IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,564

STATE OF FLORIDA

Appellant/Cross-Appellee,

v.

DIETER RIECHMANN

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT FOR DADE COUNTY,
STATE OF FLORIDA

APPELLEE/CROSS-APPELLANT'S BRIEF

TERRI L. BACKHUS
Florida Bar No. 0946427
Post Office Box 3294
100 South Ashley Drive,
Suite 1300
Tampa, FL 33601-3294

COUNSEL FOR APPELLEE/
CROSS-APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of portions of the circuit court's denial of Mr. Riechmann's motion for postconviction relief and the cross-appeal of the circuit court's order granting postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. After holding an evidentiary hearing, the circuit court denied relief on Mr. Riechmann's convictions but set aside the sentence of death based on ineffective assistance of counsel, the state's misconduct in withholding exculpatory evidence under Brady v. Maryland and the trial court's failure to prepare its own independent sentencing order.

The following symbols will be used to designate references to the record in the instant causes:

"R." – record on direct appeal to this Court;

"PC-R."- record on 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Riechmann's sentence of death has been set aside but his convictions remain to be considered by this Court. The resolution of the issues involved in this action will determine whether Mr. Riechmann will be granted a new trial. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case,

given the seriousness of the claims involved and the stakes at issue. Mr. Riechmann, through counsel, accordingly urges the Court to permit oral argument in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITY

MISCELLANEOUS AUTHORITY

STATEMENT OF FACTS AND THE CASE

At 10:32 p.m., October 25, 1987, Mr. Riechmann "flagged down" Miami Beach Police Officer Kelley Reid on Indian Creek Boulevard at 67th Street. He exited his car, heading south, and approached the officer, saying, "Help me! Oh my God! My Girl! My Girl!" Within two minutes, fire rescue medics were at the scene, and attempted unsuccessfully to revive the woman strapped in the passenger seat with a bullet hole in the right side of her head. The victim was Kersten Kischnick, Mr. Riechmann's companion of thirteen years.

For the next hour, Mr. Riechmann explained to Miami Beach Police Department ("MBPD") detectives, in broken English, what had happened. He asked several times to go to the car and see Kersten, but was kept away. At approximately 11:00 p.m., Mr. Riechmann's hands were swabbed for gunshot residue. Mr. Riechmann's account of the shooting was related with marginal assistance from MBPD Officer Jason Psaltides, who had taken two years of German in high school.

Mr. Riechmann said he and Ms. Kischnick had just come from having dinner at Jardin Brasilian at Bayside. They got lost on their way back to Miami Beach, pulled over on a dark street and asked a stranger for directions. The stranger turned away momentarily and returned with something in his hand. As Mr. Riechmann started to accelerate the car, he heard an explosion,

and sped off. He could not say where it had happened or how he had ended up where he was. He smelled of alcohol.[1] At the scene, Mr. Riechmann informed the officers that he and Ms. Kischnick were staying in a Miami Beach hotel. The detectives asked him whether he had any firearms in his hotel room and he responded that he did.

At approximately 11:30 p.m., Mr. Riechmann was transported to the MBPD station and was put in a locked "holding cell" between one and three hours. Sgt. Joe Matthews eventually removed him from the cell, said it was all a big mistake, and he apologized. Later that night, Mr. Riechmann and detectives went to his hotel room. The police took three guns, shoes, passport, travel documents and Mr. Riechmann's blood-stained clothes.

Over the next four days, Mr. Riechmann spent most of his time telling the same account over and over again to police. They spent many hours together driving around looking for the spot where the murder occurred. Mr. Riechmann also attempted on his own to locate the area. On October 28, a one-hour taped interview was conducted, which was submitted into evidence at trial. It consisted of Mr. Riechmann recounting the same description of the crime he had always given.

On October 29, a four to five hour secretly-taped interview was conducted in the MBPD Detective Bureau, with hidden recording

---

[1]Records obtained by police from the waiter at the Bayside restaurant reflected that Mr. Riechmann and Ms. Kischnick had twelve mixed drinks between them.

equipment. This taped interview was not introduced by the state. At the conclusion of the four and one half hour interview with Sgt. Matthews, Mr. Riechmann was arrested by federal ATF agents on a charge that he had provided an incorrect address when purchasing guns that were taken from his room several days earlier. He was incarcerated at the Metropolitan Correctional Center, a federal detention facility in Miami. Bond for this relatively minor charge was set at $150,000.00.

Mr. Riechmann remained in federal pretrial custody until December 29, when his two day federal trial began. Two of the three counts were dismissed by the Honorable James W. Kehoe because gun shop witnesses were unable to identify that any crime had been committed. A federal jury acquitted Mr. Riechmann of the third charge, seemingly for the same reason.

When Mr. Riechmann walked out of the federal courtroom on December 30, he was arrested by MBPD detectives for the murder of Ms. Kischnick. During the previous two months MBPD and Dade County prosecutors had been actively investigating the background of Mr. Riechmann and Ms. Kischnick, working closely with police and prosecutors in their small town of Rheinfelden in southwestern Germany. Their apartment was searched repeatedly over a period of more than five months, including searches in February and April, 1988 by Mr. Riechmann’s trial prosecutors. Dozens of acquaintances were questioned. Numerous bank accounts and safe deposit boxes were examined. Life insurance policies

were scrutinized. During November and December, while Mr. Riechmann awaited federal trial, the state assembled the ingredients for its prosecution, determining it had enough probable cause to arrest and charge him for Ms. Kischnick's murder the moment he was acquitted in federal court.

On January 21, 1988, twenty-three days after his arrest, Mr. Riechmann was arraigned for murder. He was represented by the Public Defender's Office. Mr. Riechmann retained private counsel, who was substituted for the Public Defender in late January. In the five months between counsel's substitution in late January and the beginning of trial in July, counsel filed a total of three (3) pretrial motions, one of which was a motion to suppress physical evidence, including items taken from Mr. Riechmann's first hotel room and a second room he had moved to after the death of his companion. A hearing on the motion was held on July 5-12, 1988, followed by the trial which lasted from July 13 to August 12, 1988.

A. Introduction

In its initial brief, the Appellant has recited verbatim the facts as stated by this Court on direct appeal. This Court relied exclusively on the sentencing order of the trial court which has since been determined was written by the state attorney. As a result, Mr. Riechmann suggests this Court conduct a de novo review of all of the issues presented in his case. In his state habeas, Mr. Riechmann argues that he received

ineffective assistance of appellate counsel on direct appeal. As a result of these errors, this Court did not receive an accurate factual account of this case. Mr. Riechmann sets out below the facts of the case as they were established at the evidentiary hearing and as they should have been raised to this Court on direct appeal.

B. Facts presented at evidentiary hearing

> In order to accept this story, in order for you people and your common sense to accept this story as fact, and in order to choose the mysterious black gunman as the killer of Kersten Kischnick, you first have to believe that he got lost...
>
> Next you have to believe that of all the areas in which to get lost... and ask for directions, he picks a street on which there happens to be a black man with a gun (state's closing argument)(R. 2968-69).

An innocent German tourist was convicted. A foreign national was carjacked in Miami before the word "carjacking" was introduced into our daily vocabulary. At the evidentiary hearing before Judge Gold, University of Miami criminology professor, Karen McElrath traced the emergence of the official recognition of crimes against tourists. She testified there was a "substantial difference in terms of the pattern of events and the official response to those pattern of events" after 1992 (PC-R.3898-3908).

Dr. McElrath described the exact factual scenario of this case as having the common characteristics of a typical carjacking – rental cars, inadequate directions, getting lost, and asking a

stranger for directions (PC-R. 3906-3907). In the early 1990's, crimes against tourists escalated to such an extent that local law enforcement in Miami and the Governor himself took action to curb these crimes such as placing guards on duty at rest areas, erecting large sun symbols to aid tourists in negotiating the confusing streets of Miami and removing rental car logos from cars most commonly driven by tourists.

Contrary to the actions taken in 1991 to 1993, Dr. McElrath found no articles about governmental efforts to combat crimes against tourists from 1984 through 1990, even though they undoubtedly occurred(PC-R. 3898-3899). From the moment that Mr. Riechmann sought help for his girlfriend, he told the authorities the same story which is now characterized as a common profile for a tourist crime.

Mr. Riechmann told the Miami Beach Police Department that he had taken his girlfriend, Kersten Kischnick, to dinner at the "Jardin Brasilian," a Bayside restaurant, in downtown Miami. Evidence presented at the evidentiary hearing showed that trial counsel failed to investigate evidence that could have corroborated Mr. Riechmann's story. Police reports indicated that the couple dined and drank for several hours at the "Jardin Brazilian." Officers Aprile and Marcus interviewed the waiter who served the couple that evening. The October 27, 1987 police report of this interview with waiter Hernandez was <u>never</u> provided to defense counsel. See, Def. Ex. DDD. Trial counsel deposed the

officers on March 15, 1988 during which they described their interview of the waiter who served the couple until 10 or 10:30 the night of the crime. Trial counsel did not begin investigating this avenue of defense until three and a half months after the depositions. See, State Ex. 9; (PC-R. 5627-28; 5646-47; 5670; 5674).

The withheld report indicated that the couple appeared to be vacationing tourists "in a good mood" and in "good spirits" (PC-R. 104). The couple drank "six drinks each" of rum, vodka, gin and Amaretto." State's Ex. 9. They appeared "intoxicated." None of this information was made available to defense counsel.

Between 10 and 10:30 p.m., the couple left the Bayside restaurant by way of Biscayne Boulevard. As tourists often do, they became hopelessly lost on the streets of Miami in search of their hotel. At the evidentiary hearing, evidence was presented that showed that trial counsel failed to investigate the plausibility of Mr. Riechmann's story. Testimony from defense witness, Richard Mueller, a retired Metro-Dade police officer, established that from Biscayne and 63rd Street to Indian Creek and 67th is a distance of 5.3 miles, taking approximately 13 to 13.5 minutes to drive under normal conditions at 10 p.m.(PC-R. 3945). This intersection is halfway between the "Jardin Brazilian" restaurant and Indian Creek and 67th (PC-R. 3946). Exiting the 79th Street Causeway, the right-hand lane becomes Indian Creek Boulevard heading south on 71st Street (PC-R. 3949).

This exit is only four blocks from the location where Mr. Riechmann flagged down Officer Reid.

Evidence was presented at the evidentiary hearing from the Miami Police Department to show that Biscayne from 36th Street to 79th Street is a likely place to get lost coming from Bayside going north. This area is one of the highest crime areas in Miami. See, Def. Ex. N (PC-R.3860-3880).

Mr. Riechmann testified at trial that he and Kersten were searching for someone to give them directions back to their hotel. Mr. Riechmann was driving and did not know where he was. He turned down a side street to ask for directions. Trial counsel testified at the evidentiary hearing that he did not recall asking his investigator to find the side street or locate eyewitnesses to the murder of Ms. Kischnick (PC-R. 5673). He failed to investigate the area of 63rd and Biscayne even after Mr. Riechmann told him that the intersection looked familiar.

Mr. Carhart identified a bill for the services of an investigative agency employed by him to investigate this case. State Ex. 9 reflects a total of 18.7 hours of investigator time invested in the defense of this circumstantial death penalty case (PC-R. 5627-28). Evidence at the hearing showed that trial counsel had only requested the investigators to look into two issues: locating the waiter at the Bayside restaurant and reviewing Miami Beach police frequency tapes (PC-R. 5626-28, 5647-48, 5670-71). No other investigative requests were made.

At the evidentiary hearing, Earl Stitt and Hilton Williams testified they were present on the side street (63rd & Biscayne Blvd.) at the time that Mr. Riechmann became lost. These witnesses corroborated Mr. Riechmann's story that the crime was an attempted robbery gone awry when he asked for directions from a black man. (PC-R. 4398-4480).

Mr. Stitt said he saw a car "turn around...like they lost." (PC-R. 4400). After hearing a gun shot, he saw the car "fleeting back past me." (PC-R.4401, 4412). He heard about a German tourist on the news one or two days later. (PC-R.4401-4401).[2]

Hilton Williams testified that he was on 63rd Street at the time of the shooting. He lived at 63rd Street and Biscayne Boulevard in 1986 and 1987. Id at 38. Like Stitt, he described a car coming down 63rd Street and turning around. He said it was a red rental car with a white male driver and white female passenger (PC-R. 4427-4428). He remembered seeing a lot of gold jewelry on the passengers (PC-R.4428, 4449, 4468, 4476). He corroborated Mr. Riechmann's story that the white man had difficulty communicating. "When we see they don't speak no English we don't make no sense to even try...I don't understand that language." He said:

---

[2]Mr. Stitt was engaged in a drug transaction at the time this crime occurred. He was unable to recall the year that this incident occurred however he conceded that drug usage in the years since the crime had impaired his memory. He testified that his memory would have been better if he had been contacted at the time of the crime.

> Once they came back our way somebody approached thinking they want dope. When they see nobody wanted dope somebody reached in inside with a gun. When the man saw the gun he screeched off, but somebody already got shot inside the car.

(PC-R. 4427; See also 4468-4469, 4475-76).

The car sped onto Biscayne Boulevard and headed north, going "extremely fast." (PC-R.4430). Mr. Williams testified that the shooter was "damn dumb" for letting "all the money get away." (PC-R.4428, 4471, 4476).[3]

The Williams and Stitt testimony corroborated many of the details of Mr. Riechmann's story. Mr. Riechmann testified that he drove blindly through the confusing streets of Miami searching for a police station or a policeman. He crossed a causeway and finally on the other side of the bridge flagged down Officer Reid, a Miami Beach Police Officer.

In broken English, Mr. Riechmann frantically tried to describe what had happened to his girlfriend. According to police reports which were withheld from defense counsel, Mr. Riechmann was visibly "distraught," "upset," "sobbing," "dejected," "emotionally upset," "hysterical," "crying and holding his face," "with tears coming out of his eyes," "smelling of alcohol." "He obviously had been through a terrible experience." (PC-R. 4565, 4575).

Mr. Riechmann was questioned at the scene by Officer Jason

---

[3]Mr. Williams also described a history of drug use and treatment (PC-R. 4457).

Psaltides, who studied German for two years in high school. At the evidentiary hearing, Ms. Hiltrud Brophy, a court-certified German interpreter, testified that the "Consent to Search" form written by Psaltides and given to Mr. Riechmann was a "collection of German words" that was unintelligible (PC-R.4100). Mr. Riechmann was not told that he could contact the German Consulate in Miami to advise him on how to conduct himself in a different legal system in a language he barely spoke.

From the outset, the Miami Beach Police Department employed a unique approach to its investigation. Despite a pre-trial court order giving the defense "carte blanche" discovery -- Total. No ifs ands or buts, no conditions. Whatever the State has, he gets"(R. 634)[4] significant pieces of evidence were withheld. A myriad of photographs were taken by crime scene technicians of the rental car Mr. Riechmann was driving. Unfortunately, most of the critical photographs of the driver's seat, interior of the trunk and interior roof of the car were missing and never provided to defense counsel.[5]

At the evidentiary hearing, trial prosecutors testified that they "whited-out" relevant exculpatory portions of discovery

---

[4]Despite the court's order, Mr. Carhart ineffectively failed to challenge the state's disregard of the court's order. Either Mr. Carhart failed to speak to previous defense counsel to discover the earlier court order or he ineffectively failed to utilize it in prying discovery from the State.

[5]Even though Mr. Riechmann himself catalogued the numbers of the missing photographs from the proof sheets provided at trial. The photos were never turned over to the defense and are still "missing."

materials, but could not or justify it (PC-R. 5482-5489). The State admitted it failed to provide exculpatory investigative materials gathered in Germany, but again could not say why (PC-R. 5505, 5508, 5513).

The State also admitted actively advocating for a favorable post-trial sentence in federal court for Walter Smykowski, the State's key jailhouse witness. Smykowski described at trial incriminating statements purported made by Mr. Riechmann when the two were cellmates. He implied that police had overlooked a fourth gun; that Riechmann was jubilant at becoming a millionaire and that Riechmann turned "white as the wall" when asked if he killed his girlfriend (R.4112). By strange coincidence, Smykowski spoke a little German and allegedly asked prison authorities to be placed in a cell with Mr. Riechmann because he enjoyed playing chess with him.

Affidavits presented at the evidentiary hearing established that there were five other cellmates near Mr. Riechmann who were available to rebut Smykowski's testimony. They knew Smykowski to be a professional snitch and that he had been promised favorable treatment by the State if he helped get Mr. Riechmann convicted.

Smykowski denied that he expected favors from the State in exchange for his testimony. The prosecutor testified at the evidentiary hearing that he failed to tell defense counsel his intent to move for a reduced sentence. Id. at 38.

At the evidentiary hearing, a letter dated three weeks after

trial but before sentencing was admitted into evidence from the trial prosecutor to the U.S. Parole Commission on Smykowski's behalf. When questioned about the state's intent during trial at the evidentiary hearing, Mr. DiGregory stated:

> A...What I am saying is that I don't know when I wrote – when I got the notion to write the letter. It is clear that I wrote it after the trial was over.
>
> Q Well, is it equally clear that you contemplated writing it during the course of the trial?
>
> A Sure. (PC-R. 5490).

Defense counsel testified at the evidentiary hearing that Smykowski's testimony hurt Mr. Riechmann's case and that he did not investigate the circumstances surrounding Smykowski's involvement in the case (PC-R. 5684). However, it was shown by the testimony of Michael Klopf, a fellow prisoner of Smykowski's, that Smykowski planned and intended to lie to the police about Riechmann in exchange for reduced prison time (PC-R. 4199-4205). Another federal inmate, Hans Lohse, who spent time in federal prison with Smykowski and Mr. Riechmann, said "everyone knew about Smykowski's reputation as a snitch who was looking for short time. Smykowski had a reputation for being dishonest." Lohse said he sent a letter to Mr. Riechmann's lawyer explaining that Smykowski was lying and that he would help exposed him, but he never received a reply (PC-R. 5749-5760).

Regardless of whether defense counsel would have used his testimony, the letter from Lohse went unanswered and this fruitful avenue was never investigated. Had it been, defense

counsel would have learned that Smykowski was lying and planned to get a reward for his participation. Defense counsel admitted at the evidentiary hearing that he did not investigate this avenue (PC-R. 5684).

The State withheld critical police reports that contradicted the State's expert serologist Rhodes. Three police reports of Detective Hanlon showed that Rhodes, upon his examination of the rental car, said that "the passenger window was no more than six inches from being fully closed at the time of the shooting." Def. Ex. HHH. Not the 3 to 3 and a half inches he testified to at deposition and at trial. The same six inch measurement by Rhodes was repeated in two other withheld police reports.

At the evidentiary hearing, Def. Ex. AA was introduced as an example of the cover-up of Rhodes' initial measurements. The complete 11/2/87 police report of Detective Trujillo concerning the window height was introduced as Def. Ex. AA, the report which was <u>never</u> provided to defense counsel. Def. Ex. BB was the report given to defense counsel. The withheld paragraph said:

> 14. Crime lab stated that the window had to be all down but subject claimed window was half down for security.

The State's explanation for why this paragraph was not disclosed to the defense was that "somebody made a mistake...I would say that report is wrong."(PC-R. 4718). "The author of that report didn't always have all the facts straight." (PC-R. 4737). The State failed to present evidence at the evidentiary

hearing by the author of the report to indicate that the omitted portion of the report was a mistake. The prosecutor admitted at the evidentiary hearing that the report would have been favorable to the defense. He said defense counsel would have used it to rebut the State's contention that the lead particle gun residue on Mr. Riechmann came from reaching his hand protectively at the muzzle of the gun instead of the breach, just as he had repeatedly told police. The prosecutor also admitted at the evidentiary hearing that there were deletions from the police reports, but he did not know who made them -- himself, Sreenan or someone at his direction. He agreed that the police reports contradicted each other (PC-R. 5477, 5482, 5483).

In the direct appeal, this Court underscored the significance that this blood evidence played in convicting Mr. Riechmann. Citing testimony from Rhodes that blood on the driver's door "could not have gotten there if the driver's seat was occupied...", this Court stated, "We are satisfied...[e]vidence of blood spatter and stains on the car, blanket and clothes was consistent with the state's theory of what happened that night." Riechmann v. State, 581 So. 2d 133, 136, 141 (Fla. 1991).

At the evidentiary hearing, Judge Solomon, the state attorneys and defense counsel all agreed that the blood evidence was the lynch pin of the case (PC-R. 4965, 4994-99, 5003-04, 5007, 5089-90, 5486, 5685, 5719-5720). Defense counsel failed to

utilize readily available information and expert assistance to discredit Rhodes' grossly incorrect conclusions. Three pretrial depositions of Rhodes were submitted into evidence at the evidentiary hearing as State's Ex. 10. In the May 24, 1988 deposition, Rhodes raised the "impossibility" of the driver's seat being occupied. (State's Ex. 10 p. 25-27, 32, 40-43).

Stuart James testified at the evidentiary hearing that Rhodes was wrong about the driver's door, the blanket and he covered up his earlier measurement of the passenger window. He completely missed the most important item of bloodstain evidence -- absolute proof that Ms. Kischnick was in the process of handing three one-dollar bills to someone at the moment she was shot (PC-R.3669-3671, 3682-3690). Mr. James eliminated the possibility that blood specks on the driver's door came from exhaled blood (PC-R. 3681-3682; 3741-3742). He also found Rhodes' analysis of the "matted brain matter" on the headliner above the passenger window described by various police officers to be incorrect:

> I have never seen in my experience over twenty-five years with a small caliber weapon, I have never seen brain deposited to the extent that it is matted on a surface as a result of back spatter. ...to me it sounds much more like transfer, contact transfer of brain matter possibly as she was being removed from the vehicle...I have never seen it with anything other than a shotgun. (PC-R. 3669-3670).

Mr. James challenged Rhodes' analysis of the height of the passenger window saying that,"[T]here is no way to know that this is truly back spatter." (PC-R. 3674). If not back spatter, the

state's theory as to any limitation on the amount of gunshot residue in the car also is invalid.

As with the passenger window and the driver's door, the State used Rhodes' flawed analysis of the position of a shawl/blanket in the car to suggest that Mr. Riechmann could not have been in the driver's seat at the time of the shooting. Mr. James concluded that Rhodes' testing of the blanket was so unscientific that to use it as proof that the driver's seat was unoccupied was "very misleading." (PC-R. 3702-3703).[6]

The shawl/blanket evidence also is significant in that defense counsel failed to use Officer Veski's testimony regarding his notes on the position of the shawl and whether there was even any blood on the shawl. Veski wrote that the shawl/blanket was draped over the passenger seat when he processed the rental car. FSC Motion to Relinquish Jurisdiction filed June 3, 1997. Veski testified in his deposition that the shawl/blanket was in the backseat of the car. Assuming one of these two accounts is correct, James' opinion rings true that it was physically impossible for the presumptive blood spatter evidence to show whether the driver's seat was occupied(PC-R. 3774).

Rhodes completely missed the bloodstain evidence on three one-dollar bills on Ms. Kischnick's left thigh at the time she was shot. James conducted two physical inspections of all the trial evidence. In his examinations of the clothing and

photographs of the victim, he discovered “extremely relevant” information in that three one-dollar bills had blood spatter on them. The bills directly fit into outlines of blank areas on Ms. Kischnick’s left pant leg (PC-R. 3706). This information corroborated Mr. Riechmann’s story that they were getting ready to tip the man of whom they asked directions. Rhodes missed this critical evidence entirely.

The State also withheld exculpatory reports about the activities of the couple immediately before the shooting. The 10/27/87 report of Officers Aprile and Marcus was never provided to defense counsel.

A 10/28/87 report of Officer Psaltides, three days after the crime, indicates that Kersten’s father said the couple had known each other for about “15 years and that their relationship was good. He had no harsh comments about Mr. Riechmann.” Def. Ex. KK. This report was withheld from the defense.

The state conceded at evidentiary hearing that 37 statements from fact witnesses gathered in Germany were not disclosed to defense counsel (PC-R. 5478). The statements describe Mr. Riechmann and his relationship with Kersten very favorably. The materials discussed the independent sources of Mr. Riechmann’s income from legitimate employment and business ventures. The evidence showed that Mr. Riechmann was not a pimp as was suggested at trial. These materials were never disclosed to defense counsel even though they went to guilt as well as penalty

phase issues. The judge and the state were the only parties privy to the 37 statements from German witnesses. The trial judge relied upon these German statements as mitigating (R. 600). DiGregory testified at the evidentiary hearing that he provided Judge Solomon with the German witness statements, but failed to give them to the defense. He said he did not know why he failed to turn the statements over to the defense–-the court never ordered him to do so. DiGregory also testified that if the documents were available to the defense, he had no obligation to turn them over. His interpretation of Brady was whether the defense has access to the materials (PC-R. 5478-5507). Judge Gold disagreed with his interpretation (PC-R. 6069).

In his February 22, 1988 deposition, Thomas Quirk testified that it was his opinion that the only weapons that could have fired the .38 caliber bullet were an Astra revolver, a Taurus revolver, and an FIE Derringer. Def. Ex. TTT, P. 14, 19. At trial, Quirk again testified that only these three types of guns could have fired the fatal bullet (R. 2968-72). This Court relied on those facts when it rendered its opinion affirming Mr. Riechmann's conviction:

> We are satisfied that the state has met its burden of proof in this instance...Riechmann possessed two of the only three types of weapons that could have been used to kill Kischnick, showing his preference for that particular type of weapon.

Riechmann v. State, 581 So. 2d 131,141 (Fla.1991).

Although both guns had been ruled out as the murder weapon

(R. 2970), Mr. Riechmann's connection to these weapons was extremely harmful. Defense counsel failed to use available expertise to rebut or investigate that Quirk's testimony was misleading. At the evidentiary hearing, Quirk conceded that there were numerous other guns that could have fired the deadly .38 bullet, based on their rifling characteristics –- guns that he failed to mention in his pretrial or trial testimony (PC-R.5567-5568). Defense counsel failed to discover these facts. Quirk also conceded that the data base he used for his trial testimony was limited to guns that had passed through the Metro-Dade crime lab as opposed to the "clearly more inclusive" FBI data base (PC-R.5584).

Raymond Cooper, a ballistics expert, testified there were fourteen different types of weapons that could have fired the .38 caliber bullets–-nine in the .38 caliber weapon category and five in the .357 caliber category (PC-R.3821). Cooper testified that the partial box of bullets found in Mr. Riechmann's hotel room was produced "in the millions per year." (PC-R. 3814). He said the Winchester company "manufacture[s] millions of that particular round per year." This would "absolutely" classify the ammunition as "readily available." (PC-R. 3814). Trial counsel failed to take reasonable measures to inform the jury that the type of bullet that killed Ms. Kischnick was "readily available."

The state's theory for the killing was that Ms. Kischnick had a "serious gynecological problem" that made it impossible for

her to continue as a prostitute. The State's theory was that Mr. Riechmann, being her pimp and reliant on her income, murdered her for insurance money because she was more valuable to him dead than alive (R. 2402-04, 4977-78, 4982-84, 5082-84).

At the evidentiary hearing, testimony established that her condition was greatly exaggerated to bolster the state's case. Ms. Kischnick's medical records one month before her death do not show a serious gynecological condition. Dr. Alex Brickler, an expert gynecologist, testified that her medical records reflect a "very common diagnosis and common malady" that was treated successfully with antibiotics (PC-R. 3598-3599, 3507-3608).

Ulrike Karpischek testified that Ms. Kischnick did not intend to give up prostitution (PC-R. 3618). The 37 German witness statements and the German witnesses who testified at the evidentiary hearing, which Judge Gold found credible, could have been used to demonstrate that Mr. Riechmann was financially independent of Ms. Kischnick, did not rely on her income as a prostitute and was not her pimp.

Judge Gold found that defense counsel's failure to renew his request for these statements and his failure to discover the German witnesses who testified at the evidentiary hearing was "deficient performance," "unreasonable" and "below community standards" (PC-R. 6075).

Testimony at the evidentiary hearing established that trial counsel's sudden unilateral decision to have Mr. Riechmann

testify was unreasonable and prejudiced his cause with the jury. Trial counsel acknowledged that putting Mr. Riechmann on the stand without any preparation was an unmitigated disaster.(PC-R. 5701). The decision for Mr. Riechmann to testify was solely his (PC-R. 5629). Mr. Riechmann adamantly did not want to testify. (PC-R. 5692). Even after pressure by defense counsel, Riechmann was not convinced that he should testify (PC-R. 5692).

Mr. Klugh, assistant federal defender who represented Mr. Riechmann on his federal charges, was brought in by defense counsel to "get him [Reichmann] into some kind of frame of mind...[T]his is going to be a shock to Dieter and he is not going to want it." (PC-R. 3991). Counsel first told Klugh of his plan to have Mr. Riechmann testify. He then told his client. Klugh testified at the evidentiary hearing that "Dieter looked at me and his jaw dropped literally...the sense of complete bewilderment and shock taking over."(PC-R. 3991). Klugh was unaware of time spent preparing Mr. Riechmann for testifying before he took the stand. (PC-R. 3994).

Klugh observed the first day of trial and stated:

> Q. And was it evident from that that he was not prepared?
>
> A. Yes. What was striking to me was the --he hadn't even done the initial concept of preparing whether he was going to speak through an interpreter or not. It was so completely haphazard I was beside myself.(PC-R. 3997).

Expert testimony was offered at the evidentiary hearing to assist the court in analyzing the propriety of forcing Mr. Riechmann to take the stand. Mr. Potolski, qualified as an

expert defense attorney, concluded ”In this case, there was some very, very damaging impeachment and other evidence that would not have been before the jury.”(PC-R. 4310-4311).

Ms. Georgi-Houlihan, qualified by the court as an expert in capital and criminal defense representation, testified, “I can’t imagine aiming towards not having the defendant testify and then suddenly putting him on...I am not aware of anything that would have justified it.”(PC-R. 4084-4085).

Because of all these errors at guilty phase, it was no surprise that the jury found Mr. Riechmann guilty of first degree murder. Penalty phase went no better. Defense counsel failed to investigate or present any evidence in mitigation. At the evidentiary hearing, counsel was unable to cite to one contact with potential mitigating information. Among the 18.7 hours of investigator time, none of it was devoted to investigating possible mitigation witnesses. No calls were made to Germany for potential witnesses despite a handwritten list of witnesses provided by Mr. Riechmann (PC-R. 5683, 5626-28, 5648, 5672-73).[7] The jury recommended death by a vote of 9 to 3 (R. 568).

Before sentencing, Judge Solomon had an ex parte conversation with the prosecutor and he asked that the prosecutor prepare the court’s sentencing order (PC-R. 6072-73). Prosecutor

---

[7]During trial, defense counsel severely injured his knee to such a degree that he sat at counsel table during penalty phase. He had to ask bailiffs to retrieve evidence from the bench because he could not walk. He was in extreme pain and under medication but he did not request a continuance (PC-R. 4108).

DiGregory readily admitted that he prepared the sentencing order at the request of Judge Solomon when they "ran into each other" in the hallway(PC-R. 5464). It was a "momentary conversation" where Judge Solomon told DiGregory to "prepare an order."(PC-R. 5490). DiGregory did not "recall him telling me the contents of the order" and he admitted the words in the order were his. (PC-R. 5490-91).

Judge Solomon said at the evidentiary hearing that although he could not remember how he communicated with DiGregory, the sentencing order "was based on my findings totally...the first draft and the final draft."(PC-R. 5725).

Notwithstanding the inability of DiGregory and Judge Solomon to remember the means by which the judge conveyed his thoughts, DiGregory was responsible for drafting the ten-page sentencing order without consultation with defense counsel.[8]

Judge Solomon said the sentencing order was his own because he deleted one paragraph and added a paragraph on non-statutory mitigation even though none had been presented by defense counsel. He said:

---

[8]Collateral counsel discovered the "rough draft" of the court's Sentencing Order in the State Attorney case files which were disclosed during Mr. Riechmann's Chapter 119 inspection of those files. The ten-page document entitled "Rough Draft" of the court's Sentencing Order is evidence as Def. Ex. B. at the evidentiary hearing.

> However, the Court has taken into consideration, as a non-statutory mitigating circumstance a collection of statements taken by the police in the Federal Republic of Germany. These statements of acquaintances, friends and the ex-wife of the defendant suggest that those persons found him to be a good person. Thus non-statutory mitigation is warranted (R. 600).

Defense counsel never received 37 German witness statements because they were withheld by the State as not discoverable. Defense counsel failed to renew his request for the statements after in camera review by the Court. The jury never heard about these 37 credible witnesses by Judge Solomon's standards. Nor did the jury learn the mitigating evidence that they contained (R. 600). At the conclusion of the evidentiary hearing, Judge Gold entered an order denying relief on Mr. Riechmann's convictions but set aside the sentence of death based on the state's preparation of the judge's sentencing order, the ineffective assistance of counsel at penalty phase and the Brady violation by the State in withholding the 37 German witness statements from defense counsel(PC-R.6077-78).

The State chose to appeal this case, even though it has declined to so in similar cases such as Maharaj v. State, Case no. 86-30610 (11th Judicial Circuit), and Card v. State, 652 So.2d 344 (Fla. 1995). Mr. Riechmann cross-appeals the lower court's denial of guilt phase relief.

SUMMARY OF ARGUMENT

1. The lower court failed to grant a new trial on Mr. Riechmann's claims of ineffective assistance of counsel at guilt

phase. Judge Gold failed to apply the same fact analysis on the guilt phase evidence that he used to evaluate the penalty phase evidence. Trial counsel failed to investigate facts of the offense that would have proved Mr. Riechmann innocent. He failed to challenge the state's forensic experts and failed to obtain his own experts to rebut the state's case. He failed to present evidence of 37 German witnesses who could have testified about the relationship of the couple. He failed to investigate available evidence to discredit Smykowski, the state's informant. He failed to transcribe or introduce evidence of police misconduct. He failed to investigate and present the cultural differences between German and American lifestyles. He failed to request a second lawyer to assist in preparing Mr. Riechmann's defense when it was clear he was overwhelmed by the state's case. He failed to investigate rebuttal evidence on the health of Ms. Kischnick. A new trial is necessary.

2. Newly-discovered evidence establishes that there were eyewitnesses to the carjacking who were not previously available. These witnesses rebutted the state's theory that Mr. Riechmann killed the victim and corroborated Mr. Riechmann's version of the crime. New evidence proves that Smykowski's testimony at trial was knowingly false. A new trial is appropriate.

3. Material evidence was withheld by the state and police that proved that Mr. Riechmann's account of the crime was consistent with the evidence gathered at trial. The state's

disregard of Judge Sepe's order for open discovery and its failure to disclose exculpatory evidence renders Mr. Riechmann's trial fundamentally unfair.

4. The lower court correctly vacated the death sentence and correctly ordered a new sentencing before a new judge and jury. Under the facts of this case, a new trial is necessary because counsel failed to investigate both trial phases, thus rendering the outcome unreliable. The state's admitted drafting of the sentencing order through ex parte contact with Judge Solomon renders all of the fact findings suspect. On direct appeal, this Court relied on the purported fact findings of the trial judge. In reality, the findings are those of the state. No "independent" weighing of the guilt or penalty facts could occur. Confidence in the outcome is undermined.

5. Mr. Riechmann received ineffective assistance of counsel when his trial counsel failed to effectively argue to suppress the illegally-obtained evidence from Germany. Had counsel investigated, he would have learned that many of the searches conducted by the German authorities, prodded by the American prosecutors, were illegal under German law and based on misinformation from the Miami police. A new trial is required.

6. Mr. Riechmann was denied effective assistance of counsel when his trial counsel prevented the jury from learning that Mr. Riechmann had been acquitted on federal gun charges before his arrest on first-degree murder charges. Because the

jury was not told of Mr. Riechmann's acquittal, the jury was free to believe that any statements Mr. Riechmann allegedly made to the jailhouse snitch involved the murder and not the federal gun charges. Evidence about Mr. Riechmann's relinquishing all insurance proceeds to the family of Ms. Kischnick left the impression that he was doing so in an effort to "look good," when in fact he had done so before he was ever charged with murder.

7. Mr. Riechmann was denied effective assistance of counsel when his trial counsel failed to object to the state's egregious misconduct throughout the trial. The state continually attacked Mr. Riechmann's lifestyle and his right to remain silent. Such personal attacks were improper and prejudiced the jury against Mr. Riechmann.

8. Mr. Riechmann received ineffective assistance of counsel when he wanted African-American jurors on his panel, but trial counsel ignored his wishes.

9. Mr. Riechmann received ineffective assistance of counsel when his trial counsel failed to cross examine and impeach key state witnesses. Trial counsel's failure to do so was based on his lack of investigation. A new trial is proper.

ARGUMENT I

THE LOWER COURT ERRED IN FAILING TO GRANT MR. RIECHMANN A NEW TRIAL AFTER SETTING ASIDE HIS SENTENCE OF DEATH WHEN IT FAILED TO USE THE SAME ANALYSIS FOR GUILT PHASE EVIDENCE THAT IT DID FOR PENALTY PHASE EVIDENCE.

A. Introduction

The State's case was a house of cards. When one lie is revealed the entire case crumbles. The lower court recognized this in finding specific facts that required him to correctly rule that Mr. Riechmann's sentence be set aside. The lower court relied on a combination of errors relating to trial counsel's failure to adequately investigate or prepare a defense at penalty phase; the state's failure to disclose material and exculpatory evidence pursuant to Brady that would have aided in Mr. Riechmann's defense; and the trial court's failure to prepare its own findings of fact in sentencing. The hearing court failed to recognize that these same deficiencies applied to guilt phase evidence.

B. Judge Gold's order

At an evidentiary hearing held in May, June and July, 1996, Mr. Riechmann proved he is entitled to relief. Judge Gold set aside Mr. Riechmann's sentence but did not disturb the convictions. Based on the court's own findings and the facts that the court mistakenly failed to apply to the guilt phase, Mr. Riechmann is entitled to a new trial. The hearing court held:

> The Court concludes that trial counsel's performance at sentencing was deficient. First, trial counsel failed to renew or pursue his motion to obtain the German and Swiss statements which would have provided him with mitigating evidence to present to the jury. To not do so vigorously when he lacked any mitigating evidence of his own was unreasonable and below community standards, especially where his closing argument contained little, if anything, of a mitigating nature. (PC-R.4321-22; 4324).
>
> The Court concludes that the Defendant was prejudiced by his counsel's failure to present available mitigation as to his

positive character traits, personal history and family background... With such evidence presented, there is a reasonable probability the outcome of the case would have been different, as against a jury, who without any mitigating evidence, was already ambivalent about their recommendation.

Moreover, when the cumulative effect of the trial's counsel's deficiency is viewed in conjunction with the improper actions of the trial judge and prosecutor during the penalty phase, the Court is compelled to find, under the circumstances of this case, that confidence in the outcome of the Defendant's penalty phase has been undermined. See, Gunsby v. State, supra, 670 So. 2d 920 (cumulative effect of errors may constitute prejudice), and that the Defendant has been denied a reliable penalty phase proceedings. Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995). (PC-R.6076-6079).

The lower court failed to apply these same principles of deficient performance to the guilt phase issues.

C. Ineffective assistance of counsel at guilt phase;

1. Trial counsel's failure to adequately challenge blood spatter and gun residue evidence.

At the evidentiary hearing, defense counsel, Mr. Carhart testified that he considered the blood spatter evidence to be a "lynch pin" of the state's case but that he considered the state's expert, Mr. Rhodes, to be "benign" until his trial testimony. He said Rhodes' importance did not become evident to him until "...it was showering down on me at trial." (PC-R.5685).

Judge Gold acknowledged that trial counsel's failure to investigate rebuttal evidence was not tactical and that trial counsel should have been aware of this important evidence:

> Applying these principles, the Court concludes that trial counsel's performance was not deficient. Admittedly, trial counsel offered no tactical reason why he did not retain or call an expert serologist.
>
> ***

> By July 7, 1988, trial counsel <u>was certainly on notice</u> that Mr. Rhodes' testimony was a "moving target" and ultimately problematic. (PC-R. 6036-37)(emphasis added).

Instead of applying the same principles it used to grant relief in sentencing, the Court gave a convoluted excuse for why defense counsel did not investigate or present rebuttal evidence:

> Notwithstanding Mr. Potolski's testimony, the Defendant has failed to sufficiently meet his burden by demonstrating that, based on a reasonable probability, Mr. James, or a similar expert, would have been found by an ordinary competent attorney using diligent efforts and that such an expert would have been prepared to rebut the State's serologist at trial.
>
> ***
>
> Rather, the "reasonable probability" standard must be measured from trial counsel's perspective at the time, without resort to distorting hindsight. No testimony was offered that, given the time limitations immediately before trial, Mr. James could have rendered the same opinions as offered at the post conviction hearing. (PC-R. 6037-38).

Judge Gold said Stuart James was credible. He simply questioned Carhart's ability to retain an expert within the time constraints of trial.[9] The record does not show that Carhart requested a continuance to get an expert. The Court then concluded that trial counsel's cross-examination of the witness was effective in showing the weaknesses of Rhodes' testimony (PC-R.6038-39).

The community standards that the judge upheld on penalty

---

[9]Judge Gold forgets that defense counsel apparently had sufficient time to retain an expert in gunshot residue, Dr. Guinn. It stands to reason that if counsel had time to retain one expert, he had time to retain an expert on the pivotal bloodstain evidence.

issues were ignored here. Trial defense expert, Potolski, testified that it was unreasonable for an expert not to be retained to rebut the forensic blood evidence in this case. If Judge Gold found Potolski to be credible on penalty phase issues then logically he is credible on guilt phase issues.

The Court completely misconstrued the duty of trial counsel. Trial counsel conceded he had no tactic or strategy for failing to investigate the blood spatter evidence. Carhart could not make a reasonable decision without investigating this evidence. Carhart was on notice that this evidence was important. He had a duty, at least, to investigate the possibility of getting information, evidence or an expert to rebut the important blood evidence. He knew that he needed an expert for the ballistics evidence–-he retained Dr. Guinn. He also was on notice that he needed a serology expert.

Carhart did not know if experts were available because he did not look. He did not know that the tests conducted by Rhodes defied the laws of physics. He did not know whether an expert was available because he did not ask. The circumstantial nature of the evidence in this case made impeachment of Rhodes' testimony critical. Cross-examination alone may have been impeaching but cross-examination is not hard evidence that could rebut the scientific facts. Defense counsel did not even ask if there was expert in serology who could testify or assist him in cross-examination of Rhodes.

It is not difficult to ascertain whether a serology expert exists. To say that counsel's performance should begin during the middle of trial when he realized that he had underestimated Rhodes is to reward him for his lack of preparation for trial. Carhart admitted he did not have a strategy or tactical reason for not seeking information. Lack of preparation cannot be considered effective assistance of counsel.

The jury did not know that James could have testified that he was certain that the handful of blood specks found on the driver's door and window did not come directly from the shooting. If this was true, the specks obviously had no significance on Mr. Riechmann's presence or absence from the driver's seat at the time of the shooting. James explained:

> I do not believe it is physically possible, based upon mechanics of back spatter with an entrance wound, to refer to any small specks of blood that are on the opposite side of the vehicle going in the direction of the projectile when there is no exit wound. Back spatter doesn't act like that. It does not defy the laws of physics. It does not come out of the back of the head and go up and out the other direction. It just doesn't happen(PC-R. 3681-3682; 3741-3742).

James also eliminated the possibility that the blood specks on the driver's door came from exhalation of blood. The distance and required angle from Kersten's nostril precluded such a possibility (PC-R. 3681-3682; 3741-3742). James performed a flick test that showed how easily small specks could have gotten on the driver's side door from flicking one's fingers See, Def. Ex J. This corroborated Mr. Reichmann's testimony at trial in

guilt phase. James emphasized that the blood on the driver's door could have gotten there any number of ways, due to the amount of activity occurring in the car and the evidence that the door opened and closed more than once. Id.

Rhodes mistakenly assumed that the blood on the window got there at the time of the shooting. He concluded that the window was only open 3 to 3 and one half inches at the moment of the shooting. This calculation is of great importance to the state because it argued that only a portion of the murder weapon could have been inserted through the window, affecting the amount of gunshot residue in the car. James concluded there was no way to conclude that the "presumptive blood" on the window came directly from the shooting.

The presence of matted brain matter on the headliner above the passenger window was a significant factor at trial. James found the descriptions of Rhodes' analysis to be incorrect.

> ...When you shoot someone, you know, with a .38, I have never seen brain matter come roaring back toward the shooter, and if it had why isn't it on the window? I mean, that didn't make any sense to me (PC-R.3669-3670).

Mr. Riechmann's jury was similarly misled about the significance attached to the blanket recovered from the driver's seat of the car. As with the driver's door, the state used Rhodes' flawed analysis to suggest that Mr. Riechmann could not have been in the seat at the time of the shooting. James said by failing to use a " negative control" or to test portions of the

blanket other than the top and bottom surfaces made the test invalid. "[T]his blood occurred at a prior time. It has nothing to do with the shooting or exhalation" (PC-R. 3702-3703).

Since Rhodes also obtained positive test results for "presumptive" blood on the underside of the blanket as well as the top, "the blanket becomes a non-issue." Id. "It is not usable for any opinion that I can give." Id. "[H]igh velocity impact spatter is not going to drip through anything...it will not soak through, because is dries almost immediately...within less than a minute. Easily." Id. James concluded that Rhodes' testing the blanket to determine whether Mr. Riechmann occupied the driver's seat was "very misleading." Id.

Finally, James discussed the string test performed by Rhodes to show the origin of the blood specks on the driver's door by running strings from the various specks to the point of common origin on the right side of the passenger's head (R. 3893-3906). James found this test to be invalid because of the impossibility of the blood "defying the laws of physics" and jumping over the victim's head to get to the driver's door and due to the shape of the bloodstains described by Rhodes (PC-R. 3770). The jury never heard this information. Rhodes also completely missed the bloodstain evidence on the three one-dollar bills found in Kischnick's leg that further corroborated Mr. Riechmann's story (PC-R. 3706).

Attorney experts Potolski and Georgi both testified at the

evidentiary hearing about the need for early and thorough preparation for these types of cases. Failure to prepare or investigate the case in advance was deficient performance of counsel. The state offered no evidence to rebut their expertise.

Judge Gold erroneously held that under the time constraints imposed on Carhart at trial, it was not unreasonable for him not to obtain a blood-spatter expert. This ruling is contrary to the evidence because Judge Gold failed to recognize that Mr. Carhart placed the time constraints on himself. Had Carhart prepared pre-trial for the blood expert's testimony, he would have proven to the jury that Rhodes' unscientific methods were bunk. Counsel had sufficient time to retain an expert because he retained Dr. Guinn to rebut the state's gun residue evidence. Even Judge Gold acknowledged that Carhart should have known what Rhodes' testimony was going to be important (PC-R.6037).

Judge Gold ruled that Mr. Riechmann did not prove that an expert would have been available at the time of trial. However, James testified that he would have been available to testify. Dr. Guinn made himself available to defense counsel for the gunshot residue testimony. If not James himself, other serology experts were available upon proper notice by defense counsel.

A reasonableness standard cannot attach unless defense counsel made a strategic or tactical informed choice that he will not present or seek certain evidence. Strickland v. Washington, 466 U.S. 668 (1984). Carhart did not have a strategic reason for

failing to investigate evidence to rebut the State's forensic expert, therefore, he should not be subject to a reasonableness analysis. He should be subject to the same standard Judge Gold used on the penalty phase issues--that community standards dictate that a reasonable attorney under the same circumstances would have investigated possible rebuttal evidence before the trial started.

The Court failed to recognize the significance of the state withholding a critical police report from the defense that directly rebutted the testimony of Rhodes. The court held that defense counsel's failure to retain a blood spatter expert was not prejudicial to Mr. Riechmann's case because trial counsel had the ability to cross-examine the expert. The court also said there was no evidence presented that a blood expert could have been available at trial(PC-R. 6037-38).

Neither of these issues address the prejudicial effect of the uncontradicted expert testimony on the jury. The jury never heard that Rhodes' testimony defied the laws of physics; that his methods were scientifically suspect; that the conclusions he drew regarding blood droplets on the blanket were not made at the time of the crime; that Rhodes' string test indicated no one point of origin; that Rhodes completely missed the blood evidence that was present on several one-dollar bills that were on Kersten's leg at the time of the crime; and that the blood spatter evidence on the passenger window indicated that the window was rolled down

significantly lower than he testified to at trial.

Judge Gold also failed to consider the devastating impact of the Brady violation. The state withheld the police report of Officer Trujillo, proving that the passenger window of the rental car was down significantly lower than Rhodes' testimony indicated. The withheld report completely discredited Rhodes. Had the jury heard this evidence and defense counsel investigated the possibility of using evidence to rebut the state's blood spatter expert before the trial started, the outcome of the trial would have been different.

Trial counsel testified at the evidentiary hearing that he had no tactical or strategic reason for not obtaining expert assistance on blood evidence. He inexplicably failed to investigate this highly technical area of forensic evidence–the "lynch pin" of the state's case. Defense counsel testified that he did not realize until he was in trial that the evidence was going to "evolve" in this manner. However, the record belies this testimony. Trial counsel deposed Rhodes three times. Judge Gold acknowledged that the depositions reflected what Rhodes was going to testify about (PC-R. 6037-38). Because of the circumstantial nature of this case, trial counsel admitted that this evidence was central to the state's ability to make a case against Mr. Riechmann. Mere cross-examination of a witness is not enough to rebut scientific forensic evidence.

To the extent that the state prevented counsel from

discovering exculpatory evidence that would have undermined the credibility of Rhodes, Mr. Riechmann was prejudiced by the jury's inability to consider this evidence in evaluating his testimony. The state conceded that defense counsel was not provided with the reports of Officer Trujillo that contained exculpatory evidence. The lower court misconstrued the import of this omission.

Gunshot residue and ballistics evidence;

An important factor in Mr. Riechmann's conviction was testimony from Metro-Dade gunshot residue analyst Gopinath Rao. Riechmann v. State, 581 So. 2d 133, 136, 141(Fla. 1991)(citing gunshot residue testimony); state's closing arguments, R. 5965, 4990-94, 5002, 5007, 5086, 5088 ("Would an innocent man, ladies and gentlemen, have gun shot residue all over his hands?") evidentiary hearing testimony of trial prosecutor Sreenan (PC-R. 4767) "I think that was important, too.").

Rao's testimony was significant because he testified that Mr. Riechmann "probably" fired a gun, based on the number and type of particles found on his hands (R. 3545-46, 3553-54). This testimony was patently false.[10] As was evident from the testimony of Raymond Cooper, expert firearms examiner at the evidentiary hearing, Rao's opinions flouted universally accepted norms for gunshot residue analysis:

[T]he only conclusion you can draw from a positive gunshot residue analysis is that the person either fired the weapon, was

[10]It bears noting that trial counsel "Thought [Rao} was a perjurer." (PC-R. 5709). However, counsel had no facts to back up his intuition.

in close proximity of a weapon being fired...or he handled a recently fired weapon...

(PC-R. 3826). Cooper said there is "absolutely not" a way to distinguish between those three possibilities. Id. Cooper was unaware of any study or research that "would allow an expert to offer the opinion" offered by Rao (PC-R. 3827). Cooper had never heard of anyone rendering such an opinion (PC-R. 3829).

Cooper challenged Rao's testimony that the presence of "one more unique particle which contained all three [trace] elements" would have enabled him to say to a scientific certainty that Mr. Riechmann fired a gun. Cooper had never heard of such a thing.

Trial counsel failed to impeach Rao on these unscientific conclusions or present any evidence that Rao's conclusions were false. The jury was forced to accept what the state presented even though the conclusions defied the FBI standards and the profession. As evident by this Court's opinion on direct appeal, Rao carried the day because of counsel's failure to investigate and present impeachment or rebuttal evidence.

Despite Judge Gold's concerns about the time constraints of defense counsel, he had ample notice of Rao's opinion and plenty of opportunity to challenge his testimony. In his February 22, 1988 deposition, Rao said that Mr. Riechmann "probably fired a gun." Def. Ex. SSS pp 34-36, 49-50. A daily transcript of Rao's testimony also was prepared. Two weeks earlier, counsel called Dr. Guinn as an expert in gunshot residue for the defense.

The prejudice to Mr. Riechmann was that the jury was not

aware of the voodoo Rao was trying to spin. Defense expert, Potolski testified that the use of professional protocols in forensic evidence such as Rao's could have been "devastating" to Rao's inculpatory testimony:

> [M]y recollection of what I read was that the FBI says the most you can say when there is gunshot residue on an individual's hands is that the person was in the vicinity when a firearm was discharged. That is the Federal Bureau of Investigation. That is the agency that experts and even jurors just instinctively know is the authority.
>
> If you have something from the FBI that says that and you are cross examining a witness who says otherwise, it is likely that the witness is going to lose. (PC-R. 4285).

Judge Gold once again found that cross examination had sufficiently shown the "weaknesses in the witness" testimony. The Court concluded that trial counsel's performance was "neither deficient nor prejudicial" in failing to use the available authoritative literature and prevailing professional norms for impeachment (PC-R. 6045). Judge Gold, however, failed to recognize the significance of hard evidence to rebut forensic evidence. The Court also failed to recognize the significance of the crime lab technicians' failure to swab the interior of the rental car for gunshot residue to get the levels at which gunshot particles had been emitted into the car. Without this information, Mr. Riechmann could not prove that the residue levels on his hands when swabbed by the MBPD were consistent with levels everywhere else in the car.

The jury never knew that the FBI professional norms and controls were not used in this case. Regardless of the

impeachment of the witness, the jury never knew that the scientific conclusions of Rao were false.

Counsel's failure to rebut incorrect firearms and bullet examination testimony was equally egregious. Defense counsel was on notice that the state's witness would testify that only three types of guns could have fired the fatal shot. In the deposition of Thomas Quirk on February 23, 1988, counsel knew that Quirk's opinion was that the only weapons that could have fired the bullet were an Astra revolver, a Taurus revolver, and an FIE Derringer. At trial, Quirk testified consistently with his deposition (R. 2968-72).

The significance of this testimony was that two of the three possible weapons discussed by Quirk were found in Mr. Riechmann's hotel room; a Taurus revolver and a FIE Derringer. Although both guns were conclusively shown not to have been the murder weapon, the implication of Quirk's testimony was extremely harmful. This Court underscored the importance of this evidence:

> 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...
>
> We are satisfied that the state has met its burden of proof in this instance...Riechmann possessed two of the only three types of weapons that could have been used to kill Kischnick, showing his preference for that particular type of weapon.

Riechmann v. State, 581 So. 2d 131, 136, 141 (Fla. 1991).

This Court was forced to rely on evidence that was false and misleading. Fourteen (14) types of guns could have been used in this crime, most of them relatively common (PC-R. 3821-22).

At the evidentiary hearing, Quirk conceded that there were numerous other guns that could have fired the deadly .38 bullet, based on their rifling characteristics–-guns that he failed to mention in his pretrial or trial testimony (PC-R. 5575; 5580-81). (PC-R. 5581). Quirk conceded that the data base he used to determine which types of guns could have fired the .38 bullet was limited to those guns that had passed through the Metro-Dade Crime Lab as opposed to the more inclusive FBI crime lab. Counsel's failure to prepare adequately for this very damaging state's evidence prejudiced Mr. Riechmann's defense.

Trial counsel also failed to inform the jury that the type of bullet used to kill Ms. Kischnick was produced in the "millions per year"(PC-R. 3814). Raymond Cooper testified at the evidentiary hearing that the Winchester company manufactures "millions of that particular round per year." Id. This would "absolutely" classify the ammunition as "readily available." Id. Such testimony would have minimized the impact of the forensic barrage that was left dangerously misunderstood by the jury.

Judge Gold ignored the prejudicial impact of this evidence by sidestepping the issue:

> Even if such rebuttal evidence were available, the Court concludes, after considering all the evidence at trial, that the Defendant has failed to prove prejudice

(PC-R. 6047).

There was unrebutted evidence at the evidentiary hearing that this information was available through Quirk himself. There

was no evidence that the information was not available. Counsel did not say that he tried to get the information and it was unavailable. Counsel did not investigate the possibility of rebuttal evidence. He did not have a strategic reason for not investigating this avenue. This misleading information had a prejudicial impact on this Court and the jury.

2. Counsel's failure to investigate facts of Mr. Riechmann's innocence.

At a pre-trial hearing, Judge Sepe ordered that Mr. Riechmann be provided with every piece of discovery that the state gathered. Judge Sepe said the defense would have "carte blanche" discovery -– Total. No ifs ands or buts, no conditions. Whatever the State has, he gets." (R. 634) Defense counsel either was unaware of this order or failed to notify Judge Solomon of the existence of this open discovery order. Although this order had been entered in the presence of the state attorneys, the state continued to hide evidence from defense counsel at each opportunity. Defense counsel testified:

> Everything had to be pried out. Everything had to be argued for. Everything was argued over...the redactions in the reports...or cutting and pasting...was the norm.
>
> [W]e were arguing discovery right through trial...I mean it just –- it was a very conservative guard approach for giving discovery in the case.
>
> I don't think I've ever been in a case as a defense lawyer where it was so difficult to get discovery from the state.(PC-R.5659-5661).

Even though the Brady violations were many, defense counsel

still had a responsibility to investigate the case. Beyond taking depositions, defense counsel conducted no other factual investigation. At the evidentiary hearing, Carhart identified a investigative bill that reflected only 18.7 hours of investigator time invested in the defense of this important circumstantial evidence case (PC-R. 5627-28). Carhart said the investigator's instructions were to locate the waiter who served the couple only minutes before Ms. Kischnick's demise and to review "Miami Beach police frequency tapes." (PC-R. 5626-28, 5647-49, 5670-73). Both efforts were fruitless, as the waiter was no longer employed at the Jardin Brazilian and the police tapes yielded nothing.

The Bayside waiter was a critically important witness for the defense because he observed the couple in good spirits and happy. Efforts to find the waiter did not occur until June 30, 1988 (PC-R. 5672) one week before trial. This was more than eight months after the incident; five months after Carhart began his representation and three months after counsel took the depositions of officers Aprile and Marcus. A belated investigation in a case of this magnitude is not effective representation. Had counsel investigated, the results of this case would have been different.

Carhart testified that he had no recollection of asking an investigator to locate eyewitnesses to the murder of Ms. Kischnick (PC-R. 5673). Had counsel done so he might have located witnesses Early Stitt and Hilton Williams, who testified

at the evidentiary hearing that they were present on 63rd Street off Biscayne Boulevard when Kischnick was shot (PC-R. 4398-4480).

Judge Gold in his order and the state in its brief say that defense counsel was hampered in his investigation by Mr. Riechmann's inability to give a precise location where the crime occurred. Hogwash! Collateral counsel had at his disposal the same exact facts that defense counsel had. Early Stitt and Hilton Williams were found. However, there is no indication in the record that defense counsel even sent an investigator to look for witnesses. The investigative bills prove this fact. In a case of this magnitude, the investigation should not fall on a defendant who is a German citizen and does not understand the United States legal system or the language. There are no indications in the record that Mr. Riechmann interfered with counsel's investigative efforts. In fact, Mr. Riechmann gave counsel a list of potential witnesses to contact in Germany(PC-R.5646). Mr. Riechmann, a foreign national, relied on defense counsel to know how to investigate and present a case in the U.S. Courts. To expect Mr. Riechmann to be responsible for directing the investigation is ludicrous and not the state of the law.

In his evidentiary hearing testimony, defense expert Potolski explained the importance of a prompt, sound, and thorough pretrial investigation, especially in a circumstantial evidence case such as this one (PC-R. 4269-4273). "You have got to attempt to create what happened as soon as possible." Capital

defense attorney Edith Georgi-Houlihan, also qualified by the Court as an expert in such matters, testified:

> "So...I can say that unequivocally putting together the case from the start and investigating absolutely every aspect of the case...is essential and to not do so is unacceptable. (PC-R. 4058).

Ms. Georgi-Houlihan added that Mr. Riechmann's case required a particularly intensive investigation "for many, many factors." Id. To now blame counsel's lack of preparation on the client is disingenuous and wrong.

3. Defense counsel's failure to investigate times and distances:

Expert defense attorney Potolski testified:

> [I]t is pretty obvious that ...the last provable actions prior to the incident are going to be crucial to a jury or anyone else.(PC-R. 4272).

Counsel failed to present evidence to corroborate Mr. Riechmann's story. From the outset it was known that the couple dined and drank at a Bayside restaurant. Officers Aprile and Marcus were named in a discovery response in February and deposed on March 15, 1988. They described their interview of the waiter who saw the couple for several hours until 10 or 10:30 p.m. the night of the shooting.[11]

Given that Mr. Riechmann flagged down a police officer for help at 10:32 p.m., the Bayside waiter was clearly important. From the depositions, defense counsel knew of crucial testimony

---

[11]There is no indication that the October 10, 1987 police report of Aprile and Marcus describing their interview with waiter Hernandez was ever provided to the defense.

that would have supported Mr. Riechmann's account and undermined the state's outlandish characterization of his story. The time frame was critical. That the couple –- only moments before the tragedy –- had every appearance of vacationing tourists "in a good mood" and in "good spirits" would certainly have helped (PC-R. 4272). They consumed "six drinks each" of rum, vodka, gin and Amaretto. They were "intoxicated," which accounted for getting lost and for Mr. Riechmann's inability to reconstruct the location. Counsel did not send an investigator to the restaurant until three and a half months later. (PC-R. 5626-28, 5647-49, 5670-5673).

While counsel made no effort to verify the plausibility of Mr. Riechmann's story, the state went to great lengths to belittle it. The jury and this Court were left with the impression that Mr. Riechmann's story was suspect because he inexplicably spent too much time "looking for help, driving as many as ten to fifteen miles before he hailed Officer Reid to get assistance." Reichmann v. State, 581 So. 2d 133, 136 (Fla. 1991).

The October 28 taped statement of Mr. Riechmann to police illustrates how he was hopelessly confused about his travel on the night in question. In his trial testimony ten months later, he was no better able to shed additional light on how it happened. This was exacerbated by Riechmann's ill command of the English language.

Counsel also could have presented data from the Miami Police

Department to demonstrate that Biscayne Boulevard from 36th Street to 79th Street was a likely place to get lost coming from Bayside going north and is one of the highest crime zones in Miami (PC-R. 3860-3880). Nearly one violent crime occurs in that neighborhood every day.

The jury never knew that in the aftermath of the shooting of his girlfriend, Mr. Riechmann was "distraught," "upset,""sobbing,""with tears coming out of his eyes," "dejected," "emotionally upset," "hysterical, like crying and holding his face," "smelling of alcohol."(PC-R. 4565, 4575). Such descriptions of how the "alleged" murderer acted in the moments immediately after the shooting would have substantially advanced the defense case. Contrary to Judge Gold's order, this information was not presented to the jury.

4. Counsel's failure to present evidence of Mr. Riechmann's relationship with Ms. Kischnick:

Judge Gold said that the relationship between Mr. Riechmann and Ms. Kischnick was presented at trial:

> The remainder of Claim I...(addressing trial counsel's failure to present evidence of the Defendant's relationship with the Victim), focuses on evidence which new counsel asserts should have been presented at trial; however, most of this evidence had already been presented to the jury, although in a manner different from now desired (PC-R.6049).

The only evidence presented on this issue came from <u>state</u> witnesses. Their testimony was not beneficial to the defense. Dina Moeller testified Kristen and Dieter loved each other but they did not get along well.

Likewise, the “cervical erosion” of Ms. Kischnick used by the state as part of the motive for the murder, was false. Ms. Kischnick had a common illness that was treated with antibiotics. Independent defense evidence could have established this fact. Conclusive evidence that this was a common illness did not come to the jury through cross-examination.

Defense counsel did no independent investigation into these witnesses even though Mr. Riechmann gave him a list of people to contact. No hard evidence showed that Mr. Riechmann was financially independent and not a pimp. There was no medical evidence to show that “cervical erosion” of the victim was fiction created by the state. There was no hard evidence that the couple had a loving relationship, even though the information was available from the suppressed 37 German witness statements and the German witness who testified at the evidentiary hearing. Dina Moeller’s testimony that the couple loved each other but did not get along well is not a glowing example of a harmonious relationship. The jury was left with inaccurate information.

Judge Gold failed to acknowledge the significance of the 37 German witness statements not presented to the jury during guilt phase. Counsel failed to present the witnesses that would have been most helpful in rebutting motive. The information contained in these statements would have refuted the waffling testimony of the state’s witnesses, particularly Dina Moeller. These statements were found to be credible enough by Judge Solomon to

warrant him giving them weight as non-statutory mitigation.

At the evidentiary hearing, defense counsel testified that the relationship between Dieter and Kersten was “one of the central issues in this case” (PC-R. 5697). Judge Solomon also attested to this fact in his hearing testimony:

Q. Do you feel that the relationship between Mr. Riechmann and the victim in this case, Ms. Kischnick, was a prominent aspect of the case?

A. Yes.

Q. Would you feel it would be important for defense counsel to do his own investigation of that relationship?

A. Yes.

Q. Would you believe it would be remiss for counsel not to do so?

A. I believe so.(PC-R. 5720).

Despite the consensus that the relationship was important to the guilt phase case, there are no indications that counsel did anything whatsoever to investigate the matter himself. He did not send an investigator to Germany. Judge Gold found that the few phone calls Carhart made to Germany were essentially “efforts to raise funds” (PC-R. 5679-5681). He made no attempt to interview people who knew his client or the victim, although he was specifically asked to do so by Mr. Reichmann. Def. Ex. QQQ.

At the evidentiary hearing, numerous witnesses were available to testify that Dieter and Kersten had a very close relationship; that he treated her very lovingly and respectfully, that he was a good and devoted partner; that he was totally

nonviolent; and that he assuredly did not "live off" Ms. Kischnick. To those who knew the couple and had regular contact with them, Mr. Riechmann's guilt was inconceivable.

Judge Gold found that the testimony of the witnesses presented at the evidentiary hearing would have been relevant at penalty phase. The judge, however, did not apply their testimony to the facts at guilt phase where the quality of the relationship was made into an issue:

> Consequently, trial counsel failed to unearth a large amount of mitigating evidence as to the Defendant's character, family history and relationship with the victim, which could have been presented at sentencing. At the post conviction hearing, the Defendant presented the testimony of fifteen (15) individuals from Germany who were willing and able to testify at the Defendant's trial had they been contacted and asked to do so. The Court heard from landladies and neighbors Monika and Marlene Seeger, friends Martin and Ulrike Karpischek and Wolfgang Walitzky, and for relationship partners Doris Dessauer and Doris Rindelaub. All traveled from Germany at their own expense to speak for the Defendant. The Court also received written statements from many other individuals who would have made every effort to attend the trial, but who were unable to attend the post conviction hearing: friend and associate, Otmar Fritz, friends Angelika Fritz, Sabine Plott, and Thomas Woehe; neighbor Modersohn; the Defendant's mother, Martha, and brother, Hans-Henning, and trial witness Ernst Steffen.

(PC-R.6076-77)(emphasis added).[12]

These witnesses were relevant to motive at guilt phase. Judge

[12]The state argues in its brief that the postconviction witnesses did not have enough of a long term relationship with Dieter and Kersten to give their testimony weight. This is belied by the record which shows that the witnesses had long-standing contacts with the couple and Judge Gold's assessment of the credibility of the witnesses. It is ridiculous to argue that Dieter's mother, girlfriend and brother did not have sufficient contact to know him.

Solomon acknowledged that defense counsel was “remiss” in failing to investigate, produce or present any favorable evidence concerning the relationship between the key parties. This was particularly true when it involved the medical and life insurance policies that had been purchased in 1977, not just prior to the Miami trip as the state suggested.

Even a state’s witness at Mr. Riechmann’s trial would have provided exculpatory evidence had defense counsel simply asked. The written statement of Ernst Steffen was admitted as evidence in the evidentiary hearing and relied upon by Judge Gold as credible. Steffen knew the couple since 1977, when Mr. Riechmann first purchased health insurance for Ms. Kischnick. Counsel never knew that Mr. Steffen testified reluctantly at the insistence of the insurance company, which had a large financial stake in Mr. Riechmann’s conviction.

I should state at the outset that I testified with great reluctance. Indeed, I testified only at the insistence of the insurance company with which I work and with an assurance of compensation for my time and lost earnings. I did not want to testify. It is my understanding that the Lorrach police, who were working in close cooperation with the Florida prosecutors, put considerable pressure on “higher ups” at the insurance company to persuade me to testify.

The prosecuting authorities in both Florida and Germany made it abundantly clear that they wanted Mr. Riechmann convicted at <u>all costs</u>. One can only surmise what the prosecution of this case cost the state of Florida. The Florida prosecutors went to <u>considerable lengths to indoctrinate their witnesses both as to Dieter’s guilt as well as the brutality of the offense itself</u>. We were shown repulsive photographs and provided with details of the state’s case in an obvious effort to obtain our commitment to the state’s cause. Similarly, at this end, here in Germany, the police sought to offset any reluctance on our part by suggesting that we look upon the whole venture as some sort of “Florida

holiday."

Although it was never elicited at Mr. Riechmann's trial it is a fact that his conviction for murder involved a difference of approximately 400,000 Deutschmark in insurance benefits that the company would have been required to pay out. I would have testified to this at the trial, but no one ever inquired of me in this regard.(Def. Appendix 34; See also, Appendix 72)(Emphasis added).

Steffen's statements would have shown the jury the motivation for the insurance company and the police to convict Mr. Riechmann of this crime. Defense counsel failed to ask Steffen about his relationship with the couple.

Similarly, I was asked no questions at trial concerning my observations on the relationship between Mr. Riechmann and Ms. Kischnick. In fact, they had, from everything I could tell, a very good and loving relationship. They communicated openly and with mutual respect. I never saw any tension or hostility between them. Had it been anything otherwise, neither I nor my wife would have associated with them or welcomed them in our home as we did. For this reason, it was my impression that Kersten's participation in prostitution was entirely of her own volition.

***

In knowing Dieter Riechmann as I did, he was in no way a brutal or backstabbing sort of person. Consequently, I would have to say that I do not believe him capable of the violent premeditated act he was charged with and convicted of.

Had Dieter's lawyer inquired into these matters at trial, I would have testified as stated herein. Because he asked me no questions at all, the jury heard only "one side" of the picture, without the benefit of any attempt from the defense side to explain or expand the picture. Id.(emphasis added).

The manufactured motive created by the state could not be exposed unless the 37 witness statements had been turned over, and unless Carhart had done his homework. Defense counsel could not make an informed decision to use these witnesses if he did not talk with them or investigate their existence as Riechmann had suggested by

providing a list of potential witnesses.

5. Counsel failed to investigate information that would discredit the state's jailhouse informant.

Judge Gold erroneously found that defense counsel had made a "reasonable tactical decision not to call other inmates who would have impeached the testimony of Walter Smykowski" (PC-R. 6050-52). He also found "no undisclosed deal with Walter Smykowski" (PC-R.6064). This ruling was an abuse of discretion.

Walter Smykowski was an important prosecution witness at trial as conceded by lead prosecutor, DiGregory:

> A. He was an important witness, yes. I don't know whether he was crucial, but he was important. Perhaps –- yeah, he was a significant witness, yes.
>
> Q. Would you classify –-in fact, you have classified him as crucial?
>
> A. Crucial. That is right.

(PC-R. 5488).

DiGregory also recognized that "a reasonably effective defense lawyer would have a duty to investigate Mr. Smykowski." Id. (I would think so, yes.")

Smykowski described for the jury what were purported to be incriminating actions and statements by Mr. Riechmann when the two were cellmates in federal custody. Smykowski described Mr. Riechmann's alleged elation at becoming "a millionaire" as a result of Kersten's demise (R. 4105-08, 4131). See also, closing argument of state,(R. 5088). He implied that Mr. Riechmann acted guilty when asked "why he killed his girlfriend." According to

Smykowski, “his face was white like this wall.” (R. 4112). See, state’s closing argument (Would an innocent man...turn white in the face?” (R. 5088). Smykowski also attributed to Mr. Riechmann a statement that implied that the police had overlooked a “fourth” gun.(R. 4109) See also, state’s closing argument at (R. 5085-86).

At the time of Mr. Riechmann’s incarceration with Smykowski, he had not been charged with murder but only with federal firearms charges. On November 15, 1987, at the time of these alleged statements to Smykowski, Mr. Riechmann had signed over to the Kischnick family any and all insurance proceeds. Mr. Riechmann was not to receive one cent for Kersten’s death.

Defense counsel was asked whether he “at any time” sent an investigator “to do any investigation of Mr. Smykowski.” Counsel recalled no such efforts (PC-R. 5684). Although Mr. Riechmann had informed counsel of witnesses who could impeach Smykowski, those individuals were never located or interviewed. Id.

Hans Lohse testified that he wrote a letter to defense counsel offering himself as a witness as to Smykowski’s well-known lack of credibility. According to Lohse, “everybody” at Metropolitan Correctional Center (MCC) “know the Russian guy as a snitch” (PC-R. 5750). “He is just looking for short time.” Id. Smykowski had a reputation in the MCC community as “definitely dishonest.” Id. It was well known to everyone. Id. Smykowski was not someone people felt they could trust. “He was always

recreating new stories –- and he always try to find out something to cut his own time." Id. Everyone knew this except Carhart and the jury. Lohse was never contacted by defense counsel.

Judge Gold incorrectly found that defense counsel's decision not to use the cellmates of Mr. Riechmann was a tactical decision. Counsel could not have made a tactical decision if he did not know what Mr. Lohse would say or what information he had. Whether or not he would actually call the witness is irrelevant. What is important is that the information this man possessed could have lead to other evidence that could be used to impeach the credibility of the snitch. Counsel unreasonably failed to undertake the most basic measures on his capital client's behalf; measures that probably would have made a difference in the outcome of the case. The jury never knew that Smykowski was getting a deal because he specifically said he was not. This was a lie. Defense counsel could not prove the lie because he failed to talk to Hans Lohse about the circumstances by which Smykowski testified. This was deficient performance.

Counsel's tactic was not to present testimony on Mr. Riechmann's behalf because the potential witnesses had prior convictions. This was ludicrous. Smykowski also had prior convictions. The only possible evidence to rebut Smykowski would come from witnesses in jail. The jury should have been the ones to evaluate the credibility of the witnesses.

Newly-discovered evidence revealed that Smykowski had an

undisclosed deal with the state. After Mr. Riechmann's trial but before sentencing, DiGregory sent a letter to the federal parole authorities requesting "in the strongest possible terms" that Smykowski be given a reduced sentence on his outstanding charges (PC-R. 5462). DiGregory audaciously testified that he thought about writing the letter during trial but did not actually decide to do it until after the trial was over so he did not feel an obligation to tell defense counsel (PC-R. 5488).

It was clear, however, that the deal was closed before Mr. Riechmann was sentenced and three weeks after the trial was over. DiGregory, at least, had a duty to disclose the deal at sentencing but he never did. The jury was left with the impression that Smykowski was testifying against Mr. Riechmann out of the goodness of his heart. The lower court abused its discretion based on these facts.

6. Counsel's failure to introduce the secretly-recorded four hour tape of the interview with MBPD Sgt. Matthews.

On October 29, 1987, four days after the murder, Mr. Riechmann participated in a four-hour interview with MBPD Sgt. Matthews at police headquarters. Unbeknownst to Mr. Reichmann, the interview was recorded and audited by detectives in an adjoining room. On the pretext of allowing Mr. Riechmann to see Ms. Kischnick's body before it was sent back to Germany, Matthews picked up Mr. Riechmann from his hotel room.(R.800).[13]

[13]On the afternoon of October 29, following days of discussions, drive-arounds and several telephone conversations,

Mr. Riechmann was placed in a 10' x 12' room with a two-way mirror and hidden recording equipment. For four hours, Mr. Riechmann was interrogated and recorded. In those four hours, he gave consistent statements about what happened the night of the murder. Due to a technical malfunction, the four-hour tape contained the unintended bleed over of every comment of the detectives in the adjoining room (R. 1176-77). These comments were disturbing and indicative of the bad faith of the police in this case.

The interview consisted of four audio cassette tapes. Defense counsel submitted the tapes at the suppression hearing but not at trial. At the suppression hearing, defense counsel suggested that the court listen to the tapes to get "a feel for the credibility issue." The credibility issue was an important matter for the jury, but counsel failed to submit the tapes to the jury. The tapes were exculpatory evidence that should have been submitted at trial. Transcripts of the tapes were not made until collateral counsel requested them.

The tapes underscore Mr. Reichmann's good faith effort to cooperate with law enforcement; the difficulty in communication due to Mr. Riechmann's lack of familiarity with English; his bereavement at the death of his "wife" and the tricks Sgt.

---

at least one of which was surreptiously recorded, Matthews promised to finally allow Mr. Riechmann to see Kersten, whom he had not seen since the moment he exited the car to get Officer Reid.

Matthews used to get Mr. Riechmann to implicate himself in the murder. Matthews made up a story of how he had once been accused of killing his girlfriend. Matthews admitted nine months later that the story was "make believe." (R. 1174).[14]

When this make-believe story did not work, Matthews abandoned that tactic and confronted Mr. Riechmann, accusing him of lying to cover up the truth about how Ms. Kischnick was shot. Matthews then used a version of the Christian burial speech telling Mr. Reichmann he should tell the truth so the family can know what happened to their daughter.

Q. It's important for you, not for me. For you.

A. For me nothing can be important now.

Q. Ah, of course (Unintelligible)

A. No (unintelligible) nothing can be important, important to me. My girlfriend and the family for my girlfriend and my own family and so (unintelligible) are important to me.
P.33.

Q. Is that the most terrible thing right? [yah] OK. Then

---

[14]See, Miami Herald article dated November 22, 1988, "Miami case is talked to death," describing similar methods used by Matthews in another case. The article described the state's dismissal of charges against a mentally disturbed suspect who confessed to Matthews (posing as a social worker) to a crime he did not commit. "To get him to talk about his sexual fantasies," the Herald reported, "Matthews pretended to share a few of his own." In another case, Matthews took a false confession from a young Swiss German man, Thomas Spoerri, who like Riechmann was unfamiliar with the American Justice system...accused of a heinous offense [and] totally confused...Matthews lead Spoerri to believe he was a social worker and that if Spoerri would just cooperate...he could be released." Initial brief of Appellant, Spoerri v. State, Case No. 88-3106 (3d DCA). On appeal, Spoerri was released from custody. Spoerri v. State, 561 So. 2d 604 (Fla. 3rd DCA 1990)(rev/d on other grounds).

don’t you think, in respect for her memory and your love for your girlfriend, and your feelings towards her family, that they deserve an explanation, whether it was an accident or whether it...

A. (Unintelligible) I can’t understand what, what you say, I think I don’t hear right. Should I give my hands in the sky and pick up some explanation or what. What (unintelligible).

Q. Pick up an explanation in the sky(Ph?)?

A. For what, I don’t have to do this. For what?

Q. But there is an explanation. There is an explanation and the only one that can give that explanation is you. You’re the only one. No one else can give the explanation but you. Cause if you don’t give the explanation as to what really happened, then the police will just present what they think happened. And what if what they think happened is not what really happened?

A. I don’t think (unintelligible) explanation or something, for what? For what? Nothing.

Q. Don’t you think her family deserves...

A. What is “deserves?” P. 33-35.

Mr. Riechmann’s frustration grew, as he could discern no purpose in Matthew’s hours of discourse that had “no relation” to why he thought he was there.

Q. [U]ntil we find out from the Medical Examiner. Number one, he’s gotta tell us when the body is going to be released. [yah] OK, its up to him. [yah] OK. But, what you want to do is, you don’t want to wait until the body goes back to Germany to see the body, you want to see the body now. [yah] OK. [yah]... So, uh...that’s why we gotta wait. P.7.

Waiting and waiting and waiting and waiting. P.8.

A. I think ...I come here...I wait for message. I hope not for nothing. P.16.

The October 29 tapes present a different picture than the state had portrayed; a true picture of a bereft spouse in a post-

traumatic state. It is a side of Mr. Reichmann that the jury never saw because of trial counsel's failure to present it. Defense counsel clearly thought the October 29 tapes were important or he would not have asked the court to listen to them to get a "feel for credibility"(R. 1500-01).

Judge Gold found no prejudice in trial counsel's failure to introduce these tapes (PC-R. 6048). The prejudice was that the jury never heard how sincere Mr. Riechmann was at the time of the crime and the duplicity of Sgt. Matthews and the Miami Beach Police Department. The only impression the jury was left with was the police version of the facts and Mr. Riechmann's disastrous testimony. Prejudice was proven.

After the four hour interview ended, ATF agents arrested Mr. Riechmann on three counts of federal gun charges. Of those charges, federal Judge Kehoe threw out two counts and Mr. Riechmann was acquitted on the third. On October 30th, Ms. Kischnick's body was sent back to Germany. Mr. Riechmann never saw her again.

7. The "Unmitigated Disaster"–trial counsel's ineffectiveness for forcing Mr. Riechmann to testify.

Mr. Riechmann did not want to testify. He was a German national with broken English who placed trust in his counsel to act in his best interests under an American legal system he did not understand.

During a recess, trial counsel called Mr. Klugh[15] and asked him to "come over ...and get him [Riechmann] into some kind of frame of mind...[T]his is going to be a shock to Dieter and he is not going to want to do it." [Counsel] told me first and ...then he had me tell Dieter." (PC-R. 3991-92). Klugh did as he was instructed by Carhart.

> ...Dieter looked at me and his jaw dropped literally...,the sense of just complete bewilderment and shock taking over.
>
> ...I mean, he wouldn't even look at, I believe, Mr. Carhart...If we were going to do this why didn't we prepare for it?...we are in the middle of trial...Now you want me to just go up there and testify?
>
> ...[H]e could understand some basic concepts of springing a decision on him at the last minute as being something that didn't make any sense.
>
> ...and hearing Dieter state his reasons why this made no sent, it wasn't fair...
>
> ...that was one of my functions, was to try to –-Ed Carhart knew that Dieter trusted me...and would go on the stand with less of a feeling of betrayal and more of a feeling of getting with the program...(PC-R.3991-3995).

The decision that Mr. Riechmann testify was solely counsel's (PC-R. 4629). Mr. Riechmann did not want to testify. He succumbed to the pressure from Klugh and Carhart despite his own reluctance. "He took the stand and did testify. Whether he was convinced he should, I don't think I could say that he was." Hiltrud Brophy, translator (PC-R. 4109-11); testimony of Edith

---

[15]Mr. Klugh was the federal defender who had represented Mr. Riechmann in his federal gun charges, of which, two counts were thrown out by Judge Kehoe and the last was an acquittal won by Klugh.

Georgi-Houlihan(PC-R. 4030-4031); testimony of Richard Klugh (PC-R. 3990-3995).

As Judge Gold acknowledged, the decision was not Mr. Riechmann's, but trial counsel. The hearing court believed that the decision for Mr. Riechmann to testify evolved over the course of the trial("...a trial is a living thing and it changes day-to-day") Testimony of Carhart (PC-R. 5708-09). However, Carhart made the decision when he learned that a journalism student had spoken with a juror. This was an unexpected incident, a triggering event that caused Carhart to change his mind. At the close of trial on a Friday, Carhart announced that Mr. Riechmann would not testify. The following Monday, after the journalist incident, Mr. Riechmann testified (PC-R.4173-74). Carhart had not even thought about whether to use a German interpreter (PC-R. 4000). Carhart's decision was a sudden, knee-jerk reaction to the incident with the journalism student. Carhart did not think about Mr. Riechmann's prior convictions for perjury and involuntary manslaughter, which would never be in front of the jury unless he testified.[16] He did not think that Mr. Riechmann would be subject to the state's impeachment for a week.

---

[16]"It is always affirmatively harmful to the defense for the jury to know that the defendant has a prior criminal record...In this case...part of that prior record was for solicitation of perjury. You know, I don't know that I need to put in words how devastating that can be to the defense when the entire, you know, case is –-is the defendant's stated version to the police, you know, the truth or not." Expert Testimony of Steven Potolski (PC-R. 4311-4312).

This could not have been a reasoned tactical decision by counsel. The decision to have a German national with priors for perjury and an acquittal for involuntary manslaughter testify through an interpreter in an American courtroom is appalling by community professional standards. Expert Potolski said that Mr. Riechmann's account of the offense was already before the jury in a taped statement to police "is a factor that weighed very heavily in this particular matter towards not calling the defendant as a witness."(PC-R. 4316).

Trial counsel's failure to prepare Mr. Riechmann to testify was a novel approach to trial strategy. Klugh testified:

Q. You stated that you observed at least the first day of Mr. Riechmann's testimony?

A. Yes.

Q. And was it evident from that, that he was not prepared?

A. Yes. What was striking to me was the –- he hadn't even done the initial concept of preparing whether he was going to speak through an interpreter or not. It was so completely haphazard I was beside myself.

...I don't mean to be critical, but it did shock me.

(PC-R. 4308).

Assistant public defender Edith Georgi-Houlihan, who had represented Mr. Riechmann for several weeks before Carhart became counsel of record, followed the case closely. After attending portions of the trial and conferring informally with Mr. Riechmann and trial counsel during the course of trial, she assumed Mr. Riechmann would not testify (PC-R. 4030). To her

"amazement," Mr. Riechmann was abruptly told he would be testifying. "I don't believe he was prepared at all." (PC-R. 4031). Houlihan, qualified by the court as an expert in capital and criminal defense representation:

> It was my opinion he should not testify in general, and specifically under the conditions of having gone to trial under the premise that he would not be testifying, never having been prepared for testifying, he should absolutely not have testified.(PC-R. 4053).

Houlihan went on to state that to have Mr. Riechmann testify unprepared was "unreasonable."(PC-R. 4063). Judge Gold, however, did not agree. He found that in "light of all the circumstances, [the decision] was not shown to be outside the broad range of reasonably competent performance under prevailing professional standards..." (PC-R. 6051).

The hearing court ignored the obvious evidence that this was not a reasoned decision. Houlihan observed that counsel's decision had not "evolved"; that counsel had not decided to have an interpreter; that Carhart had told the court the day before the defendant would not testify;[17] that Klugh had to be brought in from outside to force Mr. Riechmann into a decision that according to Carhart was an unmitigated disaster.(PC-R. 5701). "Admittedly, no effort was made to prepare Defendant for his testimony before commencement of his direct examination that afternoon." See, Judge Gold's order (PC-R. 6052).

---

[17]It is imperative to note that Carhart told the court he was not going to call the defendant **after** he knew of the incident with the student journalist and the juror (R.4173-74).

The judge tried to save counsel by stating that "no evidence was presented that he [Riechmann] and Mr. Carhart were unable to prepare before each subsequent trial day, or that such preparation would have avoided or mitigated his impeachment on cross-examination"(PC-R. 6052). There was no evidence of this presented at the evidentiary hearing. No evidence was presented that Mr. Riechmann was prepared during the five days he was on the stand. It is painfully obvious that Mr. Riechmann was foundering. Potolski summarized the effects of the lack of preparation on Mr. Riechmann's testimony:

> A. I saw nothing to indicate that there was any preparation, any –- I am trying to find the right word–- any meaningful contemplation of the gravity of what was about to happen...
>
> Q. In your review of the record is there any question that the decision to put Mr. Riechmann on the stand was devastating?
>
> A. No. I have no question that it –- I mean, I believe it was devastating...[E]verything I have reviewed in and out of the record...confirms what my feeling was. (PC-R. 4316).

By this time during trial, counsel and defendant were barely speaking and sat at opposite ends of counsel table (PC-R.4028).

Contrary to Judge Gold's attempt to save counsel, Carhart's decision was a knee-jerk reaction with no plan, strategy or preparation. It cannot be considered reasonable.

8. Trial counsel's failure to request a second chair.

Judge Gold denied Mr. Riechmann's assertion that trial counsel was ineffective for failing to request that the court

appoint a second attorney to assist him in preparation for trial. It is obvious from the court's order that Mr. Riechmann was being held to the standard of what counsel was "able" to do at trial because of time constraints. These constraints were self-imposed and could have been alleviated by the assistance of a second-chair attorney. As proven at the evidentiary hearing through the testimony of Georgi-Houlihan and Potolski, the defense experts, the amount of investigation and preparation for a capital trial is critical.

At the evidentiary hearing, Mr. Riechmann established that the American Bar Association standards require at least two attorneys in death penalty cases. This standard is particularly important where, as here, circumstantial evidence investigation is required. The hearing court denied this issue stating that this Court in Larkins v. State, 655 So. 2d 95 (Fla. 1995) and Armstrong v. State, 642 So. 2d 730 (Fla. 1994) refused to grant relief on this basis. Since 1994, the trend has been toward recognizing that two attorneys be required to try capital cases that contain two phases. The standards should require counsel to request additional assistance when it is obvious that he cannot effectively litigate the case alone. Under the facts of this case where there was an intense state investigation, another attorney should have shared the workload. The attorney is responsible to adhere to the prevailing professional norms of the ABA standards. Defense counsel was ineffective for failing to

request an additional lawyer from the court.

9. Counsel's failure to explore cultural differences.

The potential for significant misunderstandings between the American jury and a German foreign national was very high. As was evident from the October 29th tapes, there was a language barrier between Mr. Riechmann and the authorities. Mr. Riechmann did not understand basic concepts. He failed to understand what defense counsel was trying to convey. Simple words and phrases were misunderstood and were translated (PC-R. 4091-4123) testimony of Hiltrud Brophy; See also, testimony of Richard Klugh (PC-R. 3959-3962).

Defense counsel failed to present testimony except through the cross-examination of state witness Moeller that prostitution is legal in Germany. Had he contacted Doris Dessauer or Ulrike Karpischek, he would have had defense witnesses testify that German women from all walks of life practice prostitution as a legitimate means of supplementing their incomes. The jury would have heard that such activities are not "looked down upon" in Germany and that they are safe and lawful activities (PC-R. 3176-77, 3617-18). This testimony also would have rebutted the state's theory that Mr. Riechmann was a pimp and living off of the victim. No investigation was done regarding this issue despite Mr. Riechmann listing the witnesses to contact.

10. Counsel's failure to rebut the state's theory of Ms. Kischnick's physical condition.

Testimony at the evidentiary hearing showed that the state

exaggerated Ms. Kischnick's medical condition to the jury. The state argued that Ms. Kischnick had a serious gynecological problem that made it impossible for her to continue working as a prostitute. The state also created the fiction that Mr. Riechmann's alleged motive for the murder was to collect the life insurance death benefits because Ms. Kischnick was more valuable to him dead than alive (R. 2402-04; 4977-78; 4982-84; 4988-89;5082-84).

Had defense counsel done any investigation in Germany he would have discovered that medical records from one month prior to Ms. Kischnick's death did not depict a serious condition. Expert gynecologist, Dr. Alex Brickler testified that Ms. Kischnick's medical records show a "very common diagnosis and common malady" that was treated successfully with antibiotics (PC-R. 3598-99, 3507-08). This evidence supports Ulrike Karpischek's testimony that Ms. Kischnick had no plan to give up prostitution. The prejudice is that the jury never knew this information. The lower court abused its discretion in denying this issue.

ARGUMENT II

NEWLY DISCOVERED EVIDENCE ENTITLES MR. RIECHMANN TO A NEW TRIAL.

A. Newly discovered eyewitnesses to the murder.

Mr. Riechmann presented testimony of two newly-discovered eyewitnesses to the murder, Early Stitt and Hilton Williams. Both witnesses confirmed Mr. Riechmann's accounts of the shooting

as a carjacking–an attempted robbery gone awry.

Stitt testified that he was in the immediate vicinity of a shooting into a car occupied by a white male driver and a white female passenger on 63rd Street off Biscayne Boulevard (PC-R. 4398-4400). At the time, Stitt was out on the street selling drugs. He saw the car "turn around...like they lost." (PC-R. 4400). He was in the middle of a drug transaction when he heard a shot. Id. Stitt described his fear as he "dropped the dope .. and left the girl with the money and I ran." Id. He ran up Biscayne Boulevard and "seen the car come fleeting back past me." (PC-R. 4401, 4412).

Stitt was unable to say what year the incident occurred. Initially, he testified he thought it was in 1983 or 1984 (PC-R. 4397), but he readily conceded that his drug use in the nine years since the incident had impaired his ability to accurately place the event in time (PC-R. 4412-13, 4417, 4721). He remembered hearing about the incident on the news:

> But two days–-about two days later, one or two days later I was looking at the news and I heard about this German tourist that had got – that had got killed and then I started thinking about it...and just so happen that after I seen the news I started putting it together, so I start thinking about it.

(PC-R. 4402) Accord at 4407.

Stitt was adamant that at the time this shooting occurred, gun fire was not common on the street like it is today.(PC-R. 4398, 4405-4407).

Stitt testified he never talked to anyone about the incident

until he was approached by his friend Pookie Joe (Hilton Williams). (PC-R. 4403-4405). Until then, he did not know that Pookie Joe also had been out on 63rd Street at the time of the shooting (PC-R. 4403-4405).

Hilton Williams testified that he was on 63rd Street at the time of the shooting. He lived on 63rd and Biscayne Boulevard in 1986 and 1987 (PC-R. 4426). Like Stitt, he described a car coming down 63rd Street and turning around. It was a red rental car with a white male driver and white female passenger (PC-R. 4427-28). He remembered seeing a lot of gold jewelry on the passengers (PC-R. 4428, 4449, 4668, 4476). The car's occupants had difficulty communicating with Williams and his fellow drug dealers (PC-R. 4427, 4451-52). ("When we see they don't speak no English we don't make no sense to even try..I don't understand that language.") He described the shooting:

> Once they came back our way somebody approached thinking they want the dope. When they see nobody wanted dope somebody reached in inside with a gun. When the man saw the gun he screeched off, but somebody already got shot inside the car.

(PC-R. 4427). The car sped onto Biscayne Boulevard and headed north, going "extremely fast." (PC-R. 4430). Williams testified that the incident was unusual for, among other reasons, the fact that the shooter was "damn dumb" for letting "all the money get away." (PC-R. 4428, 4471, 4478). Williams, too, described a history of drug use and treatment (PC-R. 4457).

Both witnesses described why they did not come forward

earlier:

> I didn't want nobody to know, because I'm scared, I'm scared that I seen something and I really don't want to go up to no police or nothing and say this because then it's going to put me on the front saying that I'm selling dope you know so I didn't want to...I hadn't even talked to nobody about this, you know...I never talked to anybody about this (PC-R. 4402).

He explained how he was contacted in 1994 by a friend who was also on the street the night of the shooting:

> He came to telling me about –-asked me about–- he must have seen me that night, you know, because I used to see him out there when I'd be out there selling my stuff and, you know.
>
> Q. Did you see him that night?
>
> A. I didn't see him that night. I didn't see him that night because I had just really got there and I ...didn't pay no attention to you know looking all around. And he came to me and asked me about it. Did I remember the shots and stuff, because —did I remember somebody getting shot over their way over on 63rd and Biscayne...
>
> So I went and told him, yeah, and I remembered it, you know because it was something that you don't forget, you know, when you think you being shot at, you know, when you out there selling drugs...and that is the first time I really thought I was really shot at, you know, and it scared the shit out of me. Excuse me, but it scared me.
>
> I didn't –- I didn't even know he was out there. I didn't even know it.(PC-R. 4403-4405).

Stitt testified that Pookie Joe brought defense investigator Frank Clay to his house "after I'd told him about what I had seen." He explained why he had come forward after being contacted by Mr. Riechmann's defense:

> Because I feel like somebody being –- being railroaded. If that man been locked up this long, it's wrong.
>
> Q. Why?
>
> A. Because the man to me –-to me, you know. I don't know

about everybody else, but the man didn't do it. You know? The man couldn't have done it.

Q. Why not?

A. For the way it happened, to me it was like there was a carjacker or jack the man or something, you know, from the way it went off, you know, like he was going to be jacked and, I mean by jacked, I mean they was figuring to take something, you know.

I wasn't even by them being to take something. I wasn't looking for the pistol for no gunshot. That was what surprised me, you know. I heard the gunshot. That's what made me run. (PC-R. 4422-4423).

Williams likewise described his initial unwillingness to get involved:

Q. You didn't call anybody and didn't tell anybody, right?

A. For what?

Q. Did you ever tell [the police] that you saw this happen?

A. No. It wasn't my place to.

Q. Okay. Now, my question to you is this. You –-why did you wait ten years to tell anyone?

A. 'Cause that is when people started asking up about it, ten years later.(PC-R. 4460-4462).

Williams testified that coming forward at this late date was at considerable personal cost:

> I stand a chance of losing my marriage, losing my gain time to go home, and my freedom of being able to walk around. I ain't gaining nothing. I losing.(PC-R. 4470).

In compelling terms, Williams explained his willingness to testify in order to correct what he saw as a terrible injustice:

> Yes, to set a man free that had nothing to do with it. Why let a man die for something he had nothing to do with?
>
> ...
>
> That man ain't had nothing to do with this...He went on

> a wrong street at the wrong time with people need money. And he just got caught up in the middle.
>
> ...It was...I remember, because it was a joke...Let all that money get away. It was a joke, but now I see that it's serious. Real serious. 'Cause, you know, they trying to take a man's life for nothing. He had nothing to do with it and I don't feel it's right (PC-R. 4470-71).
>
> ...I got to such–-I got to go through trial and tribulations behind this. Just to come down here and tell the truth? That's what I did. And I knew what I was going to be facing (PC-R. 4473).

Judge Gold found this new evidence would have been admissible at trial and material to guilt phase. He found that it did constitute newly-discovered evidence under Jones I. He also found that the witnesses were not previously known to the defendant. However the Court fell short of granting relief:

> [T]he Court must candidly acknowledge that the new evidence directly supports the Defendant's explanation of events. The prosecutor made the issue of whose story to believe the primary question for the jury to decide. The prosecutor repeatedly urged the jury to disbelieve the Defendant's testimony because he was a convicted felon and liar, and because his story was unsupported by any other evidence. (R. 4983-4984; 5094, 5097)(PC-R.6061-63).

Judge Gold found the two witnesses' inconsistencies, prior convictions and the fact that one of the witnesses was put up in a hotel by the defense in exchange for finding other eyewitnesses as reasons why they should not be believed (PC-R. 6061-63). Had defense counsel discovered these witnesses in 1988 there would have been no inconsistencies.

Judge Gold used a different standard in assessing the state's jailhouse snitch, Smykowski, and defense witnesses Stitt

and Williams. The jury should have been allowed to assess the credibility of these witnesses. Williams and Stitt may have been subject to impeachment but so was the state's star witness, Smykowski. The jury was entitled to weigh this testimony. It cannot be said that testimony from these witnesses would not have raised a reasonable doubt within the minds of the jurors. This is particularly so when the jury vote was 9 to 3 without the presentation of any mitigating evidence and were "ambivalent" about their decision.

B.The testimony of "jailhouse informant" Smykowski was false.

The state conceded that Walter Smykowski, the state's key jailhouse informant, was "crucial" to the state's case (PC-R. 5488). Mr. Riechmann presented testimony at the evidentiary hearing that Smykowski testified falsely at trial. According to newly-discovered evidence of Michael Klopf, Smykowski told him that state prosecutors "wanted him [Smykowski] to testify at Dieter's trial stating that Dieter had told him that he did kill his girlfriend," and that the state "would help Walter get out of his federal sentence, meaning early release." (PC-R. 4201).

Contrary to his trial testimony, Smykowski told Klopf that "Dieter Riechmann in no uncertain terms never mentioned anything to him or acted in any way that would indicate that he killed his girlfriend." (PC-R. 5492).

Klopf's testimony corroborates the statement of Hans Lohs who wrote a letter to defense counsel about Smykowski's plan to

lie on the witness stand. Had Klopf's testimony been presented to Mr. Riechmann's jury, it would have discredited a "crucial" state witness and severely undermined the credibility of the state's entire case. Had the jury known that of this critical testimony, it would have resulted in an acquittal.

Judge Gold found this claim to go only to impeachment of Smykowski instead of rising to the level of "false testimony." (PC-R. 6064). Smykowski repeatedly testified that he was getting no benefit from the state prosecutors because they had no authority over his federal charges (PC-R.4135-37). This was false testimony. The state prosecutors did write a letter as defense counsel guessed they might. The jury never knew that Smykowski was actually going to receive his favorable treatment practically as soon as the jury left the building.

Defense counsel did not know that Smykowski received his letter between trial and sentencing; three weeks after the jury rendered its verdict. The state did not feel compelled to share this information with defense counsel even though DiGregory admitted on the stand that the Brady obligation extends to sentencing (PC-R. 5486-87). The state's Brady obligation is ongoing and extends to sentencing, as Judge Gold said(PC-R. 6065). In a Brady violation, there is no distinction between whether the false evidence goes to impeachment or testimony at trial. False testimony is false testimony.

C. Newly discovered evidence of subsequent similar murders.

Judge Gold erred in failing to recognize that Dr. McElrath's testimony relied on much more than newspaper articles about the frequency of tourist crimes in South Florida (PC-R. 6063). The court also erred in viewing Dr. McElrath's testimony in a vacuum without considering the other factors that support her conclusions, such as the crime figures presented in evidence by the Miami Beach Police Department.

To dismiss Dr. McElrath's testimony as a recitation of newspaper articles is inaccurate. Her conclusions were that the pattern of tourist carjackings had begun long before they were recognized by the general public and governmental officials. Riechmann's account of how the murder occurred was not far fetched but tracked perfectly the common characteristics of a typical carjacking in Miami (PC-R. 3906-07).

ARGUMENT III

THE STATE'S DELIBERATE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE DEPRIVED MR. RIECHMANN OF A FAIR TRIAL.

> He is getting Carte Blanche discovery from me. I am going to give him total discovery. Total. No if's, and/or but's [sic], no conditions. Whatever the State has, he gets, okay. That's to protect everybody so that ten years down the road no one is going to come in and say abort the execution of the man if it should ever come to pass. **Pretrial order of Judge Sepe** (R. 634).[18]

---

[18]On January 27, 1988, Mr. Riechmann's original attorney, Edith Georgi-Houlihan, appeared before Judge Alfonso Sepe, circuit court judge on reciprocal motions for discovery and to preserve physical evidence. From the outset, the prosecutor made clear his feeling about Brady:

Mr. Riechmann presented conclusive evidence that the state violated its constitutional obligations to provide defense counsel with exculpatory evidence in its possession. Every aspect of the state's investigation of the case involved distortion and deception.

Every lead was contorted to fit neatly into the prosecutor's theory that Mr. Riechmann killed Ms. Kischnick. If it did not fit, it was withheld. Whether it was how high the car window was open; statements from German witnesses; what guns may have been used; photographs of the scene; expert reports; information about Ms. Kischnick's health or bizarre statements attributed to Mr. Riechmann by professional snitches; the state's approach was always the same: we don't share anything with the defense unless ordered to do so and even then, only at the last possible moment.

At the evidentiary hearing, defense counsel testified,"I don't think I have ever been in a case as a defense lawyer where it was so difficult to get discovery from the state...Everything had to be pried out...everything had to be argued for."(PC-R.5659-5661).[19]

Mr. DiGregory: She mentions Brady in all the motions she files...Ms. Georgi is asking you to preserve things about which she knows nothing...[T]he point I'm trying to make, if the defense lawyers take depositions, then they can know what materials they want to obtain (R. 633). Judge Sepe granted Ms. Georgi's motion (R. 634).

[19] It appears from the record that, having been substituted in as counsel after Judge Sepe's order, defense counsel either did not know of the ruling or ineffectively failed to raise the state's violation of the pretrial order.

Prosecutors testified that they "whited-out" relevant exculpatory portions of discovery materials, but they were at a loss to provide an explanation or justification (PC-R. 5477, 5482). They admitted they did not provide exculpatory investigative materials from Germany, but again could not say why they had withheld them (PC-R. 5478). They also admitted they went to bat for Smykowski three weeks after trial and before sentencing, but withheld their intention to do so from defense counsel (PC-R. 5488).

At the evidentiary hearing, Mr. Riechmann maintained that the state withheld exculpatory police reports concerning the height of the passenger car window. The significance being that Rhodes' theory was the narrower the opening the less gunshot residue would have entered the car, the more significant the lead particles found on the defendant's hands. The larger the opening the more likely that gunshot residue would be found on the defendant's hands without firing the gun (R. 3515-17, 3549, 3563-73, 3678,3609, 3620, 3589-96, 4883). At trial, the universal assumption was that the window was only opened 3 and a half inches. Any police report which did not fit this description was withheld even though it was exculpatory and should have been turned over to the defense under Brady.[20]

---

[20]Serologist Rhodes supposedly based his measurement of this opening from the measure of the bottommost blood stains on the window. From the testimony of Stuart James, it is clear that Rhodes mistakenly assumed the bloodstains on the window occurred at the moment of the shooting (PC-R.3661). Mr. James suggested they did not, and were transfer stains. Therefore, the entire issue of the window height was distorted.

There were three conflicting police reports authored by Det. Hanlon. The November 4, 1987 report had Rhodes saying that the passenger window was no more than six inches from being fully closed at the time of the shooting." Def. Ex. HHH. The November 12 and 16th reports reiterate the six inch measurement and add that "serology" made that determination due to "blood spattered on the passenger door window." Neither Rhodes nor Hanlon mention this in their deposition testimony.

On November 2, 1987, a portion of Det. Trujillo's report is whited-out, which indicated that the window was completely down. This corroborated Mr. Riechmann's story and was consistent with the withheld Hanlon report that says the window was down six inches.

The prosecutors had many ideas about what could have happened. Sreenan said, "somebody made a mistake...I would say that report was wrong." (PC-R.4718). The author of that report didn't always have all the facts straight." (PC-R. 4737). However, the state did not call Det. Hanlon to say that he made a mistake. In fact, there was no evidence presented that indicated it was "mistake[n]" redaction. What was whited out was the only exculpatory portion of the report.

DiGregory conceded that the report contradicted the state's theory of the case regarding window height and gunshot residue. He also conceded that it was favorable evidence to the defense which he could have conceived defense counsel using (PC-R. 5487-

88). Defense counsel testified that "everything about the physical circumstances as to the interior of the car, position of the window...became very crucial." (PC-R. 5669).[21] Expert witness Potolski concluded that the availability of police reports that contradict one of the fundamental bases of Rao's opinion"...[a]bsolutely would have enhanced the defense case."(PC-R. 4304-06).

Exculpatory police reports also were withheld from defense that provided details of the activities of the couple immediately before the shooting. Def. Ex. DDD was a report of MBPD Officers Marcus and Aprile detailing their interview of the waiter who served the couple at the Bayside restaurant. In the report, the officers refer to the waiter's statement that Mr. Riechmann and Ms Kischnick "each had six (6) drinks," including rum, gin, amaretto and vodka. "Both seemed to be in a 'good mood' and appeared to be intoxicated." "The victim and RIECHMANN left around 10:00 or 10:30 PM, and appeared to be in "good spirits." Def. Ex. DDD. This report would have corroborated Mr. Riechmann's version of the events.

The state also withheld an exculpatory report from the victim's father about Mr. Riechmann. Page three of a three page report by Officer Jason Psaltides dated October 28, 1987, three days after the crime, was not provided. Pages one and two were

---

[21]Lead particles are more characteristic of muzzle discharge particles released from the "breach" (PC-R. 3837-39). The vast majority of particles on Mr. Riechmann's hands were lead.

provided pretrial. On the withheld page, Mr. Kischnick said the relationship between his daughter and Mr. Riechmann was good. He had no harsh comments about Mr. Riechmann. Def. Ex. KK.

Other exculpatory German investigative materials and documents were withheld from the defense. Materials were withheld that proved that Mr. Riechmann had an independent source of income. These materials detailed legitimate employment and business ventures and independent sources of Mr. Riechmann's financial resources. The materials showed he did not "live off" of Ms. Kischnick's earnings from prostitution and that he did not fake a vacation in Florida. Def. Ex. EE through JJ and LLL, MMM, OOO. The materials were substantial enough that Judge Solomon found them to be mitigating insofar as they depicted Mr. Riechmann as a "good person." (R. 600).

At the evidentiary hearing, the state conceded there were an additional 27 statements that had not been disclosed (PC-R. 5505). DiGregory stated, "it is clear that they weren't turned over."(PC-R. 5508, 5513). He said they were mitigating and would have been helpful for the defense...would have been important for to defense counsel. (PC-R. 5505). More importantly, these materials also would have rebutted guilt phase argument regarding the motive for the crime.

Smykowski was a crucial witness for the state. It had been defense counsel contention during trial that Smykowski was going to get a "deal" in exchange for his testimony. Smykowski

continually denied a “quid pro quo” for his testimony. He asserted that there was nothing DiGregory or Sreenan could do for him on his federal charges because they were state prosecutors.

> Q. Well, you are hoping to get from the prosecutor in the other case, aren’t you?
>
> A. Not this prosecutor. Bureau of Prisons because I am federal [sic]...
>
> Q. You don’t want a letter from Mr. DiGregory to the Bureau of Prisons, do you?
>
> A. Because I not the State. What help me Mr. DiGregory? I not state. I federal. (R. 4135-36).

In his deposition, Smykowski denied being “promised anything for [his] testimony in this case.”

Three weeks after the trial was over but before sentencing, DiGregory wrote to the U.S. Parole Commission and referred to Smykowski’s “invaluable assistance rendered to the State of Florida.” “Inmate Smykowski was instrumental..in achieving” Mr. Riechmann’s “guilty verdict and a recommendation of death in the electric chair.”

> “I urge you in the strongest possible terms to give him the utmost consideration at his next parole review.” Def. Ex. CC.

DiGregory could not pinpoint when he got the “notion” to write the letter on Smykowski’s behalf.

> Q. Well, is it equally clear that you contemplated writing it during the course of the trial?
>
> A. Sure. (PC-R. 5489).

The state allowed Smykowski to testify to the contrary at

trial and in deposition, conveying to the jury and court that this important witness had no expectation of reward for his testimony. This violation alone requires that Mr. Riechmann's conviction be vacated. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972).[22]

Michael Klopf testified at the evidentiary hearing as to the falsity of Smykowski's testimony. Klopf testified that Smykowski told him in no uncertain terms that Mr. Riechmann never mentioned anything to him or acted in any way that would indicate that he killed his girlfriend. (PC-R. 4211).

Judge Gold also found that the "missing photographs" did not exist (PC-R. 6067). Officer Ecott gave conflicting testimony at the evidentiary hearing that was inconsistent with his trial testimony. At trial, he said he photographed the interior of the rental car. At evidentiary hearing, he did not recall photographing the interior of the car. It was obvious that he photographed the car on October 26, 1987. No interior shots of the trunk and few interior shots of the passenger compartment and roof were ever disclosed to the defense.

---

[22]Handwritten notes were discovered in the state attorney's file that say "Reno to communicate with magistrate to have him reward." DiGregory at the evidentiary hearing guessed that it meant "remain" or "remand." (PC-R. 5461). The context of the notation indicates that "Walter may be hostile because he is been shipped to Eglin" followed by "fraud charges are what brought Walter here." The state offered no explanation why the State Attorney would be communicating with a magistrate regarding transportation of a inmate or why the trial prosecutor would make such a notation during his interview with Smykowski's intermediary.

Officer Douglass fluctuated on whether her trial testimony was correct. Assuming her trial testimony was correct, she took a minimum of 75 photographs.

Officer Lydia Shows submitted one roll of 36 exposures of slide film, but she could not recall whether she took a complete roll. The state offered 33 photos in evidence at trial. Only 78 photographs of the crime scene have been produced. Judge Gold adopted the idea that all of the photo omissions occurred at the end of exposed rolls, and that each officer took only a partial roll of film. This is belied by the record. Mr. Riechmann sat at counsel table with police during trial to count the numbers on the negatives from a proof sheet. The missing numbers of photographs are interspersed among the beginning and the middle of the roll of exposures. The court's ruling cannot be correct. Key evidentiary materials have not been accounted for.

Also, forensic notes and reports of ballistics and serology evidence were withheld from defense counsel. These notes and reports would have gone directly to the forensic evidence that convicted Mr. Riechmann.

Trial counsel sought copies of telexes and communication with German authorities for use in examining various witnesses. The state stonewalled (R. 947-48; 973-75). The memos to Germany show that false information was used to dupe the German authorities into cooperating quickly with Florida police. Def. Ex. LL through OO demonstrate the lengths to which the police

went to get information. Exculpatory information from the German government regarding lottery winnings that Mr. Riechmann received in the amount of 35,689 Deutschmark ($25,000 dollars) in 1987 was never disclosed. This information rebutted the state's contention that Mr. Riechmann was forced to live off the earnings of Ms. Kischnick.

The State also knowingly misled the court about the legality of the searches conducted in Germany. This Court relied on the validity of the German searches to say they did not violate the fourth amendment. Riechmann v. State, 581 So. 2d at 138. This Court did not know that the German police were falsely told that Mr. Riechmann was "in custody" for the murder of Ms. Kischnick at the time the German search warrants were issued--as early as November 4, 1987. Def. Ex. NNN Pp. 11-12.

It is now clear from the testimony of Monika Seeger at the evidentiary hearing that German Officer Schleith lied at trial when he said he complied with the German law's requirements for a neutral "third" party witness and for a specific search warrant every time he searched the couple's apartment. Ms. Seeger testified that she was not present for some of the searches, and that the police presented a search warrant only for the second of the four searches (PC-R. 3497-98).

This Court was impaired in its consideration of Mr. Riechmann's claims when it did not possess full and accurate information on direct appeal. The outcome is unreliable.

The trial court's mid-trial Richardson hearing was wholly inadequate because it addressed only a small fraction of the violations and did not address all of the Brady materials discovered recently by collateral counsel.

Judge Gold ruled in a piecemeal fashion on the Brady violations:

> The Court finds no Brady violation, except as to certain exculpatory statements obtained by the German Democratic Republic Police (PC-R. 6066).

Judge Gold's order is correct but it does not go far enough. It fails to recognize that the exculpatory evidence applied to guilt phase as well. Judge Gold held that other withheld documents contained significant and material facts but did not present a "reasonable probability" that the outcome of the trial would have been different.

> The only significant information withheld was the unredacted report of Detective Trujillo which state, "Crime lab stated that the window had to be all down but subject claimed window as half down for security." While this statement could have been used to impeach Detective Trujillo, had he testified inconsistently at trial, the Defendant did not establish at the post conviction hearing whether the statement was a mistake of the crime lab or Trujillo's report (PC-R. 6067).

Officer Trujillo's report is exculpatory and impeachment evidence. The redacted portion reflects that the crime lab described the passenger window of the rental car had been all the way down. The state conceded that this information would have rebutted the state's gun residue evidence and discredited

serologist Rhodes' testimony. The information was significant in that it destroyed the credibility of Rao's gun residue findings and the truth of Rhodes' testimony. This part of Trujillo's report corroborates Mr. Riechmann's story. The impeachment of Trujillo is ancillary to the impact of the exculpatory evidence. The lower court recognized its importance but did not grant relief.

The state presented no evidence to show that this report was a mistake, except the speculation of Sreenan who was not the author of the report nor the lead attorney. DiGregory did not know if he had redacted it or not. Whether the crime lab made a mistake, Trujillo redacted it or the state kept it out is irrelevant. What is relevant is that the jury did not get this information. It was withheld from defense counsel who would have used it. This information directly rebutted guilt phase evidence. Judge Gold conceded that this was significant information. The state also conceded as much (PC-R. 5486). More importantly, this Court relied on this information on direct appeal.

Judge Gold incorrectly said this claim cannot be raised "during the[se] post conviction proceedings because it could have been raised on direct appeal." (PC-R. 6069). This is incorrect. Appellate counsel did not have access to the state attorney files that contained many of the unredacted and undisclosed reports. A Brady violation may be raised at any time as the information

becomes known to counsel. Fla. R. Crim. P. 3.850.

The sheer number of Brady violations and the state's blatant disregard of the discovery order warrant relief. Judge Gold correctly held that the withheld German witness statements were a Brady violation. But a Brady violation of this magnitude was material to all aspects of the trial. These 27 statements, which Judge Solomon deemed credible, are gone. No one knows the impact of these statements on guilt phase.[23] No defense attorney has seen these statements. Therefore, no one representing Mr. Riechmann's interests have used them to argue in support of any issue at trial--guilt or penalty. Because of the state's duplicity and the court's ex parte contact, defense counsel was foreclosed from investigating the possibility of using these witnesses to challenge the state's case. Under Brady v. Maryland, 373 U.S. 83 (1963) and Kyles v. Whitley, 115 S. Ct. 1555 (1995), Mr. Riechmann is entitled to a new trial.

ARGUMENT IV

THE LOWER COURT CORRECTLY VACATED MR. RIECHMANN'S DEATH SENTENCE AND WAS CORRECT IN ORDERING A NEW SENTENCING HEARING BUT SHOULD HAVE GRANTED A NEW TRIAL.

A. The state's sentencing order.

---

[23]"At the post conviction hearing, only nine (9)[German witness] reports were introduced in evidence (See Def. Exs. EE, FF, GG, HH, II, JJ, LLL, MMM, and OOO), while the whereabouts of the remaining reports were unknown. The materials introduced were exculpatory in nature and described the Defendant and his relationship with the victim in favorable terms. Mr. DiGregory, the former prosecutor, conceded that these materials were mitigating and would have been helpful to the defense. Judge Gold's order (PC-R. 6068).

> DIGREGORY: I don’t recall the judge asking me to include any, you know, include anything specific in the – in the order.
>
> ALTER: Well, did he tell you the contents of the order?
>
> DIGREGORY: No, I don’t –- well, I don’t recall him telling me the contents of the order. I mean, all I remember from that exchange was “Prepare an order.” (PC-R. 5490).

Post conviction counsel discovered a “rough draft” of the lower court’s sentencing order in the state attorney files during his Chapter 119 inspection of those files. Judge Solomon’s sentencing order was admitted as Def. Ex. B (R. 592-601). It was a ten-page document. The “rough draft” found in the state attorney’s files is a ten-page document and admitted into evidence as Def. Ex. A.

Prosecutor DiGregory admitted that he prepared the order because he “was asked to do so by Judge Solomon.” He and the judge “ran into each other in the hallway” and the judge asked him to write the order. It was a “momentary conversation.” (PC-R. 5464-65, 5490). DiGregory took no notes and had no recording device with him. Thus, the words in the “draft” were his (PC-R. 5490). DiGregory said he was responsible for putting the legal authority in the draft order (PC-R. 5494-95). More importantly, he drafted the aggravating factors and excluded any mitigating factors in the sentencing order (PC-R. 5491).

Judge Solomon testified that DiGregory prepared the draft order at his request (PC-R. 5718, 5727). The judge said he met with DiGregory to discuss the matter but initially did not recall

the meeting (PC-R. 5723-24). Later, the judge was sure the prosecutor must have come to his office, reasoning: "I did not go to the state attorney's office." Unlike DiGregory, Judge Solomon testified that the words in the order were his and that the "findings" were his own (PC-R. 5722). The judge could not remember how he communicated what he wanted in the order to DiGregory (PC-R. 5725) "Whatever I told him he put in the order, and if it came out ten pages, it came out ten pages. I don't know how he did that. I don't remember."(PC-R. 5726).

Notwithstanding the inability of DiGregory or Judge Solomon to recollect the means by which the judge conveyed his intentions to the prosecutor, it is obvious DiGregory wrote the specific words in the sentencing order, with the exception of the few identified changes made by the judge. Judge Gold found:

> The trial judge's brief oral instruction to prepare the death order included no findings of fact or conclusions of law. Rather, the prosecutor, and not the trial judge, drafted all findings as required by Section 921.141, Florida Statutes (1985) Neither the ex parte communication nor the draft order, were disclosed to defense counsel during any stage of the penalty phase.
>
> At sentencing, the judge read several paragraphs "findings" as were originally included in the draft order and then read the last two pages of the sentencing order as filed in the case. A comparison of the sentencing order with the draft order reveals that it is verbatim, with the only significant exception being the addition of one mitigating factor, namely that certain persons in Germany believed the Defendant to be a good person. Other than as stated, the trial judge did not make his own oral findings in support of the death sentence on the record (PC-R. 6070-

71).[24]

Judge Gold specifically found that the trial judge did not independently determine the specific aggravating and mitigating circumstances in this case (PC-R. 6072). There is no dispute the the prosecutor wrote the sentencing order.

Judge Solomon struck a few sentences and substituted non-statutory mitigation that came from the 37 German witness statements that were not given to the defense. Appellant suggests this redeems the order and magically transforms it into the judge's "independent" weighing of the evidence. It only underscores that he did not write the order or make the findings of fact. It shows that those were not his words but the words of the state attorney. If they were his words, no additions would be necessary. This factual scenario is exactly like Patterson v. State, infra. See also, Grossman v. State, 525 So. 2d 833 (Fla. 1988); Stewart v. State, 549 So. 2d 171 (Fla. 1989); Bouie v. State, 559 So. 2d 1113 (Fla. 1990); Card v. State, 652 So. 2d 344 (Fla. 1995); Layman v. State, 652 So. 2d 373 (Fla. 1995).

In Patterson, this Court reversed and remanded for a new sentencing when it found that "the trial judge improperly delegated to the state attorney the responsibility to prepare the

---

[24]Judge Gold also found that this issue could not have been raised on direct appeal because the State's files did not become available as public records until after the direct appeal (PC-R. 6071).

sentencing order, because the judge did not, before directing preparation of the order, independently determine the aggravating and mitigating circumstances that applied in the case." Infra at 1261. The word "independently" is underscored in this Court's opinion.

Judge Solomon said the words were his but he "can't remember" actually communicating ten pages of thoughts to the state attorney. Appellant argues that although the state prepared the rough draft at the trial court's request, the trial judge specifically reviewed it to ensure that it was consistent with his findings. Appellant's brief at page 36. But, the findings were not his. It is not sufficient for a capital sentencing judge to "read over" ten pages of fact findings made by the prosecutor and simply make sure it reflects the court's opinions and rulings in the case. DiGregory admits he wrote it and that the Judge did not tell him what to include in the order. The fact findings themselves reflect the partisanship of the author:

> ...the Court is overwhelmingly compelled to conclude...[T]he Court makes the following findings of fact,....
>
> The Court finds that the evidence presented...(R. 593).
>
> The Court finds that the victim was a prostitute who had been responsible for the financial support of the defendant (R. 594).
>
> The Court further finds that as early as 1986, the defendant became aware that the victim no longer desired to work as a prostitute and ...she was turning customers away.

> The Court finds, based upon the testimony of serologist and blood pattern evidence...(R. 595).
>
> The Court finds that the aggravating circumstance [of pecuniary gain]...has been proven beyond and to the exclusion of every reasonable doubt.
>
> The Court is convinced...the defendant was aware of her desire to stop working as a prostitute who was supporting him...
>
> ...Thus, the calculated manner in which the defendant planned and ultimately executed his plan cannot be overstated(R. 596).
>
> The Court finds that [the premeditation aggravator] has been proven...(R. 597).
>
> The Court has considered each and every statutory mitigating factor.
>
> The Court held several colloquies with the defendant concerning important issues in the trial of this cause...[Concerning mental mitigation,] the defendant impressed this Court as a normal, intelligent, rational person (R. 598).
>
> The Court strongly feels that concerning the findings made above, the results are overwhelmingly aggravating rather than mitigating (R. 600).

More disturbing, the sentencing order secretly written by DiGregory, secretly provided to the judge, and filed as the court's own findings, contains extensive discussion of Mr. Riechmann's alleged guilt. The order details the insurance evidence (R. 593-94). It discusses Kischnick's "prostitution" and the prosecutor's theory that Mr. Riechmann "lived off" her earnings (R. 594-95). It discusses the blood pattern evidence, specifically on the blanket and the driver's door (R. 595). This is from the same prosecutor who acknowledged that it withheld exculpatory police reports, statements, forensic reports and

notes, and photographs. This conduct was in violation of Judge Sepe's order for complete discovery.

The guilt phase fact findings went to this Court as findings purportedly made by Judge Solomon. This Court was inevitably influenced by what it thought was the trial court's detailed recitation of the pertinent facts and weighty evidence. This Court had no indication that the critical fact findings were "made" by the prosecutor. This Court did not know that the lower court's findings were no more than a summation of the prosecutor's pet themes in the case: prostitution, exploitation, blood stains, etc. In affirming this conviction and sentence, this Court relied on what it thought the trial court found. This Court's unknowing reliance on a sentencing order with explicit factual details and findings written by the prosecutor throws into question Mr. Riechmann's entire direct appeal. The result in this instance is an unreliable ruling that affirmed the convictions on direct appeal.

Appellant concedes that the ex parte contact was error. Appellant argues that the ex parte error between the state and the judge was "brief and initiated by the judge," after defense counsel had an opportunity to argue the aggravators. Appellant's brief at pages 35-39. Mr. Riechmann is unaware of a single case that distinguishes a brief ex parte encounter from a lengthy one. It is improper and has been improper even prior to Spencer. See, Fla. Bar Code of Jud. Conduct, Canon 3A(4); Rose v. State, 601

So.2d 1181 (Fla.1992)(quoting State ex. rel Davis v. Parks, 194 So. 2d 613 (1939). Appellant's argument that the "defense was given an opportunity to argue" the aggravators proves the point. Defense counsel should have argued to the prosecutor since he was the one making the decision on what facts would support aggravation and mitigation. There was no indication on the record, as found by Judge Gold and conceded by Judge Solomon and the state, that defense counsel knew an order was being prepared.[25] It was the sentencing order reflecting the fact findings of the state that defense counsel should have been allowed an opportunity to respond to.

Appellant also suggests that because it was common practice to have ex parte preparation of the sentencing orders by the state, the result should be mitigated. There was no evidence admitted at the evidentiary hearing that this practice was common place. And it had been condemned long before the decision in Mr. Riechmann's case. See, Section 921.141 Fla. Stat.(1985); Van Royal v. State, infra; State v. Dixon, 283 So. 2d 1 (Fla. 1973). Judge Gold properly granted relief in this case by vacating Mr. Riechmann's death sentence.

B. Ineffective assistance of counsel at penalty phase.

---

[25]Appellant cites Card v. State, infra as an example of a case where a defendant was not necessarily granted a new sentencing. A resentencing was granted by Judge Costello after evidentiary hearing where the state attorney admitted a routine of preparing the court's sentencing orders without instruction by the court.

The lower court correctly ruled that defense counsel's performance in penalty phase was deficient and below community standards (PC-R. 6075). Appellant argues that defense counsel did not have to investigate or prepare for penalty phase because Mr. Riechmann said he would not accept "any penalty." Appellant's brief at page 25.

The duty to zealously represent a client falls to the attorney not the client. According to expert testimony at the evidentiary hearing, trial counsel failed to zealously advocate for his client (PC-R. 4059-63).

Mr. Riechmann assisted counsel. The fact that he asked trial counsel not to go to Germany seemed a natural request when considered in the context of this case. Mr. Riechmann, a German national, had been attacked by the state and police at every juncture. It is understandable that he would not want his attorney to leave him to the mercy of the state in his absence. However, counsel was not prevented from sending his investigators to Germany or anywhere else. The investigators hired by defense counsel were only asked to perform 18.7 hours of investigation for a capital case. They were not sent to Germany. The state also ignores that Mr. Riechmann gave trial counsel a list of German witnesses to contact. It was not Mr. Riechmann's duty to investigate and prepare his case for trial counsel. Farr v. State,656 So. 2d 448 (Fla. 1995).

Appellant ignores trial counsel's failure to request the 37

German witness statements held in camera by Judge Solomon. This is deficient performance under any standard. Trial expert Potolski testified about his review of counsel's penalty phase performance:

> You don't just get up there and, you know, ramble on for ten minutes and hope you get a life sentence. (PC-R. 4321-24).
>
> Q....And did you note Mr. Carhart doing that [arguing mitigation from the facts in the record] at any stage of the proceeding?
>
> A. Well, he certainly didn't do it in front of the jury. When the appearance was made in front of Judge Solomon for sentencing, he made several arguments about non-statutory mitigators and about a concept called doubling of aggravating factors that would have been very persuasive to a jury but were not made...
>
> Q. And in your opinion were there acts and omissions by Mr. Carhart which brought his performance below that standard?
>
> A. As – as to both guilt phase issues and penalty phase issues, my only qualification would be that there were some acts and omissions that were more glaring than others. But I think there were some very significant ones and I think that there were others not as significant that had the combined effect of falling well below effective representation (PC-R. 4325-27).

Potolski's testimony was unrebutted by the state. Judge Gold adopted the same view that counsel failed to "unearth a large amount of mitigating evidence as to Defendant's character, family history and relationship with the Victim, which could have been presented at sentencing" (PC-R. 6076).

Finally, Appellant complains that post conviction counsel was only able to find seven witnesses in two years who "as discussed with regard to prejudice prong, infra, had little in

the way of helpful testimony to offer." Appellant's brief at page 26. Judge Gold disagreed (PC-R. 6076-77). Judge Gold found more than seven witnesses whose testimony proved the prejudice prong of Strickland, infra. He correctly viewed their potential impact on the jury who heard nothing of Mr. Riechmann's background.

Appellant's opinions on the credibility of these witnesses is irrelevant. It is the jury, as fact finder and co-sentencer, who must be given the opportunity to evaluate and test adversarial worth of their testimony. No adversarial testing can occur when defense counsel fails to investigate. No tactical or strategic decision was given for counsel's failure to present this valuable evidence. "With such evidence presented, there is reasonable probability the outcome of the case would have been different, as against a jury, who without any mitigating evidence, was already ambivalent about their recommendation." Judge Gold's Order (PC-R. 6077).

ARGUMENT V

THE SUPPRESSION OF ILLEGALLY OBTAINED EVIDENCE.

Testimony presented at the evidentiary hearing demonstrate that the German searches and seizure were unlawful. If investigated, the defense could have suppressed important items seized by the German police, specifically, personal effects such as address books and insurance policies going back many years.

Counsel could have produced Monika Seeger to describe the searches of Mr. Riechmann's apartment by local German police.

Her testimony at the evidentiary hearing strongly impeached the 1988 testimony of German officer Schleith who said that he complied with German law requiring a neutral "third party" witness and for a specific search warrant "every time" he searched Mr. Riechmann's apartment. Seeger testified at the evidentiary hearing that she was not present for some of the searches, and that the police presented a search warrant only for the second of four searches (PC-R. 3497-98).

Counsel also could have used the November 4, 1987 German search warrant for the apartment to demonstrate that the German authorities were proceeding on false information provided to them by the Florida police.

Most significant, the trial court and this Court were not aware of a German court order invalidating the searches the Courts assumed were lawful. Proffered, but not admitted, as Def. Ex. C-14 is an order from the Lorrach County Court dated July 9, 1988, invalidating the apartment searches. See, Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

ARGUMENT VI

INEFFECTIVE ASSISTANCE OF COUNSEL ON ACQUITTAL OF FEDERAL GUN CHARGES.

Four days after the murder, Mr. Riechmann was arrested by ATF agents for allegedly providing false information when he purchased a handgun. The indictment was amended to include three counts involving two gun purchases. On December 29, 1987, Judge

James W. Kehoe dismissed two of the charges after a gun shop dealer testified that Mr. Riechmann in fact did not give him false information. On December 30, 1987, after two days of trial, Mr. Riechmann was acquitted of the third and only remaining charge.[26]

Inexplicably before trial, trial counsel filed a motion in limine to prevent the jury in the first-degree murder case from knowing that Mr. Riechmann was acquitted of federal gun charges despite the fact that the state planned to present the testimony of witnesses who were incarcerated with Mr. Riechmann while in federal custody.[27](R. 93).

The state wanted the federal charges kept out. Defense counsel was left with the decision of whether to inform the jury of the acquittal of federal charges (R. 1652). This motion was of great advantage to the state, because the jury would not know of Mr. Reichmann's acquittal on federal charges and it would not understand that any of the statements by Mr. Riechmann to Smykowski concerning the murder were made at a time when he was not charged with murder. The jury would not know that any

---

[26]Mr. Riechmann was acquitted. No appeal was ever taken and no transcript of the trial was prepared. The Miami Herald reported on December 31, 1987 that "Riechmann's acquittal came as little surprise to lawyers in the case...The charges fell apart when the gun shop manager testified that Riechmann told him the address on the license wasn't current." 3.850 appendix at 91.

[27]The motion in limine was one of only three pretrial motions filed by defense counsel in this complex capital case. The only other motions were a motion to suppress and a motion for production.

conversations about guns and their acquisition pertained to Mr. Riechmann's federal case. The jury would not know that any statements by Mr. Riechmann concerning his intention to share the life insurance benefits with Kischnick's family were made, before he was charged with murder, and at a time when he would not have had the motive of trying to "look good" by such magnanimity.

In the middle of direct examination of Mr. Riechmann, the problem arose of how to tiptoe around his two month incarceration and acquittal prior to being arrested on December 30 for first-degree murder. The state suggested that it was proper to mention the arrest on federal charges but not Mr. Riechmann's acquittal (R. 4570).

Even though the court's previous ruling had been to leave it up to defense counsel whether to get into the issue (R. 1652), the state now argued that it had stayed away from the federal case on purpose because of the court's pre-trial ruling (R. 4571). Remarkably the court acceded to the state's wishes:

> COURT: I'm going to limit you, Mr. Carhart, as to saying that he was arrested, he was arrested on federal charges and let it go at that (R. 4572).

Defense counsel argued that such a solution was unfair to Mr. Riechmann. Ultimately, defense counsel struck a compromise with the state. He would not mention that there was insufficient evidence to arrest Mr. Riechmann on the day he was arrested on federal charges and the state would not mention the federal charges or the acquittal (R. 4577). Mr. Riechmann resumed his

testimony, seriously hampered by the "compromise" between his attorney and the state.

Mr. Riechmann testified that he wrote a November 15 letter to his attorney in Hamburg releasing all of his claims to the life insurance policy on Ms. Kischnick to her parents. Mr. Riechmann's release of the insurance proceeds on November 15 occurred before he was charged with Ms. Kischnick's murder. The significance of this was now lost to the jury because it did not know that Mr. Riechmann was not under arrest for murder on November 15. The jury was left to conclude that Mr. Riechmann only released the proceeds in direct response to his arrest for murder. Instead of a mitigating fact or motive, it became a proof of motive. Defense counsel finally grasped this concept after Mr. Riechmann had concluded his testimony:

> Carhart: So the obvious position of the State will be this was a ruse by Mr. Riechmann that he tried to assign the insurance policy.
>
> Mr. DiGregory: That's fair.
>
> Mr. Carhart: Well, I'm glad you think it's funny, Mr. DiGregory.
>
> Mr. DiGregory: I said that's fair. I didn't say that's funny.
>
> Mr. Carhart: Okay. I think secondly, and this is interesting because it goes into our motion in limine regarding what he was arrested for and when, because originally he was arrested October 29...and you know, he did not know he would be arrested for murder. So he'd assigned these policies without any knowledge he'd be arrested for murder and then two months later or a month and a half later after his federal prosecution and his acquittal, they walk into court and arrest him on murder (R. 4869).

> ...But the original assignment commenced on November 15, 1987 when he hadn't been arrested for murder and had no reason to believe he would be (R. 4870).

The court allowed Mr. Riechmann to take the stand for the limited purpose of confirming the assignment of benefits to the Kischnick family (R. 4909-12). The jury remained clueless about the sequence of events and their significance.

Counsel's failure to properly argue this issue at pretrial and during trial destroyed the exculpatory value of this issue. In fact, defense counsel helped to create this misconception in the jury's mind that Mr. Riechmann was a desperate man attempting to eliminate a motive for murder. Accordingly, relief is proper under Strickland v. Washington, 466 U.S. 688 (1984).

ARGUMENT VII

THE PROSECUTORIAL MISCONDUCT CLAIM

Defense counsel failed to object or effectively argue against the state's egregious misconduct during trial. This Court acknowledged on direct appeal that trial counsel had failed to object to many instances of misconduct and failed to show how sustaining the objection was not sufficient to cure the overreaching of the prosecution. Riechmann v. State,at 139.

As described and incorporated herein from the Rule 3.850 motion, Mr. Riechmann was prejudiced by the unreasonable improper personal attacks on Mr. Riechmann's lifestyle, improper personalization of evidence, improper closing argument, misstatements of evidence, comments on Mr. Riechmann's right to

remain silent, shifting the burden of proof to the defense, and urging a conviction on evidence not adduced at trial (R. 4658-59, 4660, 4662-63, 4667-68, 4678-79, 4681, 4707-08, 4717-19, 4721, 4729, 4734, 4777-78, 4916, 4964-69, 4977, 4987, 4992, 5006-10, 5083-84, 5087-88, 5091, 1093-96, 2393, 2394, 2401, 2395, 2742-43, 3362-63.

An example of the egregious conduct of the state came during DiGregory's closing argument:

> You know that he lied on the firearms form. You know that he lied about the marriage (R. 5094).
>
> ...and of course we know he's lied about his occupation before by virtue of his loan applications...(R. 4979).
>
> Put aside the fact that he lied on numerous occasions (R. 4971).
>
> ...and boy it was a hard time getting him to admit to some of these lies when I examined him, a hard time (R. 4984).
>
> So he's got to quickly admit to you it's a lie...(R. 4985).
>
> The evidence that the defendant lived off the very flesh and blood of Kersten Kischnick, a high-priced prostitute, and that she wished to work no more, and that as early as 1986 the defendant knew she wanted out is contradicted only by a man proven to be a convicted criminal and a liar, and the only witness, I submit to you ladies and gentlemen, who has anything to gain from this proceeding by lying to you (R. 4989).
>
> He lied to the police and he lied to you about how the shooting happened (R. 5007).
>
> ...from sitting here and watching him for almost five days on that witness stand and watching him say some of the stupid things he said and tell some of the stupid lies he told...(R. 5082).
>
> ...he's a liar and a fraud and a cheat and everything

else...(R. 5087).

> ...you've dealt with liars before and some ways you can say you know a liar when you see one, and you know a liar when you hear one. And ladies and gentlemen, with respect to this defendant, you can see he's a liar by looking at him on the witness stand...(R. 5092-93).

> ...and if you find this story to be unbelievable by virtue of the fact that the man tells it to you has been proven to be a liar, a thief...if you consider that story he gave is a lie, then you can consider that lie as evidence of his consciousness of guilt in this crime (R. 5005).

> ...Mr. Rao's findings when combined with the evidence of motive and the lie which is the defendant's story to the police and to you should leave you to the inescapable conclusion that the defendant fired the gun and the shot that killed Kersten Kischnick (R. 4993-94).

Counsel failed to object to this devastating barrage. Had counsel simply objected the first time, or the second or the third time and requested that the state be admonished, the massacre would have stopped. Such attacks on the defendant are clearly improper and "improperly appeal[ed] to the jury's passion's and prejudices." Cunningham v. Zant, 928 F2d. 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they so "infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974) See also, Garron v. State, 528 So. 2d 353, 358 (Fla. 1988); Campbell v. State, 679 So. 2d 720 (Fla. 1996). Counsel's failure to object to preserve this issue for appeal was deficient performance beyond the realm of reasonable conduct.

ARGUMENT VIII

INEFFECTIVE ASSISTANCE OF COUNSEL AT VOIR DIRE.

Mr. Riechmann wanted African-American representation on his jury panel. Counsel testified that it was his decision who would sit on the jury (PC-R. 5629). Mr. Riechmann had a right to a fair cross-section of the community on his jury. Vasquez v. Hillary, 474 U.S. 254 (1996); Batson v. Kentucky, 476 U.S. 79 (1986); Neil v. State, 457 So. 2d 481 (Fla. 1984); State v. Slappy, 522 So. 2d 18 (Fla. 1988). He also had a right to decide who would be on his jury –-without having the decisions imposed by his attorney. Fla. R. Crim. P. 3.180 (a)(4); Turner v. State, 530 So. 2d 45, 48-49 (Fla. 1987). Mr. Riechmann's right to decide who would be on his jury, and specifically his right to minority representation, were violated at trial.

ARGUMENT IX

TRIAL COUNSEL FAILED TO EFFECTIVELY CROSS EXAMINE KEY STATE WITNESSES.

After the state rested its case against Mr. Riechmann, counsel said he did not intend to offer any witnesses or evidence (R. 4174). Although this decision was abruptly changed, it was clear that the defense's theory of the case was to put the state to its burden of proof. (i.e. not to present a case in defense)(R. 4174). Assuming that the state's case would be the only chance to rebut the evidence, counsel's duty to attack the credibility of prosecution witnesses was critical.

Counsel's failure to conduct probative cross examination can be attributed to the absence of pretrial investigation by the defense. Had counsel investigated he would have had impeachment evidence against Smykowski, the jailhouse informant. He also would have had impeachment evidence against witnesses who testified about Kischnick's prostitution; insurance company representatives; blood and gunshot residue experts; and potentially important crime scene witnesses.

Had counsel used the information available to him at the time of trial, he would have learned that Smykowski was a professional snitch who targeted Mr. Riechmann as a way to shorten his federal time for fraud. Defense counsel had information from Klopf, a cellmate of Smykowski, which would have impeached the credibility of Smykowski. Defense counsel should have used a Russian interpreter so that Smykowski's evasive answers would not have been passed as competent testimony.

Counsel did not master the forensic facts for an effective cross examination of the state's blood and gunshot residue experts. Counsel's failure to use his own expert in blood stain analysis was improper. Rebuttal of this testimony was critical. Defense counsel could have used FBI and other authoritative treatises to impeach the state's gunshot residue expert. Residue evidence was obtained from Mr. Riechmann's hands, which indicates that he was only in close proximity to the firing of a gun. The FBI documents and treatises would have settled the swearing match

between Rao and Guinn, the defense expert.

Counsel failed to elicit important impeachment evidence from the German insurance company executives who testified as to what life insurance benefits were available to Mr. Riechmann because of Ms. Kischnick's death. Counsel's failure to investigate this avenue of defense was emphasized by the statement of Ernst Steffen, admitted into evidence at the evidentiary hearing. Steffen said the insurance company had a large financial stake in the outcome of Mr. Riechmann's trial.[28] Defense counsel did not know this information because he failed to ask the questions in deposition or at trial. The jury should have known that insurance company witnesses were testifying "at the insistence" of insurance companies with a 400,000 Deutschmark ($250,000) interest in Mr. Riechmann's conviction.

Counsel failed to conduct cross-examination of witnesses who observed and examined the crime scene automobile minutes after Kischnick was shot. Counsel never inquired of the medical rescue personnel or crime scene evidence technicians whether any of Kischnick's blood was tracked, smeared or deposited on parts of the car during efforts to revive and remove her. Had counsel asked about this information, the state's serology testimony

---

[28]At the state's closing argument, DiGregory argued, "in evaluating the testimony of [Ernst Steffen] you must consider...what does [he] have to gain...Ernst Steffen was taken away from his family and business [to come here and testify]." (R. 4987).

would have been discredited. No adversarial testing occurred.[29]

CONCLUSION

For the foregoing reasons, Mr. Riechmann respectfully requests that this Court affirm the lower court's order setting aside his death sentence but reverse the lower court's order regarding his conviction. In Gunsby v. State, 670 So.2d 920 (Fla. 1996), this Court was faced with a similar fact pattern and granted a new trial. The errors which occurred in this case involve the withholding of 37 German witness statements which rebutted motive at guilt as well as refuting the forensic conclusions of the state's experts. State prosecutors and police changed documents, hid exculpatory evidence and made undisclosed promises to a jailhouse informant, all to protect the proceeds of an insurance company and to keep suspicion away from the reality of a tourist murder. The lower court findings should be set aside as it pertains to the guilt phase. A new trial is proper because confidence in the outcome of this trial has been undermined so significantly that no adversarial testing occurred.

TERRI L. BACKHUS
Backhus & Izakowitz, P.A.
Florida Bar No. 0946427
Post Office Box 3294
100 S. Ashley, Ste. 1300
Tampa, FL 33601-3294
(813) 226-3140

[29]See, United States v. Cronic 466 U.S. 648 (1984); Davis v. Alaska, 415 U.S. 308 (1974).

PAMELA H. IZAKOWITZ
Fla. Bar No. 0053856

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 6, 1998.

_____
TERRI L. BACKHUS
Florida Bar No. 0946427
Post Office Box 3294
100 South Ashley, Ste. 1300
Tampa, FL 33601-3294
(813) 226-3140

Copies furnished to:

Mr. Randall Sutton
Assistant Attorney General
Rivergate Plaza--Suite 950
444 Brickell Avenue
Miami, FL 33131