IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Case No. SC05-611

Appellant/Cross Appellee,

v.

VIRGINIA LARZELERE,

Appellee/Cross-Appellant.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT/CROSS APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar #998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

STATEMENT OF THE CASE

Larzelere filed an amended motion to vacate judgment of conviction and sentence on August 31, 2000. (R389-517). The State filed a response on October 12, 2000. (R520-580). A *Huff* hearing was held on November 1, 2000.[1] (R5077—5133). An evidentiary hearing was held before the Honorable John W. Watson, III, Circuit Court Judge for the Seventh Judicial Circuit of Florida, in and for Volusia County, on May 13-24, 2002, and Jun 3-4, 2002. (R5357-8005). An Order denying claims I B, I D, II, III B, III D, III E, IV B, XIV, and XV and granting a new penalty phase based on claims IV C and V was issued on March 24, 2005. (R3343-2414). The State filed notice of appeal on April 4, 2005. (R3417-3418). A notice of cross-appeal was filed by Larzelere on April 8, 2005. (R3420-3422).

STATEMENT OF THE FACTS

Larzelere's first witness was John Howes, co-counsel at Larzelere's trial and lead counsel for Larzelere's co-defendant son, Jason.[2] (R5388-89, 5397). After the trial court granted the State's motion to sever, Howes began representing Virginia

[1] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

[2] Jason Larzelere was tried and acquitted of all charges after his mother's trial. *Larzelere v. State*, 676 So. 2d 394, 399 (Fla. 1996).

Larzelere.[3] (R5389). He had represented many defendants in first-degree murder trials during both the guilt and penalty phases. He and Jack Wilkins[4] were responsible for Larzelere's penalty phase. (R5390). He said, " ... Jack looked to me for the majority of the decision making." (R5390-91). Howes had more experience in penalty phase litigation and would start preparing for a penalty phase "upon receipt of the indictment or the first contact with the client," whichever occurred first. (R5391, 5392-93). He would consult with psychologists or psychiatrists in preparation for a potential penalty phase. (R5394). He had extensive conversations with co-counsel Jack Wilkins, as well as Larzelere's family, in order to prepare for a penalty phase and to try "to figure out what we could present that would be of benefit to her." (R5394-95). He had many conversations with Virginia, both before and after the trial. In addition, there was a considerable period of time between the guilt and penalty phases. (R5395). He remembered talking to Jeanette Atkinson (Virginia's sister) about aggravating and mitigating circumstances that would be presented. He asked her to "tell me anything you can that can help us keep her from getting the

[3] In addition to a waiver by the defendants, the trial court conducted "an extensive colloquy with the Larzeleres ..." (R5459). Eventually, William Lasley took over representing Jason Larzelere. (R5459).

[4] Jack Wilkins was lead counsel for Virginia Larzelere. (R5408).

electric chair." (R5396). He would have pursued every avenue available to him in order to avoid the death penalty. (R5398). He and Wilkins tried the case together and had a "joint theory on what the defense was going to be ... " (R5398). Information regarding Virginia's case and Jason's case was shared between Howes and Wilkins. (R5399). He did not feel the need to help Watkins prepare for Virginia's penalty phase "because I knew from experience that he was capable and competent to do that." After Howes came to represent Virginia as well as Jason, he paid more attention to the penalty phase issues. (R5400). He was not aware of any sexual abuse suffered by Virginia Larzelere. (R5400, 5422, 5491).

Howes contacted Dr. Krop to get him involved in the case, but did not remember what materials were sent to him for his preparation in interviewing Virginia. (R5402). He did not recall that no witnesses or evidence was presented by the defense during the penalty phase. (R5404). From the beginning, Howes made evaluations as to whether any particular person would be a good witness and would give favorable information. (R5406). It would not have been beneficial to have Virginia's 14–year-old daughter, Jessica, testify at the penalty phase. (R5404, 5406-07). He did not recall why co-defendant Jason (after his acquittal) was not called to testify on his mother's behalf at her penalty phase. (R5414). Howes said there are tactical

reasons " ... under certain circumstances you don't fight certain aggravators. There are tactical decisions made when you're standing up there looking at the jury as to whether or not they're accepting what you're saying about certain things." (R5408). He has to maintain credibility with the jury in order to serve his client well. (R5409).

Howes was well-aware of Dr. Krop's expertise and ability to testify. He did not attend a deposition of Dr. Krop (in this case) as "he could handle whatever was going to be presented to him ... " He had used Dr. Krop in quite a few cases. (R5415).

After reviewing a deposition taken on July 27, 1992[5] of Harry Mathis, Virginia's previous husband, Howes became aware that Virginia's sister, Peggy Beasley, had told Mathis that Peewee Antley, Virginia's father, had sexually abused all four of his daughters.[6] (R5421-23). Virginia never told Mathis that she had been abused by her own father.[7] (R5422). Howes was not aware if Virginia had told Dr. Krop about any sexual abuse but he would have alerted Dr. Krop if he had known this information. (R5424). Howes did not know that Jason Larzelere also claimed

---

[5] This is after the trial and penalty phase, but before sentencing, which took place on May 11, 1993.

[6] Virginia, Peggy, Patsy and Jeanette. (R5423).

[7] Mathis believed his former wife, Virginia Larzelere, had engineered a plot to send him to a rural area in Polk County where he was shot in the stomach. (R5482, 5483).

abuse by his grandfather, Peewee Antley. (R5428). Howes believed a jury would "look down at any mother who puts her child in a situation where the child is sexually abused." (R5429). If he had been aware of these allegations, Howes would have spoken to Virginia's sister, Jeanette Atkinson, as she "was the one most accessible, stable and cooperative, to confirm the information or have her deny it to go anywhere with it." (R5430). Howes explained to Larzelere what a penalty phase involves and asked her "what in her life could possibly help us keep her from getting the death penalty." (R5446).[8]

Howes said Jack Wilkins handled the arrangements for costs involving depositions. (R5450).[9] However, Howes also paid for various costs involving the case. (R5451). The fee he received in Larzelere's case came after Jeanette Atkinson's (Virginia's sister) bankruptcy proceeding. (R5452).

Howes and Wilkins were law partners at one time. They would refer cases to each other and have remained friends through the years. (R5453). He has never seen Wilkins drink alcoholic beverages in the morning or during the day. (R5453-54). He

[8] A report by defense investigator Gary McDaniel, did not indicate any sexual abuse. (R5446). In addition, Howes said "it was always necessary to sift through and find fact from theory ..." regarding McDaniel's reports. (R5446). McDaniel's reports were not accurate. (R5473).

[9] Wilkins received a Nissan Pathfinder as an initial fee. (5450-51).

socialized with Wilkins, and would see him at his lake house on the weekend. Wilkins would drink at night, but he was a "private person." (R5454). He did not see him drink during a trial; not in the courtroom, during a break, or at lunchtime. (R5455). He did not recall Wilkins drinking "any stupendous amount of alcohol at some point in time." (R5456). Howes never saw Wilkins "drink to excess to the point to where it affected him." (R5457). Only on the last night of Larzelere's trial, did he see Wilkins drink "half bottle of wine and one drink besides that." (R5456). Howes never saw Wilkins act intoxicated. (R5456).

Larzelere was not cooperative with Howes. She was not consistent and direct in her conversations. (R5462). Her responses would be "whatever she perceived the hearer wanted the answer to be." (R5463). She had made several pre-arrest statements to law enforcement which were inconsistent. Larzelere was "quite pleased" that Howes and Wilkins determined that she should not testify. (R5463). Had they called her to testify on her own behalf, he believed "she would have been convicted." (R5463).

Howes became aware that Larzelere was contacting defense investigator Gary McDaniel for direct consultation, outside of his supervision. (R5464). McDaniel provided privileged documents to the Edgewater, Florida, Police Department. (R5465).

Larzelere was very alert and responsive during the trial. She followed and understood the strategic and tactical decisions made by her defense team. (R5485).

Howes was aware that Jack Wilkins had represented Larzelere (under the name Gail Antley) in a case that involved embezzlement charges. (R5489-90). However, had this information been revealed to the jury, he did not feel the jury would have been compelled to give Larzelere the death penalty because of those charges. (R5490). Larzelere was also involved in a scheme where she had obtained gold coins and wrote it off as a dental expense. Howes said, "There were a number of circumstances concerning Virginia's life at or about the time of Dr. Larzelere's death that caused me concern about putting on this testimony, because the testimony that we had available was comparatively weak in relation to the other damaging information that would have come out if we went into it." (R5490-91). Any sexual abuse suffered by Larzelere was never presented by her or Dr. Krop. (R5491-92). Howes would have questioned his client on why she would expose her own children to potential abuse and why would she have allowed them to "be around this man at any time, ever, under any circumstances, period." (R5493).

Having used Dr. Krop before, Howes was "confident with his ability to testify." (R5508-09). He recalled that Dr. Krop told him "there wasn't much he could do." He told Larzelere that Dr.

Krop could not provide them with any beneficial information and would not be called as a witness. (R5510). At that point she should have told Dr. Krop any other information that might have helped in mitigation. (R5511). Larzelere knew "it was important to have experts and lay witnesses testify." (R5514). Further, "Virginia Larzelere's certainly intelligent enough to understand the pressure she was under at that time." (R5516).

Prior to and during the trial, Howes did not see co-counsel Wilkins drink excessively. (R5518-19). He did not have any doubts as to Wilkins' abilities to handle legal issues or effectively cross-examine witnesses. (R5519). Wilkins, Howes, and Larzelere often had conferences, "where there's three heads together like a football huddle ..." There was never any concern expressed by anyone regarding a problem with alcohol. (R5520, 5521). Wilkins and he were together "virtually 24 hours a day for five weeks" during the trial.[10] (R5523).

It was not his job to hire a mitigation expert prior to Larzelere's trial. (R5534). There are times when he had been appointed as counsel and he did not hire anyone. He said, "I seek the appointment of people in circumstances where I feel it is ... appropriate to do." He was actively involved in the guilt phase of this trial and Jack Wilkins looked to him to handle the

[10] They rented a condominium together during the course of the trial. (R5522).

penalty phase aspects. (R5537).

Gladys Jackson was Jack Wilkins' office manager/bookkeeper for fifteen years. (R5580-81). She recalled Larzelere hiring Wilkins to "clear up her record, worthless check" prior to her arrest for first-degree murder. (R5581). Jackson saw Wilkins drink alcoholic beverages in his office. "He always had social drinks." (R5582). On occasion, she would buy alcohol for him "when we made office runs for any supplies ..." (R5583). She had seen him have several drinks throughout the day. (R5586). She did not recall ever seeing John Howes drinking with Wilkins in his office. (R5589). There was approximately $25,000.00 in costs spent on the Larzelere case. (R5590-91). The Larzelere case put a financial strain on the office. (R5593). In 1994, Wilkins was served with a Federal subpoena that ordered him to turn over his receipt books from the office. (R5593-94). Jackson had three receipt books in her desk. Wilkins told her to get rid of one of them. She did not, and told him to do it. (R5594). Ultimately, the "cash receipt" book was destroyed. (R5596). Jackson testified in front of the Federal Grand Jury regarding Wilkins' illegal practices in his law firm. (R5598). On occasion, Wilkins would receive a cash payment and only report half or some of it. (R5601). Jackson did not recall any receipts in the "cash receipt" book that belonged to the Larzelere case. (R5606). If she wrote out the cash receipt in the book, it would reflect the

correct amount received from the client. (R5608).

Wilkins received a 1991 Nissan Pathfinder as a partial retainer. (R5607). Jackson understood that Wilkins' fee for the Larzelere case would be paid from the insurance proceeds. (R5621). She did not recall a time when Wilkins requested payment for costs for the Larzelere case that she was not able to cover. (R5610). She did not recall any illegal financial dealings of any kind connected with this case. (R5615).

Larzelere called Wilkins frequently. He always accepted her calls. (R5612). Howes and Wilkins consulted quite frequently leading up to Larzelere's trial. (R5614).

Jackson did not see any increase in alcohol consumption during the Larzelere trial. (R5613).

Wilkins had defended other murder cases besides Larzelere's, in addition to drug-related cases. (R5627-28). Jackson did not remember specific instances where Wilkins gave her cash from clients, but did recall making cash deposits. (R5640).

Jackson said the proceeds from selling the Pathfinder would have been deposited into the office account. There may not have been a receipt written for it. (R5642). When Wilkins received cash from clients, it should have been deposited to the office account. (R5644). Jackson was never questioned by Federal prosecutors about financial matters involving the Larzelere

case. (R5644).

Jack Wilkins, lead counsel for Larzelere, initially spoke with Jeannette Atkinson, Larzelere's sister, about representing Larzelere in this case. (R5646-47). He had been counsel in numerous murder cases but had not previously tried a capital case. (R5647, 5648, 5649). Wilkins practiced law for over twenty years and only did criminal work. (R5652).

Wilkins' fee for the Larzelere case included a $100,000.00 retainer fee plus $3000.00 per day during the trial, plus expenses. The Nissan Pathfinder was part of the retainer. (R5656). Wilkins' fee was to be paid whether the insurance policy (on the decedent, Dr. Norman Larzelere) was paid out or not. (R5656). He did not believe there was a financial risk (to himself) regarding this case. (R5661).

Initially, Jeannette Atkinson asked Wilkins to represent both Virginia and Jason Larzelere. Wilkins would not represent both (due to a potential conflict) and subsequently gave Atkinson John Howes' name. (R5673-74). Larzelere tried to terminate his representation various times prior to trial but she always changed her mind. (R5675).

Although Howes became the lead lawyer for the penalty phase, Wilkins prepared for the second phase, as well. (R5681, 5684). He did not see any issues with regard to physical or sexual abuse. (R5686). After reviewing a report purportedly

written by Defense Investigator Gary McDaniel, Wilkins said he probably would have talked to Larzelere's sister, Jeannette Atkinson, about the abuse referenced in the report, as well as to Larzelere herself. (R5690). Dr. Krop eventually examined Larzelere in anticipation of sentencing. (R5692). Dr. Krop asked Larzelere about any alleged abuse and she denied it. (R5693).

Wilkins did not recall discussing McDaniel's report with co-counsel Howes. (R5701). He did not believe the report had any credibility. (R5707). In addition, for various reasons, Wilkins and Howes decided not to call certain witnesses in the penalty phase, including ex-husband Harry Mathis, and Larzelere's daughter, Jessica. (R5703). Dr. Krop's letter, dated April 15, 1992, indicated there was no evidence of abuse. (R5709).

Wilkins did not hire any additional experts (except for Dr. Krop) as " ... there were no areas that I felt needed an expert witness." (R5773).[11] Although there were voluminous cell phone records, Wilkins did not hire an expert to sort out the documents as it " ... didn't make any difference anyway. We had Jason back at the house at the time it was committed ... but Jason was not at the scene." (R5774). Wilkins did not believe there was strong evidence to prove Larzelere's guilt or

[11] Wilkins consulted with experts "that were listed by the State (and) may have been experts in their own field." (R5773).

involvement in this case. (R5774-75). It was always Larzelere's position that the murder of Norman Larzelere was the result of a foiled robbery attempt. (R5814).

Money received from Larzelere's sister, Jeanette Atkinson, was used to pay for any expenses or cost involved with the case. (R5779). Wilkins eventually hired another investigator, Don Carpenter, as "Gary McDaniel had caused all kinds of tremendous problems, including writing unauthorized letters to the Judge and lying on his reports, and I fired him." (R5781, 5782).

In 1995, Wilkins pled guilty to various federal crimes including money laundering, obstruction of justice, income tax evasion, and perjury. (R5817, 5819). He personally destroyed a cash receipt book that belonged to his office. (R5824). None of the receipts had anything to do with the Larzelere case. (R5824).

During Larzelere's trial, Wilkins usually had a glass of wine with dinner, but "during the trial, never." He did not drink to the point where someone might smell alcohol on his breath or where he would have a hangover the next morning. (R5825). On occasion, Wilkins drank alcoholic beverages in his office. (R5696).

After Larzelere was convicted, her sister, Jeanette Atkinson, was solely responsible for Wilkins' fees. (R5841).

Wilkins received one of Investigator McDaniel's reports and

subsequently spoke with Larzelere about purported abuse by her father. He said, " ... as a part of our preparation for this trial and the ongoing parts of it, we were looking for all those things that might have to do with our presentation on the mitigation." However, "She denied it." (R5856, 5861). Once he received a report from Dr. Krop, he did not feel the need to do any further investigation. (R5857).

Wilkins did not want to call any of Larzelere's former husbands as character witnesses because, "For every reason that we found to call a witness, there were dozens of reasons not to." (R5862). He did not want to call daughter Jessica as a witness as there were indications that Larzelere had other lovers "even with her husband's knowledge ... and she was meeting some of these people and, at the same time, that's inconsistent ... that the jury would believe, as the definition of a good mother." (R5862-63). Based on the overall evidence presented in this case during the trial, the court found that Larzelere was not credible. (R5864).[12]

Larzelere and Investigator McDaniel (unbeknownst to Wilkins) started having meetings at the jail. Ultimately, McDaniel gave "investigative material" to the Edgewater police department. Detective William Bennett subsequently alerted the

[12] See, ROA (TT.7354, Sentencing Hearing). In addition, Larzelere was very inconsistent with her descriptions of the purported "robber." (R5865).

chief prosecutor in this case, Dorothy Sedgewick, regarding this information, who also informed the trial judge. (R5867-69).

At the end of the penalty phase, Wilkins "was begging" for a life sentence for his client. (R5878).

Wilkins believed his Federal case did not affect his representation of Larzelere and had no effect on her case at all. (R5885).

Rodney Kent Lilly was the attorney that handled the Larzelere insurance claim litigation. (R5735). Wilkins had recommended him and there was no referral fee involved. (R5736, 5739). He and Wilkins were neighbors and friends, and also belonged to the same country club. (R5737). On occasion, he would see Wilkins having lunch at the country club. Other patrons told Lilly that Wilkins sometimes drink at lunchtime. (R5738).

Since Wilkins was handling the criminal aspect of the Larzelere case and Lilly was handling the civil aspect, there were times when they talked about what was going on in each case. (R5740). Lilly provided Wilkins with insurance charts that he had created in order for Wilkins to show them to the jury. (R5741). A receivership was established to handle any insurance proceeds that were to be paid to various beneficiaries. (R5741, 5744). Wilkins was not one of the beneficiaries. (R5745).

Gary McDaniel, a private investigator since 1975, was hired

by Wilkins for the Larzelere case in 1991. (R6287, 6288). At their initial meeting, he remembered Wilkins drank at least three alcohol beverages. (R6289). Wilkins asked him to "do the debriefing of the client" and told McDaniel there would be financing available to cover his expenses. (R6289, 6290). Subsequently, a contract was written for Pretext Services, McDaniel's company. (R6291). He understood that his fee would be contingent on the payment of the insurance policies taken out on the victim, Dr. Larzelere. (R6292).

McDaniel's investigative report, dated June 7, 1992, indicated that there had been abuse in Larzelere's past. He spoke with either John Howes or Jack Wilkins regarding this information. (R6296). McDaniel spoke with Howes about this report as he "had a rapport with Howes ... and ... Wilkins would never give me the time on any issue ... so we were in contact frequently ... " (R6299). He was told not to worry about the penalty phase and to concentrate on finding whether the evidence was there to establish the guilt or innocence of Virginia and/or Jason Larzelere. (R6299-6300).

McDaniel attended a case conference with Wilkins and Howes in Orlando. Wilkins was "drinking, as usual ... He always has five or six to my one." (R6302-03). Nothing about the Larzelere case was discussed at this meeting. (R6304). McDaniel believed there were potential witnesses in California that could help in

the Larzelere case. He did not interview them as he was not paid for his services. (R6307-08). At one point, Wilkins offered the Larzelere's boat as payment for McDaniel's expenses. (R6309). Eventually, McDaniel's employment was terminated by Wilkins and Howes. (R6310, 6317-18).

Howes told McDaniel that Wilkins and Larzelere did not have a good relationship. In addition, Larzelere called McDaniel and told him this, as well. (R6323). McDaniel spoke with Larzelere "intermittently" even after his termination. (R6324). He was paid $52,000.00 (from Jeannette Atkinson's bankruptcy proceedings) for his work. (R6324, 6343).[13] Eventually, McDaniel's visiting privileges ended at the jail, pursuant to Wilkins' request. (R6329). He still maintains a relationship with Larzelere. (R6334).

McDaniel had suggested various experts to Wilkins and Howes that could assist in the case, including an accident reconstruction person, a handwriting expert, an insurance expert, and "a ballistics expert and an expert relevant to the issue of the disposed weapons in the river." (R6332-33). In addition, he also recommended a blood splatter expert. (R6367). Any leads furnished in his final report were never followed up. (R6335-36).

McDaniel attends mitigation seminars annually. He is a

[13] He sued Atkinson for the money. (R6344).

"prolific reader on the subject" and is "very active in educating" himself. (R6347-48). He was involved with Larzelere's case for three months. (R6350). Although he believes Wilkins and Howes did not pursue any of the "leads" he gave them, he did not know what they may have done independent of those leads. Nor was he aware of the basis for any of the decisions they made as lawyers for Larzelere. (R6350). However, Larzelere and her son, Jason, "always wanted me on the case." (R6353).

McDaniel gave the Edgewater police department a cover letter with police reports attached, which contained "various police leads" that he felt was his "obligation" to give to authorities. Although he did not speak with counsel, both Virginia and Jason Larzelere told him to give this information to law enforcement. (R6357). Howes ultimately terminated McDaniel. (R6363).

Dr. Harry Krop, a licensed psychologist, evaluated Larzelere in April 1992, after the trial and penalty phase had taken place.[14] (R5897, 5900, 5907). Dr. Krop reviewed police reports, depositions, interviewed several witnesses, and had three "fairly lengthy interviews" with Larzelere. (R5905). In addition, he received copies of correspondence that Larzelere had sent to her attorneys and he also spoke with Wilkins. (R5906). Larzelere had acknowledged, prior to the *Spencer*

[14] This was before the final sentencing hearing. (R5901).

hearing, that Krop would not be testifying at that hearing. (R5909).

Larzelere denied any history of abuse, which Dr. Krop indicated in his report to Wilkins. Had he known of any abuse, he would have "confronted" her with that information. (R5916). In addition, he would have sought permission to speak with other family members and would have encouraged Larzelere that it would be important to talk about it. (R5917, 5918). Due to Larzelere's "adamant denial of culpability despite the conviction, the focus strategically was to show that Ms. Larzelere is a pretty normal person, does not have a personality disorder, does not have any mental illness, is an intelligent individual, would not present any management problems, and, therefore, the focus would be to show the normalcy of her background ..." (R5919). His evaluation showed Larzelere lacked antisocial tendencies. (R5920).

Larzelere admitted a previous husband, Harry Mathis, had physically abused her on a few occasions. She never told Mathis she had been sexually abused. (R5923). Krop was specifically told that there would be no family members available to talk to him. (R5932).

Larzelere's MMPI test results indicated a normal profile. There was no evidence of a thought disorder or any kind of psychotic process. (R5941). Dr. Krop encouraged trial counsel to present Larzelere in a "positive light." She had denied any

involvement in the offense as well as any history of physical or sexual abuse. (R5943). He estimated that, intellectually, she was in the "high average range or above average ... between 110 and 120 ..." She did not exhibit any neurological deficits or give any history that would have suggested any type of brain damage.[15] (R5945). There was no evidence of any kind of mental illness. (R5948). It was Larzelere's choice to decide what to tell him regarding family history. (R5951). It is not uncommon for a criminal defendant to manipulate a psychologist, and occasionally even lie to them. (R5958). He explained to Larzelere how important his evaluation (of her) would be. (R5959). He asked Larzelere for names of any other potential sources that could provide helpful information. (R5960).

Larzelere had not been near her alleged sexual abuser (her father) for a substantial period of time. In addition, there was no proof to support the notion that her daughter, Jessica, was a product of incest. (R5962). Murdering a spouse in order to collect insurance proceeds is not typical behavior of someone who has been sexually abused. In addition, women that are sexually abused by someone are very cautious in allowing their own children to be around the abuser. (R5965). Dr. Krop did explore the possibility of sexual abuse with Larzelere. (R5978).

[15] Dr. Krop did not conduct any neurological, psychological or intellectual tests. (R5945).

She did tell him about previous embezzlement and bad check charges that had been filed against her. (R5978).

Jeanette Atkinson, Larzelere's next younger sister, got involved in this case when Larzelere named her as the next contingent person to receive the insurance proceeds. This was done at Jack Wilkins' suggestion, in order for him to take the case. (R6012). She signed an agreement that Wilkins' fees and costs would be paid contingent upon the insurance settlement. (R6013). Wilkins knew he would not be paid if the insurance money was not paid out. (R6013-14). Wilkins also received a 1991 Nissan Pathfinder and $17,000.00 for expenses and costs.[16] (R6014). Her sister, Peggy, also gave him $1000.00 for expenses. (R6028). The discussions she had with Wilkins were always about the finances. (R6015).

According to Jeanette, although there was sexual abuse within her family, Wilkins never asked her about it. Their father, William (Peewee) Antley sexually abused both her and Virginia. (R6017). She saw Antley abuse Virginia. (R6040-41). She never told her other sisters about any abuse. (R6057).

Wilkins only discussed finances with her, not mitigation. (R6032). He never sat with both her and Virginia at the same time to discuss "humanizing" her. (R6038). Virginia was a good

16 The $17,000.00 was the difference between a vehicle Virginia had returned under the "Lemon Law" and the cost of the Pathfinder. (R6014).

mother, who “doted on her children and spoiled them rotten.” (R6037).

When discussing finances in Wilkins’ office, she saw him drink alcoholic beverages. (R6027-28). She recalled smelling alcohol on him at the bond hearing. (R6028). She did not report this to Virginia as “that was her decision; that’s who she wanted.” (R6059). Larzelere never complained to her of smelling alcohol on Wilkins. (R6061).

At one point, Wilkins told her Virginia wanted to terminate his services but if that happened, “he would see that John Howes dropped Jason’s case.” Virginia backed off so that Jason would have an attorney. (R6034).

The first time she saw John Howes was at the trial but she never spoke with him. (R6038). Neither Wilkins nor Howes ever discussed the penalty phase with her. (R6039). She would have been willing to testify on her sister’s behalf. (R6040).

When Larzelere was initially arrested, she called Atkinson and told her she wanted Wilkins to represent her. (R6042). Larzelere did not raise concerns about Wilkins’ representation until “during the trial.” (R6052). Wilkins presentation of himself was consistent from the first time she met him throughout the trial. (R6054). At the point when Larzelere wanted to terminate Wilkins’ representation, she wanted to hire Mr. Lasley. (R6054).

She is the closest sister in age to Virginia, and they are very close and communicate with each other - - it was her opinion that Virginia did not need any kind of psychological assistance. (R6057). While growing up, Larzelere was sexually promiscuous. (R6058).

Atkinson does not believe her sister had good representation. She formed this opinion after Larzelere was found guilty. (R6064).

Patsy Antley is Larzelere's younger sister by five years. (R6121). She said her father, Peewee Antley, sexually abused her when she was a young girl. (R6122-23). She did not tell anyone about the abuse until the night Antley committed suicide and she and older sister Jeanette discussed it. (R6124, 6125).

Wilkins and Howes never explained the bifurcation process to her; she did not know what mitigation meant and they did not interview her. (R6127, 6128). During the trial, Wilkins would take her to lunch. She said, "He didn't eat. He drank during lunch." (R6129).

Antley was so upset during the trial that she blocked out parts of it. She did not recall the specific occasions that she had lunch with Wilkins. (R6132). She did not tell Virginia about any concerns she had regarding Wilkins' drinking. (R6133). Had Larzelere's attorneys asked her to testify, she would have been willing to do so. (R6131).

Peggy Beasley is the youngest of Larzelere's sisters. (R6139). She was not involved in any of the finances regarding Larzelere's case except when she gave Wilkins $1000.00 "to be used to call additional witnesses to testify." (R6139-40, 6141-42).

Wilkins and Howes did not explain the two-part process of Larzelere's trial. (R6142). They did not interview her so she did not realized how relevant the girls' upbringing would have been to Larzelere's trial. (R6143, 6153).

She was also abuse by her father but could not recall when it started. (R6145). She never told anybody. (R6146). On one occasion, her father abused her four-year-old daughter. (R6149-50).

She was aware that Larzelere's first husband, Harry Mathis, physically abused Virginia. (R6151). After Virginia married Dr. Larzelere, they gave Peggy money for expenses involving her premature baby. (R6152).

Prior to her arrest, Larzelere gave Beasley gold coins to pawn so she could pay household expenses. Larzelere had no other cash funds available to her. (R6154-55).

Beasley was not aware that her sister, Patsy, ever had lunch with Wilkins. (R6155). She never saw Wilkins drink or consume any drugs. (R6156). She did not visit Larzelere while in jail and did not speak to her by phone, but would have testified

on her behalf. (R6153-54, 6156).

Dr. Bill Mosman is a licensed psychologist who specializes in forensic work, neuropsychology, mitigation and post traumatic stress disorder. (R7154, 7167). In reviewing a vast amount of material (R7170-78) and interviews with Virginia's family members, he determined that Virginia grew up in a very dysfunctional, traumatic family. (R7184). When Virginia and her sisters turned four years old, the sexual abuse (by their father) began. (R7185-86). Virginia tried to shield her sisters from the abuse so she would "offer herself up" in order to protect them. (R7187). She was taught at a very early age to "trade sex" for "options and opportunities." (R7193-94).

Dr. Mosman gave Larzelere a battery of tests. (R7204-06). He ruled out "organic brain damage ... no history of exposure to toxic substances, no closed-head injuries with substantial symptoms." (R7209-10). In addition, there was no indication of any psychosis, schizophrenia, paranoias or manic depressives. She has a "host of personality disorders." (R7210). Larzelere does suffer from post traumatic stress disorder. (R7214). She described her relationship with Dr. Larzelere (the victim) as "absolutely ideal." She requires "constant attention and admiration and will keep fishing and manipulating for compliments."(R7226). She has a narcissistic personality disorder. (R7228).

Larzelere had been arrested more than once. The fraud and check-writing charges were “related to times of stress, marital difficulties ...” (R7238). There was an indication of Larzelere having contracted Legionnaire’s disease prior to 1991. (R7247). He did not find the presence of any mental disturbance. (R7253). Larzelere’s age at the time of the murder was “clearly” a mitigating factor. He said, “Age, has never been - - limited to the chronological age from birth to what it says on your driver’s license. Age includes physical age, mental age, emotional age, intellectual age, moral age, developmental age ...” (R7256).

During his proffered testimony, Dr. Mosman said Larzelere did not have a meaningful understanding of mitigation. She believed she had “the abuse-excuse defense.” (R7284). She discussed the PTSD to some extent but did not want to put her siblings in jeopardy in discussing any sexual abuse. Mosman said, “She had been completely told and conditioned throughout these years that discussing this would harm them. And her perception was one of to bring this up would embarrass, humiliate ...” (R7285). In his opinion, Larzelere’s “waiver” of presenting mitigation was not voluntary “because of the duress and ... clinical impairments ...” (R7296). Mosman could not have assisted trial counsel in determining “mitigation or the waiver issues” because the appropriate data had not been

provided. (R7300).

During his proffered cross-examination, Dr. Mosman said Larzelere never had clinical treatment for the sexual abuse she suffered. (R7312). She knew she had exposed her own children to being sexually abused by her own father. (R7315).

During cross-examination, Dr. Mosman said he was aware that Larzelere had made attempts to have individuals that she knew try to kill her husband. This was not an impulsive crime. (R7321). It was committed so Larzelere could collect 3.5 million dollars in life insurance. (R7323). Larzelere denied her guilt. (R7326).

Larzelere claims her son, Jason, is disabled. Medical records would indicate a seizure disorder, abnormal EEG, neurological impairments, and a military discharge based on a disability. (R7330). Dr. Mosman had no firsthand knowledge regarding these claims. (R7331).

Larzelere had made attempts to kill two previous husbands and was engaged in multiple extramarital affairs. She had solicited various individuals to murder Dr. Larzelere and had embezzled from a previous employer. (R7338). She is quite adept at lying and conning people. (R7353, 7377). Her husband was understanding and gave his blessing to her extramarital affairs. (R7356).

Mosman did not diagnose Larzelere as having a borderline

personality disorder. However, she does have anger management problems and adult antisocial behavior. (R7371, 7374). She does not have any mental impairments. (R7382, 7402).

Dr. Harry McClaren, a licensed psychologist, conducted a thorough psychological evaluation of Larzelere on three separate occasions. (R7463, 7479).[17] In addition, he interviewed all three of Larzelere's sisters and her two oldest children, Jason and Jessica. (R7481).

Larzelere's score on the MMPI-2 indicated "a lot of anger, both repressed anger and probably hostility ..." (R7486). There was no evidence of post traumatic stress disorder. (R7491).

One of Larzelere's former lovers described her as " ... devilish, manipulative ..." (R7494). Her daughter, Jessica, did not think Virginia was a good mother, and that she tried to drive a wedge between Jessica and her father, Norman (the victim). Larzelere lied to Norman about things that Jessica did. Jessica "didn't forgive her mother until her mother owned up to being a bad mother." (R7495).

Jason Larzelere told Dr. McClaren that the Navy had discharged him for "being gay." (R7497).

After talking with Virginia's sisters, it was clear that Virginia had been sexually abused by her father, and possibly,

[17] April 2, 2002, April 3, 2002, and April 16, 2002. (R7479).

her uncle.[18] None of her sisters were currently incarcerated. (R7498). In addition, none of her sisters reported that they had committed any major felony offenses. (R7499). Dr. McClaren concluded that Larzelere "does not suffer from any psychotic disorder ... has average intelligence ... suffers from hysteroid and narcissistic (disorders)... has some features of borderline obsessive-compulsive personality disorder." She did not meet the criteria for post traumatic stress disorder, "though she has some symptoms of it." (R7500). Larzelere denied any substance abuse or dependence although she did indulge in using diet pills. (R7501). She did not meet the criteria for antisocial personality disorder. (R7502).

Dr. McClaren relied on his professional experience with posttraumatic stress disorder (PTSD) in determining that Larzelere did not fit the criteria. (R7506). Although she denied any substance abuse, her son, Jason, said, " ... she liked to take diet pills and Valium, and that after Norman's death, she became much worse in this regard, as far as taking more stimulants ..." (R 7506-07). Jason was not aware if Larzelere used cocaine, but that his mother and he were involved in cocaine drug trafficking. (R7507).

Virginia and her sisters described her life as "the best of

[18] Her sister reported being sexually abused by their father, as well. (R7498).

times" prior to the murder of Dr. Larzelere. (R7508). No one suggested that "she was mentally ill in the sense of any kind of a psychotic break with realty." (R7508). In Dr. McClaren's opinion, Larzelere was not under the substantial domination of another or under duress. Jason commented to Dr. McClaren that, "he couldn't picture his mother being dominated by anybody." (R7509).

Larzelere is "exploitative, has a grandiose sense of self-importance, sense of entitlement, requires constant attention and admiration, lacks sympathy." In addition, she also "seeks or demands reassurance, approval, or praise, is inappropriately sexually seductive in appearance and behavior, is overly concerned with physical attractiveness, is uncomfortable ... where she is not the center of attention ..." (R7512). In conclusion, narcissistic personality disorder and histrionic personality disorder are the two primary diagnoses that apply to Larzelere.[19] (R7512). Larzelere has told multiples lies, was very deceitful, and used various aliases. (R7518, 7519). In reviewing notes that Larzelere took during her trial, Dr. McClaren concluded, "she was being very vigilant in tracking court proceedings and very actively aiding and assisting her attorney." (R7521).

[19] Along with personality disorder "not otherwise specified." (R7513).

One of Virginia's sisters, Patsy, told Dr. McClaren that she has PTSD. (R7526). Jessica, Larzelere's daughter, also told Dr. McClaren that she was abused as a child and also suffers from PTSD. Jason was diagnosed as having PTSD by Dr. Myers. (R7527).

Virginia, as well as her sisters and their children, were sexually abused by Virginia's father, Peewee Antley. (R7530). Virginia denied "reexperiencing" any of the sexual abuse and therefore, the diagnosis of PTSD did not apply. (R7531). Larzelere's "complete denial," Dr. Krop's evaluation, and her prison records all indicated the lack of PTSD. (R7533).

Virginia was not "bothered by unwanted memories, no nightmares, not jumpy ..." She avoided reliving when her husband died, but it was not related to the sexual abuse. (R7560). She did not think she had PTSD, "had gotten some type of book about survival ..." (R7561). She was very prone to conning and manipulating people. (R7562). There were no medical records indicating she had ever had a heart attack or Legionnaire's disease. (R7564). During his evaluation of her, Larzelere was very "animated, engaged, smiling, batting her eyes ... just very gregarious ..."[20] She has a "high capacity for deception." (R7575).

---

20 During the evidentiary hearing, she appeared sad, and showed very little facial expression. (R7574).

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court applied the wrong legal standard to this case -- instead of recognizing that the "unpresented mitigation" consisted of facts that the defendant affirmatively concealed from counsel, the trial court decided this case as if the defendant had affirmatively **waived** the presentation of mitigation, and applied the reasoning of the *Koon/Lewis* line of cases. That legal conclusion was wrong as a matter of law. When the correct legal standard is applied (which recognizes that the defendant did not reveal certain facts that could arguably be used in mitigation to her attorneys or confidential expert), there is no basis for relief.

Moreover, the collateral proceeding trial court was wrong as a mater of law when it found that counsels' performance was deficient under *Strickland.* Trial counsel is not required to investigate possible mitigation that the client has told him is not there.

Finally, the trial court was wrong as a matter of law when it found that Larzelere had established the prejudice prong of *Strickland*. Had the evidence upon which the trial court granted relief (which had occurred many years before) been presented at trial, it would have opened the door for the presentation of extremely damaging evidence about the defendant's recent past, which included, *inter alia*, attempts to murder **two** of her

previous husbands.

ARGUMENT

THE COLLATERAL PROCEEDING TRIAL COURT GRANTED SENTENCE STAGE RELIEF BASED UPON WHAT IT ERRONEOUSLY FOUND TO BE A "WAIVER" OF THE PRESENTATION OF MITIGATION EVIDENCE.

The collateral proceeding trial court incorrectly evaluated the "ineffectiveness for failure to present mitigation evidence" claim when it applied the wrong legal standard. That court decided the claim as if the defendant had affirmatively "waived" the presentation of mitigation, and applied the *Koon/Lewis* line of mitigation waiver cases to this case. (R3369-3373). Rather than being an affirmative waiver of mitigation, **this case is one in which the defendant did not disclose pertinent facts to her attorneys**, and now, after having been sentenced to death, labels them constitutionally ineffective for not discovering those facts in spite of her obfuscation.[21] The collateral proceeding trial court ignored binding precedent when it granted relief on this claim and reached a result that is directly contrary to settled Florida law. This Court's review is *de novo*. *Stephens v. State*, 749 So. 2d 1028 (Fla. 1999).

[21] No evidence, and nothing in the record, supports the idea that the witness "waived" the presentation of mitigating evidence. This is not a "waiver of mitigation" case. *See, Power v. State*, 886 So. 2d 952, 961-62 (Fla. 2004). To the contrary, all of the evidence supports the conclusion that the defendant intentionally kept the "sexual abuse" evidence from her attorneys.

The Legal Standard when the Client Fails to Disclose Potential Mitigation.

The focus of the trial court's order granting relief seems to be on counsel's "failure" to present evidence that the defendant had been sexually abused as a child.[22] However, the trial court treated this claim as a "waiver" of the presentation of mitigation instead of what it is: evidence that was not presented because the defendant did not reveal it to her attorneys.[23] The two situations are not the same, and the trial court was wrong when it confused them -- those different situations are evaluated under different legal standards. At the most fundamental level, the trial court ignored the basic tenet of *Strickland v. Washington*, 466 U.S. 668 (1984), that the reasonableness of counsel's actions can be determined or influenced by what the client revealed. In this case, the client revealed **nothing**, and should not have been heard to complain.

In *Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000), the Florida Supreme Court addressed the same situation that is

---

[22] The evidence of alleged sexual abuse is in no way connected to the murder for which Larzelere was sentenced to death. There is no suggestion that she was abused by the victim. Assuming the truth of the abuse claims they are an unfortunate fact from Larzelere's past. However, that abuse is not linked to the murder in any way at all. The sentencing court recognized that fact, *infra*, but overlooked the same fact in granting relief.

[23] The defendant did not testify, and the testimony that this information was not provided to counsel (and the trial mental state expert) is uncontroverted. The trial court completely overlooked this aspect of the evidence.

presented in this case. The Court found that the defendant was not entitled to relief, stating:

> Finally, as noted above, Cherry failed to provide defense counsel with the names of any witnesses who would testify on Cherry's behalf. During the evidentiary hearing, trial counsel testified that Cherry did not provide him with names of any witnesses who could have provided mitigating evidence. Further, upon commencement of the penalty phase proceeding, trial counsel asked Cherry in open court whether he knew "of anyone who would be able to come in and substantiate mitigating grounds that the Court has enumerated here." Cherry responded in the negative. As the Supreme Court noted in *Strickland*, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. By failing to provide trial counsel with the names of witnesses who could assist in presenting mitigating evidence, Cherry may not now complain that trial counsel's failure to pursue such mitigation was unreasonable. *See id*. Accordingly, it appears the trial court correctly found that counsel was not deficient in failing to investigate and present mitigating evidence because Cherry refused to communicate with trial counsel or provide him with names of witnesses to call for mitigation purposes.

Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000); *Walton v. State,* 847 So. 2d 438, 459 (Fla. 2003); *See also, Power v. State*, 886 So. 2d 952 (Fla. 2004); *Marquard v. State/Moore* 850 So. 2d 417, 429-430 (Fla. 2003). If the defendant’s refusal to provide names of potential mitigation witnesses precludes a finding of deficient performance, then the refusal to communicate background information to counsel does so, as well.

> The Collateral Proceeding Trial Court Ignored Controlling Law.

Rather than applying *Cherry* (which was cited in the State's closing argument) (R2797), the trial court relied on *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002), for the proposition that counsel must first evaluate potential avenues of mitigation **before following the defendant's instructions to waive the presentation of mitigation evidence**. (R3372). That is the holding in *Lewis*, but that legal principle is inapplicable to the facts of this case -- the defendant in this case **did not instruct counsel not to present mitigating evidence**. The cases relied on by the trial court simply have nothing to do with this case. The procedural requirements that come into play in a true waiver of mitigation were not triggered in this case, and the trial court's reliance on the waiver cases was wrong. The extreme to which the trial court took this fallacious line of reasoning is demonstrated (as is the court's failure to understand the issue it was to decide) by the following sentence from the order: ". . . the State's argument that since Dr. Krop asked her about abuse during the evaluation, she knew the importance of such mitigation is not persuasive, as it is counsel's obligation to investigate all avenues and then fully advise Defendant of the ramifications of such mitigation." (R3372). What is omitted from the court's order is that the defendant **denied having been sexually abused when Dr. Krop asked her about it** -- it makes no sense at all, and is squarely

contrary to two decades of case law, to suggest that defense counsel is required to investigate something that has been denied by the defendant, especially when the defendant had also refused to reveal this information to defense counsel. (R5491, 5506, 5516).[24] As the United States Supreme Court pointed out in *Rompilla v. Beard*:

> Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there. *E.g., Strickland,* 466 U.S., at 699, 80 L. Ed. 2d 674, 104 S. Ct. 2052.

Rompilla v. Beard, 125 S. Ct. 2456, 2467 (2005). And, as the Eleventh Circuit has pointed out:

> At the start, we note that a defendant's Sixth Amendment rights are his alone, and that trial counsel, while held to a standard of "reasonable effectiveness," is still only an assistant to the defendant and not the master of the defense. . . . Because we recognize that a defendant must have this broad power to dictate the manner in which he is tried, it follows that, in evaluating strategic choices of trial counsel, we must give great deference to choices which are made under the explicit direction of the client.

Mulligan v. Kemp, 771 F.2d 1436, 1441 (11th Cir. 1985), *cert. denied*, 107 S.Ct. 1359 (1987). If choices made at the explicit direction of the client are entitled to “great deference,” and that is the law, it makes no sense at all to find that counsel

[24] As counsel pointed out during his testimony, the sexual abuse claims raised the additional question of why the defendant placed her own children in jeopardy by leaving them with her father, who allegedly abused her. (R5492-93).

were constitutionally ineffective because they did not know a fact that the client affirmatively kept from them. As the Fourth Circuit has observed,

> Trial counsel is too frequently placed in a no-win situation with respect to possible mitigating evidence at the sentencing phase of a capital case. The failure to put on such evidence, or the presentation of evidence which then backfires, may equally expose counsel to collateral charges of ineffectiveness.

Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991).[25] It is beyond dispute that trial counsel has only a finite amount of time for trial preparation -- it makes no sense to fault counsel for not pursuing a line of investigation that **the client had indicated was not productive**. *Id.,* at 1364. Just as "[i]t is difficult . . . to fault counsel for failing to obtain additional testimony when the client himself was not forthcoming with names," *Id.,* at 1365, it should have been difficult for the trial court to find counsel ineffective for not presenting sexual abuse testimony when his client has expressly denied it. The trial court reached a result that is contrary to the law, and, moreover, is contrary to common sense because it places the burden on trial counsel to investigate every possible line of mitigation even when the defendant has affirmatively given

[25] As discussed *infra*, the evidence that the trial court held should have been presented is extremely damaging to the defendant. Had that evidence been presented, the defendant would have no doubt claimed that counsel were ineffective for doing so.

counsel every reason to believe that such investigation will be unproductive. That "rule" does not effectuate the deference to trial counsel's independence that *Strickland* requires. The grant of relief should be reversed.

The Trial Court's Finding of Deficient Performance Ignores the Evidence.

Implicit in *Cherry* is the recognition that counsel's performance must be reasonable. The evidence in this case, which the trial court ignored, showed that counsel sought out **any** information that would be helpful to the defendant, and was unable to discover anything helpful. (R5481, 5491, 5492, 5506, 5516). The trial court's conclusion that counsel:

> did not spend sufficient time preparing for the penalty phase, never sought out Defendant's background, never sufficiently followed-up on the investigator's report outlining the abuse and family history, and never interviewed family members

(R3374) is not supported by the record. Trial counsel testified at length about his penalty phase preparation, which included imploring the defendant to "give me something" to use in mitigation. (R5516). To the extent that the court criticizes counsel for not following up on an investigator's report indicating abuse, that finding fails on the facts -- the confidential mental health expert specifically inquired about sexual abuse, and the defendant denied it. (Krop's testimony) (R5916, 5943). And, trial counsel was aware of what various

family members, including the defendant's sister and her children, Jessica and Jason, had to contribute to the case.[26] (R5481). **Significantly, the defendant did not testify at the evidentiary hearing.** Because that is so, trial counsels' testimony is unchallenged. With respect to the "investigative report," counsel testified that he had serious concerns about the accuracy of the information[27] contained in that report based upon the performance of the investigator, which had included releasing privileged documents to law enforcement. (R5465, 5467, 5479, 5868-69).[28] The trial court ignored all of this evidence, which is uncontroverted, and which shows that trial counsel's performance was not deficient under the deference owed to counsel by *Strickland.*

The Trial Court's Finding of Prejudice
Ignores the Evidence.

---

[26] As trial counsel explained, the sexual abuse claim could easily have backfired because the defendant allowed the person who had abused her access to Jessica and Jason. (R5493; 5862). Counsel testified that he had discussed sexual abuse with the defendant and she had denied it -- this was a primary reason that the McDaniel report was viewed as incredible. ((R5891). The defendant should not benefit from her tactic of telling different members of the defense team different, conflicting, things.

[27] In counsel's words, "I wouldn't believe a word he told me today." (R5844).

[28] This investigator was turning documents relating to this case over to law enforcement after he had been fired by defense counsel. (R5467). Counsel's distrust of this person and his work is certainly understandable.

The trial court overlooked the evidence that counsel's strategy was to portray the defendant as being essentially "normal," and that she "did everything she wanted and [the victim] paid for it." (R5874). As counsel put it, the value of the mental state testimony had to be weighed against the "skeletons that come in the closet." (R5489). The mental state testimony at the post-conviction hearing was that the defendant has various personality disorders (R7210; 7500), none of which are particularly compelling. Had that testimony been offered, it would have opened the door to the presentation of evidence of the defendant's prior bad acts (R5490), including attempts to kill **two** previous husbands (R5481) -- given the rather weak nature of the mental state testimony, compared to the defendant's exposure of her children to the person who had allegedly abused her as a child, the attempts on previous husbands' lives, and the drug and insurance fraud activities that defendant was involved in (R5498-5500), the defendant was not prejudiced within the meaning of *Strickland* by the non-presentation of the mental health testimony (which kept the door to the presentation of the defendant's bad acts closed). *Thompson v. Nagle*, 118 F.3d 1442. 1452 (11th Cir. 1997).

While present counsel has made it clear that he would try this case differently, that is not the standard under which ineffectiveness claims are judged. In addition to being

objectively reasonable in the first place, trial counsel's penalty phase strategy kept the detrimental information about the defendant from the jury and judge. The trial court was wrong when it found that the defendant was prejudiced because this damaging information was not presented, and the grant of relief should be reversed.

The Collateral Proceeding Trial Court Found that Counsel were Ineffective for not Presenting Damaging Information About the Defendant.

In finding that trial counsel were ineffective for not discovering the "sexual abuse evidence," the lower court found prejudice under *Strickland* even though the use of a mental state mitigation theory would have resulted in the admission of extremely damaging evidence about the defendant.[29] The defendant is not psychotic, is of average intelligence, and has narcissistic and hysteroid personality disorders. (R7500). Interpersonally exploitive behavior, a grandiose sense of self-importance, a sense of entitlement, and a lack of sympathy are some of the behavioral correlates of narcissistic personality disorder. (R7511). She has features of obsessive-compulsive personality disorder, and has some symptoms of post-traumatic stress disorder, but does not meet the criteria for that

[29] The trial court mistakenly focused on the agreement between the defense and State experts as to the claim of sexual abuse and went no further -- the court did not follow through by considering what the testimony actually was.

diagnosis. (R7500). The defendant specifically did not relate any of her PTSD symptoms to any prior sexual abuse. (R7560).

The State's mental state expert testified that the defendant produced an MMPI-2 profile suggesting antisocial traits, disturbed interpersonal relationships, and a significant degree of repressed anger. (R7486). There is nothing to support the notion that the defendant suffers from Post-Traumatic Stress Disorder, and that diagnosis is inappropriate because she does not meet the "reexperiencing" component of the diagnostic criteria. (R7491, 7531).[30] Various people who were interviewed for background information about the defendant described her as lying and manipulative, as "attempting to buy people," and as "devilish." (R7494). The defendant's daughter, Jessica, described her as lying and as being a bad mother, and her son, Jason, described a cocaine trafficking operation that he and his mother were involved in. (R7494, 7507). The defendant has repeatedly engaged in lying and manipulation, and has a high capacity for deception. (R7518, 7562, 7564, 7575).[31]

With respect to the legal issue of whether the statutory

[30] Reporting facts consistent with PTSD to her expert but not to the State's expert is consistent with the defendant's pattern of conning and manipulative behavior. (R7562). The defendant admitted having a book about PTSD. (R7561).

[31] For example, there is no support at all for defendant's claim that she has suffered a heart attack or has had Legionnaire's Disease. (R7564). The trial court's contrary finding has no support in the evidence.

mental mitigators are present, the State's expert testified that, in his opinion as a psychologist, they were not. (R7508). The defendant, and her sisters, described her life prior to the murder as "the best of times," and there is no suggestion at all that she was or is mentally ill. (R7808). She was not under the substantial domination of another, and her son commented that he couldn't picture his mother being dominated by anybody. (R7509). The defendant's efforts to locate a killer to murder her husband and to misdirect the investigation do not suggest impairment. (R7508).

Likewise, the defense mental state expert was aware that the defendant had tried to kill at least two of her previous husbands (R7338), and, despite that witness's efforts to sanitize those actions, it stands reason on its head to suggest that they would not have had an impact on the jury when the defendant had been convicted of killing her husband to collect $3.5 million in insurance proceeds. *See,* R 7323. The murder of Dr. Larzelere was not an impulsive crime. (R7321, 7352). The defendant has claimed to have a disabled child (Jason), and to have suffered from Legionnaire's disease, but there is no support in the record for those claims.[32] (R7330; 7378). The defendant has, on at least one occasion, "traded" sex to avoid a

[32] Jason enlisted in the United States Navy after the defendant's trial. (R7496-7497). That is inconsistent with any "disability."

traffic citation (R7333), and engaged in multiple extramarital affairs with the blessing of her husband. (R7356). The defendant is very adept at "conning" people. (R7353). While the defense expert is of the opinion that the defendant suffers from PTSD, that diagnosis is based largely on the self-report of the defendant, including her claim to re-experience the traumatic events. (R7343-46).[33] Impulse control problems are one of the behavioral correlates of PTSD. (R7350). The defendant is properly diagnosed with adult antisocial behavior. (R7374). Further, the defendant frequently lies, engages in dishonest behavior, and is exploitive of others. (R7393-97; 7419-20). Presenting this testimony to the jury, despite the view of the defense expert, would have been a disaster for the defense, and it is difficult to imagine any defense attorney who would not do everything possible to keep this sort of information away from the penalty phase jury. If the penalty phase theory of defense had been what present counsel advocates, all of this evidence would have been admissible -- none of it mitigates, in any fashion, the financially motivated murder for which the defendant was convicted.[34]

---

[33] Many of the symptoms of PTSD, such as dreams, are not observable, but rather are dependent on the report of the subject. *Diagnostic and Statistical Manual - Fourth Edition - Text Revision*, 463-68.

[34] The defendant seemingly had everything that she wanted, but

In granting relief on ineffectiveness grounds, the collateral proceeding trial court focused on the bare fact that the sort of mental state evidence presented in the Rule 3.851 proceeding was not presented at sentencing. That analysis ignores the prejudice component of *Strickland*, and resulted in an elevation of form over substance.[35] *Ferrell v. State*, 30 Fla.L.Weekly S451 (Fla. June 16, 2005). *See also, Evans v. Cabana,* 821 F. 2d 1065, 1071 (5th Cir. 1987). The state of the law is not that mental state evidence must always be presented -- instead, the correct prejudice analysis takes into account the actual nature of the "unpresented" testimony. In this case, because of counsels' "ineffectiveness," the jury did not hear that the defendant was a deceptive, conning, manipulative, dishonest person who involved her own son in drug trafficking activities. The jury did not hear that the defendant was able to spend money, travel, and engage in extra-marital affairs at will, apparently with no interference from her husband. Given that there has been no linkage of the sexual abuse to any mental

---

nonetheless wanted to collect $3.5 million in insurance proceeds. While the defendant's early life history does engender sympathy for her, it in no way mitigates the cold, callous way that this murder was planned over several months and then executed.

[35] The trial court's order comes close to requiring the presentation of mental state evidence in every case without regard for the effect of that evidence on the jury. Such an approach has been squarely rejected. *Davis, supra; Ferrell, supra; Evans, supra.*

condition, and in light of the negative information that would have come into evidence had a mental state-based mitigation strategy been pursued, it makes no sense at all, and is contrary to settled law, to find counsel constitutionally ineffective. Trial counsels' strategy was to present the defendant as essentially normal, and that is what they did -- by doing so, they kept all of the foregoing negative information from the jury. As this court held in *Davis*:

> Although the report does contain some potentially mitigating evidence regarding Davis's troubled upbringing and his farther's abusive behavior, **we determine that trial counsel's strategy of not presenting the report to the jury was reasonable given the highly negative information that was also contained in the report. Therefore, we hold that Davis's trial counsel was not deficient for failing to present Dr. Diffendale's report to the jury** and that Davis's claim was properly denied. *See Hodges*, 885 So. 2d at 348 ("In light of evidence demonstrating that counsel pursued mental health mitigation and received unusable or unfavorable reports, the decision not to present the experts' findings does not constitute ineffective assistance of counsel.")

Davis v. State, 2005 Fla. LEXIS 2052 (Fla. Oct. 20, 2005) (emphasis added). The trial court's order granting relief is contrary to settled law, and should be set aside.[36]

[36] In granting relief, the trial court fell into the trap of second-guessing trial counsel and giving the defendant a free pass for the original penalty phase. The fact remains that the penalty phase was tried as it was because of the defendant's own actions. When the first strategy failed, the defendant changed strategies, and the trial court allowed her to do so. That is not the law, and is contrary to any notion of common sense, accountability, or finality.

The Sexual Abuse Evidence was Before the Sentencing Court, Anyway.

Ironically, the issue of sexual abuse was in fact considered and rejected in the trial court's final sentencing order. Specifically, the sentencing court stated:

> Even had this Court found this allegation of child sexual abuse to be true, there is no proof that said abuse had an impact on the defendant such that 26 years later it influenced or caused or contributed to the commission of the capital felony by the defendant.

(R7354).[37] In granting relief based on the very evidence that was originally rejected, the trial court engaged in the very sort of hindsight-based evaluation of counsels' performance that is prohibited by *Strickland*. Putting aside for the moment the defendant's affirmative concealment of any evidence of sexual abuse, the trial court was wrong when it found that the very evidence it had previously considered **as true** and found insufficient to outweigh the multiple aggravating factors supported a finding of ineffectiveness of counsel (a finding which, itself, was based on a legally flawed evaluation).[38] Under the facts of this case, the trial court was wrong to grant

---

[37] The defendant was nearly 40 years old at the time of the murder. There is no allegation at all that she was ever abused in any fashion by the victim.

[38] The collateral proceeding trial court did not even acknowledge the foregoing portion of its own sentencing order. In a very real sense, the trial court's grant of sentence stage relief is no more than an improper re-opening of a final order.

relief.

CONCLUSION

The collateral proceeding trial court erroneously treated the defendant's refusal to reveal her history of sexual abuse as a "waiver of mitigation," and, by so doing, applied the wrong legal standard to the ineffective assistance of counsel claim that was before it. This case was not one in which the defendant instructed defense counsel not to present mitigating evidence, it was a case in which the defendant failed to disclose that evidence to counsel. Because that is so, the responsibility falls on the defendant under settled Florida law. The trial court applied the wrong standard, and should be reversed.

In addition to applying the wrong legal standard to the defendant's failure to reveal the potentially mitigating evidence, the trial court misapplied *Strickland v. Washington.* Assuming for the sake of argument that counsel's performance can ever be deficient based on facts that the defendant did not disclose, the facts of this case show that the defendant suffered no prejudice. The testimony of the mental state experts, which was only partially considered by the trial court, established that extremely damaging information about the defendant, including attempts to murder **two** prior husbands, would have come before the penalty phase jury had the newly-created mitigation strategy been followed. The trial court did

not consider the detrimental aspect of this strategy, but merely recited part of the evidence and concluded, *ipse dixit*, that the defendant was prejudiced. (R 3375). That is not what *Strickland* requires, and that conclusion is wrong as a matter of law. When the evidence from the post-conviction hearing is fairly considered, there is no reasonable probability of a different result had that evidence been presented at trial. The grant of sentence stage relief should be reversed and the death sentence reinstated.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **David Hendry,** CCRC – Middle**,** **Richard Kiley,** CCRC – Middle**,** and **April Kiley,** CCRC – Middle, Capital Collateral Regional Counsel – Middle 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, on this _____ day of October, 2005.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL