

**IN THE SUPREME COURT OF FLORIDA**

**GEORGE JAMES TREPAL,**

**Petitioner,**

**vs.**

**No. SC04-2029**

**THE STATE OF FLORIDA,**

**Respondent.**

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**GEORGE JAMES TREPAL,**

**Appellant,**

**vs.**

**No. SC89,710**

**THE STATE OF FLORIDA,**

**Appellee.**

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**CONSOLIDATED PETITION FOR WRIT OF HABEAS CORPUS, TO  
INVOKE THIS COURT'S ALL-WRITS JURISDICTION, MOTION TO  
REOPEN APPEAL IN CASE NO. SC89,710, AND MOTION FOR  
BRIEFING AND ORAL ARGUMENT**

**COMES NOW THE PETITIONER/APPELLANT, GEORGE**

**JAMES TREPAL, by and through his undersigned counsel, and herein files this**

Consolidated Petition for Writ of Habeas Corpus, Petition to Invoke this Court's All-Writs Jurisdiction, Motion to Reopen Appeal in Case No. SC89,710, and Motion for Briefing and Oral Argument. In support thereof, Mr. Trepal states as follows:

### **INTRODUCTION**

This petition is being filed to address matters arising from this Court's prior adjudication of Mr. Trepal's appeal from the denial of Rule 3.850/3.851 relief, *see Trepal v. State*, 846 So. 2d 405 (Fla. 2003), in light of *Guzman v. State*, 868 So. 2d 498 (Fla. 2003), as revised on March 4, 2003, *reh'g. denied*, 2004 Fla. LEXIS 309 (Fla. 2004).

One of the central claims raised in Mr. Trepal's postconviction addressed the false testimony presented to the jury by FBI Laboratory chemist Roger Martz under the rubric of the Supreme Court's decision in *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny. That Martz provided false and misleading argument at Mr. Trepal's trial is a matter of fact found by the trial court, and these findings were not disturbed on appeal. *See* 2PCR. 2682 (Martz's "conduct at trial was outrageous and shocking" because he falsely testified and misled the jury); *id.* at 2679-80 ("[t]he testing results of the Coke samples and Q206 were the only direct evidence of Trepal's guilt . . . [and] if Martz had testified truthfully the only

direct evidence in the case would have been greatly weakened” and that “[t]here is no doubt that the data available at the time of trial did not support the opinion Martz offered and that he knew it”); *id.* at 2679 (Martz was either an incompetent scientist or “quite skilled and knowingly colored his testimony”); *id.* at 2678-79 (Martz lied about testing sample Q3, lied about stating that a positive result on the DP test will yield a blue color indicating the presence of nitrate, “misled” the jury when testifying that nitrate was not present in unadulterated Coke, and “knew” that the data available at trial did not support the opinions he offered”).

While there was no real dispute over the facts on appeal, what *was* disputed on appeal was the appropriate legal standard attendant to Mr. Trepal’s *Giglio* claim. In his briefs, Mr. Trepal argued that the lower court applied the wrong standard, relying on this Court’s decision in *Rose v. State*, 774 So. 2d 629 (Fla. 2000).<sup>1</sup> *See* Initial Brief of Appellant at 55, 56 & n.75. In its Answer Brief, the State contended that the lower court did apply the proper *Giglio* test (Answer Brief of Appellee at 20). Notably, the State never addressed the actual argument by Mr. Trepal as to the correctness of the *Giglio* test set forth in *Rose*. In his Reply Brief,

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<sup>1</sup>That the lower court relied on *Rose* and applied an erroneous standard for obtaining relief under *Giglio* is not in dispute. *See* 2PCR. 2689 (“[t]he test for determining whether false testimony is ‘material’ under *Giglio* is the same as the standard for determining whether the state withheld ‘material’ evidence in violation of *Brady [v. Maryland]*, 373 U.S. 83 (1963)”).

Mr. Trepal again noted that the lower court applied the wrong standard and that the State had failed to take on the issue of whether *Rose* set forth the proper legal standard (Reply Brief of Appellant at 16 & n.10). In its decision affirming the lower court's order, this Court, sidestepping its obligation to conduct *de novo* review of Mr. Trepal's *Giglio* claim, simply relied on the "competent and substantial evidence" standard, quoted the passage from the lower court's order relying on *Rose*, and affirmed. *Trepal*, 846 So. 2d at 425-26; 428 ("When the above conclusions are combined with the other circumstantial evidence of guilt in this case (summarized above in this Court's opinion on direct appeal), we agree that the prejudice suffered by Trepal as a result of Martz's improprieties was insufficient to warrant a new trial. Applying the *Glatzmayer*<sup>[2]</sup> standard of review, set forth above, we conclude that the court's factual findings are supported by competent and substantial evidence in the record, and the court properly concluded—based on those findings—that the prejudice suffered by Trepal was insufficient to warrant a new trial. We find no error").<sup>3</sup> Mr. Trepal thereupon filed

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<sup>2</sup>*State v. Glatzmayer*, 789 So. 2d 297 (Fla. 2001).

<sup>3</sup>In a concurring opinion, Justice Pariente did write to "clarify" the difference between the legal standards for establishing prejudice under *Giglio* and *Brady*. *Trepal*, 846 So. 2d at 437-39 (Pariente, J., specially concurring). The majority opinion, however, relying on the lower court's incorrect analysis, did not make this crucial distinction. Justice Pariente concluded that Mr. Trepal was nonetheless not

a rehearing motion, arguing, *inter alia*, that the Court failed to conduct *de novo* review, instead reviewing the legal claims under a competent and substantial evidence test, and that the Court, by simply deferring to the lower court's legal analysis, continued to misapply *Giglio* (Motion for Rehearing at 7-17). No response was filed by the State, and rehearing was subsequently denied.

Several months after the disposition by this Court of Mr. Trepal's appeal and rehearing, the Court issued its decision in *Guzman*,<sup>4</sup> where the Court acknowledged that the arguments made by Mr. Trepal were in fact correct. In *Guzman*, the Court observed that "Guzman asserts that the postconviction court applied the wrong standard in deciding the materiality prong of his *Giglio* claim." *Guzman*, 868 So. 2d at 505.<sup>5</sup> Noting that its precedent in this area has "lacked clarity, resulting in some confusion and improper merging of the *Giglio* and *Brady*

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entitled to relief because of the evidence of guilt. *Id.* at 439. This conclusion, as later explained in this petition, is contrary to *Guzman*, *Giglio*, and *Chapman v. California*, 386 U.S. 18 (1967), a point made by Mr. Trepal in his motion for rehearing. *Guzman* now establishes the correctness of Mr. Trepal's arguments.

<sup>4</sup>The Court issued a revised decision in *Guzman* on March 4, 2004, and denied rehearing on that date.

<sup>5</sup>This was the identical argument made by Mr. Trepal in his briefs and rehearing to this Court, to no avail.

materiality standards,”<sup>6</sup> the Court observed that “the trial court’s order that we approved of in *Trepal* erroneously stated that in addressing a *Giglio* claim, ‘the materiality prong is the same as that used in *Brady*.’” *Id.* at 506 (quoting *Trepal*, 846 So. 2d at 425). The Court in *Guzman* thus “recede[d] from *Rose* and *Trepal* to the extent that they stand for the incorrect legal principle that the ‘materiality’ prongs of *Brady* and *Giglio* are the same[,]” *Guzman*, 868 So. 2d at 506, and went on to “clarify the two standards and the important distinction between them”:

The *Brady* standard of materiality applies where the prosecutor fails to disclose favorable evidence to the defense. *See Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, the undisclosed evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682 (1985).[] A criminal defendant alleging a *Brady* violation bears the burden to show that the undisclosed evidence would have produced a different verdict. *Strickler v. Greene*, 527 U.S. 263, 281 n.20, 289 (1999).

By contrast to an allegation of suppression of evidence under *Brady*, a *Giglio* claim is based on the prosecutor’s knowing presentation at trial of false testimony against the defendant. *See Giglio*, 405 U.S. at 154-55. Under *Giglio*, where the prosecutor knowingly used perjured testimony, or fails to correct what the

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<sup>6</sup>In his briefs to this Court, Mr. Trepal also argued, to no avail, that the lower court’s analysis, relying on *Rose*, improperly merged or confused the materiality standards of *Brady* and *Giglio*. *See* Initial Brief of Appellant at 56 n.75 (“Thus, although both *Brady* and *Giglio* require a showing of ‘materiality,’ the legal standard for demonstrating entitlement to relief is significantly different”).

prosecutor later learns is false testimony, the false testimony is material “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103 (1976). Justice Blackmun observed in *Bagley* that the test “may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.” 473 U.S. at 679-80. The State, as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. *Id.* at 690 n.9 (stating that “this Court’s precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* [*v. California*, 386 U.S. 18 (1967)] harmless-error standard”).[]

Thus, while materiality is a component of both a *Giglio* and a *Brady* claim, the *Giglio* standard of materiality is more defense friendly.[] The *Giglio* standard reflects a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a defendant. *See Bagley*, 473 U.S. at 682 (explaining that the defense-friendly standard of materiality is justified because the knowing use of perjured testimony involves prosecutorial misconduct and a “corruption of the truth-seeking function of the trial process”)(citing *Agurs*, 427 U.S. at 104). Under *Giglio*, once a defendant has established that the prosecutor knowingly presented false testimony at trial, the State bears the burden to show that the false testimony was not material.

*Guzman*, 868 So. 2d at 506-07 (footnotes omitted).<sup>7</sup>

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<sup>7</sup>In his Initial Brief, Mr. Trepal also noted, to no avail, that the proper test was the Florida version of the harmless-beyond-a-reasonable-doubt standard found in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), and that the State bore this burden (Initial Brief of Appellant at 48). In his rehearing motion, Mr. Trepal again noted that the Court failed to put the burden on the State in order to establish the harmless-beyond-a-reasonable doubt standard of *Chapman*. *See* Motion for Rehearing at 8.

In light of the Court's belated recognition in *Guzman* that the arguments in Mr. Trepal's case were correct, and in fact the Court having now receded from its decision in *Trepal*, Mr. Trepal files the instant petition seeking to correct the errors in the Court's prior disposition of his appeal. Mr. Trepal submits that relief is warranted in the form of a new trial. At a minimum, the Court should remand the case to the trial court for a proper *Giglio* analysis, as it did in *Guzman*.

### **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. Cont. 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.

Alternatively, Article V, §§ 3 (b)(1) and (7) of the Florida Constitution give this Court exclusive appellate jurisdiction over all capital cases and the ability to issue "all writs necessary to the complete exercise of its jurisdiction." This Court's "all writs" jurisdiction may be invoked in capital cases when warranted by the circumstances. *See Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997); *Johnston v. Singletary*, 640 So. 2d 1102 (Fla. 1994); *Bedford v. State*, 633 So. 2d 13 (Fla. 1994). The circumstances presented herein warrant invocation of the "all writs"

jurisdiction.

In addition, this Court has “exclusive jurisdiction to review all types of collateral proceedings in death penalty cases.” *State v. Fourth District Court of Appeal*, 697 So. 2d 70, 71 (Fla. 1997). Errors apparent in this Court’s prior disposition of a matter raised in a capital cases suffices to establish this Court’s jurisdiction. *See Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Foster v. State*, 810 So. 2d 910 (Fla. 2002). Based on this Court’s acknowledgment in *Guzman* that it applied the wrong *Giglio* test in Mr. Trepal’s case—and indeed receded from the case—Mr. Trepal submits that this Court’s jurisdiction to re-evaluate his case is without question.

### **REQUEST FOR ORAL ARGUMENT**

Mr. Trepal requests oral argument on this petition.

### **PROCEDURAL STATEMENT OF THE CASE**

On April 9, 1990, Mr. Trepal was indicted by a grand jury in the Tenth Judicial Circuit for Polk County, Florida, 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 a four (4) week trial, the jury found Mr. Trepal guilty on 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 (9) to three (3). This Court affirmed Mr. Trepal's convictions and sentences on direct appeal. *Trepal v. State*, 621 So. 2d 1362 (Fla. 1993), *cert. denied*, 114 S. Ct. 892 (1994).

An initial Rule 3.850 motion was filed on June 16, 1995, and an amendment thereto on March 21, 1996 (1PCR. 1107-1361).<sup>8</sup> An evidentiary hearing was conducted on some claims in October, 1996, and an order denying relief was entered on November 6, 1996 (*Id.* at 3337). Following a rehearing motion which was denied (*id.* at 3515), a timely appeal was filed.

On April 15, 1997, the United States Office of the Inspector General issued a report (OIG Report) regarding various serious deficiencies noted in a number of cases, including this case, in which the FBI Crime Laboratory and its scientists were involved. On June 20, 1997, Mr. Trepal sought, and this Court granted, a relinquishment of jurisdiction to investigate and file a Rule 3.850 motion. Mr. Trepal thereupon filed his motion, which was later amended after disclosure of additional records by the federal government (2PCR. 2485). The circuit court held an evidentiary hearing,<sup>9</sup> and issued an order denying relief on October 26, 2000 (*Id.*

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<sup>8</sup>In the interim, Mr. Trepal filed an interlocutory appeal regarding public records issues. *Trepal v. State*, 704 So. 2d 498 (Fla. 1997).

<sup>9</sup>The hearing was bifurcated, having been stayed by this Court pending an interlocutory appeal. *Trepal v. State*, 754 So. 2d 702 (Fla. 2000).

At 2675). Mr. Trepal timely filed his appeal, which was consolidated with the first Rule 3.850 appeal, and this Court, after briefing an oral argument, denied relief. *Trepal v. State*, 846 So. 2d 405 (Fla. 2003). A state habeas petition was also denied with the appeal. *See Trepal v. Crosby*, No. SC01-2267.

Subsequently, on June 23, 2003, Mr. Trepal filed a petition for writ of habeas corpus based on the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which was denied on November 14, 2003. *Trepal v. Crosby*, 2003 Fla. LEXIS 2332 (Fla. Nov. 14, 2003). A timely rehearing was denied on May 4, 2004.

## ARGUMENT

### **MR. TREPAL IS ENTITLED TO RELIEF IN THE FORM OF A NEW TRIAL BASED ON THIS COURT'S ACKNOWLEDGMENT THAT IT PREVIOUSLY APPLIED THE INCORRECT LEGAL STANDARD TO HIS FALSE EVIDENCE CLAIMS.**

Despite having advanced, in his prior written and oral submissions to this Court, the argument that the lower court applied an incorrect materiality standard to Mr. Trepal's *Giglio* claim and that this Court's decision in *Rose v. State*, 774 So. 2d 629 (Fla. 2000), set forth an incorrect standard, this Court reaffirmed the lower court's reliance on *Rose* and, in doing so, endorsed that standard when affirming the order denying Rule 3.850 in Mr. Trepal's appeal. *Trepal v. State*, 846 So. 2d 405, 425 (Fla. 2003). Mr. Trepal's arguments, however, have turned out to be well-taken as this Court subsequently receded from its decision in Mr. Trepal's case in *Guzman v. State*, 868 So. 2d 498 (Fla. 2003). Based on this Court's acknowledgment of error, Mr. Trepal seeks relief in the form of habeas relief. He further requests the opportunity to fully brief the issues presented in this petition. *See Bottoson v. Moore*, 824 So. 2d 115 (Fla. 2002) (following filing of habeas petition, court enters stay of execution and orders full briefing of the issues raised in the petition). In the alternative, this Court should remand Mr. Trepal's case to

the circuit court for proper resolution of the *Giglio* claim, as the Court did in *Guzman*.

The central issue presented in this case as to the *Giglio* claim is the ‘materiality’ of Martz’s false testimony.<sup>10</sup> That Martz testified falsely on just about every matter to which he testified is not a matter of factual dispute, this Court having found competent and substantial evidence to support the lower court’s factual findings on this issue. That being said, the issue comes down to whether the State, using the proper standard of law that Mr. Trepal urged in his case and that this Court subsequently acknowledged in *Guzman* to have been correct, can establish that Martz’s false testimony is harmless beyond a reasonable doubt.<sup>11</sup> Under the facts of this case, the State unquestionably cannot meet its very high

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<sup>10</sup>The State has agreed with this. *See* Answer Brief at 20 (“The analysis of materiality with regard to the problems presented by Martz’s trial testimony is the core issue presented by Trepal’s challenge to Martz’s testimony”).

<sup>11</sup>Neither the lower court nor this Court put the burden on the State to establish harmlessness. In fact, the State has never acknowledged its burden, arguing instead that it was Mr. Trepal’s burden. *See* Answer Brief of Appellee at 23 (“Trepal has failed to demonstrate that he is entitled to a new trial due to the prosecutor’s knowing use of false testimony at his trial”). On appeal, this Court, after noting the lower court’s conclusion that Mr. Trepal was not “impermissibly prejudiced by the testimony of Martz” and its “agree[ment]” with that conclusion, cited to *Strickland v. Washington*, 466 U.S. 668 (1984). *Trepal*, 846 So. 2d at 426 n.12. The party that bears the burden of establishing prejudice under *Strickland* is, of course, the defendant.

burden.

At the outset, while it is critical to understand what the *Chapman* standard is, it is perhaps more important to understand what the *Chapman* standard is not: it is not a sufficiency-of-the-evidence test. For example, in *United States v. Alzate*, 47 F. 3d 1103 (11<sup>th</sup> Cir. 1995), a case cited by the Court in *Guzman*, see *Guzman*, 868 So. 2d at 507 n.10, the Eleventh Circuit condemned the sufficiency-of-the-evidence test, dismissing outright the contention made by the Government in that case that the “weight of the evidence” against Alzate established that he was entitled to no relief. *Alzate*, 47 F. 3d at 1110. This analysis, in the Eleventh Circuit’s view, “miss[ed] the mark” because a proper *Giglio* analysis must look to “where the line of contention was drawn at trial.” *Id.* This analysis is consistent with a proper harmless test, which demands that if there is “any reasonable likelihood” that the false testimony “could have” affected the judgment of the jury, relief is warranted. *Williams v. Griswald*, 743 F. 2d 1522, 1543 (11<sup>th</sup> Cir. 1984).

Under the appropriate *Chapman* standard, which this Court follows, see *Guzman*; *DiGuilio*, a reviewing court looks not only to the “permissible evidence on which the jury could have legitimately relied,” but also requires “*an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.*” *DiGuilio*, 491 So. 2d at 1135 (emphasis added). Indeed, a

reviewing court “must resist the temptation to make its own determination of whether a guilty verdict could be sustained by excluding the impermissible evidence and examining only the permissible evidence.” *Goodwin v. State*, 751 So. 2d 537, 542 (Fla. 1999).<sup>12</sup> As former Chief Justice Traynor wrote in his essay THE RIDDLE OF HARMLESS ERROR, discussed and cited with approval by this Court in *Goodwin*:

Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution’s case may have played a substantial part in the jury’s deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

*Goodwin*, 751 So. 2d at 542 (citations omitted).

As this Court noted in *Guzman*, strict adherence to the appropriate standard for materiality in the *Giglio* context is particularly important because it reflects a “heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a defendant.” *Guzman*, 868 So. 2d at 507. This is so because “[a]ll perjury pollutes a trial, making it hard for jurors to see the truth.” *United States v. LaPage*, 231 F. 3d 488, 492 (9<sup>th</sup> Cir. 2000).

Thus, under *Guzman* and the appropriate standard, the fact that this Court “would

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<sup>12</sup>See also *Williams v. State*, 863 So. 2d 1189 (Fla. 2003) (quashing lower court decision applying sufficiency-of-the-evidence test because such test was contrary to proper harmless error analysis under *Goodwin* and *DiGuilio*); *Knowles v. State*, 848 So. 2d 1055 (Fla. 2003) (same).

sustain a conviction untainted by the false evidence is not the question.” *United States v. Barham*, 595 F. 2d 231, 242 (5<sup>th</sup> Cir. 1979). “Harmless error is not a device for an appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.” *DiGuilio*, 491 So. 2d at 1139.

That the circuit court and this Court believed that there was circumstantial evidence sufficient to convict Mr. Trepal without Martz’s testimony is just not the issue under *Chapman* and *Giglio*. As the State candidly conceded at the oral argument conducted in this case, Martz’s testimony finding thallium nitrate in the tainted Coca-Cola bottles and the Q206 bottle was like a “fingerprint.” The State also candidly conceded the importance of linking the thallium nitrate in the Q206 bottle to the thallium nitrate found in the tainted Coca-Cola bottles. This “link” was provided by Roger Martz and Roger Martz alone. Indeed, the lower court found, in an order this Court concluded to be supported by competent and substantial evidence, that “if Martz had testified truthfully, the only direct evidence in this case would have been greatly weakened” (2PCR. 2679).

“Review of the record to ascertain whether the error is harmless is an essential and critical appellate function.” *Goodwin*, 751 So. 2d at 546. Yet because this Court applied an improper *Giglio* standard, no such review was

conducted. A meaningful review of the record in this case reveals the State's concerted efforts at trial to prove Mr. Trepal's guilt of premeditated murder and attempted first-degree murder through the now debunked "link" between the *type* of thallium found in the tainted Coca-Cola bottles and the *type* of thallium in the Q206 bottle. Indeed, the Court, based on the factual record as it now exists, concluded at most that the tainted Coca-Cola bottles contained thallium of an undetermined type and the Q206 bottle contained thallium and an oxidizing ion consistent with the presence of a nitrate. *Trepal*, 846 So. 2d at 427-28. These findings eviscerate the State's theory of prosecution advanced at trial. As noted in his Initial Brief, the State relied on this "link" to convince the trial court to introduce *Williams* rule evidence against Mr. Trepal. *See* Initial Brief of Appellant at 50-55; Reply Brief of Appellant at 5-7. At the evidentiary hearing, defense counsel testified extensively to the critical nature of what they labeled the "nexus" provided by Mart which allowed the State to introduce the *Williams* rule evidence (2PCR. 1973-74). As defense counsel stated, "the bottom line significance of that is if there is a particular salt of thallium in the Coke bottles and a different salt of thallium in the Q206 bottle, then it would certainly be obvious that the thallium in the Cokes didn't come from the Q206 bottle" (2PCR. 3542). Based on the conclusions of this Court that there was no way to know what salt of thallium was in either the tainted Coke bottles or the

Q206 bottle now that Mart's false testimony has been proven, the prosecution's entire theory had been debunked. Because this is where "the line of contention was drawn at trial," *Alate*, 47 F. 3d at 1110, there is no way that the State can establish harmlessness beyond a reasonable doubt.<sup>13</sup>

The issue here is not that the Carr family had been poisoned with thallium. Rather, the State determined that it was significant to attempt to link the evidence of the contents of the Q1 through Q3 bottles to the contents of Q206, and of course, the contents of both to Mr. Trepal. The particular form of thallium contained in Q1-Q3 and Q206 was the dispositive factor and the foundation for Mr. Trepal's arrest and the ultimate linkage to Mr. Trepal of the Q1-Q3 and Q206 items. In other words, if this case had involved a shooting, Martz's testimony provided the State with evidence that the lands and grooves of the bullet used to kill the victim matched a gun in Mr. Trepal's possession. Without the linkage between the specific bullet to a specific gun, the State would not be permitted to simply introduce "a bullet" and "a gun" and hope the jury believes they are somehow

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<sup>13</sup>In *Cash v. State*, 875 So. 2d 829 (Fla. 2d DCA 2004), the Court rejected an argument advanced by the State that the false testimony of a prosecution witness was not "material" in light of the fact that the State's argument at trial was that the evidence was relevant. *Id.* at 831. Here, there is no question that the State presented Martz's testimony and relied on such during closing arguments as relevant evidence. Any distancing now from Martz or his testimony should be likewise rejected.

related to the case and the defendant.

The State relied heavily on Martz's testimony to demonstrate premeditation. For example, at closing argument, the State argued "[t]his defendant has got Thallium I Nitrate in his garage. Thallium I Nitrate" (R4193). It is now known that this is not true. Even this Court has found that, at most, the Q206 bottle contained thallium and an oxidizing ion consistent with the presence of a nitrate. *Trepal*, 846 So. 2d at 427-28. The State also argued in closings that "Mart goes in there from the FBI and says I can test for nitrates or sulphates. And he finds out that it's Thallium I Nitrate—Thallium Nitrate. Could be Thallium I as far as Mart knows, could be Thallium III as far as Mart knows, but he knows its Thallium Nitrate" (R4193-94). This too was not true. Based on even this Court's findings, this record does not support any conclusion as to the type of thallium found. Moreover, based on the State's failure to disclose under *Brady*, it is now known that Mart tested for far more salts than just nitrates or sulphates; as he explained, he conducted testing on the tainted Coca-Cola bottles which revealed the presence of, in his words, "lots of different salts" including thallium sulfate, thallium phosphate, thallium oxide, and thallium chloride (2PCR. 2490; 2948-55; 2958-60). The State then argued in closing arguments:

What happens? Coca-Cola makes Thallium I, Thallium III, and they

put it in a bunch of Coke bottles. *Well, isn't it an amazing, an astounding coincidence, a coincidence that a Coca-Cola bottle without any thallium in it looks like this, and a Coca-Cola bottle with up to a gram of thallium also looks like this (demonstrating). Just like this. No thallium, quarter gram, half gram, three quarters of a gram, a whole gram. No chance. You cannot see this stuff. Isn't that amazing. Because if you take Thallium III and put it in Coca-Cola, what happens? Coca Cola becomes extremely discolored. Now who's going to drink this (demonstrating)?*

*Now, as far as the defense argument at the end that perhaps even if Mr. Trepal did this he didn't intend to kill anybody. Why didn't he just put Thallium III in there? Nobody would drink this crap, but they certainly would have had it tested and they would know that somebody was trying to poison them. That isn't what's in here. Thallium I Nitrate was in there.*

(R4193-94) (emphasis added).<sup>14</sup> The prosecutor's own theory of the case and the evidence the State chose to present to the jury belies any notion that Martz's testimony could not but have influenced the jury's verdict in this case, as the State expressly relied on Martz's testimony to convince the jurors of Mr. Trepal's guilt.

Because the lower court applied an incorrect standard under *Giglio*, an error compounded by this Court on appeal but acknowledged in *Guzman*, no analysis has been conducted as to the effect that the false testimony had on the jury. Mart testified falsely about "the only direct evidence of Trepal's guilt" and, had he

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<sup>14</sup>On direct appeal the State also urged the Court to find premeditation because "the use of thallium one nitrate shows that appellant intended to kill" (Answer Brief of Appellee, *Trepal v. State*, No. SC77-667).

testified truthfully, “the only direct evidence in the case would have been greatly weakened.” These statements are not rhetorical flourishes of an advocate; they are factual findings made by the lower court in this case. Mart not only provided false testimony about the contents of the Coke sample and Q206, he also lied about testing sample Q3, lied about stating that a positive result on the DP test will yield a blue color indicating the presence of nitrate, “mislead” the jury when testifying that nitrate was not present in unadulterated Coke, and “knew” that the data available at trial did not support the opinions he offered (2PCr. 2678-79). These too are factual findings made by the lower court. Given that all of these opinions related to “the only direct evidence of Trepal’s guilt,” as the lower court concluded, the State simply cannot establish harmlessness beyond a reasonable doubt, as *Guzman* now establishes the correct standard to be.

WHEREFORE, based on the foregoing, Mr. Trepal requests that the Court order full briefing and oral argument, grant habeas relief in the form of a new trial and/or new sentencing proceeding, and/or remand this case to the lower court to conduct a proper materiality analysis, and/or grant any other relief as deemed proper.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true copy of the foregoing has been furnished by U.S. Mail to Assistant Attorney General Carol Ditmar, Department of Legal Affairs, Concourse Center #4, 3507 Frontage Road, No. 200, Tampa, Florida 33607, this 19<sup>th</sup> day of October, 2004.

Respectfully submitted,

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TODD G. SCHER  
Counsel for Appellant