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 REPLY BRIEF

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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.

STATEMENT OF TYPE SIZE AND STYLE

This brief is submitted in New Courier typeface in 12 point type.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY PROVISIONS

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. Ineffective assistance of counsel: Blood spatter and gunshot residue evidence.

Contrary to the state's argument in its answer brief, a defense expert at trial would have contradicted the testimony of the state's expert. See, State's Answer Brief at page 50. Trial counsel did not retain or investigate the possibility of obtaining a defense expert on blood forensic evidence even though he admitted that the blood evidence was the "lynchpin" of the state's case.

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:

> ...Admittedly, trial counsel offered <u>no tactical reason</u> 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 found Stuart James to be credible. The judge simply questioned Carhart's ability to retain an expert within the time constraints of trial.[1] The record does not show that trial counsel did not have time to retain an expert as he did for the gunshot residue. The record does not show that trial counsel requested a continuance to get an expert. The Court concluded that trial counsel's cross-examination of the witness was effective in showing the weaknesses in the state's expert's

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[1]Defense counsel 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.

testimony. This was an erroneous conclusion because trial counsel could not know the weaknesses in the state's case without obtaining a defense expert.

At the evidentiary hearing, the blood spatter expert, Mr. James, did testified to matters that the state's expert failed to discover during his "investigation." For example, the state's blood expert failed to discover that several one dollar bills were lying on Ms. Kischnik's leg at the time she was shot (PC-R.3706). This evidence, missed entirely by the state's blood expert, corroborated Mr. Riechmann's story that he and Ms. Kischnik were lost and going to give some money to the person who gave them directions out of the neighborhood they had strayed into.

Mr. Riechmann could not have cross-examined the state's expert on this evidence at trial because he did not know it. Neither the trial court nor the jury knew it. Had defense counsel taken the time to obtain his own expert he would have known this information.

The state misrepresents the substance of Mr. James' testimony at evidentiary hearing. See, State's Answer Brief at pages 50-54. The state falsely concludes that Mr. James' flick test corroborated the state's testimony at trial.

The flick test was one of many tests conducted by the defense expert to contradict the state's expert testimony. The purpose of the test was to show that there were many possible causes for the blood spatter to appear as it did that were more reasonable than the state's version of the facts. James eliminated the possibility that the blood specks on the driver's door came from exhalation of blood. The distance and the required angle from Kersten's nostrils precluded such a possibility. The flick test was done to show how easily blood specks could get on the driver's door from flicking one's fingers. This corroborated Mr. Riechmann's story. Defense counsel argued that there were other possibilities but could offer no evidence to back it up.

One of Mr. James' explanations was that the crime scene had been tainted by law enforcement and medical personnel on the scene. James testified that due to the large amount of activity occurring in the car and that the door opened and closed more than once, blood could have gotten on the driver's door any number of ways (PC-R. 3681-82; 3741-42). There was evidence to support this claim but it was withheld or not discovered by trial defense counsel. See, state habeas at page__.

James' testimony is affected by the <u>Brady</u> material that was withheld – the crime lab reports and Officer Trujillo's report about the height of the passenger window when the shooting occurred. Defense counsel could not have cross-examined the state's witness on the critical discrepancies of this blood and window height evidence because **he did not have it.**

The state contends that Mr. James' testimony could not have been offered by trial defense counsel because it would have contradicted Mr. Riechmann's testimony about the angle of Ms. Kischnik's head after the shooting.[2] This is incorrect and contradicted by the state's own brief. See, State's Answer Brief at pages 53, 17. Mr. James did not concede that his explanation of the blood spatter contradicted Mr. Riechmann's testimony. He explained that it could not have happened exclusively as the state's expert said it did at trial.

Mr. James said 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. The specks that the state's expert contended were made at the time of the shooting had no significance to whether Mr. Riechmann was in the driver's seat (PC-R. 3681-82; 3741-42). In fact, based on the laws of physics and the entrance wound, Mr. James testified "[I]t 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. 3681-82; 3741-42).

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[2]Trial counsel did not testify at the evidentiary hearing that he did not present a blood expert because he would have contradicted his client's story. He had no knowledge about what an expert would say because he did not speak to one. Also, defense counsel supposedly decided at the last moment to call his client. He had no prior plan to call his client. Therefore, an expert's testimony could not have been contradictory at guilt phase.

Mr. James also testified that the state’s “string test” was completely beyond the scope of current physics (PC-R. 3770). This testimony would have had a profound effect on the jury’s ability to judge the credibility of the state’s witness.

Judge Gold did not deny the claim on the basis of the state’s allegation of contradictory evidence. He denied the claim on the mistaken belief that trial defense counsel could not find an expert in time.

Mr. Riechmann offered uncontradicted evidence at the evidentiary hearing that trial defense counsel placed the time constraints on himself. Expert witnesses, Georgi and Potolsky both testified that failure to prepare or investigate the case in advance was deficient performance. The state offered no evidence to rebut their testimony. Had defense counsel prepared pre-trial, he would have retained a blood expert as he apparently had time to do for the gunshot residue. Even Judge Gold acknowledged that trial defense counsel should have known how important the state’s blood evidence was going to be (PC-R. 6037).

More importantly, Mr. James testified that he would have been available to testify at trial. The state has construed his remark that it would “depend on scheduling” to mean that he was not available (PC-R. 484). This is not true. Defense counsel would have scheduled his blood expert just as he did his gunshot residue expert. It is reasonable that if Dr. Guinn, the gunshot residue expert, could make himself available, that a blood expert would have done the same. Mr. James did not testify that he was not available. The state presented no contradictory evidence.

The Court also 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 conclusions 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’s failure to grant a new trial based on this omission by counsel in conjunction with others was error and an abuse of discretion.

B. Gunshot residue evidence.

The state’s argument that Dr. Guinn, the defense expert on gunshot residue, developed the FBI method of gunshot residue analysis. Contrary to the state’s argument, Dr. Guinn was not allowed to testify at trial that he had developed the FBI method of gunshot residue analysis. The state objected and the objection was sustained by the court. The state’s argument now that it was not important is disingenuous. See, State’s Answer Brief at page 56, n.6. It was certainly important enough for the state to keep the information of Dr. Guinn’s expertise away from the jury. It was one in a number of ploys to undermine the credibility of Dr. Guinn’s authority at trial. That is why the use of treatises and supporting documentation was so important.

The state suggests the gunshot evidence was not important and that there was no “battle of the experts” on the gunshot residue evidence. See, State’s Answer Brief at page 57. However, this is contrary to the testimony of the state attorney at the evidentiary hearing (PC-R. 4767).

The state’s expert, Dr.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.[3] 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 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

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

and present impeachment or rebuttal evidence.

In his February 22, 1988 deposition, Rao said that Mr. Riechmann “probably fired a gun.” Def. Ex. SSS pp 34-36, 49-50. Defense counsel contacted his expert two weeks prior to this deposition but failed to elicit from his expert that the state’s protocol violated accepted scientific norms.

The jury never knew that FBI professional norms and controls were not used in the case. Regardless of defense counsel’s attempts at impeachment, the jury did not know that the scientific conclusions of Rao were false. Mr. Riechmann offered expert testimony at the evidentiary hearing that showed that the most you can say about gunshot residue on the hands of a person is that the person was “in the vicinity” when a firearm was discharged (PC-R. 4285). Again, Judge Gold’s finding that cross-examination by the defense was enough fails to consider that no hard forensic evidence was presented by the defense to rebut the state’s expert. The hearing court failed to recognize that crime lab technicians failed to swab the interior of the car to ascertain what levels of gunshot residue was in the rest of the car. Without this information, Mr. Riechmann could not prove that the residue levels on his hands when swabbed by the Miami Beach Police Department were consistent with levels elsewhere in the car.

The state’s suggestion that the jury rejected that Mr.

Riechmann's testimony because he had more residue on his hands than the victim had on hers is pure speculation. The crime scene technicians did not even swab the inside of the car. There was no evidence that Ms. Kischnick had her hands up in a defensive manner at the time of the shooting. Mr. Riechmann did.

The jury's ignorance of the fourteen (14) types of guns that could have fired the fatal shot also was ignored by the hearing court. The state argues that it did not matter that the state's expert, Quirk, testified that only three guns could have fired the shot instead of fourteen because two of the guns that were on his list were in the possession of Mr. Riechmann. See, State's Answer Brief at page 59. The two guns in the possession of Mr. Riechmann were conclusively shown **not** to be the murder weapon. The defense expert at the evidentiary hearing proved that the list of weapons that could have fired the fatal shot was in existence at the time of the crime. Mr. Quirk's database was not more valid because it was located in Miami near the crime scene. It was an incomplete database. However, it is not the validity of the Quirk's database that is the issue. The issue is whether defense counsel failed to discover the forensic evidence that would have rebutted the state's case.

The state's legal authority of <u>Valle</u>, <u>Provenzano</u>, <u>Card</u> and

Glock[4] do not establish that defense counsel's efforts would have been cumulative. Here, the jury did not know there were 11 other gun models that could have fired the fatal shot. The jury did not know that the bullet was one of millions to be manufactured. It is not cumulative to completely refute the state's evidence.

C. Failure to investigate the facts of the case.

At page 84, the state proves Mr. Riechmann's claim of ineffectiveness of defense counsel for not seeking out the waiter who served the couple on the night of the crime. The state suggests that defense counsel deposed the two officers who took a statement from the waiter at the Bayside restaurant. The state suggests that the officers informed defense counsel of who and where this witness was and the content of their interview. See, State's Answer Brief at page 84.[5]

If this is true, then defense counsel should have found the witness and spoken with him at that time. Instead, the state claims at page 57 that Mr. Riechmann did not show that "an earlier investigation would have made the waiter available at trial." [citations omitted]. See, State's Answer Brief at page

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[4]Valle v. State, 705 So.2d 1331 (Fla. 1997); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Glock v. Dugger, 537 So. 2d 99 (Fla. 1989); Card v. State, 497 So.2d 1169 (Fla. 1986).

[5]The state's suggestion that Mr. Riechmann, a lost foreign tourist, should know who waited on him at a restaurant is unrealistic. The responsibility for investigating the case lies with the attorney not the client. See, Farr v. State, Infra.

60. It is obvious that earlier investigation was possible unless the state withheld the evidence. The deficient performance was either caused by the state's Brady violation or ineffectiveness of counsel for failing to discover the witness earlier. For whatever reason, the information did not reach the jury, and prejudice is shown.

The state's erroneously argues that the video of the couple that night would make the waiter's testimony cumulative. The video tape does not show the number of drinks the couple drank, the general tenor of their conversation, the mood of the couple minutes before the crime. The waiter's testimony was critical. Counsel was ineffective for failing to investigate the case in a timely manner.

The state also argues that defense counsel could not have found the newly-discovered eyewitnesses because "he had gotten lost in the West Dixie Highway area near 163rd Street."(R. 1657-59). This is false. Mr. Riechmann could not tell where he had been. That was plain from the beginning of the investigation. Any conjecture as to where he came from was from police officers who guessed where Mr. Riechmann in broken English tried to describe. To say it was Mr. Riechmann's fault that defense counsel only spent 18.7 hours investigating the case is an incorrect statement of the law and facts.

Counsel made no effort to look for witnesses, even when the police gave their guesses as to where he got lost. Counsel made no effort to go to a restaurant when he actually knew the location. Even with the information given by Sgt. Matthews and Hanlon, defense counsel made no effort to investigate the West Dixie Highway location or 100 blocks away.

Counsel made no effort to locate witnesses for guilt phase who could testify about the couple's relationship. Judge Gold found that trial counsel's few phone calls to Germany were essentially efforts to "raise funds." (PC-R. 5679-81). It was undisputed that counsel only spent 18.7 hours of investigator time on the entire capital case. In his opinion, Judge Gold misunderstood the significance of the German witnesses to guilt phase. He erroneously found that the substance of their testimony had "already been presented to the jury." (PC-R. 6049). This was not true.

The jury heard only from state's witnesses. Dina Moeller and the victim's sister were not going to be favorable to the defense. They were state witnesses, prepared to testify by the state. Cross-examination of these witnesses did prove facts favorable to Mr. Riechmann even though they were readily available. Judge Solomon acknowledged that these witnesses were important to the guilt phase (PC-R. 5720).

For example, the alleged motive for the crime was insurance proceeds from Ms. Kischnik because she could no longer work as a prostitute because of “cervical erosion.” The state’s theory was that Mr. Riechmann depended on Ms. Kischnik for his livelihood. The defense neither investigated nor presented testimony that showed that Ms. Kischnik was not ill but suffered from a common malady that was treatable with antibiotics. At trial this was only suggested in cross examination. No defense testimony was presented based the medical records that were available to rebut the state’s evidence. Medical records from one month before to the crime show that Ms. Kischnik’s condition was not serious. The jury did not know that medical records existed that refuted the state’s theory.

Mr. Riechmann could have proved that he was not dependent on Ms. Kischnik for his livelihood. Mr. Riechmann could have proved that prostitution in Germany was perfectly legal and women from all walks of life practice it as a means of supplementing their income. The testimony of Doris Dessauer and Ulrike Karpischek go directly to this issue. The fact that Mr. Riechmann had $25,000 lottery winnings at his disposal was not presented to the jury. The loving relationship evidence that was available through other German witnesses would have rebutted the state’s witness, Ms. Kischnik’s sister, Regina. In fact, the withheld statement from Kersten’s father, Mr. Kischnik, would have rebutted his own daughter’s testimony but it was not provided to defense counsel. The state cannot say that Mr. Kischnik did not have sufficient knowledge of their relationship. Also, defense counsel did not discover until during the later part of the trial that the insurance proceeds that were supposedly the motive for the crime were offered to the Kischnik family by Mr. Riechmann **before** he had been charged with murder. The jury also did not know that the Kischnik family stood to receive all of the insurance proceeds should Mr. Riechmann be convicted.

The jury also did not know that Ernst Steffen was pressured to testify favorably for the state by his insurance company employer and the assistant state attorneys. Had he been called as a defense witness, he would have testified to the loving, and good relationship of the couple.

The state's contention that this evidence had been presented is wrong. The jury had no evidence for the defense to illustrate Mr. Riechmann's relationship. The jury was only presented with the skewed testimony of the victim's sister and Dina Moeller's inconsistent testimony about a rocky relationship. Cross examination of the state's witnesses and counsel's argument was insufficient evidence to rebut the state's case.

Judge Gold found that defense counsel did not seek out the witnesses who should have been presented at penalty phase. Defense counsel also did not seek out the witnesses who would have rebutted the state's case on guilt. They were the same people. Judge Gold failed to consider the impact that the 37

German witnesses would have had on guilt phase. The two phases at trial did not have two separate investigations–trial defense counsel failed to conduct investigation for either phase.

D. Failure to investigate the jailhouse informant.

The state concedes that defense counsel had in his possession a letter from Hans Lohse offering to assist in rebutting the state's testimony through jailhouse informant, Walter Smykowski. See, State's Answer Brief at page 66 67. Mr. Lohse would have testified that Smykowski was a liar and out to curry any favorable deal he could for himself. His testimony that Mr. Riechmann was "[A]ll day happy because millionaire" was devastating to the defense. DiGregory testified that his testimony was crucial and that any reasonably effective defense lawyer would have investigated Smykowski (PC-R. 5488). Judge Gold found that defense counsel made a "reasonable" tactical decision not to call any witnesses. But he came to this conclusion without the proper analysis under <u>Strickland.</u> A reasonable tactical decision can only be given deference if it is the result of adequate preparation and investigation. Defense counsel never spoke with any of the potential witnesses. Therefore, he could not have know whether their testimony would have been helpful.

The state argues that tactical decisions of counsel are "virtually unchallengable." See, State's Answer Brief at page

67. Under Strickland, the decisions of counsel must be reasonable. Those decisions are challengeable when they are not based on adequate investigation. Counsel did **no investigation** here. He did not even send the investigator out to talk with Mr. Lohse. Therefore, the tactical decision is unreasonable and challengeable.

This claim also must be viewed in the context of the newly discovered evidence of Michael Klopf. Klopf offered testimony at the evidentiary hearing that Smykowski had a "deal" before he testified. He also said that Smykowski's testimony was false and perjured. See, Rule 4-3.4(b) Florida Rules of Professional Responsibility; U.S. v Lowrey, 15 F. Supp. 2d 1348 (1998); 18 U.S.C.A. Section 201(c)(2). Defense counsel was rendered ineffective by the state's failure to disclose the secret deal in exchange for testimony. Trial counsel could not impeach Smykowski on information he did not know.

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. 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.

The remainder of the state's argument on guilt phase ineffective assistance of counsel has been adequately rebutted by Appellee/Cross-Appellant's Brief.

ARGUMENT II & III

NEWLY DISCOVERED EVIDENCE AND BRADY CLAIMS

Judge Gold ruled in a piecemeal fashion on the Brady violations. The judge found a Brady violation for the state's improperly withholding the 37 German witness statements, but he made inconsistent rulings on the other Brady material.

> 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 does not go far enough. It fails to recognize that the exculpatory evidence applied to guilt phase as well as penalty phase. 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 states, "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 court found that postconviction counsel had to prove where the mistake occurred–crime lab or Officer Trujillo. This is incorrect. Postconviction counsel only needed to show that by some state action defense counsel did not get access to the redacted information. Who withheld the state's evidence is irrelevant. See, Kyles v. Whitley, 115 S. Ct. 1555 (1995).

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.

In its answer brief, the state suggests that this evidence was “minor” and may have been contradictory. See, State’s Answer Brief at page 83. This is not the standard for determining a Brady violation. Defense counsel should have been given the opportunity to decide whether to call Trujillo or decide where or how to use this evidence at trial. He did not have that opportunity because the state withheld it. There was no question after the testimony at the evidentiary hearing that DiGregory and Sreenan did not know who redacted the report but it was clear that defense counsel did not have it (PC-R. 5486). It also is clear that the state did not call Trujillo as a witness. This does not ameliorate the Brady violation as the state suggests.

In addition, the state ignores the sheer number of Brady violations in this case. The state withheld forensic crime lab reports which it contends contradict Mr. Riechmann’s version of the window height. This is not true. The withheld crime lab reports and statements of the crime scene technicians are contradictory amongst themselves. Some say the window was all of the way down. Rhodes, the state's serology expert, says it was not. All of these reports would have rebutted the state's case, but they were withheld. It is not the state's duty to now argue that the window evidence is "minor impeachment evidence." It is the state's duty to disclose the evidence and the defense attorney will decide how significant it is. See, State's Answer at page 84. The state's position now contradicts the testimony of its own state attorneys who admitted at the evidentiary hearing that the blood evidence and window height was crucial.

Telexes from Miami law enforcement to German authorities were never disclosed even though defense counsel sought copies of all communications and Judge Sepe ordered full disclosure. The state refused to obey Sepe's order (PC-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. Defense Exhibits LL through OO demonstrated the lengths to which the police went to get information. Contrary to the state's argument, the defense was never provided all of the telexes. See, State's Answer at page 90. The only telexes that counsel had were those discovered in the State Attorney's files after direct appeal. Not all of the telexes were provided to defense counsel.

Exculpatory information regarding 35,689 Deutchmark ($25,000) lottery winnings that Mr. Riechmann received the year before the crime also was not disclosed.

The testimony of Doris Dessauer-Rohr was offered not only to show that prostitution is a legal profession in Germany but to show that Mr. Riechmann lived with her for six years and he never asked nor took any money from her. He lived with her for seven years and was never a “pimp.” Her testimony would have rebutted the state’s motive for the crime. The state contention that Ms. Dessauer could not testify because she tried to get Mr. Riechmann out of a traffic ticket is hardly a significant development.

The state also argues that Office Psaltides’ report containing Mr. Kischnik, the victim’s father’s exculpatory statement that he could not say anything bad about Mr. Riechmann, was not admissible. See, State’s Answer Brief at page 84. This is a novel argument since it would have been trial defense counsel’s decision as to whether to present this testimony to rebut the testimony of Regina Kischnik. Because the state improperly withheld the statement, defense counsel could not assess whether to call Mr. Kischnik.

At page 85, the state suggests that Mr. Riechmann should have known about the information withheld from him that was seized by the German police regarding his income. Mr. Riechmann was incarcerated in Miami without any of his personal effects, books or information. His defense attorney failed to investigate the German aspect of the case except to get more funds. The burden is on the state to turn over Brady material. Judge Sepe ordered full discovery. No one could guess as to what the state had gathered. Mr. Riechmann did not have access to any documents or files from his home to defend himself. The state's argument here is misleading.

The state misled the trial court about the legality of the searches in Germany (PC-R. 3497-98). This Court relied on these false representations. Riechmann v. State, 581 So. 2d at 138.

Key evidentiary photos of the interior roof of the car and trunk have not been found nor provided to defense counsel. Judge Gold's order on the photographs defies logic. The state offered 33 photographs in evidence at trial, but none of them show the interior roof of the car or the trunk. Mr. Riechmann himself sat at counsel table during trial making notes of the photographs. Not all of the photographs were provided. The fact that some photos of the crime scene are missing proves the point. Judge Gold erred on this point.

Judge Gold also said this Brady 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.

At page 85, the state misunderstands the availability of the 37 German witness statements that Judge Gold found were improperly withheld. At no time has Mr. Riechmann known what was contained in the 37 statements. The information introduced at the evidentiary hearing by the seven witnesses from Germany was not that of the 37 statements because they are allegedly "lost." They had been in possession of the trial court. They have since disappeared. The defense was never provided with a list of the witnesses or access to the statements. Defense counsel ineffectively failed to renew his request for these documents at trial.

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. 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.

For the remainder of the newly-discovered evidence and Brady arguments, Mr. Riechmann relies on his Appellee/Cross-Appellant's Brief. The state's arguments offer nothing that is not rebutted in Mr. Riechmann's prior brief.

ARGUMENT VI

INEFFECTIVE ASSISTANCE OF COUNSEL--FEDERAL GUN CHARGES CLAIM

The state claims that Mr. Riechmann's assignment of insurance benefits was a ruse. See, State's Answer Brief at page 92. This is false and contrary to the record. If this were the case, then trial defense counsel would not have sought to have this evidence presented to the jury (PC-R. 4572, 4869-70; 4909-12).

Trial defense counsel bungled the entire issue. The jury was left with the impression that Mr. Riechmann was assigning the benefits because he was about to be arrested. Mr. Klugh's testimony at the evidentiary hearing does not reflect when he has these discussions with his client. Mr. Riechmann assigned the insurance benefits a month and a half before the December 30, 1987 acquittal on federal charges. The state's interpretation of these facts is false.

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.

Judge Gold found that the trial judge did not independently weigh the aggravating and mitigating circumstances in this case because the order contained "no findings of fact or conclusions of law." (PC-R. 6070-72). Judge Gold found and the state concedes that prosecutor DiGregory prepared the order that sentenced Mr. Riechmann to death.

> ...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."

(PC-R. 6070-71).

Even though the state in its answer brief uses the word "proposed" sentencing order, Judge Gold found that the order was not "proposed" but the final version adopted by the trial court.

> 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) [emphasis added].

Judge Gold specifically found that the trial judge **did not independently determine** the specific aggravating and mitigating circumstances in this case (PC-R. 6072). He also found that the order was a result of ex parte communications between the trial judge and DiGregory. The state concedes that ex parte communication occurred. It is undisputed that neither defense counsel nor the defendant had an opportunity to read, argue, or submit its own order for the trial judge's consideration. The assistant state attorney admitted that he wrote the order **without** knowing what the contents of the order were to be. He could only remember his ex parte contact with the judge and being told to "prepare an order." (PC-R. 5490).

Contrary to the state's argument, the deletion of a few sentences in the order by Judge Solomon does not mean that he independently weighed the aggravating factors. It means that the judge read through the order. Judge Solomon said the words were his but he "can't remember" actually communicating ten pages of thoughts to the state attorney. (PC-R. 5725). The rough draft of the order found in the state attorney's file was ten pages long. The final order sentencing Mr. Riechmann to death is ten pages long.

Under Florida law in 1988, the trial court was compelled to make his own findings of fact. See, Fla. Stat. 921.141 (1985). The purpose of this statute was to give the Florida Supreme Court an opportunity to review the legal reasoning behind the aggravating and mitigating circumstances to insure against arbitrary and capricious application of the death penalty. See, Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987). Here, this Court reviewed what it thought was the lower court's reasoning on the aggravating and mitigating circumstances. But in fact, it reviewed the state's findings. See, Appellee/Cross-Appellant's Brief at page 98-99. The sentencing order, secretly written by DiGregory, contained extensive findings on Mr. Riechmann's guilt. This is the same DiGregory who admitted withholding exculpatory police reports, statements, forensic reports, notes, and photographs despite an order for full discovery from Judge Sepe.

B. Prejudice

The state also argues that Mr. Riechmann was not prejudiced because this Court affirmed the trial judge's decision on direct appeal. But that is exactly the prejudice Mr. Riechmann suffered. This Court did not review Judge Solomon's order. It reviewed an order written by the state. This Court was inevitably influenced by what it thought was the trial court's detailed account of the pertinent facts and weighty evidence. In affirming the conviction and sentence, this Court relied on what it thought were the trial court's findings. This Court's unknowing reliance on a sentencing order written by the State throws into question Mr. Riechmann's entire direct appeal. The result is an unreliable ruling that affirmed the convictions on direct appeal.

The state also erroneously relies on Patterson to salvage its argument that the ex parte contact in this case does not require reversal. This is wrong. Patterson does not condone ex parte communication with only one party nor does it demonstrate that Judge Gold abused his discretion when he found that the trial court erred in having the state prepare a biased, prosecutorial order. See, Patterson v. State, 513 So. 2d 1257 (Fla. 1997). Cf. 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 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. Therefore, even if Spencer[6] is not considered retroactive,

[6]615 So.2d 688 (Fla. 1993).

Patterson and the 1985 version of Section 921.141 Florida Statutes was in effect well before Mr. Riechmann was sentenced These cases placed responsibility for preparing sentencing orders squarely with the trial judge, not the state. Ex parte contact was condemned long before 1988.

Even if Patterson did not condemn ex parte contact, the 1985 Florida Statutes in effect in 1988 specifically stated that the judge was to render his own opinion. See, Section 921.141, Fla. Stat. (1985). Judge Gold was correct in finding that the trial court erred in failing to prepare its own sentencing order and that it prejudiced Mr. Riechmann. In addition, this tainted order has rendered this Court’s analysis on direct appeal unreliable. Mr. Riechmann is entitled to a new review of all of his appellate issues. Thereafter, a new trial should be ordered. Gunsby v. State, 670 So.2d 920 (Fla. 1996).

C. Ineffective assistance of counsel at penalty phase.

The state argues that Mr. Riechmann made a number of concessions. See, State’s Answer Brief at page 42. Mr. Riechmann **does not** concede that “the only proper evidence at issue” is the testimony of the witnesses who actually testified at the evidentiary hearing. The hearing court accepted the affidavits as evidence of those witnesses who were unavailable to testify. The state’s objection was overruled. The hearing court considered the evidence. To suggest some stipulation was required before the court could consider the evidence is wrong and a misrepresentation of the record.

Mr. Riechmann also **does not** concede to the state's oversimplified and erroneous recitation of the testimony of the witnesses from the evidentiary hearing. See, State's Answer Brief at page 42. Nor did Judge Gold agree with the assessment of the state regarding the value of the wealth of mitigating evidence that counsel did not investigate or prepare.

> 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, <u>Gunsby v. State</u>, supra, 670 So. 2d 920 (cumulative effect of errors may constitute prejudice), and that the Defendant has been denied a reliable penalty phase proceedings. <u>Hildwin v. Dugger</u>, 654 So. 2d 107, 110

(Fla. 1995). (PC-R.6076-6079).

Even if the only evidence at the evidentiary hearing was as the state professes about Mr. Riechmann being a “good person” and having a “good, loving relationship” with Ms. Kischnik, Judge Gold found that the outcome of the jury’s decision would have been different. The state has not demonstrated any abuse of discretion in the hearing court’s order.

Further, the state disagrees that “the lack of credibility and import of said testimony has a direct bearing on the determination of the alleged deficient conduct by trial defense counsl, not to mention the probability of a different outcome, as required in Strickland v. Washington, 466 U.S. 668 (1984)[other citations omitted].” See, State’s Answer Brief at page 43. As co-sentencer, the jury is a co-fact finder. The jury did not hear any evidence in mitigation at trial, only the argument of counsel that the judge instructed them was not evidence.

At the evidentiary hearing, Judge Gold has found that the witnesses were credible and important and that had their testimony been presented to the “ambivalent” jury their recommendation would have been different (PC-R. 6070-72). The state has not shown that the witnesses were not credible or important. It contends that “rearguing a ‘good, loving relationship’ during penalty phase, when the jury obviously found Defendant murdered the victim for insurance money, is akin to arguing that a defendant who has murdered his parents deserved mercy because he is an orphan." See, State's Answer Brief at page 43. This is wrong.

Trial counsel failed to investigate this aspect of the case in guilt **and** penalty phases. Trial counsel billed for only 18.7 hours of investigator time during his entire representation of Mr. Riechmann. No time was spent investigating his client's background information in Germany. He presented **nothing** about the good relationship between Mr. Riechmann and Ms. Kischnik or any other mitigating evidence. The jury only heard cross-examination of state's witnesses in guilt phase. It was not instructed that this cross-examination could be considered as mitigating evidence. It had no way of knowing what standards to use in assessing the testimony for statutory or non-statutory mitigating evidence. They were not instructed on mitigating evidence until weeks later.

Next, the state suggests that the length of time each one of the witnesses presented at the evidentiary hearing had known Mr. Riechmann precluded them from being credible or important witnesses. See, State's Answer Brief at pages 44-47. However, the state ignores the testimony of Doris Dusseau-Rohr who lived with Mr. Riechmann for seven years (PC-R.3176-77, 3617-18). Even if the witnesses were casual acquaintances, Mr. Riechmann is aware of no caselaw that suggests that witnesses must live with the defendant in order to offer credible testimony. In fact, the jailhouse informant, Smykowski had only a brief encounter with Mr. Riechmann but the state is certainly not suggesting that he is not credible.

In fact, the only cases that the state cited as authority were Koon v. Dugger, 619 So.2d 246 (Fla. 1993) and Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985). These cases hold that trial counsel cannot be faulted for following his client's wishes regarding background investigation for penalty phase. However, the distinction between these cases and this one is that the trial counsel must have "investigated Defendant's background to the best of his ability under the circumstances created by the Defendant." Koon at page 249.

Judge Gold found that trial counsel did no investigation into Mr. Riechmann's background, despite the fact that Mr. Riechmann had given him a list of German witnesses to contact. The state also ignores that trial counsel did not even renew his request for the mysterious 37 German witness statements held in camera by Judge Solomon. Not much effort was required to request information that was already in the court's possession.

The state has presented no evidence that Mr. Riechmann in any manner interfered with trial defense counsel's investigation. He only requested that his attorney stay in town because he was at the mercy of a foreign law enforcement. It was trial counsel's responsibility to send an investigator to Germany, request the in camera materials, or take some steps to get information on his client's background. Farr v. State, 656 So.2d 448 (Fla. 1995).

The state offers nothing to suggest that Judge Gold abused his discretion in finding trial defense counsel's performance deficient and prejudicial to such a degree that confidence in the outcome of the trial was undermined.

> 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)[Testimony trial expert-Potolsky].

The remaining arguments by the state do not offer any new information that is not rebutted by Appellee/Cross-Appellant's Brief.

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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 1,1999.

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