IN THE SUPREME COURT OF FLORIDA
SC10-1830

TROY MERCK, JR.
Appellant
v.
STATE OF FLORIDA
Appellee

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY, STATE OF FLORIDA

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This reply brief addresses Issue V of Appellee's Answer brief. (Received on 12/5/11) As to all other issues, Mr. Merck stands on the previously filed initial brief and Habeas Corpus petition.

ISSUE V

> THE POSTCONVICTION COURT PROPERLY REJECTED MERCK'S CLAIM THAT HIS PENALTY PHASE COUNSEL WAS INEFFECTIVE FOR MAKING THE INFORMED AND STRATEGIC DECISION TO PRESENT THE DEFENSE MENTAL HEALTH EXPERT AT THE SPENCER HEARING RATHER THAN BEFORE THE JURY. (AS STATED BY APPELLEE)

The contention that "the court conducted a colloquy with Merck and he confirmed that he was aware of this decision and agreed with it." (See answer brief of appellee p. 55) is a misapprehension of fact. At trial, the following testimony was elicited by Judge Downey:

> MR. WATTS: Judge, we are winding down to the point of we may be calling Troy, I expect that we will, and I would like to have a few minutes with him and get that ready, and that's the last witness that we'll be calling.
> THE COURT: I'm wondering if it not be in everyone's best interest that we get Mr. Merck on the record saying that he understands that there were other potential people that would testify in the hearing that testified in the last one, and that's my understanding, that they are not going to be called to make sure that he is in agreement with this

strategy.
MR. RIPPLINGER: Good idea, and that he doesn't have to testify if he doesn't want to and if there are other witnesses that he wants called that they are available to him.
MR. WATTS: Fine. I think that's a good idea.
THE COURT: I'll send the Jury out and I'll talk with him and we'll take a break.
THE COURT: Take the Jury out, please.
***
(THEREUPON, the Jury is excused from the courtroom and proceedings resumed as follows:)
***
THE COURT: Mr. Merck, I have had a chance to talk to Mr. Watts off and on throughout the course of the Defense presentation here and he has advised me now that it is his plan at this point that the only additional potential witness that he is going to be calling is you. Are you aware of that plan, Mr. Merck?
THE DEFENDANT: *Yes, I was just made aware of that a few minutes ago.* (Emphasis added)
THE COURT: I'm aware, as I am sure that you are aware, this being your third penalty phase, that in penalty phases of the past other witnesses were called to testify to attempt to establish certain other mitigating circumstances. In particular, Mr. Bell to testify with regards based on the testimony presented in the extrapolation that he could do with regard to, at least within a range anyway, of what your alcohol content was way back then. My understanding that he is not going to be called as a witness, right?
MR. WATTS: That is correct, Judge.
THE COURT: Do you understand that, Mr. Merck?
THE DEFENDANT: *Yes, it had been explained to me.* (Emphasis added)
THE COURT: The reason that I'm mentioning this is that just because something was presented in '97, in front of

Judge Khouzam, we are starting all over again and I cannot take into account or into consideration what happened back then. So if Mr. Bell doesn't testify, it would delete from the Jury's consideration, and then potentially my consideration, with any exactness what your state of sobriety or lack thereof might have been on that night and it might have bearing on what the jury hears certainly and what I might be called upon to rule on down the road if we get that far. In addition, I'm told by Mr. Watts that no mental health expert is going to be called. Have you been made aware of that, Mr. Merck?

THE DEFENDANT: *Yes, I have been told that anyway.* (Emphasis added).

THE COURT: Again, we are not in a situation here where – we are not in a Mohammad situation where we have a defendant that doesn't want any mitigation presented. We are in a situation where in prior penalty phases certain things were done. I know that there were things done in '97 that were not done in '93, and vice versa, and now we are in a situation where certain things were done in both '97 and '93 at the prior hearings that are not going to be done now. Those are the two main ones, as I see it anyway, that we are not hearing from. Of course, if your defense attorneys don't present a mental health expert then, of course, that precludes the State from being able to call their expert in rebuttal. I don't how in your lawyer's mind that weighs out, but certainly that – and I'm talking to you about this on the record to make sure that there is a firm understanding in your mind and between you and your lawyers and your lawyers and me that there is some understanding and agreement on your part that this is the way that you want to go and that you understand that if I don't hear it and this Jury doesn't hear it, then your lawyers cannot argue it, and if it comes back in a 7 to 5 or more for death, they can't present it to me in mitigation and I cannot consider it in a sentencing order.

MR. SCHWARTZBERG: With all due respect, Judge, we

have a Spencer Hearing available.
THE COURT: We do have a Spencer in which some of that could be presented, but it could not be argued to the Jury, I just want to make sure that you understand that that's where we are going on this. I'm going to take a break now and give you a chance to talk to your lawyers and before we bring the Jury back in I'm going to talk to you again about your testifying to make sure that you understand that the record is clear with regard to that and just to make sure that we have a clear record here. Mr. Ripplinger, comment?
MR. RIPPLINGER: Judge, you had mentioned Dr. Bell and Dr. Maher, there was also a Dr. Willy, a pathologist who has testified in the past who it is my understanding that they are also choosing not to call. I can see very strategic reasons for that. There are some other witnesses and family members and friends or whatever that they are making a decision not to call, and that's fine. As far as a Spencer Hearing, I think that they can call additional witnesses at that's for the Court's final benefit.
THE COURT: Certainly.
MR. RIPPLINGER: I would not want the record to have any idea that that's not a possibility at a later time.
THE COURT: Of course, a Spencer Hearing assumes that we get to a Spencer hearing. I just want Mr. Merck to understand just because it didn't happened back then, doesn't mean that it can be argued now. If it is not presented to the Jury and at a Spencer Hearing, it is not considered to me, then I cannot consider it either. I know that I have given you things to talk to your lawyers about, Mr. Merck, and I want to give you an opportunity to do that before they stand up and say the word rest. We'll be in recess for about ten minutes. Thank you.
***
(THEREUPON, a recess was held.)
***
THE COURT: Let's bring Mr. Merck in, please.

> MR. WATTS: Judge, I thank you for the opportunity. Mr. Merck and I have spoken about the matters that Your Honor raised and it is our intention at this time, and I believe that Mr. Merck is in accord, to go forward with Mr. Merck being the sole and final witness.
> THE COURT: Mr. Merck, you understand that during this penalty phase that you have a right to testify. And if you wish to testify, as I'm being told that you do, that nobody can stop you from testifying; do you understand that?
> THE DEFENDANT: Yes, sir.
> THE COURT: Do you understand, on the other hand, if you don't want to testify, nobody can force you to, and you don't have to if you don't want to; do you understand that?
> THE DEFENDANT: Yes, sir. (FSC ROA Vol. V p. 277-282).

Neither Watts nor Merck could have forced Schwartzberg to do his job. Merck was not an attorney and there is no evidence to reflect that he was aware that if the case had progressed to a Spencer hearing the Jury would have already sentenced him to death. Merck would therefore then be placed in the unenviable position of asking the trial court to override a jury's recommendation which, by law, the court is required to give great weight. (See Larzelere v. State, 979 So.2d 195 (Fla. 2008) at 205-206).

The timing of Schwartzberg's unilateral decision to "streamline the trial" is suspect. Mr. Watts testified that there was a division of labor with Mr. Watts being responsible for the out of town witnesses, Troy Merck's family, his teachers, and the lady that ran the Christian home, Ms. Rackley. (PCR Vol. VII p. 947). Mr.

Schwartzberg was responsible for the cross-examination of the State's case and Dr. Maher. (PCR Vol. VII p. 947). Mr. Watts had done his job when it was time for Schwartzberg to do his, he completely abdicated his duty. Mr. Watts testified as follows:

> As it may affect this case – I'm going to just try to be as specific as I can. I'm surprised at the lack of contact that I see with Dr. Maher, who would have been a player at some point in the case. So to answer this question as best I can, Mr. Schwartzberg would brush off things that he didn't want to deal with. My best insight into the Dr. Maher issue is that I find I did the direct examination. I did not prepare to do that. And the best I can recall is that I was asked to do that at the 11th hour - 12th hour. And I didn't have a dialogue with Dr. Maher beforehand other than, if I did, was to get in there and I'm – in looking back, I'm surprised that, first of all, Schwartzberg had the responsibility of Dr. Maher and second of all, that given that he had the responsibility of Dr. Maher, that I'm the one that did the direct examination. We did not spend the typical time that I would spend with a mental health expert. And apparently, Schwartzberg didn't spend the usual time. Why? I couldn't say. And I wasn't aware of it at the time, but I do recall being somewhat miffed that I'm doing this. (PCR Vol. VII p. 988)

It is clear that the word strategic has been bandied about in this case to cover up the complete abdication by Schwartzberg to effectively represent his client during the penalty phase of the trial. Schwartzberg's decision to streamline the trial was based on ignorance as to what his expert would testify to as evidenced by the

testimony of Dr. Maher at the evidentiary hearing:

> Q. Okay. Doctor, prior to this case when you worked with Mr. Schwartzberg, did you discuss with him issues relating to the strategy of presenting information before the jury or only at a Spencer hearing?
> A. In previous cases I would have had discussions with him about where my testimony was best presented and the manner in which it was best presented. I never had any discussions with him such as that with regard to the Merck case.
> Q. Well, did that cause you some concern?
> A. It caused me grave concern.
> Q. Sir, were you present in court on either the – right before the State – or the defense rested when it was announced out of the presence of the jury – excuse me, out of the presence of the jury that you would not be called?
> A. Yes.
> Q. That they were streamlining the trial?
> A. Yes.
> Q. All right. And do you remember – and do you remember Judge Downey asking Mr. Merck if he understood this was going on?
> A. Yes, I do remember that quite clearly.
> Q. Did this strike you as unusual?
> A. Yes.
> Q. Well, you said you were concerned, sir, that you never had a discussion with Mr. Schwartzberg as to which information you would present at trial and which information you would present at a Spencer hearing.
> A. That's correct.
> Q. Okay. Why did that cause you concern, sir?
> A. Because it had been my usual pattern of practice with him, as well as other lawyers, to include a discussion about where my opinions and possibly other mental health opinions were best presented in their case. And it would always be something that I would raise. Sometimes

lawyers were interested in discussing it. Sometimes they weren't. Mr. Schwartzberg usually was. *But there had been no opportunity and certainly no discussion of that between me and Mr. Schwartzberg in regard to this case.* (Emphasis added).

Q. Okay. Well, what are some of the opinions you would have presented had you been asked?

A. Many of the things you've asked me about today, the presence of mitigating evidence, the presence of various diagnoses, Post Traumatic Stress Disorder, fetal alcohol effect, Attention Deficit Disorder, the emotional and mental aspects of his deficits, the effect of alcohol.

Q. How about in previously dealing with Mr. Schwartzberg or other attorneys, had you ever just presented issues at a Spencer hearing only?

A. Not to the best of my recollection, no.

Q. Why not?

A. My understanding of that would be that if I had significant mitigating information, the attorneys would always wanted to present that to a jury and then possibly again at a Spencer hearing.

Q. Did you recall Judge Downey expressing concern that if you weren't called, the jury was not going to hear any mental health testimony, in spite of the fact Mr. Merck had had mental health testimony presented at previous trials?

A. Yes, I do recall the Judge expressing that concern.

Q. Again, sir, you testified that Michael Schwartzberg was going to handle your direct and the other mental health professional, right?

A. That was my understanding, yes. That was my expectation.

Q. You didn't bill Richard Watts, did you?

A. No.

Q. Doctor, who ultimately handled your direct examination at the Spencer hearing?

A. Mr. Schwartzberg.

Q. Mr. Schwartzberg at the Spencer hearing?

> A. I believe it was him.
> Q. Well, if the record shows that Mr. Watts handled you at the Spencer hearing, would you have any reason to dispute the trial record?
> A. No. What I remember about the Spencer hearing is that I testified very briefly and – I don't recall independently which of the lawyers –
> Q. Well, had you ever discussed with Mr. Watts your proposed Spencer hearing testimony?
> A. Not other than in a very superficial way. (PCR Vol. VI p. 886-889).

As per Richard Watts' testimony; this was an instance where Schwartzberg would "brush off things he didn't want to deal with" Ibid. Schwartzberg realized that he was unprepared to call Dr. Maher to "tie up the mitigation" as planned so he abdicated his duty. At the Spencer hearing, again, he didn't want to deal with Dr. Maher because he had not spoke to him so he passed the witness off to a surprised and miffed Watts. This was a clear abdication of his duty to defend Mr. Merck and relief is proper. A new penalty phase is the remedy.

The trial strategy on handling the witnesses was explained by Mr. Watts at the evidentiary hearing:

> Q. With respect to Mr. Merck's trial, did you have some sort of division of labor, so to speak?
> A. We did.
> Q. And what was that division of labor?
> A. Well, there were a lot of out of town witnesses, South Carolina, Troy Merck's family, teachers, the lady that ran the Christian home, Ms. Rackley. I took those witnesses.

> Schwartzberg took the cross-examination of the State's case and he would have also taken Dr. Maher. As the mental health expert. (PCR Vol. VII p. 947)

At the evidentiary hearing, the State attempted to minimize the importance of Dr. Maher's testimony in this manner:

> Q. Was it more important for you and Mr. Schwartzberg in this penalty phase to try to come up with some mitigation rather than blaming somebody else?
> A. I would answer, yes.
> Q. And, in fact, in doing that, you know, the emphasis the two of you would have had would be calling the teachers, the family members from North Carolina to highlight his very disturbing upbringing?
> A. That was my responsibility. And when I'm commenting on Neil Thomas and the alternate theory of his participation, that was Schwartzberg's, and he knew the details of that. I was responsible for the, I would say, high road mitigation, the troubled, a chaotic upbringing of Troy Merck, and also the personal growth that he had achieved while on death row.
> Q. Actually, going back to the minor participant angle, historically, the other penalty phases and trials that had occurred had not really been a successful –
> A. No.
> Q. – strategy?
> A. True.
> Q. As far as Mr. Thomas is concerned, he actually turned his life around when he testified, which kind of probably enhanced his testimony to some degree?
> A. I would say yes. I was surprised at his presence that he had.
> Q. He probably had a tie on, if I recall correctly, and he had his job in the computer industry and things like that?
> A. Yes.

> Q. Basically, stopped committing crimes and things?
> A. True.
> Q. But as far as the – his upbringing and background and education, that was a big emphasis of your strategy?
> A. Yes.
> Q. And that was actually the most successful strategy historically than any other penalty phases, bringing in the sister, the lady from the foster home, and those aspects?
> A. Yes.
> Q. And you actually didn't need Dr. Maher to focus on those things. You had the actual people who were there?
> A. Well, and this is a territory wher that would have been Schwartzberg's responsibility. And I can see in looking back where, to tie the mitigation together, Dr. Maher would be good at that. (PCR Vol. VII p. 960-962).

The strategy was already being implemented. Mr. Watts was already presenting the civilian witnesses. Dr. Maher was already in the courtroom evaluating their testimony in order to tie up the mental health issues. It was Schwartzberg's unilateral, uninformed decision to forego his duties regarding the mental health experts. Had Dr. Maher been permitted to tie up the mitigation a true picture of Troy Merck's mental difficulties would have been presented. As it was; the jury was left with meaningless anecdotal stories about Troy Merck's childhood with nothing to apply to his mental state at the time of the crime. The outcome of the trial would have been different. In Williams v. Taylor, 529 U.S. 362 (U.S. Va. 2000) the Supreme Court stated: " the graphic description of Williams' childhood, filled with abuse and privation, or the realty that he was "borderline mentally

retarded," might well have influenced the jury's appraisal of his moral culpability." In Mr. Merck's case, the jury was aware of Merck's childhood which was indeed filled with abuse and privation. However, the instances of PTSD, ADHD, the ptosis, the fetal alcohol effect, the brain injuries and the alcoholism went unheard by the penalty phase jury. These examples of mental health mitigation might well have influenced the jury's appraisal of Merck's moral culpability. As it turned out; the jury heard nothing about the effect of drinking turpentine on an undeveloped fetus. Nor did it hear anything about Post Traumatic Stress. The jury could not assess Merck's moral culpability because Schwartzberg "didn't want to deal with it." Relief is proper.

Appellee's reliance on Gaskin v. State, 822 So.2d 1243 (Fla. 2002) is misplaced and factually distinguishable from the facts in Mr. Merck's case. The Gaskin Court held in part:

> Thus, the trial court found "that counsel made a reasonable strategic decision not to present this nonstatutory, non-mental health mitigation
>
> Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony. *See* *Ferguson v. State*, 593 So. 2d 508, 510 (Fla. 1992) (finding that counsel's decision to not put on mental health experts was a "reasonable strategy in light of the negative aspects of the expert testimony" because the

> experts had indicated that they thought that the defendant was malingering, a sociopath, and a very dangerous person). Id at 1248.

In Mr. Merck's case, there was no finding that Merck was malingering. The nonstatuory non-mental health mitigation had already been presented to the penalty phase jury by Mr. Watts' witnesses.

The lower court's order denying this claim is based on a misapprehension of fact. The horrific aspect of the crime and Merck's behavior after the crime already was brought before the penalty phase jury through the testimony of Neil C. Thomas. (See FSC ROA Vol. IV p. 55-76 (Downey)). The speculation that Merck had admitted to Dr. Maher that Merck had stabbed the victim and thus would alienate the penalty phase jury is a "red herring" in that Merck had already been convicted of stabbing Newton by the guilt phase jury. Merck's prior history of violence (the five convictions for robbery with a deadly weapon) had already been introduced into evidence. (See FSC ROA Vol. IV p. 184-188 (Downey)).

It was up to Schwartzberg to mitigate these facts by explaining the brain damage, the alcoholism, the ADD and the fetal alcohol syndrome through the testimony of Dr. Maher.

In Fennie v. State, 855 So.2d 597 (Fla. 2003) the Court held:

> We agree with the trial court that counsel cannot be

> faulted for deciding against calling a witness who might have condemned Fennie with her testimony as related by the witness's counsel. *See* *Sweet v. State*, 810 So.2d 854, 861 (Fla. 2002) (determining that the decision not to call a witness who had made an out-of-court identification of the defendant did not constitute ineffective assistance of counsel). Fennie most certainly would have alleged ineffective assistance of counsel had trial counsel gambled and presented Colbert as a witness only to have her inculpate Fennie. Thus, the instant case provides a crystalline example of why tactical decisions regarding whether or not a particular witness is presented are subject to collateral attack only in rare circumstances when the decision is so irresponsible as to constitute ineffective assistance of counsel." *Jackson v. State*, 711 So.2d 1371, 1372 (Fla. 4th DCA 1998), *discussed with approval in Ford v. State*, 825 So.2d 358, 360-1 (Fla. 2002). Id. at 605-606.

This case is one of the rare circumstances when the decision is so irresponsible as to constitute ineffective assistance of counsel. It was not a tactical decision to ignore Dr. Maher's repeated entreaties to meet to discuss the case. It was an irresponsible act. It was not a tactical decision to streamline the trial at the 11th hour despite the obvious concern expressed by the trial court that mental mitigation; if unpresented by Schwartzberg could not be argued before the penalty phase jury. The strategy of the defense team was clear. Mr. Watts was to present the civilian witnesses and Schwartzberg would use Dr. Maher to tie up the mitigation. Mr. Watts had completed his job. When Michael Schwartzberg

decided to streamline the trial Dr. Ron Bell, a toxicologist, was dismissed and so was Dr. Maher. Schwartzberg was left with nothing to do. Dr. Bell's testimony would have focused upon the alcohol consumption of Merck at the time of the crime. Where was the detriment elicited by that testimony? The answer is there was or would have been no detriment in the penalty phase jury hearing how alcohol affected Merck's thinking process. Mr. Merck, through Schwartzberg's ineffectiveness, was deprived of a reliable testing of the evidence. Had the statutory mitigation provided by Dr. Maher been presented to the penalty phase jury the outcome would have been different. As per the trial court cited above, the jury was unable to consider the compelling mitigation offered by Dr. Maher at the evidentiary hearing. Relief is proper.

At the Spencer hearing, Schwartzberg again abdicated his responsibility and passed Dr. Maher off to a surprised and miffed Mr. Watts, (FSC ROA 2d Addendum Vol IV p. 631-52), Mr. Schwartzberg attempted to justify his ineffectivness in this manner:

> MR. SCHWARTZBERG: I would tell the Court that the reason why Dr. Maher is testifying in a Spencer Hearing and not before the jury is because I believe that some of the testimony that Dr. Sloman is going to present to the Court in rebuttal of Dr. Maher creates the exact same problem is that lead this jury to the question that they asked you within minutes of being out in and the exact

> reason as to why I placed and proffered Felix Ruiz's testimony in front of this Court and would be the exact reason, and I have numerous cases that I will present to the Court now or after Dr. Sloman finishes here, that would have presented in this courtroom for a viciousness and dangerousness that would have permeated the remaining proceedings regarding Mr. Merck. (FSC ROA 2d Addendum Vol. IV p. 651-2).

At the Spencer hearing, Dr. Sloman testified as follows:

> Q. Doctor, you said that's a conclusion that you have drawn based on your March 1, 2004 interview, mental staff examination and MMPI. If you want to relate back to the time of this offense, do you believe that the same diagnose would apply, the antisocial personality?
> A. Yes.
> Q. Have you found any change between materials that you had been provided, the testing materials and so forth, factual matters, between then and now?
> A. No, there is no change.
> Q. In listening to Dr. Maher's testimony, do you believe that he has somehow developed a new value system or a concious in his incarceration?
> A. No, I don't.
> Q. Could you elaborate on that?
> A. Conscious is formulated certainly in the early years. As a psychologist, in using basically the learning theory, is that from an early age the child gleans the morals and values of their culture or society, and this is certainly true in the formative years up to five years old and then it is transferred to the educational system, teachers, and then later years of religion or scouting or some other discipline may take place, but each one reenforces the others as we move through childhood into adolescence and adulthood.
>
> A conscious, we know from research, is not formulated or built in a setting of incarceration. I would

> take umbrage with the maturity level. I heard my colleague's prior testimony. My understanding is that Mr. Merck has been in confinement, in isolation, and there really has not been a test of his interaction with other individuals within a prison setting, let alone outside of one. I would tender from research and from learning theory that the best predictor of future behavior is always past behavior. (FSC ROA 2d Addendum Vol. IV p. 662-3).

It is clear from the testimony of Sloman, that Sloman was inferring that Merck's past behavior rendered him a risk to society. In Teffeteller v. State, 439 So.2d 840 (Fla. 1983), the Court held:

> Appellant's remaining issues relate to the sentences he received for these crimes. He first argues that the trial court erred during the penalty phase in denying his motion for a cautionary instruction or a mistrial based upon improper and prejudicial comments by the prosecutor. We agree. During his argument to the jury, the prosecutor urged the jury to recommend that appellant receive the death penalty or else he would be paroled in twenty-five years and would kill again. Id. at 844.

Ultimately, Teffeteller was granted a new penalty phase based on the denial of appellant's motion for mistrial. The Court went on to hold:

> The intended message to the jury was clear: unless the jury recommended the death penalty, the defendant, in due course, will be released from prison and will kill again, this time two of the witnesses who testified against him, and maybe others. There is no place in our system of jurisprudence for this argument. Id. at 845.

Schwartzberg's self serving explanation as to why he deprived Merck of a fair adversarial testing of the evidence at trial is based on a misapprehension of law. Had the State or any of its witnesses mentioned future behavior, Schwartzberg could have and should have moved for a mistrial pursuant to Teffeteller. If the motion for mistrial wasn't granted, at least the issue would have been preserved for appellate review.

As cited in Appellee' answer brief, Schwartzberg had passed away and was unavailable to testify regarding the strategic reasons for presenting Dr. Maher at the Spencer hearing (See Answer brief of Appellee p. 54). That was a misapprehension of fact. Schwartzberg did not present Dr. Maher at the Spencer hearing. A surprised and "miffed" Mr. Watts did. Again, Schwartzberg had abdicated his duty to represent Mr. Merck. Appellee's contention that Dr. Slomin would have rebutted Dr. Maher is speculation. The penalty phase jury could have believed all, part, or none of both experts' testimony. What is beyond speculation is Judge Downey's on the record expression of concern that Dr. Maher suddenly was not called to testify regarding the mental mitigation. (FSC ROA Vol V p. 277-282 (Downey)). The sentencer ultimately was the trial court. The issue is that Mr. Merck was deprived a fair adversarial testing of the evidence because Schwartzberg's performance fell outside the purview of Strickland. Ignoring your

own expert when he has issues to discuss was deficient performance. Passing your expert to an unprepared co-counsel at the Spencer was also deficient performance.

The prejudice was expressed by the trial court when the court stated" If I don't hear it and this Jury doesn't hear it, then your lawyers cannot argue it." Ibid.

The jury was not allowed to consider statutory mental mitigation because as Mr. Watts testified, "Mr. Schwartzberg would brush off things that he didn't want to deal with." Obviously due to his personal and health problems, Mr. Schwartzberg was unable to practice law in an effective manner. Relief is both necessary and proper.

CONCLUSION AND RELIEF SOUGHT

Based on the facts and arguments presented above and in Mr. Merck's initial brief and Habeas Corpus petition; Mr. Merck respectfully moves this Honorable Court to:

1. Vacate the conviction and sentence of death
2. Remand for a new trial or in the alternative
3. Remand for a new penalty phase.

Respectfully submitted,

Richard Kiley

James Viggiano

Ali Andrew Shakoor

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this____, day of January, 2012.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief**,** was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

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