IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,564

THE STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

DIETER RIECHMANN,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

POINT ON APPEAL

THE COURT BELOW ERRED IN FINDING, AFTER AN EVIDENTIARY HEARING UNDER RULE 3.850, THAT DEFENDANT'S COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF TRIAL, AND THE COURT ALSO ERRED IN ORDERING A NEW PENALTY-PHASE PROCEEDING WHERE ALTHOUGH THE PROSECUTOR PREPARED THE ORIGINAL DRAFT OF THE SENTENCING ORDER, THE TRIAL JUDGE TESTIFIED THAT HE REVIEWED THE ORDER AND IT REFLECTED HIS FINDINGS, AND WHERE THE TRIAL JUDGE FURTHER MODIFIED THE ORDER IN DEFENDANT'S FAVOR.

STATEMENT OF THE CASE AND FACTS

A. TRIAL AND DIRECT APPEAL

This is a State appeal from the court below's grant, after a Fla. R. Crim. P. 3.850 evidentiary hearing, of a new sentencing proceeding before a new judge and jury.

Defendant was originally charged by indictment filed on January 27, 1988, in the Eleventh Judicial Circuit of Florida, case no. 87-42355, with, on October 25, 1987, (1) the first-degree premeditated murder of Kersten Kischnick with a firearm, and (2) the use of a firearm in the commission of a felony. (D.A.R. 3).[1] After he was convicted and sentenced to death, Defendant appealed to this court, which affirmed, Riechmann v. State, 581 So. 2d 133, 141 (Fla. 1991)(Barkett, J), finding the following facts:[2]

> Riechmann and Kischnick, "life companions" of thirteen years, were German citizens and residents who came to Florida in early October 1987. Kischnick was shot to death in Miami Beach on October 25, while she sat in the passenger seat of an automobile that had been rented and driven by Riechmann. The state's theory at trial was that Kischnick was a prostitute, Riechmann was her pimp supported by her income, and when she decided to quit prostitution, he killed her to recover insurance proceeds. Relying on circumstantial evidence, the state

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[1] The terms "D.A.R." and "D.A.T" will be used to refer to the record and transcript prepared on direct appeal in Riechmann v. State, Florida Supreme Court case no. 73,492. The terms "R." and "T." refer to the record and transcript in the instant, post-conviction, appeal.

[2] Defendant did not raise any issues on direct appeal regarding his sentence. Riechmann, 581 So. 2d at 141.

sought to prove that Riechmann stood outside the passenger side of the car and fired a single fatal shot through the partially open passenger-side window, striking Kischnick above the right ear. Riechmann has consistently denied committing the crime, asserting that a stranger shot Kischnick when they stopped the car somewhere in Miami to ask for directions.

Testimony at trial established that as early as the summer of 1986 Kischnick became too sick to work and wanted to quit prostitution. In the months immediately prior to the murder Kischnick and Riechmann were not getting along, and Riechmann was often verbally abusive toward Kischnick.

After arriving in Miami from Germany, Riechmann rented an automobile with his Diner's Club card, which automatically insured the passengers for double indemnity in the event of accidental death. On the evening of October 25, Riechmann drove around the Miami area with Kischnick in the passenger seat. At some point that evening, Kischnick was shot.

The evidence at trial included a series of statements Riechmann made to police during the hours and days that immediately followed the murder. Riechmann, who spoke broken English, made his first statement during the investigation at the scene on October 25. He told officers that when he stopped to ask directions from a black man, he sensed danger and suddenly heard an explosion. Realizing that the man had shot Kischnick, he accelerated the car and drove around Miami in a panic looking for help. Finally, he spotted Officer Reid and pulled over. Riechmann made subsequent statements to officers at the police station, during "drive-arounds" when attempting to help police find the location of the shooting, and on the telephone. In each pretrial statement Riechmann told virtually the same story, but he was unable to recall details of the shooting or where it took place. Riechmann also told officers that he had not fired a gun on the day of Kischnick's murder.

In his trial testimony, Riechmann gave a more detailed account. Riechmann testified that he and Kischnick had been touring in their car, intending to videotape some of the Miami sights. They got lost and asked a stranger for directions. When Riechmann realized they were close to their destination, he unbuckled his

seat belt, reached behind him and grabbed a video camera, apparently getting prepared to use it. He said he put the camera on Kischnick's lap and was in the process of handing her purse to her so she could tip the stranger when he saw the stranger reach behind him. Feeling threatened, Riechmann said he "hit the gas pedal" and stretched out his right arm in a "protective manner," with his palm facing outward in front of him. Instantly he heard an explosion, accelerated the car, and saw Kischnick slump over. After the shooting he began looking for help, driving as many as ten to fifteen miles before he hailed Officer Reid to get assistance.

While questioning Riechmann at the scene, police "swabbed" his hands for gunpowder residue. An expert for the state, Gopinath Rao, testified that numerous particles typically found in gunpowder residue were discovered in the swab of Riechmann's hand. Based on the number and nature of the particles, Rao concluded that there is a reasonable scientific probability that Riechmann had fired a gun. Rao also said he would not have expected to find the same type and number of particles on Riechmann's hands if Riechmann had merely sat in the driver's seat while somebody else fired a shot from outside the passenger-side window. An expert for the defense, Vincent P. Guinn, testified that the particles of gunpowder residue found on Riechmann's hand proved only that Riechmann was in the vicinity of a gun when it was fired--not that he actually fired a gun--and that Rao's opinion was not scientifically supported.

In Riechmann's motel room police found three handguns and forty Winchester silver-tipped, 110-grain, .38-caliber-special rounds of ammunition in a fifty-shell box. An expert firearms examiner testified that those bullets were the same type that killed Kischnick, although none of the weapons found in the room were used to murder Kischnick. The expert also testified that the bullet that killed Kischnick could have been fired from any of three makes of guns. Riechmann owned two of those three makes of weapons.

The state also presented testimony about the blood found in the car and on Riechmann's clothes. Serologist David Rhodes testified that high-velocity blood splatter found on the driver-side door inside the car could not have gotten there if the driver's seat was occupied in a normal driving position when the shot was fired from

outside the passenger-side window. The pattern of blood found on a blanket that had been folded in the driver's seat was consistent with high-velocity blood splatter and aspirated blood, rather than other kinds of blood stains, the serologist said. Blood splatter was found on the steering wheel, but none was found on Riechmann's seat belt or on the back of the driver's seat. Additionally, Riechmann had blood stains, rather than blood splatter, on his clothing. Rhodes testified that had Riechmann been sitting in the driver's seat during the shooting, his clothes would have shown evidence of blood splatter rather than just the blood stains that were found.

Evidence seized by German authorities and brought back to the United States included numerous documents. Among them were insurance papers revealing that between approximately 1978 and 1985, Riechmann had become the beneficiary of several German insurance policies on Kischnick, totalling more than $961,000 in the event of her accidental death. Under all the policies murder was considered an accidental death. German documents also showed that on June 9, 1987, Riechmann and Kischnick filed reciprocal wills in a German court designating each other as "sole heir" of their respective estates.

A fellow inmate of Riechmann, Walter Symkowski, testified that while incarcerated pending trial, Riechmann was pleased with the prospect of becoming rich from the proceeds of the insurance policies and Kischnick's will.

The jury found Riechmann guilty of first-degree murder and unlawful possession of a firearm while engaged in a criminal offense. No evidence was presented in the penalty phase, and the jury recommended death by a nine-to-three vote. The court found the murder was committed for pecuniary gain, and was cold, calculated, and premeditated without any pretense of legal or moral justification. Although Riechmann presented no mitigating evidence, the trial court found as a nonstatutory mitigating circumstance that people in Germany who know Riechmann told police they consider him to be a "good person." The trial court imposed the sentence of death, concluding that "[t]he aggravating circumstances far outweigh the nonstatutory mitigating circumstance."

Riechmann v. State, 581 So. 2d at 135-37 (footnotes omitted).

B. POST-CONVICTION PROCEEDINGS REGARDING DEFENDANT'S SENTENCE

On September 30, 1994, Defendant filed a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850, raising the following sentencing issues, verbatim:

> CLAIM XI
> THE TRIAL COURT'S SENTENCING OF MR. RIECHMANN TO DEATH WAS INVALID INSOFAR AS THE COURT'S FINDINGS WERE NOT WRITTEN BY THE COURT BUT WERE WRITTEN VERBATIM BY THE PROSECUTOR, PROVIDED TO THE COURT EX PARTE, READ IN PART BY THE COURT INTO THE RECORD AT SENTENCING, AND FILED AS IF THEY WERE "THE COURT'S" -- ALL WITHOUT THE KNOWLEDGE OF MR. REICHMANN OR HIS COUNSEL, IN VIOLATION OF PATTERSON, DIXON, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16, 21, AND 22 OF THE FLORIDA CONSTITUTION.
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> CLAIM XIV
> MR. RIECHMANN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE WHICH OMISSION RESULTED DIRECTLY IN THE JURY'S RECOMMENDATION AND THE COURT'S IMPOSITION OF THE SENTENCE OF DEATH.

(R. 455, 482). On November 3, 1995, the post-conviction court granted an evidentiary hearing as to both claims.[3] (T. 103, 105, R. 2154A).

The hearing was conducted on May 13-17, June 11, and July 17-19, 1996. (T. 197). In regard to the claim of ineffective

[3] An evidentiary hearing was also granted as to most of Defendant's guilt-phase claims, which will not be addressed herein.

assistance of counsel, Defendant presented the testimony two of Defendant's ex-girlfiends, Doris Dessauer and Doris Rindelaub, his landladies Marlene and Monika Seeger, a friend, Wolfgang Walitzki, Defendant's hairdresser, Martin Karpischek, and the hairdresser's wife, Ulrike, all of he whom he alleged counsel should have called at trial.

Marlene Seeger, Defendant's landlady, testified generally that Defendant seemed nice and that Defendant and the victim appeared to have a good relationship. (T. 220-24). On cross, she conceded that Defendant had told her he worked for an insurance company, and she was surprised to learn that he did not, although she admitted that she had never seen him go to work. (T. 228-29). She also did not know that the victim was a prostitute. She admitted that she did not know much about the victim and that she had never spoken with her. (T. 233). Indeed, the entire extent of Seeger's relationship with Defendant consisted of conversations when he was paying the monthly rent. (T. 234). None of her converstaions with Defendant occurred when the victim was present. (T. 237). Ms. Seeger also noted that Defendant never asked her to contact defense counsel or to testify in any of their pretrial correspondence. (T. 241).

Marlene's sister, Monika Seeger, also stated that Defendant

and the victim had a nice relationship. (T. 266). On cross she admitted that she told the police at the time of the murder that she and her sister had no close relationship with Defendant, that they only only rented the apartment to him. (T. 275). Like her sister, she had never spoken to the victim. (T. 276). She confimed that Defendant had written them at least two letters before trial, and had never asked them to testify in his behalf. (T. 277).

Doris Dessauer testified that she had met Defendant in a disco in Hamburg in 1971, and they began to date. (T. 243-44). Like the victim, she was also a prostitute. She testified that Defendant had nothing to do with her trade. (T. 244). Eventually they moved in together in Luebeck, while Defendant commuted 65 kilometers each way to Hamburg. (T. 245). They lived together for 7 years, during which time she continued to be a prostitute. (T. 246). She asserted that Defendant was very nice during their relationship, and decribed going out and on vacation, which Defendant paid for. (T. 247-48). Dessauer stated that she was still in contact with Defendant's mother. (T. 248). She stated that she was interviewed by German police at the time of the murder, and told them Defendant was nice, that their separation was amicable, and that they had stayed in touch. (T. 249-50).

On cross, Dessauer conceded that she had been convicted of perjury for giving false testimony on Defendant's behalf in 1976, in a case involving a traffic citation. (T. 252, 254). Defendant was also convicted of solicitation of perjury at the same time. (T. 253). Defendant had gotten two other witnesses to lie in that court proceeding, also. (T. 263). She further conceded that she had told the police in 1988 that she broke up with Defendant because he was cheating on her. (T. 255). She had also told the police that she had never spoken to Defendant a whole lot after that. (T. 256).

Wolfgang Walitzki had known Defendant and the victim since 1978. He spent a lot of time with them, and felt that they got along well. Defendant lived with Walitzki during a four-week separation from the victim, but Defendant did not say what problem was at that time. (T. 287). After Defendant and the victim got back together, they rented an apartment in in one of the better parts of Hamburg. (T. 289). Walitzki did not have a lot of contact with them after they moved to southern Germany. (T. 290). Before 1985, Walitzki had observed D discuss insurance with Ernst Steffen, a broker who was a mutual acquaintance. (T. 292). Steffen explained Germany's 3-tier retirement benefits to Defendant (T. 294).

On cross, Walitzki stated that despite their many years of friendship, he did not know what Defendant did for a living. (T. 296, 302). He did not know that the victim was a prostitute, and was unaware of allegations that Defendant was her pimp. He was not aware that they had separated (per Defendant's trial testimony) for six months in 1979. He was only aware of the separation during four weeks in 1987 or 1988.[4] (T. 299-301). Walitzki again conceded that he did not know Defendant's occupation, but suggested that he might have been in insurance. He asserted that Defendant was brokering an insurance transaction for Steffen. He was unable to offer an explanation, then, as to why Steffen would be explaining basic insurance precepts to Defendant: "I don't know exactly" (T. 302). Walitzki was "very much" suprised to hear that Steffen denied that Defendant had worked as an insurance agent for him. (T. 303). He was also surprised to learn that Steffen lied on Defendant's behalf as to Defendant's alleged earnings from Steffen.[5] (T. 304). Walitzki denied any interest in Defendant's livelihood, but conceded that Defendant knew his. (T. 305). He was now not sure when they met, but thought it was in 1978. (T. 306). He again asserted that the subject of Defendant's employment

[4] This testimony is obviously incorrect in that Defendant was incarcerated in late 1987 after the victim was killed.

[5] See Steffen's trial testimony at D.A.T. 2697-2702, and Defendant's own corroboration of Steffen's statement at D.A.T. 4365.

never came up in nine years. (T. 307). The victim never discussed her employment either. (T. 310). Walitzki also conceded that he had no contact with Defendant or the victim in 1987, and maybe once in 1986. (T. 311). He could not recall if they had had any contact in 1985 or not. (T. 312). Defendant wrote to him before trial, but never asked him to testify. (T. 315). Walitzki also did not know about Defendant's German convictions, except for his manslaughter conviction, which he characterized as the "vehicle accident." (T. 316-17). He did not know that Defendant had been convicted of defrauding Mercedes. He was also surprised to learn that the victim had married a Swiss citizen in a scheme to eventually obtain Swiss citizenship for Defendant. (T. 318). Ultimately, Walitzki was forced to agree that there was a lot he did not know about Defendant and the victim. (T. 319).

Doris Rindelaub met Defendant in 1982 during another of Defendant's separations from the victim, and they had an intimate relationship that lasted about six months. (T. 327). During that time, she saw him almost daily. When they went out, Defendant usually paid. She denied knowing anything about Defendant being a pimp, and stated that he was polite and considerate, and she considered him a good friend. (T. 328). On cross, Rindelaub conceded that in her 1988 statement to the police she had said they were together not in 1982, but 1981. In that statememnt she also

indicated that the relationship ended when she found out Defendant had another girlfriend who was a prostitute, i.e., the victim, in Luebeck. (T. 332-34). She conceded that she saw Defendant very rarely after they broke up, only once or twice since 1982. (T. 334). She never observed the relationship between Defendant and the victim, and, indeed, there was a lot she did not know about Defendant. (T. 335). Rindelaub stated that Defendant told her he was in the insurance business at time they dated, although she never actually saw him go to work. (T. 336). When informed that Defendant had testified that he did not work in insurance, Rindelaub then claimed that he supported his "lavish lifestyle" off of his savings. (T. 337).

Martin Karpischek was Defendant's hairdresser. (T. 339). He stated that Defendant always had plenty of money. (T. 342). He further opined that the victim would not have allowed Defendant to "sponge" off of her. (T. 343). He never saw anything negative in the relationship between Defendant and the victim. (T. 344). He then opined that Defendant was too smart to kill his girlfriend in a country with the death penalty. (T. 345). On cross Karpischek stated that he had contacted Defendant two to three weeks after the murder. Defendant wrote to him six months before the trial, but did not then, or in any subsequent letter, ask him to testify on his behalf. (T. 350). Karpischek conceded that he never saw

Defendant or the victim other than in his salon to do their hair, and that they were two of 2500 regular customers. Likewise, he never saw them together, except when Defendant picked the victim up after getting her hair done. (T. 351, 355). Karpischek did not know what Defendant did for a living, although he did know that the victim was a prostitute, which he learned from other customers of his that were "in the scene," i.e., the prostitution business. (T. 352-53). He also conceded that his opinion of Defendant's financial status was based solely on him being well dressed and groomed. (T. 355).

Ulrike Karpischek was the business partner and wife of Martin. (T. 386). She, too, opined as to the wonderful relationship that Defendant and the victim had. (T. 387). Like her husband, she conceded on cross that the only contact she had with them was in the salon, and that they did not know much about Defendant's personal life. (T. 391-93). She also noted that Defendant had written to them after murder, but had never asked them to testify. (T. 393-94).

The trial court also permitted Defendant to introduce, over State objection, affidavits from Defendant's mother, Martha Riechmann, (T. 913, R. 2488), his brother, Hans-Henning Riechmann, (T. 915, R. 2505), a second hairdresser, Thomas Woehe, (T. 923, R.

2536), a friend, Ottmar Fritz, (T. 925, R. 2540), Fritz's ex-girlfriend, Sabine Plott, (T. 927, R. 2557), and Fritz's sister, Angelika, (T. 927, R. 2561), all of whom defense counsel allegedly also should have called at trial. The affidavits of Defendant's mother and brother briefly described Defendant's upbringing and relationship with the victim and noted that none of Defendant's other five siblings was willing to testify or even give an affidavit. (R. 2512). The remainder stated generally that Defendant was a nice person.[6] The State presented evidence that Woehe had not seen Defendant or the victim for six years, and that he had stated that Defendant was the victim's pimp. (T. 1406, R. 3404).

Defendant also presented, over State objection, (T. 811-27), the testimony of two alleged experts on the subject of effective assistance of counsel. Edith Georgi, the head of the capital unit of the Miami-Dade County Public Defender's Office, was the original appointed counsel on the case before Defendant hired Edward Carhart.[7] (T. 789-800). Ms. Georgi testified only tangentially as to the penalty phase, opining that counsel should investigate a defendant's background, even if the defendant opposes it. (T. 839-

[6] The affidavits of Plott and Angelika Fritz merely adopt Ottmar Fritz's affidavit by reference.

[7] Ms. Georgi also filed the notice of appeal herein on Defendant's behalf. (R. 6084).

40).

Steven Potolski, a former trial partner of one of Defendant's post-conviction attorneys, who was a regular speaker at the Florida Public Defenders Association's annual death penalty seminar, was immediate past president of the Miami chapter of the Florida Association of Criminal Defense Lawyers, was on the FACDL's statewide death penalty committee, and has developed a "network" of capital defense contacts, was also allowed over State objection to testify as an "expert" as to the deficient performance prong of the Strickland test. (T. 1032-35, 1133). Potolski opined that minimum standards called for the appointment of two attorneys in a capital case. (T. 1038-45). He further opined that Defendant's counsel had been deficient for failing to investigate Defendant's background in Germany, regardless of whether Defendant wanted him to or not, and for failing to present any witnesses at the penalty phase of trial. (T. 1057, 1098-1103, 1122-24).

Regarding the ineffectiveness claim, the State presented the testimony of trial counsel, Edward Carhart, who received his law degree from the University of Florida in 1964, and was admitted to practice in 1965. (T. 1611). Carhart was employed for a total of 10 years with the State Attorney's Office in Miami, six of those years as Chief Assistant to State Attorney Richard Gerstein. As an

assistant state attorney, he handled between 20 and 50 capital cases. (T. 1611-13). The remainder of his experience as an attorney was in private practice, primarily in the area of criminal defense. He had defended 10 to 20 capital cases prior to Defendant's. (T. 1614). Counsel had numerous conversations with Defendant about the case. (T. 1616). They discussed Carhart going to Germany to interview witnesses for both phases, but Defendant was opposed. (T. 1617). Before trial, defense counsel had told the court that Defendant did not want him to go to Germany, and Defendant agreed on the record. (T. 1618). Defendant attended all the depositions of the witneses. (T. 1621). At the deposition of German police officer Bernd Schlieth, a list of 37 people German police had interviewed was disclosed. Defendant never asked that any of the people on that list testify. (T. 1646). Carhart called Defendant's family in Germany; he had conversations with them about whether they could testify and whether they had anything useful information. (T. 1652). When asked if they would have been helpful, Carhart replied that he "was able to determine that they weren't really available to [him]." (T. 1652). On cross, counsel stated that Defendant assisted him in the preparation of the case. (T. 1681).

With regard to the sentencing-order issue, Defendant introduced two exhibits, the final order filed in the case, and a

self-titled “rough draft” of the same order that bore the initials of the trial prosecutor. (R. 2252, 2263).

The State presented the testimony of the trial judge, Harold Solomon. Judge Solomon testified that the findings in the sentencing order were his, although the prosecutor prepared the draft at the judge’s request (T. 1724). The judge then reviewed it and made sure that it reflected his opinions and rulings. (T. 1725). He also testified that that after reviewing the draft he asked the prosecutor make some changes. (T. 1729).

Kevin DiGregory, the trial prosecutor, stated that he prepared the rough draft at the judge’s request, but that he did not prepare the final order. (T. 1804). The judge made the request after the the jury issued its sentencing recommendation. (T. 1805). The final order differed from the draft in that the judge added nonstatutory mitigation and deleted two paragraphs relating to the CCP factor. (T. 1807-08). On cross, DiGregory stated that the handwritten corrections on the draft were made by him during proofreading. (T. 1836).

After oral and written argument of counsel, (T. 1895-1958, R. 5883-5999, 6000-6024), the post-conviction court entered an order on November 4, 1996, rejecting Defendant’s claims as to the guilt

phase and re-affirming Defendant's conviction. (R. 6025-71). The court then concluded that counsel's penalty-phase performance was deficient because he failed to adequately investigate the mitigating circumstances. (R. 6076-77). The court further concluded that counsel "failed to unearth a large amount of mitigating evidence," (R. 6077), and that therefore Defendant was prejudiced. (R. 6078). The trial court also concluded that the prosecutor's preparation of the first draft of the sentencing order required reversal of Defendant's sentence, and ordered a resentencing before a new judge and jury. (R. 6072, 6079). The State filed a timely notice of appeal, (R. 6080), and this appeal follows.

SUMMARY OF THE ARGUMENT

A. The court below erred in finding deficient performance at the penalty-phase trial where counsel was stymied in his investigation and presentation of mitigating evidence by Defendant himself. Moreover, even if counsel's performance were deemed deficient, Defendant has failed to establish prejudice where the witnesses presented in the post-conviction proceedings were shown to have little knowledge of Defendant's true character, had had little contact with Defendant in the years before the murder, and their testimony opened the door to an abundant amount of damaging character evdience. Finally, this evidence, even taken at face value, showed only that Defendant was a "nice person" and good to his long-term lover. Given that the evidence established that Defendant had murdered that lover to obtain the nearly one million dollars in life insurance benefits that he had procured on her life, the presentation of this evidence could not reasonably have resulted in a different recommendation by the jury, or a different sentence by the judge. As such the trial court erred in finding that counsel' alleged ineffectiveness required reversal of Defendant's sentence.

B. The court below erred concluding that the judge's ex parte request that the prosecutor prepare a draft sentencing order required reversal where the court subsequently modified the draft

in Defendant’s favor, where Defendant was given the opportunity to present argument and evidence before the trial court pronounced sentence, where the pronouncement of sentence was accompanied by the contemporaneous filing of the written sentencing order, and where Defendant failed to otherwise establish prejudice.

Defendant’s sentence should be reinstated.

ARGUMENT

THE COURT BELOW ERRED IN DETERMINING THAT A NEW SENTENCING PROCEEDING WAS WARRANTED.

As noted above, the court below determined that a new sentencing proceeding before a new judge and a jury was required based on its conclusion that counsel was ineffective in the penalty phase and because of the prosecutor's preparation of the first draft of the sentencing order. The court's finding of ineffectiveness is unwarranted where counsel testified that he discussed the issue of testifying with Defendant's German relatives, but they were not helpful, and that Defendant had prohibited him from going to Germany himself. Moreover, the court's conclusion of prejudice is wholly without record support where at the evidentiary hearing, the defense presented no evidence whatsoever of any statutory mitigation. The witnesses the defense did present only testified essentially that Defendant was a nice person, and the cross-examination of these witnesses revealed that they actually knew very little about Defendant, and their testimony opened the door to a great deal of damaging information regarding Defendant's character. Given that Defendant was convicted of murdering his long-time girlfriend for the insurance proceeds, resulting in the finding of the CCP and pecuniary gain aggravators, which Defendant has not challenged, the presentation of evidence that he was "a nice guy" could not reasonably have resulted in a life recommendation. Likewise, the trial court's finding that the

prosecutor prepared the rough draft of the sentencing order does not require a whole new penalty phase where the judge subsequently modified and adopted the order, and testified that it reflected his findings.

A. THE COURT BELOW ERRED IN FINDING THAT DEFENDANT'S COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF TRIAL.

The court below determined that Defendant's counsel provided ineffective assistance during the penalty phase of trial. This conclusion was unwarranted, however. A claim of ineffective assistance of counsel must be reviewed under the United States Supreme Court's two-pronged test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), where the Court explained:

> First, Defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the 'counsel' guaranteed Defendant by the Sixth Amendment. Second, Defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive Defendant of a fair trial, a trial whose result is reliable.

In addressing the performance prong, the Court explained that the standard is one of reasonableness, and specifically noted that "no particular set of detailed rules for counsel's conduct [could] satisfactorily take account of the wide variety of circumstances faced by defense counsel." 466 U.S. at 688-89. Thus, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id.

This standard requires the reviewing court to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. Finally, the court noted that the burden of proof was on the defendant to overcome the presumption. Id.

In explaining the appropriate test for proving prejudice, the Court held that "Defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. In reviewing counsel's performance, the Court must be highly deferential to counsel, and in assessing the performance "every effort must be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from counsel's perspective a the time." Id.

Finally, the Court noted that in order to be entitled to relief, the defendant must establish both deficient performance and prejudice. The failure to meet either prong will result in the failure of the claim. 466 U.S. at 697.

The record reflects that counsel was stymied in his

investigation and presentation of mitigating evidence by Defendant himself. Moreover, even if counsel's performance were deemed deficient, Defendant has failed to establish prejudice where the witnesses presented in the post-conviction proceedings were shown to have little knowledge of Defendant's true character, had had little contact with Defendant in the years before the murder, and their testimony opened the door to an abundant amount of damaging character evdience. Finally, this evidence, even taken at face value, showed only that Defendant was a "nice person" and good to his long-term lover. Given that the evidence established that Defendant had murdered that lover to obtain the nearly one million dollars in life insurance benefits that he had procured on her life, the presentation of this evidence could not reasonably have resulted in a different recommendation by the jury, or a different sentence by the judge. As such the trial court erred in finding that counsel' alleged ineffectiveness required reversal of Defendant's sentence.

1. Counsel's performance was not deficient.

In addressing the performance prong of the Strickland test, the the court below determined that counsel's performance was deficient for conducting an inadequate investigation. This conclusion, however ignores the unrefuted testimony of trial counsel that he had discussed going to Germany with Defendant to

interview witnesses for both phases of trial, and that Defendant was opposed. (T. 1617). The court's conclusion, (R. 6077), that counsel "clarified" his testimony to state that Defendant did not prohibit him from doing so misreads the record. This "clarification" addressed only a statement counsel had made on the record before trial regarding the depositions of State witnesses. The "clarification" came during the defense cross-examination of counsel, and the questions were carefully limited to what counsel had meant at the pretrial hearing, and in no way addressed counsel's previous testimony that Defendant had prohibited him from conducting an investigation in Germany. (T. 1683-84). Moreover, the post-conviction testimony is borne out by the record at trial. First, after the jury returned the guilty verdict on August 10, 1988, counsel requested some time to contemplate what evidence he would present at the sentencing hearing. (D.A.T. 5180). The sentencing hearing was held on August 30, 1988. At that time, during his closing argument, counsel made it clear that he would have liked to have presented evidence, but was not being permitted to, apparently based on Defendant's refusal to concede his guilt:[8]

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[8] Note also Defendant's own statements to the court at the allocution hearing:

> I wish to say since I am innocent I will not accept any kind of penalty, neither the death penalty nor life imprisonment.
>
> And that I am firmly convicnced that this verdict will not stand as it is in appeal.

> I'm not authorized to beg for Dieter Riechmann's life. I'm not allowed to. I am the servant of my client. ... But I'm not permitted to beg for his life because he maintained he's innocent and he still maintains he's innocent.

(D.A.T. 5288).

Counsel also testified that he attempted to elicit the assistance of Defendant's family members before trial, but they were not helpful. That testimony is borne out by the post-conviction record, where, despite months of advance notice as to the hearing date, post-convcition counsel was unable to produce any family members at the evidentiary hearing. Only one of Defendant's many siblings was even willing to give Defendant's attorneys an affidavit on his behalf.

Finally, the finding of deficiency is also belied by the fact that with two years in which to investigate,[9] post-conviction counsel were able to produce only seven witnesses who, as discussed with regard to the prejudice prong, infra, had little in the way of helpful testimony to offer. Furthermore, counsel testified that in preparing for trial, Defendant had essentially acted as his assistant, attending all the depositions, keeping the large amount

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> That was it.

(D.A.T. 5320).

[9] Trial counsel had roughly six months.

of documantary evidence organized, etc. Yet the witnesses called at the post-conviction hearing all testified that despite the fact that Defendant had contacted them all before trial, he never asked any of them if they would testify on his behalf. Counsel's performance was thus not deficient. Rose v. State, 617 So. 2d 291, 294 (Fla. 1993)(no difficiency where defendant insisted on maintaining innocence, even through penalty phase); Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985)(no deficiency where defendant discouraged counsel from undertaking investigation, and counsel's attempts to elicit family's assistance were fruitless, it did not appear to counsel that finding useful evidence was likely).

Moreover, in spite of the roadblocks Defendant erected, counsel presented a forceful closing argument that focused on why the jury should exercise its discretion and be merciful, focusing on the circumstantial nature of the State's case, and why the asserted aggravation did not apply. (D.A.T. 5275-5287). This tack apparently convinced three members of the jury. Under these circumstances, counsel's performance cannot be considered deficient. See Francis v. Dugger, 908 F.2d 696, 703 (11th Cir. 1992)(pursuit of sympathy and mercy rather than focusing on defendant an appropriate closing argument strategy); Haliburton v. State, 691 So. 2d 466, 471 (Fla. 1997)(finding no deficiency where presentation of other evidence would have contradicted lingering

doubt argument actually made). Furthermore, counsel emphasized evidence produced at the guilt phase of trial to the effect that Defendant was an intelligent and decent person who loved the victim. (D.A.T. 5287-88). Nothing in the testimony of the witnesses produced at the post-conviction hearing would have added any more than the evidence already before the jury. See White v. Singletary, 972 F.2d 1218, 1225 (11th Cir. 1992)(counsel not deficient for failing to present cumulative testimony).

In view of the foregoing, it is plain that the trial court erred in determining that Defendant had met his burden of overcoming the presumption of competence. For that reason, the trial court's order granting Defendant a new penalty phase because of ineffectiveness of counsel should be reversed.

2. Counsel's alleged deficiency was not prejudicial.

Even assuming, arguendo, that defense counsel's performance was deficient, Defendant wholly failed to demonstrate prejudice below. As alluded to above and in the statement of the case, Defendant presented only seven witnesses below. Four were business acquaintances: his two landladies, his hairdresser and the hairdresser's wife. All conceded that they really knew very little about Defendant or his personal life. As such their character

references were of very little value.[10]

The three remaining witnesses were two ex-girlfriends and a long-time friend. The first girlfriend, Dessauer, was a prostitute and admitted that she had previously been convicted of perjury. She explained that Defendant had suborned that perjury, and was himself convicted on that account. She further testified that there were two other people involved in that scheme, and that they had also been convicted of lying on Defendant's behalf.[11]

The second girlfriend, Rindelaub, who dated Defendant for all of six months, gave testimony that was inconsistent with her pretrial statements to the police. She gave several dates as to her involvement with Defendant. Apparently she was dating him at a time he was either living with or involved with the victim. In either case, she broke up with Defendant when she found out she was not the sole object of his affections.

The friend, Walitzki, who claimed to have been a close associate for many years, did not even know what Defendant did for

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[10] The hairdresser offered the wonderfully mitigating opinion that Defendant was too smart to kill his wife in a country with the death penalty.

[11] That case was a traffic violation. If she was willing to lie for Defendant for such small stakes, the implications as to her credibility where Defendant was fighting for his life are obvious.

a living, and was forced to admit that there was a lot he did not know about the victim. During the course of cross-examination the State also brought out numerous examples of Defendant's prior illegal and/or dishonest conduct.

The only positive testimony any of these witnesses offered was essentially that Defendant was a nice person and was good to the victim. On cross, each one of these "friends" was forced to admit that Defendant had lied to them or concealed facts about his criminal history and source of income. They also had had little contact with Defendant in the years before the murder. Walitzki had not really seen much of Defendant since 1984, Rindelaub, since 1982 and Dessauer since the 1970's.

It must also be recalled that the State's theory of the case as to guilt, which prevailed at trial, on direct appeal, and below, was that Defendant <u>was</u> intelligent, that he <u>was</u> able to get people to like him, but that he was dishonest. As such, a parade of witnesses who all said that Defendant seemed nice, but who were all also required to concede that Defendant had been dishonest with them, and which gave the state the opportunity to go through a litany of Defendant's past bad acts, including perjury, fraud, and theft convictions, simply would not have persuaded the jury that Defendant was entitled to mercy. Likewise, all their bleating

about what a wonderful relationship Defendant and his girlfriend had would have rung hollow with a jury that had just determined that Defendant killed that girlfriend because he apparently loved money more than her. See Darden v. Singletary, 477 U.S. 168, 186 (1986)(admission of mitigation evidence bears the risk of opening the door to unfavorable rebuttal); Breedlove v. State, 692 So. 2d 874, 877-78 (Fla. 1997)(no ineffectiveness in not presenting witnesses where they would have opened door for state to explore negative information about defendant); Medina v. State, 573 So. 2d 293, 297 (Fla. 1990)(same); Valle v. State, 581 So. 2d 40 (Fla. 1991)(same); Floyd v. State, 569 So. 2d 1225 (Fla. 1990)(same); White v. Singletary, 972 F.2d 1218, 1225 (11th Cir. 1992)(same); Lusk v. Singletary, 890 F.2d 332, 338 (11th Cir. 1989)(entirely possible jury would have considered such evidence as aggravating rather than mitigating).

In his post hearing-memorandum, Defendant postulated that he had established the following mitigation: (1) that he was “a kind and considerate person;” (2) that he was “totally non-violent;” (3) that he was good to the victim and they had a loving relationship; (4) that he was a good friend; (5) that he was distraught about the victim’s death; (6) that his father abused him as a child; (7) that he had a difficult childhood; (8) that Defendant was intoxicated at the time of the offense. (R. 5595-

96). The first claim has been thoroughly addressed above. The second is wholly refuted by the jury's verdict, wherein it found that Defendant had shot his long-time girlfriend for money. The third claim is likewise refuted by the fact that he killed her. The fourth claim is essentially the same as the first, and is entitled to little, if any, weight, as previously discussed. The fifth is comparable to killing your parents and then asking for mercy because you are an orphan.

The sixth and seventh claims, relating to Defendant's childhood, were not testified to by any witness at the post-conviction hearing. They are based solely on affidavits purportedly executed by Defendant's mother and brother. Although the trial court permitted Defendant to introduce these affidavits as evidence at the post-conviction hearing, the State strenuously objected. Thus, to the extent the court below relied on these affidavits, it was in error. Routly v. State, 590 So. 2d 397, 401 n.5 (Fla. 1991)("absent stipulation or some other legal basis, we cannot see how the affidavits [presented at a post-conviction hearing] can be argued as substantive evidence"). Because this evidence was improperly admitted it cannot form the basis for upholding the trial court's conclusion of prejudice.

Moreover, even had this evidence been properly admitted, such

evidence, where, as here, the Defendant was 44 at the time of the murder, is of little relevance. And indeed, any claim that Defendant committed this crime because his father was cruel to him would wholly have contradicted his steadfast maintenance of innocence, as well as the notions, untenable though they are, that he was "nonviolent," "nice," and had led a decent and productive life as an adult. See Francis, 908 F.2d at 703 (noting the limited value of such mitigation evidence as to older murderers); Rose, 617 So. 2d at 294 (counsel was not ineffective in failing to present childhood-based mitigation where the defendant was 33 at the time of the murder, and the evidence would have been inconsistent with other proffered mitigation and defendant's maintenance of innocence). This testimony would also have opened the door to the further damaging evidence that Defendant actually admired his father's role as an SS captain during World War II, as well as associated racist comments that Defendant had made. (T. 1445-46). Medina.

The last claim, that Defendant was intoxicated, was not established, other than that Defendant had had a few drinks before he killed the victim. This claim is further refuted by the evidence that established that this was a highly planned killing. There is simply nothing about the fact that Defendant took the

vicitm out for a few last drinks before he killed her[12] that is mitigating.

In view of the foregoing, the court below clearly erred in concluding that Defendant had established prejudice. Its order granting Defendant a new penalty phase because of ineffectiveness of counsel should be reversed.

[12] It is possible that he was trying to get her drunk to make the crime easier to carry out. This speculation is just as probable as Defendant's, and certainly more consistent with all the facts of the case. Lusk.

B. THE COURT BELOW ERRED IN ORDERING A NEW PENALTY-PHASE PROCEEDING WHERE ALTHOUGH THE PROSECUTOR PREPARED THE ORIGINAL DRAFT OF THE SENTENCING ORDER, THE TRIAL JUDGE TESTIFIED THAT HE REVIEWED THE ORDER AND IT REFLECTED HIS FINDINGS, AND WHERE THE TRIAL JUDGE FURTHER MODIFIED THE ORDER TO ADD MITIGATING CIRCUMSTANCES AND DELETE LANGUAGE RELATING TO THE CCP AGGRAVATOR.

The post-conviction court concluded that Patterson v. State, 513 So. 2d 1257 (Fla. 1987), required Defendant's sentence to be reversed. However, that case involved an improper delegation of the determination of the aggravating and mitigating factors to the assistant state attorney. Here, although the prosecutor prepared a draft order, the judge subsequently modified it. Thus, the error lay not in the improper delegation of the sentencing determination, but in the ex parte request for the State to prepare the draft. Under such circumstances, Defendant is entitled to have his sentence reversed only if he can show prejudice, which he failed to do below. As such, the court below's reversal of Defendant's sentence was in error.

In Patterson the Court held that the defendant's sentence had to be reversed because the trial court pronounced a sentence of death, and afterwards instructed the prosecutor to prepare the sentencing order without indicating what should be placed in the order. 513 So. 2d at 1262. There was no evidence that the trial

court had independently weighed the aggravating and mitigating circumstances prior to sentencing the defendant. Id. The Court thus concluded that the trial court had not carried out its statutorily mandated role under Section 921.141, Fla. Stat., requiring a new sentencing proceeding before the judge. 513 So. 2d at 1263.

Here, however, the sentencing order was prepared before the pronouncement of sentence. Further, although the prosecutor prepared a rough draft at the trial court's request, the trial judge specifically testified that the remainder reflected his conclusions, and that he had reviewed it to ensure that it was consistent with his findings. (T. 1724-25). The testimony is borne out by the fact that the court itself modified the order before sentencing, deleting two paragraphs relating to the CCP aggravator,[13] and adding nonstatutory mitigation. (T. 1807-08). Thus, the sentence was pronounced after the record evidence reflecting the judge's deliberative process was made, and after Defendant and counsel were given the opportunity to address the court and present any additional evidence they desired.[14] (D.A.T.

[13] This modification was wholly ignored by the court below in its order.

[14] When Defendant addressed the court, he simply stated that he would not "accept" any sentence, be it life or death. (D.A.T. 5320).

5309). As such, the proceedings fully comported with Patterson, and no based on that case occurred should have been found.

The only error that occurred was the trial judge's ex parte request for the prosecutor to prepare the draft. This practice was condemned in Spencer v. State, 615 So. 2d 688, 691 (Fla. 1993). However, that case was decided five years after Defendant was sentenced. In Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994), the Court held that Spencer would not be applied retroactively absent a showing of prejudice by the defendant. Card v. State, 652 So. 2d 344 (Fla. 1985), is on point, and instructive. In that case, the defendant alleged in his Rule 3.850 motion that the trial judge had received a proposed sentencing order ex parte from the prosecutor. In reversing the summary denial, the Court characterized the issue as a Spencer claim, and specifically noted that the defendant would not be entitled to relief absent a showing of prejudice, citing Armstrong. Card, 652 So. 2d at 345 n.2. The court went on to list factors that were to be considered in determining prejudice on remand: the nature of the contact between the judge and the prosecutor, when the court was given the draft, and the stage in the proceedings that defense counsel received a copy. 652 So. 2d at 346.

Here, by all accounts the contact was brief, and was initiated

by the judge, not the prosecutor. The court requested the draft only after all the evidence had been submitted, and after the jury had returned its recommendation. (T. 1805). Furthermore, the aggravating circumstances found in the draft and in the final order were the same circumstances that the State had argued to the jury, and to the court: cold calculated and premeditated and pecuniary gain.[15] Of particular note, the entire theory of the State's case, which had prevailed in the guilt phase, was that Defendant had bought numerous insurance policies on the victim's life, and then shot her, attempting to make it look like a robbery. The defense was given the opportunity to argue that these aggravators did not exist, and did so, and also argued that they should have been "merged."[16] (D.A.T. 5310-13). The findings in mitigation were not even the product of the ex parte contact, but were added by the trial court. Moreover, the mitigation found, that people thought Defendant was a nice person, was essentially the same as that argued by the defense before Defendant was sentenced. (D.A.T. 5315). Under the circumstances, Defendant has failed to establish prejudice. The court below's reversal of Defendant's sentence was

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[15] As noted, the trial court modified the CCP findings in the final order.

[16] This court has held that the CCP and pecuniary gain aggravators apply to different aspects of the offense, and do not require merger. Larzelere v. State, 676 So. 2d 394, 406 (Fla. 1996)(holding finding of both aggravators proper where defendant had spouse killed for insurance proceeds).

thus error.

Finally, even assuming, arguendo, that reversal were required on this ground, the remedy imposed below is incorrect. In its order, the court below ordered a new sentencing proceeding before a new judge and jury.[17] However, Patterson itself was remanded for the imposition of a new sentencing order by the trial judge. Here, the trial judge continues to sit as a senior circuit judge. The appropriate remedy, if the court concludes that a remedy is required, would be to remand the case for a new sentencing proceeding before the judge. The State is not unmindful of the Court's concern for the appearance of impropriety in cases of ex parte contact. It would note, however, that the judge's actions were not uncommon practice throughout the state at the time, that that practice that was not ruled improper until after Defendant's trial, that there was no evidence presented of any bad faith on the part of either the judge or the prosecutor with regard to the sentencing order, and indeed the judge modified the draft order in Defendant's favor. Under these circumstances, it would indeed be a waste of judicial resources to require a full-blown jury trial on Defendant's sentence ten years after the fact as a remedy to an error that was not even regarded as such at the time, and from

[17] In fairness, the court had also found ineffective assistance of counsel, which could be the basis of the remedy ordered. However, as discussed above, counsel was not ineffective.

which Defendant has failed to demonstrate prejudice.

CONCLUSION

For the foregoing reasons, that portion of the trial court's Rule 3.850 order granting a new sentencing proceeding should be reversed, and Defendant's sentence reinstated.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **INITIAL BRIEF OF APPELLANT** was furnished by U.S. mail to **TERRI L. BACKHUS**, Counsel for Defendant, P.O. Box 3294, Tampa, Florida 33601-3294, this 14th day of January, 1998.

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