IN THE SUPREME COURT OF FLORIDA

CASE NO.
LT No. 16-1991-CF-1505

STEVEN EDWARD STEIN

Appellant

v.

STATE OF FLORIDA,

Appellee

ON APPEAL FROM THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

CORRECTED INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS

1. Procedural History

On February 7, 1991, Appellant was indicted by the grand jury in Duval County, Florida, charged with two counts of first-degree murder and one count of armed robbery. (R. 13)

On June 17, 1991, the Appellant's jury trial commenced, and, on June 20, 1991, immediately following guilty verdicts on all counts, the penalty phase commenced and a jury recommendation of death by a 10-2 vote was returned. (R. 916)

On July 23, 1991, Appellant was sentenced to death. (R. 942) The trial court subsequently entered its written findings. (R. 354)

On direct appeal, the Florida Supreme Court affirmed the convictions and sentence. Stein v. State, 632 So. 2d 1361 (Fla. 1994) Subsequently, the United States Supreme Court denied Mr. Stein's Petition for a Writ of Certiorari on October 3, 1994. Stein v. Florida, 513 U.S. 834, 115 S. Ct. 111 (1994).

On November 15, 1995, Appellant filed an initial motion for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. A first amended 3.850 motion was filed on June 21, 1996.

In May, 2002, Appellant filed his second amended Motion to Vacate the Judgments of Conviction and Sentences.

After a bifurcated evidentiary hearing, the lower court denied Mr. Stein's Motion.

This appeal follows.

2. Evidentiary Hearing Testimony (10/18/02)

On October 18, 2002, Chief Judge Moran presided over the evidentiary hearing to which the State had stipulated Mr. Stein was entitled based upon the allegations in his 3.850 that the State Attorney's file contained an unsigned draft of the sentencing order. (PC-R. 23-100)

Prior to the hearing, Appellant renewed his objection to the judicial bifurcation of the proceeding. (PC-R. 28)

At the evidentiary hearing, Judge Wiggins was a material witness. (PC-R. 72-83) The State Attorneys also testified subsequently, Judge Moran issued an Order denying relief because Appellant does not appeal the denial of relief on the Patterson claim. (PC-R. 18-46)

Appellant does appeal Judge Moran's Order refusing to disqualify Judge Wiggins from the case. However, pursuant to the authority of Lewis v. State, 565 S.G. 2d 437 (Ga. 2002), Appellant maintains that the hearing court erred in denying his Motion for recusal and disqualification of Judge Wiggins. (PC-R. 15-17)

3. Evidentiary Hearing Testimony (2/13/06 and 2/14/06)

Judge Wiggins presided over the continuation of the Appellant's evidentiary hearing held on February 13 and February 14, 2005 (PC-R3. 1)

At the 2006 evidentiary hearing, trial attorney Jeff Morrow testified that he defended Mr. Stein at the 1991 capital trial. (PC-R3. 3-10)

Mr. Morrow testified that he prepared for the death penalty case by talking to Frank Tasone a lot, although he apparently failed to note that time on his bill. (PC-R3. 13) He talked to Mr. Tasone, another Jacksonville lawyer who had a capital case, prior to the guilt and penalty phases. Id. Mr. Morrow recalled that there was "a big break" in Hardwick, Mr. Tasone's case, and Mr. Tasone asked Mr. Morrow for ideas. (PC-R3. 14) Mr. Morrow would bump into Mr. Tasone like this at the courthouse, and occasionally they discussed Stein and Harwick. Id. Mr. Morrow testified that he was mentioning this because Mr. Tassone couldn't come up with mitigation either. (PC-R3. 15) However, Morrow didn't recall that they discussed either investigation or what they'd done to try to locate some mitigation. (PC-R3. 16)

Stein was the first death penalty case that Mr. Morrow handled by himself. Id. As a public defender, he had sat in with Public Defender Chipperfield on Jackson but didn't do anything. Id. Also, he once had a non-capital murder case that

resulted in a second-degree verdict. Id. On Jackson, he had been a "go-fer" on the guilty-phase and didn't do much. (PC-R3. 17) Stein's was his first penalty-phase. Id.

Mr. Morrow testified that his investigation consisted of an initial call to Detective Scott to try to set him up for depositions and there were complications because Scott was ill and there were motions to perpetuate testimony. (PC-R3. 18) Then Mr. Morrow had a first investigator for a couple of weeks, before settling on Ken Montcrief, who located witnesses. (PC-R3. 18) However, the investigation didn't locate any witnesses. Id. Mr. Stein's sister and a girlfriend came to court so they testified. Id. The remainder of possible penalty-phase evidence in Mr. Morrow's file consisted of a bill for Mr. Stein's attendance at the Phoenix School of Technology, a technical school in Phoenix. (PC-R3. 19, Def. Ex. 2) Mr. Morrow recalled "getting stuff," presumably this record, from that school. (PC-R3. 25)

A review of Mr. Morrow's statement for services rendered indicated that he billed three-and-a-half hours for penalty-phase preparation. (Def. Ex. 1; PC-R3. 19-25) Further, Mr. Morrow testified that some of his previous talks with Mr. Stein's sister must have been at least partially penalty-phase related, as were his discussions with Dr. Krop. (PC-R3. 21-22) Finally, as with Mr. Morrow's on-the-fly discussions with Mr.

Tasone, Mr. Morrow engaged, at some point, in some "soul searching" with Attorney Hank Coxe on how to avoid the imposition of the death penalty on Mr. Stein. (PC-R3. 22-23)

Mr. Morrow testified that, while he billed for receiving and reviewing co-defendant's Christmas' Notice of Mitigating Circumstances, he didn't recall preparing such a Notice of Mitigation on behalf of Mr. Stein. (PC-R3. 29) After reviewing his statement again, he confirmed that he did not bill for the preparation of such a penalty-phase document. Id. He did bill for talking to Christmas' attorney, Mr. Chipperfield, about Mr. Christmas' Notice of Mitigation, however, confirming that Mr. Chipperfield was the more experience capital attorney. (PC-R3. 30)

Regarding a penalty-phase strategy, Mr. Morrow testified that his strategy was to humanize Mr. Stein before the jury and try to argue that Christmas was the shooter. Id. Mr. Morrow wanted to argue that, for all Mr. Stein knew, the plan was robbery only. (PC-R3. 31) Morrow hoped this guilt-phase defense would "blend over" into penalty-phase by the use of the sister and girlfriend. (PC-R3. 31-32)

Mr. Morrow conceded, however, that he had "no mitigation," which is why he commiserated with Mr. Tasone, who said that he also had no mitigation in Hardwick. (PC-R. 32) (Mr. Morrow also indicated that he is aware that Mr. Tasone was ultimately

determined to have rendered ineffective assistance of counsel in Hardwick. (PC-R3. 33) Mr. Morrow was actually worried by the fact that he had no mitigation to present. Id. He indicated that he should have gone to Phoenix, where Mr. Stein was from, and should have "basically talk[ed] to everybody." (PC-R3. 34) Mr. Morrow knew that Mr. Stein had only been in Jacksonville for a few months, for a short time at most. Id. Mr. Morrow knew that Stein was not from Jacksonville and spoke with Mr. Stein's sister in Phoenix. (PC-R3. 35) Nevertheless, neither Mr. Morrow nor his investigator went to Phoenix to investigate. Id. Tellingly, Mr. Morrow conceded that, were he on the case today, he would not merely go to Phoenix but would "camp out there." Id. Further, he testified that he should have done the same at that time. Id.

Mr. Morrow agreed that, clearly, if there were people who could present testimony about problems that Mr. Stein had growing up, possible problems with drugs or injuries, or things which shaped him as a person and as a human being, such testimony would be the sort which the defense should present to the jury in the penalty phase. Id. "That's what you're supposed to do," Mr. Morrow enthused, and, looking back, confirmed that he should have presented such evidence in this case. (PC-R3. 36)

As it was, the totality of the penalty-phase took a single day. Id. The penalty-phase began immediately upon the conclusion of the guilt-phase Id. Mr. Morrow did present the two girls who attended the trial, Mr. Stein's sister and girlfriend, Ms. Moss and Ms. Griffin. Id. In preparation, he'd talked to the sister months before and again right before she testified. (PC-R3. 37)

Consistent with his recollection that he had not prepared a life story or a life history of Mr. Stein, Mr. Morrow's primary recollection of the substance of the penalty-phase is that he did not have any mitigation to present. Id.

Regarding the guilt-phase, Mr. Morrow testified that he planned to concede that Mr. Stein was guilty of robbery despite the fact that the concession would mean that Mr. Stein was also guilty of felony murder. (PC-R3. 38) Mr. Morrow maintained that he talked to Mr. Stein about the fact that a concession of guilt to robbery would make Mr. Stein liable for felony murder and eligible for the death penalty. Id. Thus, Mr. Morrow's strategy was to concede guilt to robbery, but to argue for a lesser-included like second-degree murder on manslaughter. Id. In fact, Mr. Morrow admitted that his strategy was to "look for a jury pardon." (PC-R3. 39) Mr. Morrow maintained that the jury could find Mr. Stein guilty of robbery but not guilty of felony murder. Id. He did not, however, indicate how this could

happen, although this is precisely what he asked the jury to do in his closing argument. Id. Further, Mr. Morrow maintained that Mr. Stein agreed that Morrow could plead him guilty to robbery. Id.

Mr. Morrow initially indicated that he had many jail conferences with Mr. Stein. Id. However, the statement for services rendered doesn't corroborate "many" such conferences. (PC-R3. 39-40) Each time he went to court, Morrow testified, he saw Mr. Stein, although he simply couldn't recall every single time. (PC-R3. 41) Close to trial there would be a lot of times where they discussed the particular strategy of calling the sister and girlfriend. Id.

Mr. Morrow also discussed the guilt-phase strategy of conceding guilt and pleading Mr. Stein guilty to armed robbery felony murder. Id. Such discussion, Mr. Morrow asserted, was "very, very complex." Id. They discussed felony murder in great detail. Id.

Mr. Morrow's only guilt-phase strategy was to argue for a jury pardon. (PC-R3. 45). He disputed that the felony murder determination would be "automatic" upon conviction for armed robbery, which he was conceding, but admitted that a verdict of guilt on an armed robbery count and guilt on a count of second-degree murder instead of on a felony murder or first degree murder count would be inconsistent. (PC-R3. 46) Mr. Morrow did

not explain what sort of jury form or instruction could permit the outcome he was arguing for. Id.

Mr. Morrow did not advise Mr. Stein regarding the law on jury pardons, but told Mr. Stein that the jury pardon is a mechanism for society to express mercy and for the jury to try to find the good in people. (PC-R3. 46) Thus, "sometimes a jury pardon exists and, when it does, if there's a finding of second degree murder then the state will not be able to appeal and get a first-degree murder." Id. After such a discussion, Mr. Morrow recommended this strategy and, he testified, Mr. Stein agreed that the defense "May have to take the argument of felony murder and try to get a jury pardon." (PC-R3. 17) Further, such a strategy was not only a guilt-phase strategy, but was, according to Mr. Morrow, Mr. Stein's "best chance of not getting the death penalty." Id.

Apparently, then, Mr. Morrow propounded the jury pardon strategy as a way to obviate the need for mitigation as well as the only practicable guilt-phase defense, although Mr. Morrow did not think there was any realistic chance that Mr. Stein would not be convicted of armed robbery. (PC-R3. 47-48) In fact, Mr. Stein agreed that he asked the jury to convict Mr. Stein of the armed robbery count. (PC-R3. 48) The only alternative, Mr. Morrow testified, would be to "stonewall the state and make them prove every single element of the crime."

Id. However, Mr. Morrow thought then, and still believes, that the best strategy was to go for a jury pardon. (PC-R3. 49)

Mr. Morrow testified that the main thing that he knew about Mr. Stein's life was the "evidence of him being a skinhead," and of his "hate crimes," and "all that." (PC-R3. 50) He testified that Mr. Stein had racial tattoos, had a "hate crime" to his name, and had a prior murder in Arizona. Id. Nevertheless, conflictingly the Court records reveal that the only mitigation the Court found was "no significant criminal history." (PC-R3. 51) Further, Mr. Morrow acknowledged that the Court did not find that he had presented any credible mitigation. Id. Mr. Morrow also acknowledged that nothing about Mr. Stein's life was presented. Id.

Ultimately, Mr. Morrow reiterated, when asked if this dearth of mitigation was a shortcoming in the defense, that he wished he had, in fact, camped out in Phoenix. Id.

Finally, on direct examination, Mr. Morrow confirmed that, Mr. Stein's jury could not have been made aware that Mr. Christmas ultimately received a death sentence for the obvious reason that the Florida Supreme Court's reversal of the Christmas court's over-ride of the Christmas jury recommendation for life occurred after the Stein jury was released from service. (PC-R3. 53-54); Christmas v. State. 632 So. 2d 1368(Fla. 1994) In fact, Mr. Christmas was tried later then Mr.

Stein because, as the court tentatively recollected, the defense in Stein pushed to proceed more quickly. (PC-R3. 53)

Also, Mr. Morrow testified that, around the time of the Stein trial, Mr. Morrow's partner's wife was murdered. Id. Mr. Morrow denied that her victimization, though hitting close to home, effected his preparation or performance. Id.

Mr. Morrow did recall having to leave the hearing on Mr. Stein's Suppression Motion because he had to attend to a sick child. (PC-R3. 55) Mr. Morrow acknowledged that he did not get Mr. Stein's permission to leave. Id. Therefore, Mr. Stein was left unrepresented at the hearing, of an admittedly "crucial" motion. Mr. Morrow reasoned, "[I]f the confession came in, then I'd have to do the jury pardon. If it didn't come in, then "I would take a different strategy." Id. Here, Mr. Morrow clearly adopted the portrayal of the "jury pardon" approach as a "last ditch strategy" – "I mean that's something you use when you don't have anything else." (PC-R3. 56)

In response to the question of whether he could or should have sought a continuation of the suppression hearing, Mr. Morrow testified that there was an emergency call and that he had to leave, but he deferred to the record as to whether a continuance was requested. (PC-R3. 56-57) Mr. Morrow did apparently understand that "technically" Mr. Christmas' counsel

couldn’t have represented Mr. Stein for the duration of the hearing because of a conflict. (PC-R3. 57)

On cross-examination, Mr. Morrow reiterated that he had been a public defender for four years before the Stein trial. (PC-R3. 62) In that capacity, he observed the Public Defender’s capital trial attorneys. Id. After 1985, he made his living in private practice as a criminal defense attorney. (PC-R3. 63)

In the Stein case, he felt that the best strategy was to pursue a “jury pardon,” which he’d seen happen in a sexual battery case.

Regarding the investigation of possible mitigation, Mr. Morrow spoke with Mr. Stein and hired Mr. Moncrief (PC-R3. 65-66) Further, both Mr. Stein and Mr. Stein’s sister explained to him that Mr. Stein’s parents were too old to be involved. (PC-R3. 66) However, Mr. Stein’s sister had flown in from their home in Arizona, presumably to assist the defense.

Mr. Morrow testified that his research revealed a federal case that put the prerogative for calling the parents as witnesses on the defendant. (PC-R3. 67-67) Further, he talked to Mr. Chipperfield, Christmas’ attorney, about mitigation generally. Mr. Morrow also conferred with Hank Coxe about the penalty phase. (PC-R3. 67) Also, the investigator, Ken Moncrief, may have spoken to Kyle White, a friend of the defendant and a guilt-phase witness for the prosecution. Id.

Regarding innuendo that Mr. Stein may have been a skinhead or a white supremacist and accordingly may be blazoned with racial tattoos, their signature imprimatur, and that Mr. Stein's friends might be similarly decorated, Mr. Morrow denied that he spoke with any of them. (PC-R3. 69-71) Investigator Moncrief did, however, and, ultimately, Mr. Morrow did not believe any alleged noxious affiliations or their insignia became issues for the jury. Id.

Finally, on cross, Mr. Morrow testified that he hired Dr. Krop, a mental-health expert, but, as Krop reported nothing helpful, Krop was not used. Id.

Regarding the guilt-phase, Mr. Morrow testified that the prospective admission into the evidence of Mr. Stein's "confession," that he was involved in a robbery gone bad at the Pizza Hut, was rendered unavoidable by the denial of Mr. Stein's Motion to Suppress and forced Mr. Morrow and Mr. Stein to engage in extensive discussions about whether Mr. Morrow should concede guilt to the armed robbery and argue for "some sort of lesser conviction on a homicide or some sort of jury pardon." (PC-R3. 75-76) Ultimately, Morrow testified, that was the "whole strategy," including for the penalty-phase, in which Mr. Morrow hoped that the credibility he would gain with the jury by making the concession would cause the jury to recommend life. (PC-R3. 76)

Finally, Mr. Morrow explained why voluntary intoxication was not a viable defense, and, reviewing the bill which he submitted for payment, Mr. Morrow identified time on his bill which could have been spent on penalty-phase issues. (PC-R3. 78-87)

On redirect, Mr. Morrow clarified that Stein was his first capital case. (PC-R3. 92) Thus, prior to Stein, he had not handled a capital case or conducted a penalty-phase. Id. Tellingly, the only person he actually recalls talking to about possibly providing mitigation was Mr. Stein's sister, although the girlfriend was also called as a witness and he also spoke to Kyle White, who was hostile. (PC-R3. 92-93)

On re-cross, Mr. Morrow acknowledged that he added Investigator Moncrief to the brief mitigation witness list. (PC-R3. 93) Unfortunately, Dr. Krop provided "nothing helpful" toward mitigation. Id. Lastly, Mr. Morrow penalty-phase preparation included talking to attorneys Coxe and Chipperfield about mitigation. (PC-R3. 93-94)

Mr. Stein's sister, Sandra Bates, testified that she is approximately eight years older than Mr. Stein. (PC-R3. 105) In fact, she recalled the happy day when she and their parents rode to the orphanage to bring Steven home. (PC-R3. 106) Sandra recalled that she was the first of the family to hold him. Id. Her parents, she testified, waited thirteen years to have

children, first adoption her and then his. Id. The Steins were older when they adopted her, and much older when they adopted Steve. Id.

The Stein family, now four, lived in a small house in Maywood, New Jersey. (PC-R3. 107) Sandra simply adored Steve. Id. Every year they took a special family vacation. Id. His sister babysat for Steve after school, and the parents and Steve had a loving relationship. Id.

Then, in 1977, the family moved to Phoenix. (PC-R3. 108) Mrs. Stein was in ill health, with arthritis, and the family doctor recommended Arizona. (PC-R3. 109) Mr. Stein, the father, a warehouse manager, was initially unemployed when they moved, but Mrs. Stein's arthritis was relieved, although she subsequently became further afflicted with other illnesses. Id. Despite her poor health, she loved Steve "immensely." Id. She "adored him." Id.

As Sandra Bates testified, the Steins were two people who had lost nine babies naturally. Id. "They wanted children terribly and they opened their hearts" to Sandra and to Steve. (PC-R3. 109-110) Sandra had been adopted as a newborn, and, later, Steve was adopted at about eight months of age. (PC-R3. 110) Mrs. Stein told Sandra that Steve's mother was young and had just happened to be in the area when she went into labor and gave birth. Id. (See also Def. Ex. 3)

Steve was in elementary school when the Steins moved to Phoenix, and Sandra was in High School. Id. Sandra still recalled that she and her mom registered Steve for school. (PC-R3. 110-111)

The move was hard on their father, though, and money was very tight, Sandra recalled. (PC-R3. 111) Predictably, money pressures created stress in the house. Id.

Sandra got married when she was 18 and moved away for two years. (PC-R3. 112) Her husband was stationed in Guam. Id. However, she kept in touch with Steve through letters. (PC-R3. 113) They couldn't afford the phone, but Steve wrote all the time. Id. Sandra described Steve as a "sweet, young kid" who would draw pictures and mail them to her. Id. Once, she heard from her mother that he had had an appendicitis attack and felt terrible that she couldn't be there. Id.

After Sandra returned, she was divorced in 1981 or 1982. (PC-R3. 114) Eventually, she remarried and had a baby, but now she lived in Phoenix, so Steve would come over and stay with her son all the time. Id. They would play board games and family games, and she entrusted her son to Steve. Id.

Sandra testified about the horrific automobile accident that Steve was in. (PC-R3. 115) One passenger died, a girl, and Sandra recalled attending the funeral. Id. Steve suffered bad injuries as well, and Sandra saw him in the hospital with

his jaw wired shut. Id. Steve seemed "heartbroken." (PC-R3. 116) Because he couldn't attend the funeral, she represented him. Id.

Mrs. Stein's health had continued to deteriorate and she became diabetic and suffered renal failure, requiring dialysis. Id. The father also lost his health, suffering from emphysema. Id.

Sandra Bates recalled that she testified at Steve's trial, but she was not prepared by counsel to testify. (PC-R3. 118) She had flown in to be with Steve because their parents were too sick to travel. (PC-R3. 119) Steve had only moved to Jacksonville from Phoenix "maybe" six months earlier. Id. However, Steve's attorney never came to Phoenix and, in fact, had called her on short notice, within a week of when she needed to be there. (PC-R3. 120) Nevertheless, had she been asked at trial the questions which she was asked at the evidentiary hearing, she would have testified at trial in the same way. Id.

On cross, Sandra Bates reiterated that the Stein family was rich in terms of emotional support and love. (PC-R3. 120-121) Steve was raised in the same loving, caring family environment. (PC-R3. 121) Sandra testified to her love for Steve and that she tried to help him when she could. (PC-R3. 122)

Sandra testified that her father died in 1991 and that, at that time, he and his wife had been married over 40 years. (PC-

R3. 124) They raised her and Steve to the best of their ability. Id. Sandra recalled that Maywood, New Jersey was outside New York City and that it was full of families with young children, so Steve had many friends growing up, was a Cub Scout, and played sports. (PC-R3. 126) She remembered that Steve was always smart, and he got along well with the rest of the family. (PC-R3. 127)

She was 16 and Steve was 9 when they moved to Phoenix. Id. Subsequently, when Steve was 16, he was involved in a serious automobile accident. (PC-R3. 128) Steve got a settlement after the accident, with which he financed an education in automobile repair. Id. (See also Def-Ex. 2)

Sandra acknowledged how difficult it can be to raise teenagers, but, again, testified that her parents did their best with Steve. (PC-R3. 130)

On redirect, Sandra testified that Steve was a good brother, that she has many, many good memories of him, and that he was a good son for a long time. (PC-R3. 131)

Next, Donna Nolz testified that she knew Steve from grade school in Phoenix. (PC-R3. 133) She knew him for many years and recalled his kindness. (PC-R3. 134) He did miss a lot of school, she recalled, calling in sick, and he was so pale that occasionally the kids would tease him as an "albino." (PC-R3. 135-136)

Ms. Nolz and Steve developed a strong friendship, and she recalled that he was "peaceful" – not the type of boy who picked fights. (PC-R3. 136-137) People would be happy to see him. (PC-R3. 137) He didn't run with the popular crowd but he was not disliked. Id. She testified that it was always "worthwhile" to stop and talk to him. (PC-R3. 138) He was someone she was glad to run into. Id.

No one from his attorney's office ever came to Phoenix and talked to her at the time Steve was on trial, but she'd have told the jury what she knew had she been asked to. (PC-R3. 139)

On cross, Ms. Nolz reiterated her concern that Steve missed school and his parents didn't seem to care. (PC-R3. 141)

Shandra Elaine Mann testified that she met Steve Stein when she was 15 through offices of a girlfriend whose last name's been forgotten. (PC-R3. 145) At the time, Steve was laid up in bed after the bad car accident. (PC-R3. 145-146) She quickly fell in love with him and began staying with him at the house. Id. She admired his intelligence and his recklessness. (PC-R. 147) Also, he was very nice to her. Id. For a year, or a year and a half, she lived with Steve in his room. Id. His parents were there but they were much older and ill. Id. They didn't seem to mind what Steve did. (PC-R3. 148) Steve was given a lot of freedom. Id. What happened, Ms. Mann testified, was

precisely "what one would expect to happen." Id. They did, however, get married first. (PC-R3. 149)

When Ms. Mann told Steve that she was pregnant, she insisted that she wanted to give the baby up for adoption. (PC-R3. 148) Steve was very upset at the thought of giving the baby up, because he had been adopted himself Id. Steve wanted to keep the baby. Id. He'd often told her of the pain that he suffered from being given away by his mother. Id.

Eventually, although they were married, Shandra left Steve, found adoptive parents, and moved to another state to have the baby, which she gave up. (PC-R3. 149-150) At this point, she and Steve stopped speaking. (PC-R3.151) He was "devastated" and "hurt." Id. As a child of adoption he felt that he had been lonely, that he and his parents had no bond, and that he had been hurt by the whole process. (PC-R3. 151-152) He did not want to do that to anyone else. (PC-R3. 152) Eventually, the couple were divorced. Id. In one fell swoop, Steve had lost his wife and his child. Id.

Finally, Ms. Mann testified that the car wreck had left Steve in a great deal of pain and that he had permanent scars from it. (PC-R3. 153)

Shandra Mann, Steve's former wife, was never contacted by Steve's attorneys. Id. Had she been contacted, she would have

testified consistently with her testimony in the evidentiary hearing. Id.

On cross, Ms. Mann testified that Steve did not know where she went when she left to have her baby. (PC-R3. 156)

Next, Phillip (Doug) Bacha testified that he met Steve in grade school. (PC-R3. 162) At first, they were just acquaintances, but, eventually, particularly after Doug visited Steve in the hospital, they became friends. (PC-R3. 162) Steve's injuries were serious. (PC-R3. 162) Further, the woman who was killed was one of Steve's friends. (PC-R3. 163)

Steve and Doug spent a lot of time together after that. (PC-R3. 164) Doug visited the Stein house often. Id. They were neighbors, so Doug saw him on a regular basis. (PC-R3. 165)

According to Doug, Steve was highly intelligent, with interesting things to say and interesting viewpoints. Id. They also liked the same music. Id.

After Doug went in the Navy, Steve was one of the few people that he kept an open line of communication with through correspondence and phone calls. Id. Doug trusted Steve, and Steve was one of the few people who continued to stay in contact with him when he was in the military. Id.

Doug was not contacted by Steve's lawyer when the trial took place. Id. Had the Navy cleared him to testify, he would

have testified as he did at the evidentiary hearing. (PC-R3. 167)

On cross, Mr. Bacha testified that he saw Steve every time that he came home on leave from the Navy. (PC-R3. 169)

Doug challenged the prosecutor's innuendoes that Steve "had picked up some white supremacist attitudes or racist tattoos."

Doug was concerned, however, by Steve's increasing drug use and druggie friends. (PC-R3. 172) He counseled Steve, but acknowledged that Steve could be stubborn. (PC-R3. 173)

On redirect, Doug confirmed that Steve seemed to have drifted into the use of stronger drugs and that they had a negative effect on him. (PC-R3. 174)

Shari Roinestad testified that Steve and her son were the same age and were friends. (PC-R3. 185) Steve often would hang out at her house, and she got to know him. Id. She and Steve shared an interest in politics and poetry.

Ms. Roinestad thought that Steve was "deep" for his age, and they discussed politics, poetry, and loyalties. (PC-R3. 186) She appreciated Steve's good thoughts and good opinions. Id. She noticed how important loyalty was to Steve. Id.

Since Shari was divorced and had trouble sleeping, Steve would sometimes sit up with her late and talk. (PC-R3. 186-187) Steve would write songs which she thought were "depressing" – "about canyons and crying, and all that." (PCR-3. 187) Those

were “the echoes of dead Indians,” she said. Id. She thought his stuff was depressing and he thought her poetry was depressing. Id. She saw Steve and her son, Michael, as “fatherless boys,” They just needed somebody to make them stop…they were restless and always on the go, like they couldn’t sit still. Id. They just didn’t have any masculine influence, she lamented. Id. To her, it seemed as though they were looking for a father-figure. (PC-R3. 188) Steve’s father was elderly and, thus, uninvolved. He also had emphysema. Id. She’d see Steve almost every day. Id. He would share poetry with her in a way he didn’t with his own mother. (PC-R3. 189)

After the auto accident, Shari saw Steve in the hospital. Id. In fact, both her son and Steve were in several automobile accidents, and, as he got older, Steve just seemed to start self-destructing. Id. She suspected that, perhaps, he felt guilt over the girl’s death. Id. Steve told her that he would see the girl fly through the windshield over and over again. (PC-R3. 190)

Ms. Roinestad was not contacted by Steve’s trial lawyer, although, had she been, she would have testified. (PC-R3. 191) She is very fond of Steve, who was like a son to her, and believes he is a tenderhearted guy. Id.

On cross, Ms. Roinestad testified that she knew Steve throughout the eighties. (PC-R3. 192) Steve was around 18 when

she lost touch with him. (PC-R3. 193) However, she cared for him, and still does. (PC-R3. 194) He was like a son to her, and she did remain in contact with him all of these years. Id. The automobile accident in which the girl died had a "huge" impact on Steve. (PC-R3. 196) "Hauntingly sad" is how she described Steve's music – "it was just tears." Then, after the girl was killed in the accident, Steve "just started really losing it and…was doing drugs kind of to stop the scene from playing over and over in his mind." (PC-R4. 207)

Lastly, Michael Roinestad testified that he is Shari's son. (PC-R4. 208) Steve and he were good friends for years. (PC-R4. 210) Their interest in cars and cruising drew them together. Id. He was friends with Steve when Steve took the class to become a mechanic. Id. Steve took the class after they'd talked bout opening a garage together. Id.

Michael testified that Steve connected with people well but was very guarded with himself, as if he had an emotional wall. (PC-R4. 212) Michael felt he was the only one who actually breached that wall. Id. Regarding the automobile accident, Michael explained that it was his former girlfriend who was killed. (PC-R4. 213)

Both Steve and the girl were passengers and Michael and the girl had recently broken up. (PC-R4. 214) The girl, Diane, was

not Steve's girlfriend, but Steve and she were "working on that." (PC-R4. 215-216)

Steve's jaw was shattered on one side, his collarbone was broken, and Michael noticed that Steve's eyes seemed to have darkened from light blue to a deep purple. (PC-R4. 216) Steve had "a ton of injuries" and "was messed up for a long time." Id. Steve was also prescribed a lot of painkillers, as he was in intense pain. Id.

Summarizing their friendship, Michael testified that, as a friend, Steve would do anything to help you with any problem you had. Id. He was personable and Michael would often be surprised by the unlikely people Steve would engage in conversation. Id. He was interested in people, but at a distance. (PC- R4. 217-218) Michael found this aspect of Steve's personally to be paradoxical. (PC-R4. 218) Steve would strike up conversations with people he was unlikely to be friends with, or so it seemed to Michael. Id. However, everyone he met seemed to like him. Id. He could connect with people. Id.

On their teenage rebellious years, Michael described their conduct as non-malevolent but foolish. Id. Michael didn't have a father-figure and Steve's was not a "model." Not surprisingly, he did not see their search as for a father, as his mother described. He saw their behavior as boys having fun… "typical teenage stuff." (PC-R4. 219)

Michael described Steve's dad as older and ill, but the father genuinely loved Steve, and Steve loved his parents. (PC-R4. 220) When they were sick, it would devastate Steve. Id.

Finally, Michael would have testified at trial had he been contacted.

On cross, Michael disputed the prosecutor's attempts to paint Mr. Stein as a Nazi. (PC-R4. 228) In fact, he recalled that Steve was friends with both blacks and whites. (PC-R4. 229; PC-R4. 233) Actually, as the Court noted, the racial argument was not an issue at trial. (PC-R4. 229)

Finally, Appellant entered into evidence three exhibits and by stipulation, the record in the case of Marc Christmas.

The first exhibit is Attorney Morrow's Statement for Services Rendered. (PC-R. 198-9) Secondly, the transcript from the Phoenix Institute found in Mr. Morrow's file. (PC-R. 200) Thirdly, a document the defense had obtained from the Children's Aid and Family Services in New Jersey. (PC-R. 201-3)

The State entered a sworn affidavit and statement by Marc Christmas. (PC-R. 205-225)

The Phoenix Institute Certificate and Children's Aid documents contain significant mitigation not used at trial. It shows the desperate circumstances of Mr. Stein's birth mother and of his conception. The attorney's bill provides a glimpse of what was done, and not done, by counsel.

The Christmas statement shows that Mr. Christmas is not credible but was surely at least, if not more, culpable than Mr. Stein. He was the instigator and motivator. There would have been no crime but for him.

4. Hearing Court's Order – Judge Moran

Judge Wiggins granted Appellant an evidentiary hearing on Claim III of his 3.850, which alleged that Appellant had discovered in the State's Attorney's files an unsigned Sentencing Order, creating a prima facia claim that the state attorney may have improperly assisted in drafting the Sentencing Order in violation of Patterson v. State, 513 So. 2d 1257 (Fla. 1987) and Card v. State, 803 So. 2d 613(Fla. 1994).

Surprisingly, in its Response to the Second Amended 3.850, the State had conceded that a hearing on Claim III was required. (The State's Response is not in the Record.)

Because Judge Wiggins would be a material witness in Appellant's evidentiary hearing on his post-conviction motion, on September 9, 2002, Appellant moved to recuse or disqualify Judge Wiggins. (PC-R. 1-6) Judge Wiggins denied that motion as to all claims except the Patterson claim. (PC-R. 7-8)

On the Patterson claim, Judge Wiggins requested that the Chief Judge, Judge Moran, reassign the hearing of that claim to another circuit court judge. Id. Subsequently, Judge Moran

reassigned the claim to himself and set a date for an evidentiary hearing. (PC-R. 9-10)

On October 18, 2002, Judge Moran presided over an evidentiary hearing of the Patterson claim, finding that Judge Wiggins had written the Sentencing Order without any input from the State. (PC-R. 18-22)

Appellant is not appealing Judge Moran's Order denying relief on the claim. He is, however, appealing the Denial of his Motion to Disqualify Judge Wiggins, who was a material witness. (PC-R. 1-6); PC-R. 7-8)

5. Hearing Court's Order – Judge Wiggins

On May 2, 2006, Judge Wiggins entered an "Order Denying Defendant's Motion for Post Conviction Relief." Appellant appeals the court's findings of fact and conclusions of law regarding the ineffective assistance of counsel claim in the guilt-phase of the trial for conceding guilt by undertaking a "jury pardon" strategy, the ineffective assistance of counsel claim in the penalty-phase for counsel's failure to prepare and present mitigation, and the claim that newly discovered evidence shows that Mr. Stein's death sentence is disproportionate to the life sentence of the equally, or less, culpable Christmas.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that an oral argument be ordered in this case because the State is seeking the sanction of death, and because this Court's special Constitutional role in Florida's capital jurisprudence should militate it toward providing Appellant the fullest access possible to press his claims before this Court, including the historically crucial opportunity for Appellant's counsel to argue his case to the Court.

REFERENCE KEY

The following abbreviations are used to reference the record that comprises this case:

(R) – citations to the direct appeal record;

(PC-R) – citations to post-conviction record;

(PC-R3.) – citations to Volume 3 of post-conviction record;

(PC-R4.) – citations to Volume 4 of post-conviction record;

(EX) – Post-conviction exhibit;

(Def. Ex) – defendant's post-conviction hearing exhibit;

State's EX)– state's post-conviction hearing exhibit;

(p.) – page;

(pp) – pages; and

(T.) – transcript

Other citations will be identified to the extent necessary for clarification.

SUMMARY OF ARGUMENTS

Argument I

Judge Wiggins, presiding circuit court judge, erred in failing to recuse himself when he became a material witness in the evidentiary hearing. Lewis v. State, 565 S.G. 2d 437 (Ga. 2002)

The lower court erred by failing to consider the Motion to Disqualify objectively from a reasonable Appellant's perspective. When the judge is a material witness in the case, and has been examined by Appellant's counsel on a claim that the Judge improperly permitted the State to write the sentencing order, the reasonable defendant would believe that he would suffer negative repercussions from the court.

Further, Florida Rule of Judicial Administration 2.160 actually specifies that a basis for disqualification is that the judge is a material witness for a party to the cause. Rule 2.160 (d)(2), Fla. R. Jud. Admin.

Although there is no specific showing of prejudice and Appellant does not further contest the underlying claim, the lower court erred in denying his Motion to disqualify the judge, and Appellant is entitled to a new hearing of all claims in front of an untainted Tribunal.

Argument II

The hearing Court erred in failing to find that the trial lawyer rendered ineffective assistance of counsel in the guilt-phase of the trial in that the lawyer's only strategy of defense in the guilt-phase was to seek a "jury pardon" by conceding guilt and making Appellant death-eligible.

A "jury pardon" is not a viable defense to the charges, and counsel's admission that this was his strategy and that he sold it to Appellant as the best strategy for the guilt-phase constituted deficient performance which prejudiced the outcome. Harding v. State, 736 So. 2d 1230 (2nd DCA 1999). Once the attorney conceded guilt to robbery as part of his "jury pardon" strategy, Appellant's conviction and death sentence were certain.

Because counsel, by his own testimony, obtained Appellant's consent by portraying "jury pardon" as a viable strategy, Appellant's consent was meaningless.

The hearing court also erred in failing to find that trial counsel's performance in the penalty-phase constituted ineffective counsel. See, Strickland v. Washington, 466 U.S. 668(1984). The trial lawyer failed to investigate the Appellant's family and friends in Phoenix, where Mr. Stein had

lived the majority of his life, and, thus, failed to uncover substantial lay witnesses mitigation.

Had he fully investigated, there is a reasonable likelihood Mr. Stein would have received a life sentence.

Argument III

The trial judge's sentencing order in Marc Christmas' case constitutes Newly Discovered Evidence and establishes that Christmas was more culpable than or at least as culpable as Mr. Stein, and, thus, that Mr. Stein's death sentence is not proportionate and cannot withstand Constitutional scrutiny.

First, if the jury were aware that Christmas got life, there is a probability under Jones v. State that Mr. Stein would get life.

Secondly, Mr. Stein's death sentence cannot withstand this Court's proportionality and relative culpability analysis, where the same trial judge explicitly found that the co-defendant was equally culpable or more culpable than Mr. Stein.

ARGUMENT I

The Lower Court Erred In Denying Appellant's Motion To Disqualify Judge Wiggins In Violation Of Appellant's Right To Due Process And A Fair Trial When Judge Wiggins Testified As A Material Witness

1. Standard of Review

The standard of review is whether the circuit court judge abused his discretion in denying Mr. Stein's Motions to Disqualify the judge. King v. State, 840 So. 2d 1047, 1049 (Fla. 2003); Qince v. State, 732 So. 2d 1059, 1062 (Fla. 1999) The issue, then, is, whether there is substantial, credible evidence in the record to support the court's ruling. However, if the sufficiency of the Motion is the basis of denial, then that question of law is reviewed de novo. Barnshell v. State, 843 So. 2d 836, 843 (Fla. 2000)

2. The Lower Court's Order

The circuit court ruled that Appellant's motion to disqualify him was facially insufficient (PC-R. 103-104) However, the Motion itself rebuts the court's ruling. The Motion argues that Rule 2.160(d)(2), FL. R. Jud. Admin., specifically addresses the instant circumstances. Further, the dispositive standard for resolution of the disqualification question is whether a reasonable defendant would believe that the presiding judge would be biased. The rule of Judicial Administration could, therefore, arguably, raise a presumption

which the record does not rebut. The defendant arguably challenged the judge's credibility and his honesty, since the defendant disputed his testimony, so a reasonable defendant would perceive that the tribunal which will determine his fate is tainted by his examination of the judge.

The Motion clearly and fully sets forth Appellant's basis for seeking disqualification of the judge, so the Court's Order, to the extent that it is based on the adequacy of the pleading, is erroneous.

3. Judge Wiggins, A Material Witness, Must Disqualify Himself.

Where the Judge is a "material witness," that judge may not preside over the case and must disqualify himself. Lewis v. Georgia, 565 S.G. 2d 437 (GA. 2002)

In the instant case, Judge Moran's Order, denying Appellant's Patterson claim, relies heavily upon the testimony of Judge Wiggins. (PC-R 49-61) Judge Wiggins testified that he did not write the Sentencing Order or get any help from the State in preparing the Order. Id.

Without Judge Wiggins' testimony, the testimony of George Bateh, the State Attorney, conflicts with the record. (PC-R. 35-46) However, the best evidence that Judge Wiggins wrote the Sentencing Order is his frank testimony that he did just that. (PC-R. 49-61)

As the crucial consideration is what effect on the reasonable Appellant would the judge's testimony under oath have on Appellant's belief that he is receiving a fair trail and unbiased consideration by the witness-judge of his <u>other witnesses and other claims</u>. The bifurcation of the <u>Patterson/Card claim</u> from the other claims, while, perhaps, an admission by Judge Wiggins of the need to disqualify himself <u>at least</u> on the limited basis of not presiding over the claim over which he is a witness, has no effect upon the crucial issue of the Appellant's confidence in the Judge to consider his other claims without bias. After all, the Judge may resent the allegation about which he testified, may draw inferences regarding Appellant's and Appellant's counsel's credibility and may, <u>in Appellant's mind</u>, render a judgment that is tainted by revenge or resentment. Admittedly, Appellant cannot prove that this is the case, but the appearance and perception of bias will undoubtedly taint any negative findings of fact and conclusions of law.

A motion is legally insufficient if it fails to demonstrate that the defendant has an objectively reasonable, well-grounded fear of not receiving a fair and impartial trial. <u>Arbeleaz v. State</u>, 898 So. 2d 25, 41(Fla. 2005). Thus, the fact that the Rule on Disqualification memorializes the judge-as-witness

circumstance supports the reasonableness and objectivity of Appellant's fear.

4. Conclusion and Relief Sought

Based on the foregoing this Court should disqualify Judge Wiggins and remand the case for a hearing before another Judge on the remaining claims.

ARGUMENT II

The Lower Court Erred In Denying Appellant Relief on His Claim that Trial Counsel Provided Constitutionally Deficient, Ineffective Assistance of Counsel In Violation of the Fifth, Sixth, Eight, and Fourteenth Amendments to the U.S. Constitution and of the Corresponding Provisions of the Florida Constitution

1. Standard of Review

This Court must employ a mixed standard for review of the Circuit Court's Order on an ineffective assistance of counsel claim, deferring to the circuit court's factual findings, to the extent that they are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. Stephans v. State, 748 So. 2d 1028, 1032 (Fla. 1999); Sochor v. State 883 So. 2d 766, 771-72 (Fla. 2004)

2. The Lower Court's Order

The circuit court's findings, that trial counsel's performance in the guilt-phase of the trial was effective erroneously concludes that counsel's use of an improper strategy (the jury pardon) was permissible because he adequately advised Appellant what the strategy was and Appellant consented. The Order fails to address the dispositive point of the propriety of counsel's use of the jury pardon as a viable strategy.

Secondly, regarding the penalty-phase performance, the court's findings regarding the underlying facts are not supported by competent, substantial evidence.

3. The Strickland Standard

In Strickland v. Washington, 466 U.S. 668 (1984), this Court has held that for an ineffective assistance of counsel claim to be successful, two requirements must be satisfied: first, the claimant must identify particular acts or omissions of counsel that do not meet prevailing professional standards; and, secondly, the clear, substantial deficiency shown must have been prejudicial. Maxwell v. Wainwright, 490 So. 2d 927, 932 Fla. 1986).

In the penalty-phase, trial counsel has an obligation to conduct a reasonable investigation. Strickland, 466 U.S. at 691; see also Wiggins v. Smith, 539 U.S. 510, 521 (2003). Counsel's performance should be judged by the reasonableness standard under prevailing professional norms. Id. There is, also, a strong presumption of effectiveness. See Strickland, 466 U.S. at 690.

The Court should avoid the distorting effect of hindsight, should consider the circumstances of the challenged conduct by counsel, and should evaluate the conduct from counsel's perspective at the time. Id. at 689. The burden is the defendant's to overcome the presumption that, under the

circumstances, the challenged conduct by counsel might be sound trial strategy. Id.; see also Michel v. Louisiana, 350 U.S. 91, 101 (1955) As this Court has written consistently, "Judicial scrutiny of counsel's performance must be highly deferential." Id., see e.g. Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.") The U.S. Supreme Court consistently cites the ABA guidelines for Performance of Counsel in Death Penalty cases. Peede v. State, No. SC04-2094 (Fla. Jan. 11, 2007)

In sum, the two "prongs" of Strickland are deficient performance and prejudice. Importantly, both prongs must be satisfied for the defendant to prevail. To meet the prejudice prong, the clear, substantial deficiency shown must be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. Maxwell, 490 So. 2d at 932.

4. IAC – Guilt Phase

Counsel acknowledged that his trial strategy was to attempt to secure a "jury pardon." Such a strategy falls even further outside the permissible bounds of attorney action than the gratuitous concession of guilt which has heretofore been raised

as a "Nixon" claim. See Nixon v. State, SC 92006, SC 93192 and SC01-2486 (Fla. 2006) and Harvey v. State, No. SC 95075 (Fla. 2006) (The Strickland, not Cronic, test is applicable to concession of guilt cases.) In this case, counsel's concession of guilt and consent thereto is framed as part of a legitimate trial strategy known as a "jury pardon" or "jury nullification." Such a strategy, Appellant contends, is intrinsically improper.

In Harding v. State, 736 So. 2d 1230 (2nd DCA 1999), the Florida District court held that an argument asking the jury to disregard the law was improper. Harding v. State, 736 So. 2d at 1230. Defense counsel cannot ask the jury to disregard the law. Id. citing, Urbin v. State, 714 So. 2d 411 (Fla. 1998) (Prosecution's argument, that defendant sentenced to life could still be released though ineligible for parole because law could change asked judge to disregard the law, was improper.) This court wrote that an "ignore the law" argument has no place in a trial. Urbin v. State, 714 So. 2d at 20.

Harding concludes that a defense argument grounded in the jury's "pardon power" similarly "has no place" in a trial. Harding v. State, 736 So. 2d 1230. Thus, defense counsel may not argue jury nullification in closing argument. Id. citing U.S. v. Trujillo, 713 F. 2d 102, 106 (11th Cir. 1983) Harding concludes,

> In arguing the law to the jury, counsel is

> confined to principles that will later be incorporated and charged to the jury. The jury in this case was properly instructed on their duty to follow the law as stated in the jury instructions. The jury nullification argument would have encouraged the jurors to ignore the court's instruction and apply the law at their caprice… [N]either the court nor counsel should encourage jurors to violate their oath.

Harding v. State, 736 So. 2d at 1230.

In the instant case, counsel's strategy, which the lower court found Appellant had agreed to, was improper. Further, counsel did not advise Appellant of that, rendering consent meaningless. Counsel testified to his jury-pardon strategy at length. (PC-R3. 5.104)

Regarding the guilt-phase, Mr. Morrow testified that he planned to concede that Mr. Stein was guilty of robbery despite the fact that the concession would mean that Mr. Stein was also guilty of felony murder. (PC-R3. 38) Mr. Morrow maintained that he talked to Mr. Stein about the fact that a concession of guilt of robbery would make Mr. Stein liable for felony murder and eligible for the death penalty. Id. Thus, Mr. Morrow's strategy was to concede in said manner but, without a basis at law, to argue for a lesser included like second-degree murder or manslaughter. Id. In fact, Mr. Morrow belatedly admitted that his strategy was to "look for a jury pardon." (PC-R3. 39)

Mr. Morrow maintained that the jury could find Mr. Stein guilty of robbery but not guilty of felony murder. Id. He did not, however, indicate how this could happen, although this is what he asked the jury to do in his closing argument. Id. Further, Mr. Morrow maintained that Mr. Stein agreed that Morrow could plead him guilty to robbery. Id.

Mr. Morrow initially indicated that he had many jail conferences with Mr. Stein. Id. However, the statement for services rendered doesn't corroborate "many" such conferences. (PC-R. 39-40) Each time he went to court, Morrow testified, he saw Mr. Stein, although he simply couldn't testify to every single time. (PC-R3. 41) Close to trial there would be a lot of times where they discussed the particular strategy of calling the sister and girlfriend. Id. Mr. Morrow also discussed the guilt-phase strategy of conceding guilt and pleading him guilty to armed robbery felony murder. Id. Such discussion, Mr. Morrow asserted, was "very, very complex," Id.

Mr. Morrow's only guilt-phase strategy was to argue for a jury pardon. (PC-R3. 45). He disputed that the felony murder determination would be "automatic" upon conviction for armed robbery, which he was conceding, but admitted that a verdict of guilt on an armed robbery count and guilt on a count of second-degree murder would be inconsistent. (PC-R3. 46) Mr. Morrow does

not explain what sort of jury form or instruction could permit the outcome he was arguing for.

Mr. Morrow did not advise Mr. Stein regarding the law on jury pardons, but told Mr. Stein that the jury pardon is a mechanism for society to express mercy and for the jury to try to find the good in people. (PC-R3. 46) Thus, "sometimes a jury pardon exists and, when it does, if there's a finding of second degree murder then the state will not be able to appeal and get a first-degree murder." Id. After such discussion, Mr. Morrow recommended this strategy and, he testified, Mr. Stein agreed that the defense "May have to take the argument of felony murder and try to get a jury pardon." (PC-R3.17) Further, such a strategy was not only a guilt-phase strategy, but was, according to Mr. Morrow, Mr. Stein's "best chance of not getting the death penalty." Id.

Apparently, then, Mr. Morrow is propounding the jury pardon strategy as obviating the need for mitigation as well as the only practicable guilt-phase defense, although Mr. Morrow did not think there was any realistic chance that Mr. Stein would not be convinced of armed robbery. (PC-R3. 47-48) In fact, he agreed that he asked the jury to convict Mr. Stein of the armed robbery count. (PC-R3. 48) The only alternative, Mr. Morrow testified, would be to "stonewall the state and make them prove every single element of the crime." Id. However, Mr. Morrow

thought then, and still believes, that the best strategy was to go for a jury pardon. (PC-R3. 49)

Mr. Morrow testified that the main thing that he knew about Mr. Stein's life was the "evidence of him being a skinhead," his "hate crimes," and "all that." (PC-R3. 50) He testified that Mr. Stein had racial tattoos, had a "hate crime" to his name, and a prior murder in Arizona. Id. However, the Court records reveal that the only mitigation the Court found was "no significant criminal history." (PC-R3.51)

Essentially, Attorney Morrow's "strategy" was not a strategy at all. Such representation must be deficient. Further, this situation is even closer than Nixon or Harvey to the client not having an attorney at all, which this Court initially found convincing in Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) Under such a scenario, the application of the "per se rule" of United States v. Cronic, 466 U.S. 648 (1984) is justified. But see, Florida v. Nixon, 543 U.S. 175 (2004)

Where an attorney goes to the lengths that Mr. Morrow did to convince his client that the client's best chance is to indulge a strategy which is improper, the client not only did not have a counsel considering and arguing viable strategies but had a counsel advocating a strategy which not only could not succeed but which also automatically made the client eligible

for death. Also, the argument asks the jury to violate its oath to follow the law given by the court. See Harding, supra.

Had the client offered no defense and completely declined representation, the result would be no different than the best result his counsel could have "helped" him to obtain. Because Mr. Stein, de facto, did not have the benefit of guilt-phase counsel, the prejudice to him is clear: he was completely deprived of his right to counsel. These facts are more egregious than those in Nixon v. Singletary and Florida v. Nixon. Here, counsel was, arguably, urging his client to commit a fraud upon the court by dressing the illusion of a defense up as a "strategy."

5. IAC – Penalty Phase

Unlike the guilt-phase, Mr. Morrow simply did not prepare for a penalty-phase. Without undertaking a penalty-phase investigation, he put on Mr. Stein's sister and his girlfriend without preparation because they were at the trial. The lower court fails to give proper consideration to the quality of the penalty-phase evidence presented at the evidentiary hearing.

Had counsel presented this evidence, which would give the jury a three-dimensional portrait of Mr. Stein, the young man whose life was in their hands, particularly when the jury considered that Marc Christmas was serving life (although the court found him as equally or more culpable), it is reasonably

probable that Mr. Stein would have received a life sentence. See, Hildwin v. State, 654 So. 2d 107, 109 (Fla. 1995) (penalty-phase counsel ineffective because he failed to unearth a large amount of mitigating evidence.)

Regarding a penalty-phase strategy, Mr. Morrow testified that his strategy was to humanize Mr. Stein before the jury and try to argue that Christmas was the shooter. Mr. Morrow wanted to argue that for all Mr. Stein knew, the plan was robbery only. (PC-R3. 31) Morrow hoped this guilt-phase defense would "blend over" into penalty-phase by the use of the sister and girlfriend. (PC-R3. 31-32) Again, Morrow is all argument, no facts.

Mr. Morrow conceded that he had "no mitigation," which is why he commiserated with Mr. Tasone, who said that he had no mitigation in Hardwick. (PC-R3. 32) (Mr. Morrow also indicated that he is aware that Mr. Tasone was ultimately determined to have rendered ineffective assistance of counsel in Hardwick. (PC-R3. 33)

Mr. Morrow was actually worried by the fact that he had no mitigation to present. Id. He indicated that he should have gone to Phoenix, where Mr. Stein is from, and should have "basically talk[ed] to everybody." (PC-R3. 34) He knew that Mr. Stein had only been in Jacksonville for a few months, for a short time at most. Id. Mr. Morrow knew that Stein was not

from Jacksonville and spoke with Mr. Stein's sister in Phoenix. (PC-R3. 35) Nevertheless, neither Mr. Morrow nor his investigator went to Phoenix to investigate. Id. Tellingly, Mr. Morrow conceded that, were he on the case today, he would not merely go to Phoenix but would "camp out there." Id. He knows he should have done the same at that time. Id.

Mr. Morrow agreed that, clearly, if there were people who could present testimony about problems that Mr. Stein had growing up, possible problems with drugs or injuries, and things which shaped him as a person and as a human being, such testimony would be the sort which the defense should present to the jury in the penalty phase. Id. "That's what you're supposed to do," Mr. Morrow enthused, and, looking back, confirmed that he should have presented such evidence in this case. (PC-R3. 36)

As it was, the totality of the penalty-phase took a single day. Id. It began immediately upon the conclusion of the guilt-phase Id. Mr. Morrow did present the two girls who attended the trial, Mr. Stein's sister and girlfriend, Ms. Moss and Ms. Griffin. Id. In preparation he'd talked to the sister months before and again right before she testified. (PC-R3. 37)

Consistent with his recollection that he had not prepared a life story or a life history of Mr. Stein, Mr. Morrow's main recollection of the substance of the penalty-phase is that he

did not have any mitigation to present, other than hoping to "humanize" Mr. Stein with the sister's and girlfriend's testimony. Id.

Mr. Morrow testified that the main thing that he knew about Mr. Stein's life was the "evidence of him being a skinhead," and of his "hate crimes," and of "all that." (PC-R3. 50) This information, however, was not true. Further, Mr. Morrow acknowledged that the Court did not find that he had presented any credible mitigation. Id. Tellingly, Mr. Morrow acknowledged that nothing about Mr. Stein's life was presented to the jury. Id.

Mr. Morrow confirmed that, at no time, could Mr. Stein's jury have been made aware that Mr. Christmas ultimately received a death sentence for the obvious reason that the Florida Supreme Court's reversal of the Christmas court's (Judge Wiggins presiding, there as well as over the Stein trial) over-ride of the Christmas jury recommendation occurred after the Stein jury was released from service. (PC-R3. 53-54) In fact, Mr. Christmas was tried much later then Mr. Stein because, as the court tentatively recollected, the defense in Stein pushed to proceed more quickly. (PC-R3. 53)

Available mitigation was plentiful, Mr. Stein's sister, Sandra Bates, recalled the happy day when she and their parents rode to the orphanage to bring Steven home. (PC-R3. 106) She

recalled that she was the first of the family to hold him. Id. Her parents, she testified, waited thirteen years to have children, first her and then him. Id. They were older when they had her, and much older when they had Steve. Id.

She recalled how the Stein family, now four, had lived in a small house in Maywood, New Jersey. (PC-R3. 107) She adored Steve. Id. Every year they took a special family vacation. Id. She babysat for Steve after school, and the parents and Steve had a loving relationship.

She described how, in 1977, the family moved to Phoenix. (PC-R3. 108) Their mother was in ill health, with arthritis, and the family doctor had recommended Arizona. (PC-R3. 109) Despite his mom's her poor health, she loved Steve "immensely." Id. She "adored him," Sandra said. Id. Remember the Steins were two people who had lost nine babies naturally. Id. "They wanted children terribly and they opened their hearts" to me and to Steve. (PC-R3. 109-110) Sandra was adopted as a newborn, and Steve was adopted at about eight months of age. (PC-R3. 110) Mrs. Stein told Sandra that Steve's mother was young and had just happened to be in the area when she went into labor and gave birth. Id. The Children's Aid Report describes the tough situation of his birth parents and the circumstances of his birth and early life. (Def. Ex. 3)

Sandra remembers registering Steve for school, along with Mrs. Stein. (PC-R3. 110-111)

The move was hard on Mr. Stein, and money was very tight, Sandra recalled. (PC-R3. 111) Money pressures created stress in the house. Id.

Sandra got married when she was 18 and moved away for two years. (PC-R3. 112) Her husband was stationed in Guam. Id. However, she kept in touch with Steve through letters. (PC-R3. 113) They couldn't afford the phone, but Steve wrote all the time. Id. Sandra described Steve as a "sweet, young kid" who would draw pictures and mail them to her. Once, she heard from her mother that he had had an appendicitis attack and felt terrible that she couldn't be there. Id.

After she returned, she was divorced in 1981 or 1982. (PC-R3. 114) Eventually, she remarried and had a baby, but now she lived in Phoenix, so Steve would come over and stay with her son all the time. Id. They would play board games and family games, and she trusted her son with Steve. Id.

Sandra testified about the horrific automobile accident that Steve was in. (PC-R3. 115) A girl died in it, and Sandra recalled attending the funeral. Steve suffered bad injuries as well, and Sandra saw him in the hospital with his jaw wired shut. Id. He seemed "heartbroken." (PC-R3. 116) Because he couldn't attend the funeral, she represented him. Id.

Mrs. Stein's health had continued to deteriorate and she became diabetic and suffered renal failure, requiring dialysis. Id. Mr. Stein also lost his health, suffering from emphysema. Id.

Sandra Bates could have testified to this mitigation and more, but she was not prepared. (PC-R3. 118) Moreover, Steve's attorney never came to Phoenix and, in fact, had called her on short notice, within a week of when she needed to be there. (PC-R3. 120)

Donna Nolz could have testified that she knew Steve from grade school in Phoenix. (PC-R3. 133) She knew him for many years and recalled his kindness. (PC-R3. 134) He was so pale that occasionally the kids would tease him as an "albino." (PC-R3. 135-136)

Ms. Nolz and Steve developed a strong friendship, and she recalled that he was "peaceful" – not the type of boy who picked fights. (PC-R3. 136-137) People would be happy to see him. (PC-R3. 137) He didn't run with the popular crowd but he was not disliked. Id. She could have testified that it was always "worthwhile" to stop and talk to him. (PC-R3. 138) He was someone she was glad to run into. Id.

No one from his attorney's office ever came to Phoenix and talked to her at the time Steve was on trial, but she'd have told the jury what she knew had she been asked to. (PC-R3. 139)

Shandra Mann could have testified that she met Steve Stein when she was 15 through the offices of a girlfriend whose last name's been forgotten. (PC-R3. 145) At the time, Steve was laid up in bed after the bad car accident. (PC-R3. 145-146) She quickly fell in love with him and began staying with him at the house. Id. She admired his intelligence and his recklessness. (PC-R. 147) Also, he was very nice to her. Id. For a year, or a year and a half, she lived with Steve in his room. Id. What happened, Ms. Mann could have testified, was precisely "what one would expect to happen." Id. They did, however, get married first. (PC-R3. 149)

When Ms. Mann told Steve that she was pregnant, she told him that she wanted to give the baby up for adoption. (PC-R3. 148) Steve was very upset at the thought of giving the baby up, because he had been adopted himself Id. Steve wanted to keep the baby. Id. He'd often told her of the pain that he suffered from having been given away by his mother. Id.

Eventually, although they were married, Shandra left Steve, found adoptive parents, and moved to another state to have the baby, which she gave up. (PC-R3. 149-150) At this point, she and Steve stopped speaking. (PC-R3. 151) He was "devastated" and "hurt." Id. As a child of adoption he felt that he had been lonely, that he and his parents had no bond, and that he had been hurt by the whole process. (PC-R3. 151-152) He did not

want to do that to anyone else. (PC-R3-152) Eventually, the couple was divorced. Id. Although he was very young, Steve had already lost his wife and his child. Id.

Finally, Ms. Mann could have testified that the car wreck had left Steve in a great deal of pain and he had permanent scars from it. (PC-R3. 153)

Shandra Mann, Steve's former wife, was never contacted by Steve's attorneys. Id. Had she been contacted, she would have testified consistently with her testimony in the evidentiary hearing. Id.

Next, Phillip (Doug) Bacha could have testified that he met Steve in grade school. (PC-R3. 162) At first, they were just acquaintances, but eventually, particularly after Doug visited Steve in the hospital, they became friends. (PCR3-162) Steve's injuries were bad. (PC-R3. 162) Further, the woman who was killed was one of Steve's friends. (PC-R3. 163)

Steve and Doug spent a lot of time together after that. (PCR-3. 164) Doug visited the Stein house often. Id. They were neighbors, so Doug saw him on a regular basis. (PC-R3. 165)

According to Doug, Steve was highly intelligent, with interesting things to say and interesting viewpoints. Id. They also liked the same music. Id.

After Doug went in the Navy, Steve was one of the few people that he kept an open line of communication with through

correspondence and phone calls. Doug trusted Steve, and Steve was one of the few people who continued to stay in contact with him when he was in the military.

Doug was not contacted by Steve's lawyer when the trial took place. Had the Navy cleared him to testify, he would have as he did at the evidentiary hearing. (PC-R3. 167)

Doug was concerned, however, by Steve's increasing drug use and druggie friends. (PC-R3. 172) He counseled Steve, but acknowledged that Steve was difficult to deflect from a course of action that he'd undertaken. (PC-R3. 173) Doug confirmed that Steve did seem to have drifted into the use of stronger drugs and that they had a negative effect on him. (PC-R3. 174)

Shari Roinestad could have testified that Steve and her son were the same age and were friends. (PC-R3. 185) Steve often would hang out at her house, and she got to know him. Id. She and Steve shared an interest in politics and poetry.

Ms. Roinestad thought that Steve was "deep" for his age, and they discussed politics, poetry, and loyalties. (PC-R3. 186) She appreciated Steve's good thoughts and good opinions. Id. She noticed how important loyalty was to Steve. Id. Since she was divorced and had trouble sleeping, Steve would sometimes sit up with her late and talk. (PC-R3. 186-187) Steve would write songs which she thought were "depressing" – "about canyons and crying, and all that." (PC-R3. 187) Those were "the echoes

of dead Indians," she said. Id. She thought his stuff was depressing and he thought her poetry was depressing. Id. She saw Steve and her son, Michael, as "fatherless boys," They just needed somebody to make them stop…they were restless and always on the go, like they couldn't sit still. Id. They just didn't have any masculine influence, she lamented. Id. To her, it seemed as though they were looking for a father-figure. (PC-R3. 188) Steve's father was old, uninvolved, and sick a lot. He had emphysema. Id.

She'd see Steve almost every day. Steve would share poetry with her in a way he didn't with his own mother. (PC-R3. 189)

After the auto accident, she saw Steve in the hospital. Id. In fact, both her son and Steve were in several automobile accidents, and as he got older Steve just seemed to start self-destructing. Id. She thinks that perhaps he felt guilt over the girl's death, and it seemed that he did at the time. Id. Steve told her that he would see the girl fly through the windshield over and over again. (PC-R3. 190)

The automobile accident in which the girl died had a "huge" impact on Steve. (PC-R3. 196) "Hauntingly sad" is how she described Steve's music – "it was just tears." Then, after the girl was killed in the accident, Steve "just started really losing it and…was doing drugs kind of to stop the scene from playing over and over in his mind." (PC-R4. 207)

Lastly, Michael Roinestad could have testified that he is Shari's son. (PC-R4. 208) Steve and he were good friends for years. (PC-R4. 210) Their interest in cars and cruising drew them together. Id. He was friends with Steve when Steve took the class to become a mechanic. Id. Steve took the class after they'd talked about opening a garage together. Id.

Michael could have testified that Steve connected with people well but was very guarded with himself, as if he had an emotional wall. (PC-R4. 212)

Regarding the automobile accident, Michael would have explained that it was his former girlfriend who was killed. (PC-R4. 213) Both Steve and the girl were passengers and Michael and the girl had recently broken up. (PC-R4. 214) The girl, Diane, was not Steve's girlfriend, but Steve and she were "working on that." (PC-R4. 215-216) Steve's jaw was shattered on one side, his collarbone was broken, and Michael noticed that Steve's eyes seemed to have darkened from light blue to a deep purple. (PC-R4. 216) Steve had "a ton of injuries" and "was messed up for a long time." Id. Steve was also prescribed a lot of painkillers, as he was in intense pain. Id.

Michael could have testified that, as a friend, Steve would do anything to help you with any problem you had. Id. He was personable and Michael would often be surprised by the unlikely people Steve would engage in conversation. Id. He was

interested in people, but at a distance. (PCR4-217-218) Michael found this aspect of Steve's personally to be paradoxical. (PC-R4. 218) Steve would strike up conversations with people he was unlikely to be friends with, or so it seemed to Michael. Id. However, everyone he met seemed to like him. Id. He could connect with people. Id.

On their teenage rebellious years, Michael could have described their conduct as non-malevolent but foolish. Michael didn't have a father-figure and Steve's was not a "model."

Michael could have described Steve's dad as older and ill, but he genuinely loved Steve, and Steve loved his parents. (PC-R4. 220) When they were sick, it would devastate him. Id.

Michael would have testified at trial had he bee contacted.

Had this wealth of mitigation been presented to the jury, as it easily could have been, there is likelihood that Mr. Stein would have received a life recommendation.

6. Conclusion

Mr. Stein received ineffective assistance of counsel at his trial. This Court should, thus, vacate Mr. Stein's judgments and sentences and remand the case for a new trial.

Should the Court determine that the guilt-phase is affirmed, however, the Court should vacate the death sentence and remand for imposition of a life sentence with eligibility

for parole in twenty-five years or a new penalty-phase, as the court deems proper.

ARGUMENT III

The Newly Discovered Evidence Establishes That Appellant's Death Sentence Offends the Constitutional Prohibition Against the Disproportionate Sentencing of Equally Or Less Culpable Co-Defendants

1. The Standard of Review

This standard of on this claim review is the same as that utilized for Strickland. See, Hildwin v. State. No.SC04-1264 (2006)

2. The Lower Court's Order

The lower court erred in failing to consider the newly discovered evidence cumulatively will all evidence now of record and to properly asses the probability that a jury would now return a life recommendation. Further, the lower court failed to analyze whether the Florida Supreme Court would over-turn the death sentence, as it did in Christmas.

3. The Jones Standard

In order to obtain relief from a conviction on the basis of newly discovered evidence, a defendant must establish that the newly discovered evidence would not have been discovered by the defendant or his counsel within the time limitations of Rule 3.851 and would probably produce an acquittal on retrial. Jones v. State, 709 So. 2d 512, 521 (Fla. 1997).

4. The Newly Discovered Evidence

Mr. Stein had the Court take Judicial Notice of the record in Christmas v. State, 632 So. 2d 1368 (Fla.1994) In that case, the Florida Supreme Court reversed the death sentence imposed by the Judge. See also, Ray v. State, 755 So. 2d 605 (Fla. 2000)

As in Ray, the record in the instant case is not dispositive as to who the shooter was. Regardless, the older man, the convict, the former employee, the planner, "the mastermind," was Christmas. See, Larzelere v. State, 676 So 2d 394(Fla. 1996) (only "mastermind," not shooter, got death)

The lower court found in its sentencing Order in Christmas that Christmas was more or equally culpable. See also, Ray at 611. Furthermore, most of the evidence indicates that Christmas was the dominant player. Id. As in Ray, the State sought death for both, and judge imposed it on both. Christmas, however, this Court noted in affirming Stein, presented more mitigation (Stein has now presented significantly more). In Christmas, this Court notes that no mitigation was presented in Stein. Christmas at 372.

It is manifestly disproportionate for Mr. Christmas to receive life and Stein death. See, Ray v. State, 755 So. 2d. 604 (Fla. 2000); Hertz v. State, 803 So. 2d. 629 (Fla. 2001); and Looney v. State, 803 So. 2d 656 (Fla. 2001)

In Ray, on proportionality grounds, this Court overturned Mr. Ray's death sentence. Ray v. State, 755 So. 2d at 611-612. This Court noted that equally culpable co-defendants should receive equal punishment. Id.; see also, Jennings v. State, 718 So. 2d 144 (Fla. 1998); Scott v. Dugger, 604 So. 2d 144 (Fla. 1992). Further, where a more culpable co-defendant receives a life sentence, a sentence of death should not be imposed on the less culpable defendant. Id.; see also Hazen v. State, 700 So. 2d 1207 (Fla.); Slater v. State, 316 So. 2d 539 (Fla. 1975)

Since the Christmas case was tried after Stein was concluded and the Sentencing Order and the FSC's reversal occurred after the disposition of Stein's appeal had become final, Mr. Stein satisfies the first part of the Jones test.

Secondly, the Sentencing Order by Judge Wiggins, the same trial judge in both trials, explicitly states that Mr. Christmas is as or more culpable than Mr. Stein this constitute powerful mitigation that would probably convince a jury to recommend life.

Even if the jury recommended death, this court would conduct a de novo review of the relative culpability of Mr. Stein and Mr. Christmas. The findings by Judge Wiggins in Christmas are stark evidence that the culpability of Mr. Stein can be no greater than that of Mr. Christmas. Therefore, this Court must set aside Mr. Stein's death sentence.

5. Conclusion and Relief Sought

Based on the foregoing, Appellant asks this Court to vacate his death sentence and impose a life sentence with eligibility for parole in 25-years.

CONCLUSION AND RELIEF SOUGHT

Mr. Stein respectfully prays that this Court remand this case to the circuit court for a new hearing before a different Judge; alternatively, Mr. Stein prays that his convictions and sentences be vacated and the case remanded for a new trial, or, alternatively, for a new penalty-phase; or, alternatively, that his Court vacate Mr. Stein's death sentence and remand the case for imposition of a life sentence with eligibility for parole in 25-years; and for such other relief as this Court seems proper.

Certificates of Font and Service

Below signed counsel certifies that this brief was generated in Universal 12 point font pursuant to Fla. R. App. P. 9.210 and served on all parties hereto by first-class U.S. mail or by Federal Express priority mail on this   day of March, 2007.

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