the methamphetamine lab (R. 4207). However, the only evidence the State had to show that the manufacture of methamphetamine produces Thallium 1 Nitrate was the hearsay testimony of a DEA agent who had no qualifications as a chemist and who described methamphetamine production from a description provided in a DEA pamphlet.

A. THE TESTIMONY OF DEA AGENT BROUGHTON WAS INADMISSIBLE HEARSAY AND VIOLATED MR. TREPAL'S CONFRONTATION RIGHTS.

At trial, the State proposed to call Richard Broughton, an agent of the federal Drug Enforcement Agency (DEA), to testify to his investigation of a clandestine drug laboratory with which Mr. Trepal was involved in the 1970s and the process for manufacturing methamphetamine (R. 3434-74). The State argued the evidence was relevant to show Mr. Trepal's "knowledge and opportunity" because Broughton would testify that the use of Thallium III Nitrate to produce phenyl-II-propanone (P-2-P), which is then used to manufacture methamphetamine, results in a precipitate of Thallium I Nitrate (R. 3435).[6]

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[6]The State also presented David Warren to testify that in the 1970s he was involved in a methamphetamine lab with Mr. Trepal, that Mr. Trepal was the chemist for the group, that Warren obtained chemicals for the group, and that Warren provided only P-2-P in its final form to Mr. Trepal (R. 3487-88). Warren never testified that he provided Thallium III Nitrate to Mr. Trepal. The State agreed that without Broughton's testimony regarding the chemical process of manufacturing methamphetamine, Warren's testimony was not relevant and was therefore inadmissible (R. 3440-42).

The defense objected to Broughton's testimony, arguing that he was not a chemist (R. 3441, 3471), and that he obtained his "knowledge" of the chemistry involved in methamphetamine production only after Detective Ernest Mincey asked him about it:

> [Broughton is] a DEA agent. He went looking to his computer to find out whether it could be done or not. So it comes from hearsay. Detective Mincey called him and said, "I need to know how you make methamphetamine to find out whether or not Thallium is used."
>
> Then Broughton hung up the phone, two hours later he called up and said that he had looked on his computer and found out that it could be used but it's an extremely rare process.

(R. 3441). The state argued that the information upon which Broughton's testimony would rely was contained in a DEA publication and was not hearsay because it was a regularly kept business record (R. 3442). The defense argued that the chemical processes for producing methamphetamine were not within the knowledge of the average person and thus required an expert witness (R. 3443-44). The court opined that the DEA publication "looks like a recipe for making methamphetamine" and likened it to baking a cake: "if I give you a recipe for baking a cake and you know all about baking cakes you can read the thing and say, yeah, that's right, or that's wrong. You don't need to be a chemist" (R. 3443). The State conceded that Broughton did not have a degree in chemistry, but argued that since Broughton was a DEA agent and the publication was produced by the DEA, "[i]t doesn't have to be expert testimony if he can say here's a publication that I get from DEA" (R. 3444).

After a recess, the court ruled that the DEA publication was

hearsay (R. 3450), and said, “I could see this sort of testimony coming in as expert testimony” (R. 3451). When the court asked whether Broughton knew how to make P-2-P, the state again conceded, “That I don’t know. He’s not a chemist” (R. 3451). The state continued to argue that the DEA pamphlet was a business record and therefore trustworthy (R. 3451-54, 3454-55). The defense argued, “We cannot cross-examine this witness [Broughton] about it because he doesn’t know anything about it. . . . This witness is not qualified to testify” (R. 3454). The court ultimately sustained the defense objection to the DEA pamphlet (R. 3456).

The State then proffered Broughton’s testimony (R. 3459-69). Broughton testified he had been a DEA agent for twenty years and had a bachelor’s degree in geography (R. 3459, 3460). He had attended a seminar on the manufacture of illicit drugs, including methamphetamine, and from 1972 to 1976, investigated illicit drug labs, some of which produced methamphetamine (R. 3461). The DEA provided agents a handbook listing the chemicals used to manufacture various illicit drugs (R. 3462). Broughton had used that handbook in his work and found it to be accurate (R. 3463). He then testified that Thallium III Nitrate is used in the production of phenyl-II-propanone (P-2-P), which is used in the manufacture of methamphetamine (R. 3463). During this process, the Thallium III Nitrate becomes Thallium I Nitrate and settles out of the solution (R. 3464). Broughton testified that State Exhibit 270 was a page from the DEA handbook describing in laymen’s terms the process by which P-2-P is manufactured from Thallium III Nitrate (R. 3465).

On cross-examination on the proffer, the defense asked Broughton what chemical reactions take place when thallium is used to make P-2-P, and Broughton responded, "I am not a chemist by training . . . [and] have a layman's knowledge of the chemicals" (R. 3466). He compared his knowledge of the use of thallium in making P-2-P to the use of baking soda in baking a cake: "I have no idea what baking soda does in a cake but I know how to bake a cake" (R. 3466). When Polk County officers told Broughton about the thallium poisoning case, "I then took the term thallium and proceeded to the DEA agent's handbook and was able to immediately find the formula that I brought here" (R. 3468). He learned that thallium was used in the production of methamphetamine from his handbook and from a DEA computer database (R. 3468). On redirect, the State asked Broughton if he had ever been qualified in a Florida court as an expert "regarding investigation and operation of clandestine drug labs" (R. 3469). Broughton testified he had been so qualified once in 1974 in Highlands County (R. 3469).

After the proffer, the defense argued:

> As to hearsay, Your Honor, he's not an expert as to thallium being used in the manufacture of P-2-P. He has to refer to the hearsay. He has to testify about the hearsay, and he's not an expert at that. Clearly he's not. He's not a chemist. He can't be cross-examined about it. He said he doesn't know about it.

(R. 3469-70). The State argued that Broughton was a DEA agent who had been qualified as an expert in the investigation of drug labs and "he knows these things and he refers to resource material as doctors do and lawyers do and chemists do and everyone else does" (R. 3470).

The State argued, “forget the document. Mr. Broughton’s knowledge is a different subject area” (R. 3470). The defense pointed out that Broughton got his knowledge solely from the DEA publications (R. 3470). The State argued that it was immaterial that Broughton was unable to state the scientific reactions occurring in the synthesis of these illegal substances (R. 3471). The defense again argued, “He can’t testify how it’s used without testifying to hearsay” (R. 3471).

The court ruled that the document was hearsay, but that the testimony of Broughton and Warren was admissible (R. 3472). The defense continued to object, pointing out that Broughton “did not say one time that he has ever seen thallium in a lab” and “never testified that he has ever seen thallium in an illicit methamphetamine lab” (R. 3473-74).

Broughton testified before the jury that Thallium III Nitrate is used in the production of P-2-P, which is used to manufacture methamphetamine, and that this process produces a sediment of Thallium I Nitrate (R. 3480-81). On cross-examination, Broughton admitted he was not a chemist, did not know what chemical reaction thallium causes in the course of making P-2-P, had never performed this process, and had never seen it performed (R. 3483, 3485).

During Broughton’s testimony, the defense reiterated its hearsay objections (R. 3478, 3480, 3481). Later, the defense moved for a mistrial based upon Broughton’s testimony, and that motion was denied (R. 3497-98).

Broughton’s testimony regarding the chemistry of methamphetamine production was wholly inadmissible hearsay. A

witness must have personal knowledge of the matters about which he or she testifies. § 90.604, Fla. Stat. Broughton did not have any personal knowledge regarding the chemistry of methamphetamine production, but simply recited what he had read in a DEA publication. The trial court correctly excluded the publication as hearsay,[7] but then inexplicably allowed Broughton to testify to its contents.

The only exception to the personal knowledge requirement is for expert witnesses. §90.604, Fla. Stat. However, the State never offered Broughton as an expert in any field, much less as an expert in chemistry.

Hearsay evidence is inadmissible. §90.802, Fla. Stat. Hearsay is a statement "offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. Broughton's testimony regarding the chemistry of methamphetamine production was clearly offered "to prove the truth of the matter asserted." The State's purpose in presenting the evidence was to show that Mr. Trepal had "knowledge and opportunity" (R. 3435), *i.e.*, that Mr. Trepal knew how to make Thallium I Nitrate and/or possessed Thallium I Nitrate from his involvement in the methamphetamine lab, and that is what the State relied on this evidence to show (R. 4207-08).

Admission of hearsay prevents cross-examination. See Ray v. State, 31 So. 2d 156, 158 (Fla. 1947) (introduction of a document

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[7]The trial court was correct to reject the State's argument that the DEA publication was admissible under the business records exception to the hearsay rule. That exception provides that such records are admissible if they record "acts, events, conditions, opinion or diagnosis." § 90.803, Fla. Stat. The DEA publication did not contain any such matters.

improper because “its recitals are pure hearsay and do not afford cross-examination essential to a proper focus of the truth”). Such impairments of cross-examination violate the Confrontation Clause of the Sixth Amendment to the United States Constitution. Ohio v. Roberts, 448 U.S. 56, 66 (1980); Pointer v. Texas, 380 U.S. 400, 406-07 (1965) ("A major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."). The Sixth Amendment contemplates that "the `evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. 466, 472-73 (1965).

Absent the hearsay testimony of Broughton, there would have been no evidence, either direct or circumstantial, from which the jury or court could have found beyond a reasonable doubt that the Thallium I Nitrate found in Q206 was either an ingredient in or a byproduct of the manufacturing process for methamphetamine; thus, the link between Q206 and the Coke bottles would have been completely severed.[8] The State relied upon this evidence to argue Mr. Trepal put Thallium I Nitrate in the Coke bottles:

> We put in evidence that he was a chemist at a methamphetamine lab for two reasons. . . .

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[8]The link, of course, has now been definitively severed, as the postconviction court in Mr. Trepal's Rule 3.850 proceedings explicitly refused to find as a matter of fact that the Coke bottles even contained thallium nitrate due to Martz's incompetence and/or perjured testimony at trial (2PCR. 2680).

> Now, it just so happened that there's a process by which thallium could be used in that, and that the byproduct of that process is Thallium I Nitrate which is muddy, and it just so happens that he has Thallium I Nitrate which was off-colored in his garage. Maybe that's where the Thallium I Nitrate came from and maybe it is not.

(R. 4207). Broughton's testimony was necessary to link Mr. Trepal to the Thallium I Nitrate in Q206 and the Thallium I Nitrate in the Coke bottles. Moreover, without Broughton's hearsay testimony linking Thallium I Nitrate to methamphetamine production, the prejudicial and inflammatory testimony of Broughton and Warren would have been excluded as not relevant to the charges against Mr. Trepal. The State even conceded that without Broughton's testimony, Warren's testimony would be inadmissible (R. 3440-42). Admission of this hearsay testimony, which violated the Confrontation Clause, was not harmless error. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

B. THIS COURT ERRED ON DIRECT APPEAL IN FAILING TO ADDRESS THIS CLAIM, OR APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO RAISE IT PROPERLY.

As Issue #3 of Mr. Trepal's direct appeal initial brief, appellate counsel argued that seven categories of evidence introduced against Mr. Trepal violated the Williams rule[9] (Trepal v. State, No. 77,667, Initial Brief of Appellant at 66-67). One of these matters was the testimony of Broughton and Warren regarding Mr. Trepal's involvement in the methamphetamine lab (Id. at 66, 70-75). Buried within this Williams rule argument was an argument that Broughton's

[9]§90.404(2), Fla. Stat.; Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

testimony regarding the chemistry of methamphetamine production was hearsay (Id. at 70-75). Appellate counsel cited to the portions of the record where the hearsay objections were made and discussed (id. at 70-72), and argued that Broughton's testimony was inadmissible hearsay which violated Mr. Trepal's confrontation rights (Id. at 73-75). This Court's opinion, however, did not address this hearsay/confrontation argument, addressing only the broad Williams rule issue of Mr. Trepal's involvement in the methamphetamine lab. The Court's entire discussion of Issue #3 of Mr. Trepal's direct appeal was as follows:

> Trepal alleges that evidence was admitted in violation of the Williams rule. We find no Williams rule violation. While testimony was admitted that during the 1970s Trepal was involved in an amphetamine laboratory, the fact that Trepal was convicted of a crime in connection with this activity was not introduced. A witness described Trepal as the chemist and "mastermind" of the lab. The testimony was admitted to show Trepal's knowledge of chemistry and poisons--to show that Trepal had the requisite knowledge to commit the instant crimes. The evidence introduced was relevant and properly admitted.

Trepal, 621 So. 2d at 1365-66 (footnotes omitted).

This Court should now correct this omission. This Court has habeas corpus jurisdiction to correct failings in its review process. Article V, §§ 3(b)(1), (7) & (9), Florida Constitution; Parker v. State, 643 So. 2d 1032, 1033 (Fla. 1994). The error in admitting Broughton's hearsay testimony regarding the chemistry of methamphetamine production is plain. The testimony was clearly hearsay, clearly inadmissible, clearly violative of Mr. Trepal's confrontation rights, and clearly not harmless error. The evidence was a crucial link in the State's flimsy circumstantial case, but it

plainly does not qualify as “evidence” at all.

To the extent the Court believes this issue was not presented on direct appeal, appellate counsel’s performance was prejudicially deficient. Appellate counsel has the responsibility of presenting arguments in an organized, comprehensible fashion, rather than burying a significant error within another issue, as happened here. Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). Appellate counsel clearly recognized the significant error in allowing Broughton to testify to hearsay because counsel made some attempt to present the issue. Thus, there can be no strategic reason for the deficiencies in counsel’s presentation. Mr. Trepal was prejudiced by these deficiencies: the issue is clearly meritorious, and counsel’s inadequate presentation therefore undermines confidence in the outcome of the direct appeal. Wilson, 474 So. 2d at 1165.

Finally, this Court should now address this issue in light of the findings of the postconviction court regarding Martz's conclusions as to the Q206 bottle and the Coca-Cola bottles. Since this reversible error entitles Mr. Trepal to a new trial, the Court should order a new trial rather than a new direct appeal. Johnson v. Wainwright, 498 So. 2d 938, 939 (Fla. 1986). Alternatively, the Court should order a new direct appeal.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTIONS AND SENTENCES.

A. INTRODUCTION.

Mr. Trepal had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984); Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Trepal's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Trepal's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Trepal's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Trepal involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original). There is more than a reasonable probability that the outcome of the appeal would have been different had these issues been raised, and a new direct appeal must be ordered.

B. FAILURE TO RAISE ON APPEAL THE STATE'S REPEATED PRESENTATION OF INADMISSIBLE, IRRELEVANT, INFLAMMATORY AND UNFAIRLY PREJUDICIAL EVIDENCE.

"In order for evidence to be relevant it must have some logical tendency to prove or disprove a fact which is of consequence to the outcome of the case." Stephens v. State, 787 So. 2d 747, 759 (Fla. 2001) (citing Charles w. Ehrhardt, FLORIDA EVIDENCE Sect. 401 (1999)). The vast majority of the evidence the State presented at Mr. Trepal's trial was absolutely irrelevant to the issue of whether Mr. Trepal was guilty of first-degree murder and the other charges. Further, the probative value of much of the State's evidence was substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. §90.403, Fla. Stat. Much of the evidence was also inadmissible as a prohibited attempt to show that Mr. Trepal acted in conformity with his character. See Killian v. State, 730 So. 2d 360 (Fla. 2d DCA 1999). Despite the defense's repeated objections to this evidence, appellate counsel failed to raise this meritorious argument on appeal.

The cumulative effect of all of this erroneously admitted evidence is clear: it resulted in Mr. Trepal's convictions and sentences. The State had no real evidence against Mr. Trepal, so it had to rely on a smokescreen of innuendo and fear.[10] The State presented 80 witnesses, 10 of whom testified more than once and few

[10]And, as is now known, the State relied on false, misleading, and perjurious scientific testimony as to the key pieces of physical evidence in this case.

of whom had anything to say which implicated Mr. Trepal.

There is no dispute that the case against Mr. Trepal was entirely circumstantial. As the State repeatedly said in closing argument, the case against Mr. Trepal came down to "coincidences": "What we have here in looking at Mr. Trepal as the person who did this crime is that if he did not commit this crime, if he did not, there are a list of coincidences which have to be true despite his innocence in order for you to have a reasonable doubt"; "if you can convince yourself that all these coincidences . . . can exist and him not have done it then you have a reasonable doubt" (R. 4190, 4219; see also R. 4191, 4192, 4193, 4194, 4195, 4198, 4199, 4206, 4208, 4209, 4211, 4212, 4215, 4216, 4218, 4220, 4227, 4228, 4229, 4232). According to its closing argument, the State's case depended upon putting Mr. Trepal into "the class of people who could have committed this crime" (R. 4187; see also R. 4199, 4200, 4220, 4221, 4222, 4227, 4230, 4232). Therefore, the State argued, the jury should not be concerned with missing evidence such as the lack of fingerprints on the Coke bottles, the lack of fingerprints on the threatening note, the missing bottle capper, the absence of proof that the thallium in the brown bottle was the thallium that was put in the Coke bottles, the failure to find the typewriter which wrote the threatening note, the lack of evidence that Mr. Trepal placed the Cokes in the Carr house, or the lack of evidence regarding when Mr. Trepal is supposed to have placed the Cokes in the Carr house (R. 4186-87, 4198, 4208, 4210, 4218-19, 4223). To shore up this case based on "coincidence" and the "class of people who could have done this," the State

repeatedly presented inadmissible, irrelevant, inflammatory and unfairly prejudicial evidence.

1. The "Voodoo" Pamphlet. The police could not connect Mr. Trepal to the threatening note the Carr family received in June 1988.[11] Thus, the defense objected to the note's relevance (R. 1594). The police found no fingerprints on the note and could not locate the typewriter on which the note was typed. To connect the note to Mr. Trepal, the State introduced evidence regarding Mr. Trepal's membership in Mensa and his participation in Mensa "murder mystery weekends."[12] Detective Susan Goreck, pretending to be "Sherry Guin," befriended Mr. Trepal during a Mensa murder mystery weekend in April 1989, six months after the October 1988 poisoning (R. 3212-15, 3264).[13] Goreck testified that when she arrived at the event, she was given a packet of information which included a pamphlet on "voodoo" (R. 3216-17). Four fictional murders were portrayed during the weekend, and each murder "victim" received a threatening note (R. 3223). Mr. Trepal told Goreck he prepared the "voodoo" pamphlet, which was admitted over defense objection (R. 3224-25). Again over defense objection, Goreck was permitted to read a passage from the "voodoo" pamphlet which she found significant:

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[11]The note stated, "You and all your so-called family have 2 weeks to move out of Florida forever or else you will all die. This is no joke" (R. 1595).

[12]"Mensa is an organization open for membership to persons with intelligence quotients in the top two percent of the general population." Trepal v. State, 621 So. 2d 1361, 1364 n.7 (Fla. 1993).

[13]Goreck later authored a book about Mr. Trepal's case, as well as sold to the media the rights to the story. This issue is discussed in more detail in Mr. Trepal's Rule 3.850 appeal brief.

"Few voodooists believe they can be killed by psychic means, but no one doubts that he can be poisoned. When a death threat appears on the doorstep, prudent people throw out all their food and watch what they eat. Hardly anyone dies from magic. Most items on the doorstep are just a neighbor's way of saying, 'I don't like you. Move or else'" (R. 3226). Goreck was allowed to testify over defense objection that this passage was significant to her "because I had read the threatening note that the Carr family had received prior to the poisoning" (R. 3226). Mr. Trepal told Goreck that his wife, Diana Carr,[14] had written the scenarios for that weekend and that although this was their fourth murder weekend, they had not written all of them (R. 3264-65). Goreck never established the date on which Mr. Trepal had written the "voodoo" pamphlet.

In closing argument, the State relied upon Goreck's testimony regarding the murder mystery weekend and the "voodoo" pamphlet to establish Mr. Trepal's guilt (R. 4216-18). The State argued that on the weekend Goreck attended, the "victims" were sent threatening notes (R. 4216). The State argued that Mr. Trepal sent the threatening note to the Carrs because the note used the same language as the "voodoo" pamphlet (R. 4218).

This evidence was irrelevant to the charges against Mr. Trepal, largely because the murder mystery weekend which Goreck attended post-dated the Carr poisoning by six months and because the State never established that any of the materials used at that weekend,

[14]She is not related to the Pye Carr family.

including the “voodoo” pamphlet and the notes sent to the “victims,” existed at the time of the Carr poisoning. Despite its irrelevance, this evidence was clearly inflammatory and unfairly prejudicial not only because the Carrs received a threatening note, but also because it injected notions of “voodoo” into the case, notions which could only have been frightening to the jurors and served to "demonize" Mr. Trepal in the eyes of the jurors.[15]

2. Chemicals, Chemistry Equipment And Chemistry Books. The State introduced numerous bottles of chemicals, chemistry equipment, and chemistry books found in Mr. Trepal’s Sebring home in April 1990 (R. 3785-97, 3821-23, 3833-46, 3847-52).[16] Throughout this presentation, the defense objected that this evidence was irrelevant, misleading, inflammatory, and cumulative (R. 3785, 3793, 3794, 3796, 3797, 3821, 3822, 3823, 3825-33, 3838-46, 3847). The defense argued that the State was introducing these items “to try and show that my client is a bad person because he keeps poison in his house”; that any probative value of this evidence was outweighed by its prejudicial effect; that introducing chemicals “that don’t have anything to do with thallium is simply not relevant”; that the evidence simply went to Mr. Trepal’s character; that the State could not prove Mr. Trepal ever possessed thallium, “[s]o what he’s trying

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[15]In fact, in an article written after Mr. Trepal was convicted and sentenced to death, one of the jurors confessed that "that odd club of his called Mensa -- scared her from the very beginning. [The juror] said she believes Mensa has 'voodoo ceremonies' during meetings." Mike McLeod, "Murder, He Wrote," FLORIDA MAGAZINE, May 12, 1991, at 17.

[16]Mr. Trepal lived next door to the Carrs in Alturas. He later moved to Sebring.

to do is to inflame the jury by selecting just a few chemicals out of many and showing them and saying look what a dangerous man this is" (R. 3828, 3829, 3832). The State also introduced extensive testimony regarding the kinds of chemicals found in Mr. Trepal's home and their toxicity, all over defense objection (R. 3876-87).

The State relied heavily upon this evidence in closing argument, using it, as the defense had argued, as evidence of Mr. Trepal's character. The State argued that Mr. Trepal was "very likely the most dangerous, diabolical man you will ever come face-to-face with in your entire life. Very dangerous. That's what the evidence showed" (R. 4177). The State argued that when Mr. Trepal put thallium in the Cokes, "He knew what was going to happen. . . . So exactly what was in the book happened. . . . Poison Detection in Human Organs" (R. 4183).[17] The chemistry equipment from Mr. Trepal's Sebring home, the State argued, showed Mr. Trepal "ain't a guy playing with a high school chemistry set," but a man with "a high degree of chemistry knowledge" (R. 4206-07). Mr. Trepal was guilty, the State argued, because he belonged to "a class of people who keep deadly poisons in their garages and in their house" (R. 4221).

None of the chemicals introduced or testified about was thallium. No evidence was presented that any of the chemicals introduced or testified about was in Mr. Trepal's Alturas home in

[17]Contrary to the State's argument, in sentencing Mr. Trepal to death, the trial court found there was no evidence that Mr. Trepal actually read the journal which told what would happen to victims of thallium poisoning (R. 5551). In light of this factfinding, this Court erred on direct appeal in relying upon Mr. Trepal knowing the contents of this journal. See Trepal, 621 So. 2d at 1364.

October 1988. The State used the evidence to argue Mr. Trepal belonged to the "class of people that could have done this" precisely because this evidence did not connect Mr. Trepal to thallium and because the evidence was not connected to October 1988. This evidence was not relevant, but was clearly highly inflammatory and unfairly prejudicial.

3. Mr. Trepal's "Guilty Mind." Another category of irrelevant and highly prejudicial evidence upon which the State relied was testimony regarding Mr. Trepal's character and odd behavior. Over defense objection, the State was allowed to present evidence that Mr. Trepal did not talk about the poisoning of his neighbors. Gordon Rowan, who rented office space to Mr. Trepal, was asked by the State if Mr. Trepal ever discussed the poisoning of his neighbors (R. 3283). The defense objection to this question was sustained (R. 3283). When the State asked Rowan if Mr. Trepal was a person who kept up with things going on around him, the defense objected that the question referred to Mr. Trepal's character (R. 3283). The court overruled the objection, and Rowan answered "yes" (R. 3284). The State then asked if Mr. Trepal ever mentioned that his neighbors had been poisoned (R. 3284). The defense objection to relevance was overruled, and Rowan answered, "I don't really recall. I think there was one occasion when I brought up the subject. . . . I believe that's the only time we ever spoke about it" (R. 3284). Again over defense objection, the State was permitted to elicit from Patricia Boatwright, who used to work for Mr. Trepal's wife, that when she asked Mr. Trepal about the poisonings, "For the first time that I

remember George didn't meet my eyes, and the subject was then dropped" (R. 3700-01). Boatwright was also permitted to testify over defense objection that whenever the subject of the poisonings came up in Mr. Trepal's presence, "It always just fell like a thud and the subject was changed" and Mr. Trepal's demeanor had "a strained quality. I can't give you an actual tangible thing, but it seems that for some time later our face-to-face conversations were not as comfortable as they had been" (R. 3701).

Along the same lines, the court admitted a videotape of an encounter Detective Goreck had with Mr. Trepal while she was "Sherry Guin." In December 1989, some 14 months after the poisonings, Goreck pretended to rent Mr. Trepal's Alturas house (R. 3231-32, 3246). In January 1990, after "renting" the house, Goreck arranged to meet Mr. Trepal and videotaped their encounter (R. 3733-34). The defense relevance objection to admission of the videotape was overruled (R. 3710, 3735). On the videotape, Goreck told Mr. Trepal that she had just heard about the poisonings and that police had her asked about Mr. Trepal (R. 3739). Mr. Trepal said an FBI agent had told him the neighbor was poisoned by something put in Coke bottles, that if the police were interested in him it was because of the poisoning, that he might be a suspect just because he lived in the area, that he hoped he was not the prime suspect, that Goreck had nothing to worry about because he was probably the prime suspect, and that it was probably his turn to be a suspect because the police had suspected everyone else (R. 3739-57). After the videotape ended, Goreck was allowed to testify, over defense objection, that Mr. Trepal's

behavior during this conversation was different than usual (R. 3759-60).

The State argued that the testimony regarding Mr. Trepal's behavior was evidence that he had a "guilty mind" (R. 4197-98, 4226-27). This evidence was irrelevant and highly prejudicial to Mr. Trepal. Evidence of a "consciousness of guilt" may be admissible, but only if the evidence clearly indicates a consciousness of guilt. See, e.g., Nichols v. State, 760 So. 2d 223, 225-26 (Fla. 5th DCA 2000); Brown v. State, 756 So. 2d 230, 231 (Fla. 3d DCA 2000). For example, in cases where evidence of flight is relied on to show consciousness of guilt, this Court has noted that "flight alone is no more consistent with guilt than innocence." Merritt v. State, 523 So. 2d 573, 574 (Fla. 1988). The testimony about Mr. Trepal's behavior which the State was allowed to introduce is "no more consistent with guilt than innocence." An innocent neighbor of poisoning victims could well find the subject difficult and wish to avoid it. An innocent person who is told police are inquiring about him could well wonder if the police believe he is a suspect. This irrelevant and inflammatory evidence regarding Mr. Trepal's behavior should not have been admitted.

4. Access To The Carr House. Travis Carr unequivocally testified that he bought an eight-pack of 16-ounce bottles of Coca-Cola a couple of days before he became ill and that he and other family members drank those Cokes (R. 1624-25).[18] However, the State

[18]It was Pye Carr's sister, Carolyn Dixon, who was giving the Coca-Cola to the family. Early on, Peggy Carr's daughter, Gelena

needed to try to prove a connection between Mr. Trepal and the bottles of Coke and a method by which Mr. Trepal could have introduced the Cokes into the Carr house. The only evidence the State managed to muster on these points was misleading and lacking in any probative value. Over defense objection, the State was permitted to introduce photographs of and testimony about a screen door of the Carr house (R. 3350-51). The defense argued the photographs were irrelevant and inflammatory because they showed some scraping next to the door, which implied the door was jimmied open, although there was no evidence anyone illegally went through the door (R. 3351). The State argued that Detective Mincey and Pye Carr would testify the door was easy to jimmy, so the court overruled the objection (R. 3351). Mincey later testified over defense objection about the photographs of the door and about being able to open the locked door with a credit card (R. 3782-83). To connect Mr. Trepal to the Coke bottles, the State also presented evidence that Mr. Trepal preferred Coca Cola over other soft drinks (R. 3242-43). This was not probative of any issue, but since the crime involving poison in Coca

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"Cissy" Shiver, was convinced that both Pye Carr and his sister, Carolyn Dixon, had poisoned her mother. During the days when Peggy was at home sick, Dixon continued to bring food and drink into the house that was shared by everyone except Cissy and Tammy Carr. It bothered Cissy that as Peggy's health continued to decline, Dixon administered medicines to Peggy that were not prescribed by a doctor. Dixon was also steadily plying Peggy with the Coca-Cola, on the pretext that it would provide some type of "nourishment" (R. 1800). While Dixon was freely passing out Coca-Cola to the family members, she herself did not drink any Coke (R. 6121). Dixon was one of the suspect that was not adequately investigated at the time of trial; this issue is addressed in more detail in Mr. Trepal's Rule 3.850 appeal.

Cola, the evidence was highly prejudicial.

Although this evidence was irrelevant, misleading and lacked probative value, the State later relied upon it in closing argument. The State argued that it did not have to prove how Mr. Trepal got into the house, but suggested he may have gotten in the house because the door was easily jimmied (R. 4218-19). The State also asked the jury whether it was "just coincidence" that Mr. Trepal preferred Coca Cola, even though admitting, "Does that prove that he did it? Not by itself" (R. 4205).

5. Other Irrelevant But Inflammatory Evidence. The State had no direct evidence that Mr. Trepal tampered with the Coke bottles. However, over defense objection, the State was permitted to introduce testimony that in 1982--six years before the Carr poisoning--a man helping Mr. Trepal move had seen an "antique" bottle capper among Mr. Trepal's belongings (R. 3628, 3631). In closing, the State then wondered if it was coincidental that Mr. Trepal once had a bottle capper and asked why he did not have it when the police searched his home (R. 4198). In addition to the fact that this evidence was far remote in time from the poisoning, there was no evidence that the antique bottle capper was of the type which could cap modern Coke bottles. Of course, since the case involved removing and replacing bottle caps, the evidence was highly inflammatory.

Over a defense relevance objection, the State was permitted to introduce a package of gloves found in Mr. Trepal's garage in April 1990 (R. 3730-32). In closing argument, the State pointed to these gloves as another coincidence proving Mr. Trepal's guilt (R. 4199).

There was no showing that the gloves were used for anything connected to the poisoning, or even that the gloves were in the garage in October 1988. Again, the evidence was irrelevant, and in the context of this case was also inflammatory.

In another attempt to connect Mr. Trepal to the threatening note, the State introduced a roll of stamps found in Mr. Trepal's house in April 1990. Detective Mincey searched Mr. Trepal's Sebring home in April 1990, after Mr. Trepal's arrest (R. 3775). One item found in that search was a roll of postage stamps (R. 3853). The defense objected to the relevance of the stamps (R. 3853). The State argued the roll of stamps was relevant because the stamp on the threatening note was taken from a roll (R. 3854). The defense pointed out that the State could not show the stamp on the note was from the roll being introduced (R. 3854). The court overruled the defense objection (R. 3855). The State introduced the roll of stamps (R. 3855-56), and later presented testimony that the stamp on the note came from a roll (R. 3992-93). Besides not connecting the roll of stamps to the stamp on the note, the evidence never established that Mr. Trepal had a roll of stamps in 1988. In closing, the State argued that the roll of stamps was another unusual coincidence that showed Mr. Trepal's guilt (R. 4222). This evidence was irrelevant and in the context of this case was also inflammatory.

The State introduced the fact that the novel THE PALE HORSE was found in Mr. Trepal's Sebring home (R. 3578). The State wanted Detective Goreck to testify about the story line of the novel, but the court ruled that the only way the State would be permitted to

introduce the story line would be to introduce the book itself (R. 3719-22). The State elected not to introduce the book, so the story line was never introduced. Thus, the only evidence introduced regarding THE PALE HORSE was that Diana Carr, Mr. Trepal's wife, owned a copy of it at the time Mr. Trepal was arrested[19] and that she had read it (R. 3578). This evidence was irrelevant and prejudicial. It is quite possible some member of the jury knew the story line and used that as evidence against Mr. Trepal even though it was never introduced.[20]

6. Argument. To be admissible, evidence must "be relevant to a material issue other than propensity or bad character." Drake v. State, 441 So. 2d 1079, 1082 (Fla. 1983). Even relevant evidence should be excluded when the danger of unfair prejudice from the evidence substantially outweighs its probative value. § 90.403, Fla. Stat. (1995); State v. McClain, 525 So. 2d 420 (Fla. 1988). Application of this rule requires the court to conduct a balancing test, weighing the prejudicial impact of the evidence against its probative value. Williamson v. State, 681 So. 2d 688, 696 (Fla. 1996). Here, the trial court did not conduct the appropriate balancing test, erroneously admitting evidence which went to Mr. Trepal's character, post-dated the October 1988 poisoning and was never connected to that time frame or to Mr. Trepal, and which was highly inflammatory in the context of this case. These errors were

[19]Mr. Trepal was arrested in April 1990 (R. 3253).

[20]This Court erroneously relied upon the story line of THE PALE HORSE in Mr. Trepal's direct appeal. Trepal, 621 So. 2d at 1364.

not harmless, as the State repeatedly relied upon this evidence to argue Mr. Trepal's guilt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Appellate counsel's failure to raise this issue on appeal was prejudicially deficient performance. Strickland v. Washington, 466 U.S. 668 (1984). Alone and in conjunction with the other errors presented in this petition, a new trial and/or a resentencing are warranted.

C. FAILURE TO RAISE ON APPEAL THE IMPROPER LIMITATIONS ON THE DEFENSE CROSS-EXAMINATION OF STATE WITNESSES.

Repeatedly throughout Mr. Trepal's trial, the court sustained State objections to questions the defense attempted to ask on cross-examination of State witnesses. Although these limitations on cross-examination were clear on the record, appellate counsel did not raise this issue on direct appeal. Appellate counsel's performance was prejudicially deficient.

1. Limitations on the Cross-Examination of Diana Carr. The State called Mr. Trepal's wife, Diana Carr, as a witness to testify about a conversation she had had with Peggy Carr regarding the Carr children playing loud music in the yard shortly before members of the Carr family became ill (R. 3576-78). Diana testified she believed Mr. Trepal was home at the time of this conversation (R. 3578). Diana also testified that she had never had a container of thallium, that she had read the book "The Pale Horse," that she owned that book when Mr. Trepal was arrested, and that she owned several thousand books (R. 3578-79).

On cross-examination, the defense questioned Diana regarding her educational background and the fact that while she and Mr. Trepal had "several thousand" murder mystery books in their house, Mr. Trepal read mostly science fiction (R. 3579). Diana testified that murder mysteries were “only indirectly” the inspiration for the Mensa murder mystery weekends (R. 3579-80). When the defense asked whether she wrote the plots for the murder mystery weekends, the prosecution objected that the question was beyond the scope of direct, and the court sustained the objection (R. 3580). When the defense asked Diana whether Mr. Trepal drank bottled water or regular water, the prosecution's objection was sustained (Id.). When the defense asked whether Mr. Trepal had any speech impediments, the prosecution's objection was sustained (R. 3580-81).

After a brief redirect examination by the prosecution, the State excused Diana. The defense then asked to proffer the answers to the cross-examination questions to which the State’s objections had been sustained.

The defense asked one question on the proffer, eliciting that Diana was the one who wrote the plots for the murder mystery weekends (R. 3585). Following her answer, Richard McKinley, Diana Carr’s attorney, pointed out that "Dr. Carr is still testifying based on the subpoena that compelled her attendance here today. And the testimony that's given pursuant to this proffer, we would invoke the same immunity as any testimony that's been elicited prior" (R. 3583). The prosecutor disagreed, arguing that if Diana were to answer any questions not asked by the State, then the immunity would disappear:

> MR. AGUERO: No, sir. I'm not asking the questions. She answered all of the State's questions. The State is the only agency that can confer immunity. And if [defense counsel] asks her any questions, that's between Mr. McKinley and [defense counsel]. But the State isn't giving her any immunity.
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> . . . .
>
> THE COURT: I understand your position, Mr. McKinley, and ***I'm not going to require her to answer at this point***.

(R. 3583) (emphasis added). Defense counsel then proffered that Diana would have testified that she wrote the plots for the murder mystery weekends, that George Trepal did not help write the plots, that George did some technical research, and that George drank bottled water (R. 3583-84).

The defense moved for a mistrial based on Coco v. State, 62 So. 2d 892 (Fla. 1953), because the court had denied an opportunity for full cross-examination (R. 3584). The court ruled that the questions were beyond the scope of direct and denied the motion for mistrial (R. 3584). The State excused Diana from her subpoena and stated that if she testified any further, she would be testifying without use immunity (R. 3584). The defense requested that Diana remain under subpoena and objected to the State intimidating the witness by taking away her immunity for cross-examination or for being called as a defense witness (R. 3584-85).

The limitations on cross-examination of Diana Carr allowed the State to exploit the exclusion of the evidence she would have provided. While the State was allowed to present testimony that Mr. Trepal was guilty of poisoning Peggy Carr and the other family

members because he made strange sounds when he spoke to Detective Mincey and FBI Agent Brekke (see, e.g., R. 2079, 3175), the evidence regarding Mr. Trepal's speech impediment was excluded.[21] The evidence that Mr. Trepal drank bottled water was important for the jury to know because the State argued that since Mr. Trepal felt safe enough to drink water coming from the Carrs' well, he was guilty of placing the poison in the Coca-Cola bottles (R. 4184). The exclusion of the evidence that Diana wrote the murder mystery weekend plots allowed the State to argue that the murder mystery weekends indicated Mr. Trepal was guilty. For example, the State argued that Mr. Trepal "was practicing when he was at Mensa murder weekends" (R. 4212), and that Mr. Trepal must have sent the threatening note to the Carr family because "on each of the Mensa murders . . . a threatening note is sent to the victim" (R. 4216).

The trial court's limitations on cross-examination based on scope of direct examination were erroneous. This Court has explained the parameters of cross-examination:

> [W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts. . . or to the specific facts

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[21]This is one of the issues addressed in Mr. Trepal's Rule 3.850 proceedings. Mr. Trepal does in fact have a speech impediment consisting of not garden variety stuttering, but rather characterized as "disfluency" due to muscle weakness. Because of this inherent debility also known as dysarthria, Mr. Trepal's muscles are weak and do not move efficiently. This issue has been raised in regard to ineffective assistance of counsel, as trial counsel failed to investigate and retain an expert who could have diagnosed the speech impediment and who could have explained that Mr. Trepal's stutter and tremor were not born of artifice or indicative of guilt, but rather an innocent speech defect and hand tremor that was due to a birth trauma.

> developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief. . . .

Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978) (quoting Coco v. State, 62 So. 2d 892, 895 (Fla. 1953)).

In Zerquera v. State, 549 So. 2d 189 (Fla. 1989), the trial court did not permit Zerquera to cross-examine his co-defendant, Puttkamer, and the investigating detective regarding bullets found in Puttkamer's personal belongings because those questions exceeded the scope of direct examination. Id. at 191-92. The state was allowed to present other evidence which implied that the bullets belonged to Zerquera. Id. at 192. Based upon these facts and relying upon Coxwell and Coco, this Court held that the preclusion of this cross-examination was error. Id.

What happened in Zerquera is what happened in Mr. Trepal's case. The State presented evidence and argument that Mr. Trepal was guilty because he was not afraid to drink water from the Carrs' well, that Mr. Trepal was guilty because he made odd noises when he talked to Detective Mincey and FBI Agent Brekke, and that Mr. Trepal was guilty because he wrote murder mystery weekend scenarios. Yet, Mr. Trepal was not allowed to ask Diana Carr questions relevant to these matters. As is shown by Zerquera, cross-examination cannot be so mechanically limited by the scope of direct examination. A state evidence rule may not be applied mechanistically to defeat a criminal

defendant's right of confrontation. Chambers v. Mississippi, 410 U.S. 394 (1973).

The State's withdrawal of Diana Carr's immunity for cross-examination was fundamentally unfair. The State used the immunity in order to secure her testimony for the State's case, but foreclosed cross-examination by then withdrawing that immunity. This is tantamount to allowing no opportunity for cross-examination at all, a clear violation of the Sixth and Fourteenth Amendments. Ohio v. Roberts, 448 U.S. 56, 66 (1980); Pointer v. Texas, 380 U.S. 400, 406-07 (1965).

2. Limitations on Cross-Examination Regarding the Status of Pye and Peggy Carr's Marriage.

The trial court also repeatedly sustained State objections to defense cross-examination of State witnesses regarding the status of Pye and Peggy Carr's marriage. The questions were intended to raise the issue of whether the police adequately investigated Pye Carr's possible involvement in the poisonings. The objections to these questions were mainly based upon hearsay, because the defense wished to ask witnesses what Peggy Carr had said about her marriage. Although the defense was not allowed to ask these questions, the State was repeatedly allowed to ask questions regarding Pye Carr's relationships with and concern about Peggy Carr, Travis Carr and Duane Dubberly, even though these questions also elicited answers relying upon hearsay. Thus, while the State was allowed to elicit evidence excluding Pye Carr as a suspect, the defense was never

allowed the opportunity to include him.[22]

This issue first arose before any witnesses testified. The State made a motion in limine to prohibit the defense from asking questions about what Peggy Carr had said about her relationships or some event in the past (R. 1507). Citing Section 90.803(3), Fla. Stat., the defense argued that Peggy Carr's state of mind at the time she made the statements was relevant because her relationship with Pye Carr was relevant (R. 1507-08). The defense also argued that such testimony was not hearsay because the defense needed to ask witnesses whether they told police that Peggy Carr had said she wanted to leave Pye Carr (R. 1509). The defense argued this line of questioning was not eliciting Peggy Carr's statements for their truth but to explore whether the police adequately investigated all leads (R. 1509).[23]

The court stated that a statement of Peggy Carr regarded the status of her marriage was not state of mind, but was hearsay (R. 1509). However, the court indicated that offering these statements

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[22]As discussed in Mr. Trepal's postconviction proceedings, one key piece of evidence regarding the state of the Carr's marriage was suppressed by the State. A letter from Peggy Carr to Pye was discovered in the Carr's home during a search by Detective Mincey; this letter revealed the serious state of the marriage, contradicting the testimony at trial from a number of state witnesses. Mincey never showed the note to Pye Carr, but did show it to prosecutor John Aguero, who indicated that it had no evidentiary value; Mincey then put the note in an intelligence file and it was never disclosed to trial counsel. The note was revealed, however, pursuant to a Chapter 119 request made by Mr. Trepal's postconviction counsel.

[23]"[T]here is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another is thereby rendered inadmissible; quite the contrary is the case." United States v. Abel, 419 U.S. 45, 56 (1984).

to show the police did not investigate might be appropriate (R. 1509).

The defense wanted to ask such questions of the State's first witness, Rita Tacker (R. 1511). The defense argued that in addition to testifying that Peggy Carr came to her home with the children for three days, Tacker could testify that Peggy Carr said she was leaving Pye Carr for good because he treated the children unfairly, worked late hours, had a girlfriend and drank too much (R. 1511-12). The defense argued these matters were admissible:

> [T]he sufficiency of the police's investigation is directly relevant to this case. They've got a circumstantial case here. . . . Therefore, if someone else could have done this, which is an obvious reasonable hypothesis of innocence, they didn't go around and prove that no one else did this, then they don't even get to a jury. So the sufficiency of their investigation is absolutely relevant. It's crucial to the defense. It's absolutely crucial.

(R. 1512). The State agreed that the defense could elicit from Tacker that Peggy Carr came to her house, that she stayed there three days and that she had separated from her husband, but could not elicit what Peggy Carr told Tacker about separating from her husband (R. 1513-14). The court ruled that the defense could not ask Tacker what Peggy Carr had said about her marriage (R. 1515).

The defense maintained that the question was not what Peggy Carr told Tacker but what Tacker told the police (R. 1514). The defense argued that this was not hearsay and that there were indicia of reliability in that Tacker had told police these things immediately after the poisoning (R. 1515-16). The defense argued that Tacker had told police that Peggy Carr had said she was leaving

her husband for good because of his drinking, his girlfriend, his not coming home at night, and his treating the children unfairly (R. 1516). This was why Pye Carr was the main suspect of the first detective on the case, Paul Schaill, but this angle was not further investigated after that detective left and was replaced by Mincey (R. 1516). The defense argued that the critical factor in determining the admissibility of the testimony was "[w]hat's it offered to prove" (R. 1520). The court ruled that the defense could not ask Tacker what Peggy Carr said to her or what Tacker told the police Peggy Carr had said (R. 1522).

Tacker testified that she knew Peggy Carr from work, and they had become best friends (R. 1530-32). She identified a photograph of Peggy and Pye Carr (R. 1534), to which the defense had previously objected because it showed Peggy Carr "snuggling up to her husband" at her daughter's wedding (R. 1526). Tacker then testified to Peggy Carr's symptoms before she entered the hospital (R. 1534-36). On cross-examination, the defense elicited from Tacker that Peggy Carr and her two children had stayed with Tacker for three days because Peggy and Pye Carr were having marital problems (R. 1536-37). Tacker testified that she spoke to police, who wanted her to retrace Peggy Carr's life for the last two weeks before she became ill (R. 1537-38). When the defense attempted to ask Tacker what she told the police and whether the police asked about Peggy Carr's relationship with Pye Carr, the State's objections were sustained (R. 1538).

Outside the presence of the jury, the defense then proffered Tacker's testimony that Peggy Carr had said she was leaving Pye Carr

because he did not treat her children fairly, he drank too much, and he had another woman in his life (R. 1541-43). The defense also proffered Tacker's testimony that Peggy Carr's daughter Sissy had come to her about a week after Peggy Carr became ill and said she thought Pye Carr and his sister Carolyn Dixon were poisoning Peggy Carr (R. 1543-44). Sissy repeated this concern the whole time Peggy Carr was in the hospital and even after her death (R. 1544). Tacker testified she told the police about Peggy and Pye Carr's marital problems (R. 1545).

Duane Dubberly, Peggy Carr's son, testified on direct to describe the members of the Carr family and their living arrangements in the Carr house (R. 1582-86). He also testified regarding his, Peggy Carr's and Travis Carr's illnesses, the note the Carr family received, who was home the week before Peggy Carr became ill, and the Cokes under the kitchen sink (R. 1586-1600). On cross-examination, the defense asked Dubberly if he ever observed any arguments between Peggy and Pye Carr and whether he remembered going to stay with Tacker (R. 1605). The State objected to both of these questions, and the court sustained the objections, the second time saying, "Sustained as being beyond the scope of direct examination" (R. 1605).

Pye Carr testified about numerous matters on direct examination, including that he took care of Peggy Carr when she became ill, that he took Peggy to doctors and the hospital, and that he spent every day at the hospital with Peggy for five weeks (R. 1686-97, 1706). Before cross-examination, the court instructed the

defense it could ask Pye Carr whether he and Peggy Carr were having trouble and whether they separated, but no details about the separation (R. 1723). The defense stated that it wanted to ask Pye Carr about his former and subsequent girlfriends because "the prosecution has painted a very nice picture of a very concerned and caring husband here, who was concerned about Peggy, who was staying by her side in the hospital for five weeks. And information has come out that that was just not true. . . . [S]o it's proper cross-examination because of that" (R. 1723-24). The defense wanted to ask Pye Carr whether he had told his girlfriend Laura Irving that he had made a mistake by marrying Peggy and that he wanted Irving back (R. 1724). Pye Carr said he would answer "no" to that question (R. 1724). The defense said that Irving had told the police that Pye Carr had said this (R. 1725). The court ruled the defense could not ask the question because it was hearsay (R. 1725). The defense pointed out that "[w]e have the declarant right her[e]"--the declarant being Pye Carr--and that if he denied making the statement, the defense would be entitled to call Irving to present evidence of the prior inconsistent statement (R. 1725).

The defense also wanted to ask Pye Carr about another girlfriend, Joyce Crabbs (R. 1723). On proffer, Pye Carr said that he presently lived with Crabbs, but denied he began dating her while Peggy Carr was in the hospital (R. 1726-27).

Ronald Chester, the former husband of Peggy Carr's daughter Sissy, testified on direct that he lived in the apartment next to the Carr house in September of 1988 and did not observe any problems in

the Carr household (R. 3599-3600). On cross-examination, the defense tried to ask Chester about Pye Carr telling him "he didn't blame him for leaving Sissy, that he wishes that he could get out of his marriage, too, but it would cost him too much" (R. 3602-03). The defense argued this was not being offered for the truth of the matter asserted and was not hearsay (R. 3602-03). The court ruled the answer was hearsay and did not allow it (R. 3603). The defense moved for a mistrial because the court had denied Mr. Trepal his constitutional right to cross-examination, and the court denied the motion (R. 3604).

Peggy Carr's daughter Gelena Shiver, also known as Sissy, testified on direct that the only problem in the family just before people began getting sick was feuding between the children (R. 3651). On cross, the defense tried to ask her about her statement to police that she believed Pye Carr killed her mother (R. 3652). The defense argued the question was permissible because the State had asked Shiver about the family situation (R. 3652). The court would not allow the question (R. 3653).

While the defense was prevented from asking questions which would raise the issue of whether Pye Carr could have been responsible for the poisoning based on hearsay objections, the State was repeatedly allowed to elicit hearsay testimony indicating Pye Carr should be excluded as a suspect. For example, Peggy Carr's sister, Shirley Martin, testified that she visited Peggy in the hospital one day when Pye Carr was there (R. 1855). Peggy was unable to speak, but she and Martin knew sign language, so Martin assisted Pye in

communicating with Peggy (R. 1855). Over several defense hearsay objections, Martin was permitted to testify that Peggy asked Pye why she was in the hospital, that Pye said Peggy had been poisoned, that Peggy asked why, and that Pye said he did not know (R. 1855-56, 1857). Martin testified that Peggy kept asking why and Pye told her he did not know but would find out (R. 1858).

Over defense objection, the State was permitted to ask Pye Carr's ex-wife, Margaret Smith, how he treated his children, to which Smith responded that Pye Carr was "very good" with the children, "loved" the children, was "real lenient" with the children and "worshiped" the children (R. 3587). Over two defense objections, the State was also allowed to ask Smith how Pye Carr reacted to the illness of his son Travis, to which Smith responded, "He was very upset. He said, 'If I lose Travis, I don't know what I'm going to do'" (R. 3588-89).

Over defense objections, the State was allowed to ask the Carrs' minister, Robert Grant, how Peggy and Pye Carr reacted to the threatening note they received (R. 3612-14). Grant was permitted to testify that Peggy Carr "could not believe that someone would want to harm the family" and "seemed a bit irritated . . . and upset that someone would have enough against them that they would want to harm the family" (R. 3613). Grant was permitted to testify that Pye Carr "was concerned about it" (R. 3613). Again over defense objection, the State was allowed to ask Grant how Pye Carr reacted to his family being in the hospital, to which Grant responded, "Very much concerned. I could tell that it bothered him deeply as it prolonged

and the condition of each of them seemed to get worse" (R. 3615).

Over defense objection, the State was allowed to ask Pye Carr's daughter, Tammy Reed, about the relationship between Pye and Travis Carr (R. 3656). Reed answered, "They've always been real close, a very close relationship," which continued to the present (R. 3656).

3. Argument. The striking contrast between the rulings regarding questions the defense wished to ask on cross-examination of State witnesses and the rulings on questions the State was permitted to ask its witnesses at least indicate the unfairness of Mr. Trepal's trial. The State was repeatedly permitted to ask questions regarding the Carr family's relationships and to elicit hearsay answers or answers clearly based on hearsay. The defense was improperly precluded from asking questions which would have "modif[ied], supplement[ed], contradict[ed], rebut[ted] or ma[d]e clearer" the facts as presented by the State. Coxwell, 361 So. 2d at 151, quoting Coco, 62 So. 2d at 895. The "beyond the scope of direct" rule cannot be so mechanically applied. Zerquera; Chambers v. Mississippi. Nor can the defense be precluded from asking questions exploring the adequacy of the police investigation. Coxwell; Coco. The errors in excluding this cross-examination were not harmless. Zerquera, 549 So. 2d at 192 (citing State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)). The State focused much of its case on excluding Pye Carr, while the defense was never given the opportunity to include him.

"There are few subjects, perhaps, on which [the Supreme] Court and other courts have been more nearly unanimous than in their

expression of belief that the right of confrontation is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 404-05 (1965). Accord Douglas v. Alabama, 380 U.S. 415, 418-19 (1965); Berger v. California, 393 U.S. 314, 315 (1969). Here, the defense was precluded from pursuing cross-examination directly relevant to the State's case, in violation of Mr. Trepal's confrontation rights.

D. FAILURE TO RAISE ON APPEAL THE IMPROPER JURY INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES.

The trial court instructed the jury to consider as an aggravator that "the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" (R. 4404). Trial counsel objected to the jury being instructed on this aggravator, both in a pre-trial motion (R. 5081, 5263), and in the penalty phase charge conference (R. 4345). Counsel argued that the instruction is vague and overbroad, and "provides insufficient meaningful standards to separate by definition such homicide from every premeditated murder" (R. 5079-81). The objections were overruled (R. 4345).

The trial court did not instruct Mr. Trepal's jury regarding this aggravator in accordance with this Court's limiting constructions. At the time of Mr. Trepal's trial and direct appeal, this Court had held that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), and that "premeditated" refers to a "heightened" form of premeditation greater than the premeditation required to establish

first-degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). In order to satisfy the "coldness" element, the murder must also be the product of calm and cool reflection. See, e.g., Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991). The trial court instructed the jury to consider as an aggravator whether "the defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons" (R. 4405). Trial counsel objected to the jury being instructed on this aggravator, both in a pre-trial motion (R. 5080, 5262-63), and in the penalty phase charge conference (R. 4348-49). Counsel argued that the instruction is "irrefutably vague," and "contains qualifying adjectives which are subject to definitions without any guidelines or standards" (R. 5080, 5263). The objections were overruled (R. 4349).

The trial court did not instruct the jury regarding the aggravator of great risk of death to many persons in accordance with this Court's limiting constructions, which require an "immediate and present risk." Williams v. State, 574 So. 2d 136, 138 (Fla. 1991). Nothing in the wording of the factor itself, which is all the jury heard, tells the jury that the risk created must be immediate and present. Further, the Court has held that "great risk" means more than a mere possibility, but rather a likelihood or high probability. Kampff v. State, 371 So. 2d 1007, 1009-10 (Fla. 1979). "Many" persons means more than "a small number of persons." Id.

The trial court instructed the jury on the "heinous, atrocious and cruel" aggravator. The defense objected because, as a matter of

law, the evidence was insufficient to prove HAC beyond a reasonable doubt (R. 4344). In fact the State did fail to prove the factor, as evidenced by the trial court's rejection of it (R. 5551). Because HAC did not apply as a matter of law, it was error to submit it to the jury. Archer v. State, 613 So. 2d 446 (Fla. 1993); Atkins v. State, 452 So. 2d 529, 532 (1984).

The instructions given to the jury violate the Eighth and Fourteenth Amendments. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980). States must not only adopt narrowing constructions, but also apply them during a sentencing calculus. Richmond v. Lewis, 113 S. Ct. 528 (1992). In Florida, the penalty phase jury is part of the "sentencing calculus." See Johnson v. Singletary, 612 So. 2d 575, 577 (Fla. 1993). The only way for a jury to apply a narrowing construction is to be told what that narrowing construction is. Walton v. Arizona, 497 U.S. 639, 653 (1990). Mr. Trepal's jury was not told about the limitations on the aggravating factors, but presumably found the aggravators present. Espinosa, 112 S. Ct. at 2928.

Appellate counsel was ineffective in failing to raise any issue regarding the jury instructions on aggravating factors on direct appeal. Trial counsel had preserved the issue, and Espinosa, Stringer and Richmond were issued while Mr. Trepal's direct appeal was pending. Appellate counsel's omissions undermine confidence in the outcome of Mr. Trepal's direct appeal.

E. CONCLUSION.

Several meritorious arguments were available for direct appeal, yet appellate counsel unreasonably failed to assert them. These errors, singularly or cumulatively, demonstrate that Mr. Trepal was denied the effective assistance of appellate counsel.

CONCLUSION

For all of the reasons discussed herein, Mr. Trepal respectfully urges the Court to grant habeas corpus relief.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Courier 12 font.

I HEREBY CERTIFY that a true copy of the foregoing Petition for Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 15, 2001.

TODD G. SCHER
Florida Bar No. 0899641
Litigation Director
CCRC-South
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Appellant

Copies furnished to:

Carol Dittmar
Department of Legal Affairs
2002 North Lois Avenue
Suite 700
Tampa, Florida 33607