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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER: SC14-971

LOWER TRIBUNAL CASE NUMBER: CF03-006982-XX

THOMAS RIGTERINK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Rigterink lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Rigterink.

PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's denial of Mr. Rigterink's Amended Motion to Vacate Judgments of Conviction and Sentence. The motion was brought pursuant to Fla. R. Crim. Pro. 3.851.

Thomas Rigterink will be referred to as "Mr. Rigterink" or "Defendant Rigterink." References to the record of the direct appeal of the trial judgment and sentence in this case are designated DIR. ROA followed by the appropriate page number, e.g. (DIR. ROA, p. 123). Citations to the record from the post-conviction evidentiary hearing will be designated as PC, followed by the appropriate page number, e.g. (PC, p.123). References to Exhibits are designated by the record, followed by the exhibit number, followed by the appropriate p. number, e.g. (DIR, ROA, Exh. 1, p. 1).

STATEMENT OF THE CASE

This is an appeal of the circuit court's denial of Mr. Rigterink's Amended Motion to Vacate Judgments and Sentence, brought pursuant to Fla. R. Crim. Pro. 3.851.

Mr. Rigterink was charged by Indictment on November 4, 2003 with two counts of murder in the first degree for the deaths of Jeremy Jarvis and Allison Sousa which occurred on September 24, 2003. The Public Defender for the Tenth Judicial Circuit was initially appointed to represent Defendant Rigterink on October 17, 2003. Subsequently, Byron Heilman, Esq. was hired by Defendant to represent him on October 28, 2003. On January 13, 2004, David Carmichael, Esq., was appointed by the Court to represent Defendant as penalty phase counsel. On August 16, 2005, trial commenced with jury selection. The trial ended on September 9, 2005, with a jury verdict of guilty as to each count.

On September 14, 2005, penalty phase commenced before the same jury that was empanelled for the guilt phase. The jurors returned a verdict recommending the death penalty by a vote of 7-5 as to each count of capital homicide on September 15, 2005.

On October 5, 2005, the defense moved for a continuance of the *Spencer* hearing and requested the appointment of a neurologist to examine Mr. Rigterink.

That request for the appointment of a mental health expert was denied by the trial court, as was the request for a continuance.

A *Spencer* hearing commenced on October 6, 2005. Following the *Spencer* hearing, on October 14, 2005, the trial court sentenced Mr. Rigterink to death for the murder of Jeremy Jarvis, and death for the murder of Allison Sousa. The trial court ran each of the sentences consecutive with the other death sentence.

The trial court found the following aggravating circumstances to support each death sentence: the defendant had previously been convicted of a capital felony (the contemporaneous murder of the other victim) (great weight); the homicide was especially heinous, atrocious or cruel (great weight). With regard to victim Allison Sousa, the trial court found the additional aggravating circumstance of committing the capital felony for the purpose of avoiding or preventing a lawful arrest (great weight).

The trial court found one statutory mitigating circumstance: no significant history of prior criminal activity, but only assigned this mitigation "some weight" because of Mr. Rigterink's admissions that he had used illegal drugs, primarily marijuana, since his late teens; stole from his former employer and drove with a suspended drivers license.

The trial court also found a number of non-statutory mitigating factors, ascribing each only "some" or "little" weight: (1) use of drugs (little weight); (2)

reputation with family and friends as a peaceful person (some weight); (3) kindness and attention to maternal and paternal grandmothers (some weight); (4) desire to help other prison inmates (some weight); (5) religious commitment while in prison (some weight); (6) assisted turtles across roadways (little weight); (7) supportive family (moderate weight); (8) capable of kindness (some weight); (9) one credit hour remaining to obtain bachelor of science degree in biology (little weight); (10) sympathy for the victims' families (little weight); (11) ability to be educated and to educate others (little weight); and (12) exhibited appropriate courtroom behavior (little weight).

Mr. Rigterink filed a direct appeal to the Florida Supreme Court. *Rigterink v. State*, 2 So.3d 221 (Fla. 2009). The judgments and sentence were affirmed on appeal. *Rigterink*, 2 So.3d at 260-62. The United States Supreme Court granted certiorari and remanded back to the Florida Supreme Court. *Florida v. Rigterink*, 130 S.Ct. 1235 (2010). On remand, the Florida Supreme Court affirmed the judgments and sentence. *Rigterink v. State*, 66 So.3d 866 (Fla. 2011).

Mr. Rigterink filed his initial Motion to Vacate Judgments of Conviction and Sentence on June 22, 2012. On October 31, 2012, Defendant Rigterink filed an Amended 3.851 motion containing twenty claims. The state filed its response to Mr. Rigterink’s amended motion on November 14, 2012.

An evidentiary hearing on Mr. Rigterink's 3.851 motions was conducted beginning August 19, 2013 through August 23, 2013. The trial court denied 3.851 relief on April 11, 2014 and Mr. Rigterink filed a Notice of Appeal on May 5, 2014 commencing the instant proceedings.

STATEMENT OF THE FACTS

Mr. Rigterink relies on this Court's direct appeal opinion in *Rigterink v. State*, 66 So.3d 866 (Fla. 2011), for the statement of the facts of the trial. The evidence from the guilt phase was summarized by this Court in *Rigterink* from pgs. 870-883 of its opinion. Additionally, Mr. Rigterink presents the following additional statement of facts as to the evidence presented at trial and at the evidentiary hearing on each claim for which an evidentiary hearing was granted.

Byron Hileman, who the Rigterink family retained on October 28, 2003 also testified at the evidentiary hearing. He had Defendant Rigterink seen by Dr. McClane in February of 2004. When asked about counsel's failure to fully investigate Mr. Rigterink's drug abuse and mental health, Attorney Hileman testified that he initially consulted with several doctors but decided not to have anyone but Dr. McClane evaluate Mr. Rigterink and decided not to have any expert, including Dr. McClane testify at trial. (PC, p. 1381, 1384, 1412). When asked about trial counsel's failure to file a comprehensive pretrial motion seeking the exclusion of statements made by Mr. Rigterink prior to receiving *Miranda*

warnings, Mr. Hileman testified he believed Mr. Rigterink was not in custody despite his own testimony that Mr. Rigterink was repeatedly accused of lying and confronted with evidence of his guilt. (PC, p. 1409; 1542).

When asked about trial counsel's failure to seek the suppression of State's Exhibit 436, the knife, Mr. Hileman admitted he did not consider the possibility that the knife could be used in a prejudicial manner by the jury. (PC, p. 1401-1402). When asked why neither he nor Mr. Carmichael sought to exclude the Nike shoes purchase by the state, Mr. Hileman explained his trial strategy by testifying "if those things are not prejudicial to my client and are not germane to the central issues of the case, I'm not terribly concerned about that." (PC, p. 1438-1439).

Mr. Hileman testified regarding trial counsel's failure to conduct adequate attorney client interviews and properly prepare Mr. Rigterink for his trial testimony. Mr. Hileman admitted he believed the testimony that Mr. Rigterink ultimately planned on presenting at trial was false. (PC, p. 1464). However, Mr. Hileman never advised Mr. Rigterink regarding the concept of perjury. (PC, p. 1429). Mr. Hileman testified that although he did suggest possible cross-examination questions to Mr. Rigterink, he did not recall warning Mr. Rigterink to refrain from testifying about uncharged criminal conduct. (PC, p. 1435-1436). Ultimately, Mr. Hileman admitted that Mr. Rigterink's testimony about his previous uncharged

theft and driving on a suspended driver's license negated the argument that Mr. Rigterink had a minimal criminal history prior to the offense. (PC, p. 1457).

Mr. Hileman also testified to trial counsel's failure to object to the State's argument that the jury should consider non-statutory aggravating factors. When asked whether he should have objected to the State's argument that the murders were the product of the evil within Mr. Rigterink, Mr. Hileman stated, "I would feel that should be objected to . . . I don't remember if I even heard it." (PC, p. 1475). Further, Mr. Hileman testified regarding Mr. Carmichael's concession during closing argument that the State had proven two aggravating circumstances. Mr. Hileman testified that he disagreed with Mr. Carmichael's concession that the State had proven these two aggravating factors as he testified, "it's against my religion to stipulate to those things." (PC, p. 1471). In fact, Mr. Hileman stated that he did not discuss the concession with Mr. Rigterink and was unaware that Mr. Carmichael had either. (PC, p. 1472). Further, It was unclear whether Mr. Carmichael ever discussed the concession with Mr. Hileman prior to the closing argument as Mr. Hileman claimed "If I had. . . known about it, I would have asked for a colloquy, because that, obviously, is making an admission of an element of this case that is very prejudicial." (PC, p. 1472).

Mr. Hileman testified regarding trial counsel's failure to investigate alternate suspects and present evidence to this effect at trial. Mr. Hileman testified that

although he knew of a number of individuals associated with Mr. Rigterink, he did not recall ever interviewing, or asking the investigator/ mitigation specialist to interview, these individuals in order to corroborate Mr. Rigterink's testimony. (PC, p. 1390-1392). In fact, at the evidentiary hearing, Mr. Hileman identified a multi-page memo from his own file listing a number of alternative suspects named and interviewed by police. (PC, p. 1392). Yet, Mr. Hileman acknowledged he believed he ran out of investigative techniques and acknowledged in his notes that further investigation was "futile." (PC, p. 1462, 1464).

Mr. David Carmichael, Mr. Rigterink's penalty phase counsel, was appointed on January 13, 2004. Mr. Carmichael testified at the evidentiary hearing that prior to handling Mr. Rigterink's case, he had only experienced one full capital trial. (PC, p. 826-827). Mr. Carmichael was questioned regarding his failure to fully investigate Defendant Rigterink's drug abuse and mental health. Mr. Carmichael testified that while he was aware of Defendant Rigterink's drug abuse, he made a strategic decision to not present such evidence to the jury. (PC, p. 1530). Attorney Carmichael testified he consulted with several mental health experts but chose not to have Defendant Rigterink examine by any experts because he did not want to emphasize Defendant Rigterink's drug abuse to the jury. (PC, p. 881, 1286, 1293).

Mr. Carmichael was questioned about trial counsel's failure to file a comprehensive pretrial motion to suppress Mr. Rigterink's out of court statements to police on October 16, 2003. Mr. Carmichael responded he did not believe a motion to suppress would be successful. (PC, p. 891). When questioned about counsel's failure to suppress a knife found in Defendant's home and failing to object to the admission of Nike shoes at trial, Attorney Carmichael testified that although he did consider objecting to the knife and that he appreciated the prejudicial nature of the knife at trial, he and Mr. Hileman chose not to do so. (PC, p. 839-841). Further, Mr. Carmichael claimed that he and Mr. Hileman chose not to object to a pair of Nike shoes, purchased by the State, as part of the trial strategy. (PC, p. 905-906).

Attorney Carmichael was also confronted with his lack of communication with Defendant Rigterink to which he admitted he only met with Mr. Rigterink a "handful" of times prior to trial. (PC, p. 843-844). Further, Mr. Carmichael testified that neither he nor Mr. Hileman ran through a practice cross-examination with Mr. Rigterink in order to prepare him to testify at trial. (PC, p. 900-901). Neither Mr. Carmichael nor Mr. Hileman recalled ever warning Mr. Rigterink against testifying as to uncharged criminal conduct, such as his suspended driver's license or the alleged theft from his employer. (PC, p. 937, 1436).

Mr. Carmichael admitted that he did not object to the State's inflammatory remarks during closing argument, characterizing Mr. Rigterink as "evil." (PC, p. 951-952). Mr. Carmichael additionally admitted that he conceded two aggravating circumstances during his closing argument but stated he believed it would boost his credibility with the jury. (PC, p. 1007). Mr. Carmichael also testified regarding trial counsel's failure to adequately investigate information regarding alternative suspects and present evidence to this effect at trial. Both Mr. Carmichael and Mr. Hileman admitted they never attempted to have the only eye-witnesses to the crime identify Marshall Mullins or William Farmer. (PC, p. 903, 1425). Additionally, Mr. Carmichael agreed that at trial neither of the eye-witnesses were asked to identify the composite sketch of the perpetrator. (PC, p. 904).

Dr. Tracy Hartig, a licensed psychologist initially retained by the Public Defender's office immediately following his arrest, testified at the evidentiary hearing. Dr. Hartig evaluated Mr. Rigterink in October and November of 2003 and testified that, based on her evaluations of Mr. Rigterink, which indicated an increased substance abuse prior to the offense, she believed that it would have been important in Mr. Rigterink's case to explore whether Mr. Rigterink had the ability to voluntarily waive his *Miranda* rights when giving the statement to officers. (PC, p. 1245, 1250). Dr. Hartig determined that Mr. Rigterink suffered from depression and significant substance abuse. (PC, p. 1255, 1256). Additionally, The doctor's

testing also revealed some evidence of psychopathology and bizarre thought processing, such as hallucinations and strange thoughts. (PC, p. 1256). Dr. Hartig also noted that Mr. Rigterink was "remarkable" for escalating drug abuse and that Mr. Rigterink had significant substance abuse issues. (PC, p. 1254-1255). However, despite Dr. Hartig's findings, Mr. Rigterink's trial counsel never asked the doctor to assist in preparing mental mitigation for the purposes of the penalty phase of trial, nor was she asked to evaluate Defendant Rigterink's ability to waive *Miranda* warnings. (PC, p. 1257-1258).

Dr. Daniel Buffington, a pharmacologist hired by post-conviction counsel to evaluate Mr. Rigterink in December 2012, testified at the evidentiary hearing. He testified he reviewed the toxicology results obtained by the State Attorney's Office and the Public Defender's Office immediately following Defendant Rigterink's arrest and determined that at the time of Defendant Rigterink's statements to police, Mr. Rigterink had hydroxyalpazolam in his system. (PC, p. 1123). Also present in Mr. Rigterink's system were cannabis and Norpropoxyohene, a chemical found in Darvocet. (PC, p. 1124). Because of this, Dr. Buffington testified he believed it would have been helpful for defense counsel to consult a pharmacologist prior to the motion to suppress hearing and trial. (PC, p. 1125).

Dr. Buffington also testified that the drug abuse significantly affected Mr. Rigterink's ability to conform his conduct to the requirements of the law and that

Mr. Rigterink may have suffered from a mental disorder. (PC, p. 1120-1121). Chronic drug abuse affected Mr. Rigterink's behavior, perception, and cognitive abilities on the date of the offense even if he was not intoxicated. (PC, p. 1121-1122). Furthermore, the doctor opined that the "DSM Manual definitions for . . . substance abuse and dependence are consistent with [Mr. Rigterink's] criteria." (PC, p. 1162-1164). Further, Dr. Buffington explained that long-term abuse of multiple drugs causes altered psychiatric and cognitive mental states – even when the substance is not present in the individual's body. (PC, p. 1112-1113). In other words, "with chronicity of substance abuse and the advanced stages of substance abuse, we see altered psychiatric states of behavior and cognitive states, even when the substance isn't present." (PC, p. 1113). Dr. Buffington explained that the effects are cognitive and/or behavioral in that the individual experiences "blackouts" and/or hallucinations, along with altered mental states that are not dependent on an active drug concentration in the individual's body. (PC, p. 1113). Therefore, it was Dr. Buffington's belief that any individual who has opiates, marijuana, and methamphetamine in their system at the same time is not considered mentally "intact." (PC, p. 1117). The doctor concluded that Mr. Rigterink's ability to conform his conduct to the requirements of the law was substantially impaired and that Mr. Rigterink's chronic drug abuse impaired his

judgment and perception and would have cognitively impaired him on the date of the offense. (PC, p. 1122).

Dr. Dantzler, Mr. Rigterink's drug counselor, also testified at the evidentiary hearing. Dr. Dantzler testified she began treating Mr. Rigterink for drug abuse and addiction prior to the offense in May 2003. (PC, p. 1057, 1062). Through treatment, Dr. Dantzler learned that Mr. Rigterink had not been sober for more than a week since he was fifteen years of age. (PC, p. 1062). According to Dr. Dantzler, Mr. Rigterink's fifteen years of drug usage was "rampant and indiscriminate" and this drug use affected Mr. Rigterink's ability to function. (PC, p. 1063, 1065, 1074). In fact, Dr. Dantzler believed that Mr. Rigterink was not going to be successful in treating his drug addiction without inpatient treatment. (PC, p. 1068). However, despite Dr. Dantzler's knowledge regarding Mr. Rigterink's drug abuse and mental health issues, neither Mr. Carmichael nor Mr. Hileman contacted the doctor during the course of Mr. Rigterink's representation. (PC, p. 1072).

Dr. McClane, a psychiatrist initially retained by Mr. Hileman in February of 2004 to perform an evaluation on Mr. Rigterink, also testified at the evidentiary hearing. The doctor testified that Mr. Rigterink disclosed that he used drugs such as marijuana, cocaine, methamphetamine, MDMA, GHB, LSD, and Darvocet. (PC, p. 1278). Dr. McClane testified that this information was significant as knowledge of an individual's drug history is important because drugs can alter an individual's

mental state substantially. (PC, p. 1278). Dr. McClane noted that methamphetamine specifically leads to violence, rage, and irrational behavior. (PC, p. 1285). Dr. McClane opined that Mr. Rigterink was a chronic drug abuser and that he wanted to investigate Mr. Rigterink's drug abuse further as he was aware that Mr. Rigterink had taken drugs near the time of the offense. (PC, p. 1285). Doctor McClane testified that he informed trial counsel he wanted to investigate Mr. Rigterink's drug abuse further and wanted to pursue brain studies on Mr. Rigterink; however, neither Mr. Hileman nor Mr. Carmichael retained him further on the matter. (PC, p. 1286; 1293).

Dr. Krop testified at the evidentiary hearing that he was retained by post-conviction counsel to evaluate Mr. Rigterink twice in June of 2012 and once in March of 2013. He testified that he administered the SASSI and the "personality assessment inventory" and found the results to be consistent with Mr. Rigterink's report of chronic drug abuse. (PC, p. 1201). Based on Dr. Krop's evaluation, he stated he would "not only diagnose [Mr. Rigterink] as substance abuse . . . but I would diagnose him as substance dependence, in other words, he basically craved drugs, and if he wasn't using a particular drug, he would have . . . a withdrawal effect." (PC, p. 1203). Dr. Krop testified that methamphetamine has a "real significant impact on an individual's cognitive and emotional functioning." (PC, p. 1207). Dr. Krop also explained that abuse of both stimulants and depressants can

result in unpredictable behavior, irritability, impulse control, and bad judgment. (PC, p. 1208).

Dr. Krop testified that, based on his evaluation, he believed Mr. Rigterink was in a “frenzied state” on the date of the offense and that, within a reasonable degree of psychological probability, Mr. Rigterink’s “capacity to conform his conduct to the requirements of the law was likely compromised at the time in question.” (PC, p. 1211). Further, Dr. Krop testified that Mr. Rigterink’s “drug use and, more particularly, the drug use at or around the time in question would result in a “serious emotional disturbance.” (PC, p. 1211). Dr. Krop explained that he did not use the modifier of “extreme” emotional disturbance as he believed that was a question for a jury. (PC, p. 1222).

Rosalie Bolin, the investigator/ mitigation specialist hired by Mr. Hileman for Mr. Rigterink’s case, testified she made several recommendations to both Mr. Carmichael and Mr. Hileman to retain a pharmacologist and a forensic psychologist. (PC, p. 1875). The investigator/ mitigation specialist stated that she recommended not only presenting positive mitigation about Mr. Rigterink, but also presenting evidence that would explain Mr. Rigterink’s behavior on the date of the offense – in this case, Mr. Rigterink’s mental health and drug abuse. (PC, p. 1969). However, neither attorney followed her recommended approach.

The investigator/ mitigation specialist testified that at one point during the representation, Mr. Hileman refused to visit Mr. Rigterink in jail to speak about the case, and that Mr. Rigterink's parents threatened not to pay Mr. Hileman's fee unless he actually started working on the case. (PC, p. 1904-1905). Due to her growing concern that Mr. Hileman and Mr. Carmichael were simply dismissing her suggestions, she contacted another attorney and the Florida Bar in an effort to rectify the situation. (PC, p. 1878, 1903, 1914,1986).

Courtney Sheil Betz ("Ms. Sheil"), Mr. Rigterink's former girlfriend, also testified at the evidentiary hearing. Ms. Sheil testified that she had personally seen Mr. Rigterink use methamphetamine, cocaine, mushrooms, and prescription pills such as Xanax. (PC, p. 1777-1779, 1787). Further, in regards to Ms. Sheil's obtaining the knife in Mr. Rigterink's home at the direction and encouragement of law enforcement officers, Ms. Sheil testified that she did not live in Mr. Rigterink's residence, nor did she pay rent to live in the residence. (PC, p. 1775).

Mary Dzialo, Mr. Rigterink's sister, testified at the evidentiary hearing. She testified that she saw drug paraphernalia in Mr. Rigterink's home indicating that Mr. Rigterink was abusing marijuana and crack cocaine. (PC, p. 1815). Ms. Dzialo conveyed all of this information to Mr. Rigterink's trial team; however, neither Mr. Hileman nor Mr. Carmichael ever contacted her in order to procure her testimony at the penalty phase of Mr. Rigterink's trial. (PC, p. 1818). In fact, Ms. Dzialo

testified that she offered to be a witness in Mr. Rigterink's case, but Mr. Hileman rejected the idea and stated that she was not allowed to do so because she would be too biased. (PC, p. 1824).

Ms. Katherine Enriquez, Mr. Rigterink's former wife, testified at the evidentiary hearing and stated Mr. Rigterink smoked marijuana and also used cocaine, ecstasy, and LSD. (PC, p. 1589-1590, 1633). She testified that eventually Mr. Rigterink's drug use progressed to the point where he would wake up in the middle of the night to smoke marijuana. (PC, p. 1620). Ms. Enriquez also testified that as their marriage progressed, Mr. Rigterink's drug use increase and became more frequent. (PC, p. 1592). Further, Ms. Enriquez stated that Mr. Rigterink began abusing pills like Xanax, and Valium. (PC, p. 1593). Ms. Enriquez noted that once Mr. Rigterink would start using a drug, he would use the drug to the point of passing out or experiencing physical body tremors. (PC, p. 1596). However, Ms. Enriquez was not called by the trial counsel during the penalty phase. (PC, p. 1598).

Dick Rigterink, Mr. Rigterink's uncle, testified at the evidentiary hearing. Dick Rigterink testified he spoke with Mr. Rigterink about his drug abuse prior to the offense for the purpose of encouraging Mr. Rigterink to seek drug treatment and counseling. (PC, p. 1726-1729). Furthermore, Dick Rigterink testified he made trial counsel aware of these issues during the representation as he sent several notes

to trial counsel relaying this information. (PC, p. 1731-1732). However, Mr. Rigterink's trial counsel never pursued this information further. (PC, p. 1731-1732).

Dr. Suarez testified for the State at the evidentiary hearing. Dr. Suarez claimed he determined Mr. Rigterink's statement to police was made voluntarily. (PC, p. 1656). However, Dr. Suarez is not a pharmacologist and has never been declared an expert in the field of pharmacology, rather he is a licensed psychologist. (PC, p. 1639, 1684, 1685). Additionally, Dr. Suarez did not examine Defendant Rigterink. (PC, p. 1647). However, Dr. Suarez did testify that a person does not need to be on methamphetamine to feel the effects of the drug. (PC, p. 1688). Ultimately, Dr. Suarez recognized that he could not diagnose Mr. Rigterink, nor could he come to a definite conclusion on the matter. (PC, p. 1710).

SUMMARY OF THE ARGUMENTS

The post-conviction court erroneously denied Claims 1A, 1B, 1D, 1E, 1F, 1I, 1J, 2(A)(1), 2(A)(3), 2(A)(4), 2(A)(5), 2(B), and 2(C) raised in Mr. Rigterink's Amended Motion To Vacate. The evidentiary hearing demonstrated Mr. Rigterink's trial counsel failed to provided effective assistance of counsel in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There was no substantial competent evidence to support the post-conviction court's findings that counsel was not deficient as to the following claims:

Claims 1I, 2(A)(1), 2(A)(3), and 2(A)(5) argued trial counsel was ineffective at the guilt and penalty phases for failing to fully investigate defendant Rigterink's drug abuse and mental health status.

Claim 1B argued trial counsel was ineffective at the guilt phase for failing to file a comprehensive pretrial motion to suppress Defendant Rigterink's out of court statements made to police on October 16, 2003.

Claim 1A and 1J argued trial counsel was ineffective at the guilt phase for failing to suppress and/or object to introduction of evidence by the State: the knife and the Nike shoes.

Claims 1D, 1E, and 2(A)(4) argued trial counsel was ineffective at the guilt and penalty phases for failing to conduct adequate client interviews as well as trial counsel's failure to adequately prepare Defendant Rigterink to testify at trial.

Claim 2(C) argued trial counsel was ineffective at the penalty phase for failing to object to inflammatory remarks by the State during closing argument.

Claim 2(B) argued trial counsel was ineffective at the penalty phase for conceding two aggravating circumstances during closing arguments without discussing such a strategy with Defendant Rigterink.

Claims 1F argued trial counsel was ineffective at the guilt phase for failing to timely and adequately investigate Mark Mullins and William Farmer as

alternative suspects and that trial counsel failed to make a proper presentation to the court to satisfy the requirements of Section 90.405 and 90.804 Florida Statutes.

ARGUMENT

A. INTRODUCTION

After conducting an evidentiary hearing, the post-conviction court erred in finding that Mr. Rigterink failed to establish deficient performance by trial counsel and prejudice at the guilt and penalty phases of his capital trial in violation of the, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and his corresponding rights under the Florida Constitution. Further, Mr. Rigterink's convictions are materially unreliable due to trial counsel's deficient performance.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. *Id*. at 688. Following *Strickland*, the Florida Supreme Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) (citations omitted).

There is a strong presumption that trial counsel's performance was not deficient and the defendant carries the burden to "overcome the presumption that under the circumstances the challenged action might be considered sound trial strategy." *Strickland,* at 689.

In *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000), the Florida Supreme Court held "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under norms of professional conduct."

Additionally, counsel has an obligation to conduct a thorough investigation of a defendant's background. *Porter v. McCollum*, 558 U.S. 30, 39 (2009). Counsel has a duty to make reasonable investigations or to make reasonable decisions that makes investigations unnecessary. *Hurst v. State*, 18 So.3d 975, 1008 (Fla. 2009). The Florida Supreme Court has found counsel's performance deficient where counsel "never attempted to meaningfully investigate" mitigation although substantial mitigation could have been presented. *Asay v. State*, 769 So.2d 974, 985 (Fla. 2000); *Shellito v. State*, 121 So. 3d 445 (Fla. 2013).

B. STANDARD OF REVIEW

Review of a circuit court's resolution of ineffective assistance of counsel claims under *Strickland* is a mixed standard of review because both the performance and the prejudice prong of the *Strickland* test present mixed questions

of law and fact. *Sochor v. State*, 883 So.2d 766 (Fla. 2001). The trial court's factual findings that are supported by competent, substantial evidence are given deference, but legal conclusions are reviewed de novo. *See Sochor* at 771-72.

"Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Hurst v. State*, 18 So.3d. 975, 1013 (Fla. 2009). That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Porter v. McCollum*, 558 U.S. 30 (2009) (alteration in original) (quoting *Strickland*, 446 U.S. at 693-94, 104 S.Ct 2052 (1984)). "To assess that probability, [the Court] consider[s] 'the totality of the available mitigation evidence . . .' and 'reweigh[s] it against the evidence in aggravation.'" *Id*. at 453-54 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

Because both prongs of the *Strickland* test present mixed questions of law and fact, in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court employs a mixed standard of review, deferring to the post-conviction court's factual findings that are supported

by competent, substantial evidence, but reviewing the post-conviction court's application of the law to the facts de novo. *Mungin v. State,* 932 So.2d 986, 998 (Fla.2006).

C. THE POST-CONVICTION COURT'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO FULLY INVESTIGATE DEFENDANT RIGTERINK'S DRUG ABUSE AND MENTAL HEALTH IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

An evidentiary hearing was granted by the post-conviction court as to Claims 1B, 1I, 2(A)(1), 2(A)(2), 2(A)(3), and 2(A)(5) of Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence brought pursuant to Fla. R. Crim. Pro. 3.851. All of these claims deal with trial counsel's failure to fully investigate defendant Rigterink's drug abuse and mental health status during the guilt and penalty phases. After the evidentiary hearing, the post-conviction court denied each claim, finding that trial counsel was effective. However, this ruling has no legal basis and is not supported by competent, substantial evidence.

In accordance with Florida law:

> [U]pon adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment . . . evidence may be presented as to any matter the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated . . . any such evidence which the court deems to have probative value may be received.

Fla. Stat. Section 921.141. The statute also lists several mitigating circumstances applicable when determining the applicability of the death penalty including the following mitigating circumstances: "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance," and "the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired."

Further, the Sixth Amendment requires competent mental health assistance and evaluation to ensure fundamental fairness and reliability in the adversarial process. *Ragsdale v. State*, 798 So.2d 713 (Fla. 2001). Defense counsel has a duty to properly investigate both the guilt and penalty phase of a capital case and failure to do so may constitute ineffective assistance of counsel. *See Douglas v. State*, 937 So. 2d 825 (Fla. 1st DCA 2006); *Shellito v. State*, 121 So. 3d 445 (Fla. 2013). "It is unquestioned that under prevailing professional norms . . . counsel has an obligation to conduct a thorough investigation of the defendant's background. *Shellito v. State*, 121 So. 3d 445, 454 (Fla. 2013). "Counsel must not ignore pertinent avenues for investigation of which he or she should have been aware." *Id*.

Investigation into a defendant's background is especially important during the penalty phase of a capital trial. The Eleventh Circuit Court of Appeals has recognized that psychiatric mitigating evidence cannot only act as mitigation, it

can also significantly weaken aggravating factors. *Hardwick v. Crosby*, 320 F.3d 1127, 1164 (11th Cir. 2003), citing *Elledge v. Duggar*, 823 F.2d 1439, 1447 (11th Cir. 1987), *withdrawn in part on denial of rehearing en banc*, 833 F.2d 250 (11th Cir. 1987) (withdrawing only unrelated Part III of the opinion). While '*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence . . . [or] present mitigating evidence at sentencing in every case,' *Wiggins v. Smith*, 539 U.S. 510 (2003), 'an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence,' *State v. Riechmann*, 777 So.2d 342, 350 (Fla. 2000). As to counsel's duty of securing evidence of mental health mitigation, this Court has recognized that '[w]here available information indicates that the defendant could have mental health problems, such an evaluation is fundamental in defending against the death penalty.' *Jones v. State*, 988 So.2d 573, 583 (Fla. 2008) (quoting *Arbelaez v. State*, 898 So.2d 25,34 (Fla. 2005)). In light of its significance, 'a reasonable investigation into mental mitigation is part of defense counsel's obligation where there is *any* indication that the defendant may have mental deficits,' *Hurst,* 18 So.3d 975, 1010 (Fla. 2009) (emphasis added).

While a defendant may choose to waive the presentation of certain mitigating evidence, this right "does not relieve trial counsel of the duty to investigate and ensure that defendant's decision is fully informed." *Ferrell v. State*,

29 So.3d 959, 982 (Fla. 2010) (quoting *Grim v. State*, 971 So.2d 85 (Fla. 2007)). A defendant cannot waive mitigation blindly, "counsel must first investigate all avenues and advise the defendant." *Id.* Further, "an attorney's obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated because this is an integral part of the capital case." *See State v. Pearce*, 994 So. 2d 1094 (Fla. 2008).

Counsel renders deficient performance when he fails to ensure an adequate and meaningful mental health examination. *Ponticelli v. State*, 941 So.2d 1073, 1095 (Fla. 2006); *Sochor v. Florida*, 833 So.2d 766, 722 (Fla. 2004). Counsel's failure to pursue mental health mitigation despite "red flags" and recommendations by doctors amounts to deficient performance. Prejudice is established when counsel fails to investigate and present evidence of brain damage and mental illness. *Ragsdale v. State*, 798 So.2d 713, 718-19 (Fla. 2001); *Rose v. State,* 675 So.2d 567, 571 (Fla. 1996) (citing *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994)). "Mitigating evidence, when available, is appropriate in every case where the defendant is placed in jeopardy of receiving the death penalty. To fail to do any investigation because of the mistaken notion that mitigating evidence is inappropriate is indisputably below reasonable professional norms." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). The Eleventh Circuit Court of Appeals, in *Hardwick v. Cros*by, 320 F.3d 1127, 1162 (11th Cir. 2003), held when mental

health evidence was available, and "'absolutely none was presented [by counsel] to the sentencing body, and . . . no strategic reason [w]as…put forward for this failure,' our court determined that this omission was 'objectively unreasonable.'"(quoting *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

Failure to present mitigating evidence as to the defendant's drug/alcohol abuse at the penalty phase of a capital case constitutes ineffective assistance of counsel, particularly when counsel was aware of the defendant's past and knew that mitigation was the client's sole defense. *Ellege v. Duggar*, 823 F.2d 1439, 1445 (11th Cir.) *withdrawn in part on denial of rehearing en banc*, 833 F.2d 250 (11th Cir. 1987) (withdrawing only unrelated part III of the opinion).

Further, a tactical decision is unreasonable if it is based on a failure to understand the law. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). "Where counsel is so ill prepared that he fails to understand his client's factual claims . . . counsel fails to provide service within the range of competency expected of members of the criminal defense bar." *Young v. Zant*, 677 F. 2d 792, 798 (11th Cir. 1982).

Florida is a weighing state: the death penalty may only be imposed where specified aggravating circumstances outweigh all mitigating circumstances. *Parker v. Dugger*, 498 U.S. 308 (1991). The Eleventh Circuit holds that when a petitioner contends that the presentation of additional mitigating evidence would have

changed the weighing process so that death is not warranted, the court will "look at the mitigating circumstance evidence that was not presented, along with that which was, and consider the totality of it against the aggravating circumstances that were found." *Tompkins v. Moore*, 193 F.3d 1327, 1336 (11th Cir. 1999).

At the guilt phase, trial counsel may challenge the admissibility of a suspect's statements when the statement is not made knowingly, voluntarily, and intelligently. *See Schneckloth v. Bustamonte*. 412 U.S. 218, 235-40 (1973); *Thompson v. State*. 548 So.2d 198, 204 (Fla. 1989). The Court's inquiry into whether the confession was voluntary is a totality of the circumstances analysis but there are several factors generally considered by the courts, including: whether the confession was given in the coercive atmosphere of a station-house setting, *Drake v. State*. 441 So.2d 1079, 1081 (Fla. 1983), *cert, denied,* 466 U.S. 978 (1984); whether the police suggested the details of the crime to the suspect, *Langton v. State*, 448 So.2d 534, 535 (2d DCA 1984); and whether the defendant was subjected to a barrage of questions during the predawn hours and not given an opportunity to sleep or eat. *Spradley v. State*. 442 So.2d 1039, 1043 (2d DCA 1983).

Additionally, intoxication can support the suppression of a statement based on grounds of involuntariness. *See Thomas v. State*, 456 So. 2d 454 (1984) (holding that simply being under the influence of alcohol at the time of a statement

does not render a statement involuntary); *see also Burns v. State*, 584 So. 2d 1073, 1075-76 (Fla. 4th DCA 1991) (stating that intoxication can render a confession inadmissible in the "totality-of-circumstances" inquiry when the defendant is unaware and unable to comprehend with coherence and rationality).

Furthermore, when considering the voluntariness of a defendant's statements, a jury in Florida is instructed that "a defendant's statements should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made . . . you should consider the total circumstances . . . if you conclude it was not freely and voluntarily made you should disregard it." *Florida Standard Jury Instructions in Criminal Cases 3.9(e).*

1) Failure to investigate Defendant Rigterink's drug abuse and mental health as mitigation for the penalty phase.

Claims 2(A)(1), 2(A)(3), and 2(A)(5) of Defendant Rigterink's 3.851 Motion addresses counsel's failure to investigate his drug abuse and mental health as they related to potential mitigating circumstances for the penalty phase. Specifically, 2(A)(1) asserts counsel failed to have Defendant examined in any meaningful way by an expert in the field of psychiatry, psychology, or mental health counseling to attempt to develop mental mitigation; 2(A)(3) claims that Defendant had a significant history of drug abuse. Defendant's history of drug abuse should have been utilized to show that his ability to conform his behavior to the requirements of the law was impaired (substantially or otherwise) and/or that

he was under extreme mental or emotional disturbance; and 2(A)(5) claims that trial counsel failed to properly investigate potential mitigation and interview potential mitigation witnesses in that counsel failed to present witnesses who would testify about Mr. Rigterink's drug abuse and bizarre conduct at or near the time of the offense.

Defendant Rigterink presented several witnesses at the evidentiary hearing in support of these claims. Dr. McClane, who was initially hired to perform an evaluation of Mr. Rigterink after the incident, testified that Mr. Rigterink's drug abuse history was relevant because chronic drug use can result in brain damage. (PC, p. 1279). Dr. McClane testified that he was aware that Mr. Rigterink had an extensive drug history, including marijuana, cocaine, methamphetamine, LSD, and Darvocet. (PC, p. 1278). Further, Dr. McClane testified that because of what he learned about Mr. Rigterink's chronic drug abuse, he wanted to pursue further investigation and would have pursued brain studies and examinations on Mr. Rigterink. (PC, p. 1286). The doctor testified that he relayed his findings and recommendations to Mr. Rigterink's trial counsel; however, they did not retain Dr. McClane further. (PC, p. 1293, 1286).

Dr. Hartig, a licensed psychologist initially retained by the Public Defender's Office, testified that Mr. Rigterink was "remarkable" for escalating drug abuse and that Mr. Rigterink had significant substance abuse issues. (PC, p.

1254-1255). She found that not only was Mr. Rigterink depressed, but he also evidenced psychopathology and bizarre thought processing. (PC, p. 1256).

Dr. Dantzler also had extensive knowledge regarding Mr. Rigterink's drug abuse as she testified that she began treating Mr. Rigterink prior to the offense for his drug abuse and addiction (PC, p. 1057). Through treatment, Dr. Dantzler learned that Mr. Rigterink had not been sober for more than a week since he was fifteen years of age. (PC, p. 1062) Dr. Dantzler stated that Mr. Rigterink had been abusing drugs for approximately fifteen years and that Mr. Rigterink had engaged in "rampant and indiscriminate" drug use. (PC, p. 1074)) Dr. Dantzler determined that drugs were interfering with Mr. Rigterink's ability to function and that he had a dependence on cannabis. (PC, p. 1065). In fact, Dr. Dantzler believed that Mr. Rigterink was not going to be successful in treating his drug addiction without inpatient treatment. (PC, p. 1068). Dr. Dantzler referred Mr. Rigterink to Dr. Hunter, who also testified at the evidentiary hearing. He testified he performed a drug test on Mr. Rigterink and found amphetamines, opiates, THC, and marijuana in Mr. Rigterink's system. (PC, p. 1584-1585). Dr. Hunter also testified that Mr. Rigterink's trial counsel never contacted him regarding these drug tests. (PC, p. 1584-1585).

The trial attorneys never bothered to contract Dr. Dantzler and did not follow the findings and recommendations of Doctors McClane and Hartig.

Additionally, trial counsel did not retain either doctor further, nor were the doctors retained for the purpose of supporting any mental mitigation at the penalty phase. Mr. Carmichael acknowledged that he had received reports regarding Mr. Rigterink's drug usage and was aware of that drug usage. (PC, p. 835). Yet, Mr. Carmichael admitted that he never retained any doctor to testify as to Mr. Rigterink's drug abuse for purposes of mitigation. (PC, p. 1036).

Dr. Krop was retained by post-conviction counsel. He testified he administered the SASSI and the personality assessment inventory" and found the results to be consistent with Mr. Rigterink's report of chronic drug abuse. (PC, p. 1201). Based on Dr. Krop's evaluation, Dr. Krop testified that he would "not only diagnose [Mr. Rigterink] as substance abuse . . . but I would diagnose him as substance dependence, in other words, he basically craved drugs , and if he wasn't using a particular drug, he would have . . .a withdrawal effect." (PC, p. 1203). Further, Dr. Krop explained that abuse of both stimulants and depressants can result in unpredictability of behavior, irritability, impulse control, and bad judgment. (PC, p. 1208). The doctor testified that methamphetamine has a "real significant impact on an individual's cognitive and emotional functioning." (PC, p. 1207).

Based on his evaluation, Dr. Krop testified that he believed Mr. Rigterink was in a "frenzied state" on that date of the offense and that, within a reasonable

degree of psychological probability, Mr. Rigterink's "capacity to conform his conduct to the requirements of the law was likely compromised at the time in question." (PC, p. 1211). Further, Dr. Krop testified that within a reasonable degree of psychological probability, Mr. Rigterink's "drug use and, more particularly, the drug use at or around the time in question would result in a serious emotional disturbance." (PC, p. 1211). Dr. Krop explained that he did not use the modifier of "extreme" emotional disturbance as he believes this is a question for a jury. (PC, p. 1222).

Dr. Buffington, a pharmacologist hired by post-conviction counsel, testified that the drug abuse significantly affected Mr. Rigterink's ability to conform his conduct to the law and that Mr. Rigterink suffered from a mental disorder. (PC, p. 1120-1121). Chronic drug abuse affected Mr. Rigterink's behavior, perception, and cognitive abilities on the date of the offense even if he was not intoxicated. (PC, p. 1121-1122). Furthermore, the doctor opined that the "DSM Manual definitions for . . . substance abuse and dependence are consistent with [Mr. Rigterink's] criteria." (PC, p. 1162-1164).

Dr. Buffington also noted that long-term abuse of multiple drugs can cause altered psychiatric and cognitive mental states – even when the substance is not actively present in the individual's body. (PC, p. 1112-1113). In other words, "with chronicity of substance abuse and the advanced stages of substance abuse, we see

altered psychiatric states of behavior and cognitive states, even when the substance isn't present." (PC, p. 1113). Dr. Buffington explained that the effects can be cognitive or behavioral in that the individual can experience "blackouts" or hallucinations, along with altered mental states that are not dependant on active drug concentration in the individual's body. (PC, p. 1113). Therefore, it was Dr. Buffington's belief that any individual who has opiates, marijuana, and methamphetamine in their system at the same time could not be considered mentally "intact." (PC, p. 1117). Therefore, the doctor concluded that Mr. Rigterink's ability to conform his conduct to the requirements of the law substantially impaired in that Mr. Rigterink's chronic drug abuse impaired his judgment and perception and would have cognitively impaired him on the date of the offense. (PC, p. 1122).

The investigator/ mitigation specialist testified that at the initial interview, she obtained significant information regarding Mr. Rigterink's extensive drug abuse history and that she provided Mr. Rigterink's trial counsel with this information. (PC, p. 1847). She learned that Mr. Rigterink had suffered seizures and blackouts previously as a result of his drug abuse. (PC, p. 1844). The investigator/ mitigation specialist also gave the Public Defender's file to Mr. Hileman and Mr. Carmichael which contained Mr. Rigterink's statements of drug use, including methamphetamine abuse and doctors evaluations. (PC, p. 1864,

1869). The Public Defender's file suggested a toxicologist and/or a pharmacologist for the case, but again, neither Mr. Hileman nor Mr. Carmichael instructed the investigator/ mitigation specialist to follow up or investigate this suggestion further. (PC, p. 1866).

Additionally, the investigator/mitigation specialist testified she recommended procuring a pharmacologist and a forensic psychologist to assist with mitigation; however, neither Mr. Hileman nor Mr. Carmichael followed this recommendation. (PC, p. 1875). She believed this was important as it would support the mitigator of extreme emotional disturbance. (PC, p. 1956). The investigator/ mitigation specialist also recommended that trial counsel focus on drug abuse, drug, addiction, and mental health for purposes of mitigation; however, trial counsel rejected this recommendation as well. (PC, p. 1876). Mr. Hileman and Mr. Carmichael rejected her suggestions for the penalty phase and instead chose to present only what they called "positive" evidence. (PC, p. 1967). The investigator/ mitigation specialist advocated not only presenting positive mitigation about Mr. Rigterink, but also presenting evidence that would explain Mr. Rigterink's behavior on the date of the offense – in this case, Mr. Rigterink's mental health and drug abuse. (PC, p. 1969).

Additionally, the investigator/mitigation specialist testified that although Mr. Hileman and Mr. Carmichael were aware of individuals associated with Mr.

Rigterink that sold drugs, neither attorney ever instructed her to interview these individuals. (PC, p. 1848). Likewise, the investigator/mitigation specialist was never asked to interview Mr. Rigterink's wife, Katherine Enriquez, or Mr. Rigterink's girlfriend, Courtney Sheil, regarding Mr. Rigterink's drug abuse, nor was she ever asked to interview the initial assistant public defender appointed on the case, Pete Mills. (PC, p. 1850, 1865). Due to her growing concern that Mr. Hileman and Mr. Carmichael were not pursuing proper avenues to develop mitigation in Mr. Rigterink's case, she contacted another attorney and the Florida Bar in an effort to rectify the situation. (PC, p. 1878, 1903, 1914,1986).

Mary Dzialo, Mr. Rigterink's sister testified at the evidentiary hearing as well. Specifically, Mary Dzialo testified that she observed drug paraphernalia in Mr. Rigterink's home that indicated that Mr. Rigterink was abusing marijuana and crack cocaine. (PC, p. 1815). Ms. Dzialo saw marijuana bongs, burnt tinfoil, and burnt plastic lids. (PC, p. 1814). Ms. Dzialo also testified that she found a "grow room" in Mr. Rigterink's home where he was apparently growing marijuana. (PC, p. 1816-1817). However, neither Mr. Hileman nor Mr. Carmichael ever contacted her in order to procure her testimony at the penalty phase of Mr. Rigterink's trial. (PC, p. 1818). In fact, Ms. Dzialo testified that she offered to be a witness in Mr. Rigterink's case, but Mr. Hileman rejected the idea and informed her that she was not allowed to do so because she would be too biased. (PC, p. 1824).

Catherine Enriquez, Mr. Rigterink's former wife, testified at the evidentiary hearing that Mr. Rigterink smoked marijuana and also used cocaine, ecstasy, and LSD. (PC, p. 1589-1590, 1633). Ms. Enriquez also testified that as their marriage progressed, Mr. Rigterink's drug use increase and became more frequent. (PC, p. 1592). Eventually, Mr. Rigterink's drug use progressed to the point where he would wake up in the middle of the night to smoke marijuana. (PC, p. 1620). Further, Ms. Enriquez stated that Mr. Rigterink began abusing pills like Xanax, and Valium. (PC, p. 1593). Ms. Enriquez noted that once Mr. Rigterink would start using a drug, he would use the drug to the point of passing out or experiencing physical body tremors. (PC, p. 1596).

Ms. Sheil, Mr. Rigterink's girlfriend at the time of the offense, also testified at the evidentiary hearing and stated that she had personally seen Mr. Rigterink use methamphetamine, cocaine, mushrooms, and prescription pills such as Xanax. (PC, p. 1777-1779, 1787). Ms. Sheil confirmed that she observed Mr. Rigterink smoke marijuana all day long. (PC, p. 1788). Further Ms. Sheil testified that she made a sworn statement regarding Mr. Rigterink's extensive drug use; however, neither Mr. Hileman nor Mr. Carmichael ever contacted her for the purposes of procuring her testimony at the penalty phase of trial. (PC, p. 1783).

Dick Rigterink testified he confronted Defendant Rigterink about his drug abuse and encouraged him to seek treatment. (PC, p. 1726-1727). Dick Rigterink also testified he informed trial counsel about Mr. Rigterink's drug abuse.

All of these witnesses are significant because they confirm the diagnosis of severe substance abuse by Drs. McClane, Hartig, and Krop, and by Mr. Rigterink's counselor, Dr. Dantzler, and by the pharmacologist, Dr. Buffington.

Mr. Carmichael testified at the evidentiary hearing in support of the above claims. Mr. Carmichael acknowledged that he had received reports regarding Mr. Rigterink's drug usage and was aware of that drug usage. (PC, p. 835). Mr. Carmichael also acknowledged that Mr. Rigterink's family had informed him of Mr. Rigterink's drug abuse. (PC, p. 853-854). Furthermore, Mr. Carmichael conceded that there was substantial evidence of Mr. Rigterink's drug abuse, not only from Mr. Rigterink's own statements, but other sources as well. (PC, p. 991). Specifically, Mr. Carmichael recounted a "statement in the summary that [he] received from the Rigterinks that there was some amphetamine use in one of [Mr. Rigterink's] drug tests, another drug test that showed Xanax and Darvocet, and [it was his] recollection that [Mr. Rigterink's Wife] had indicated that . . . she knew that he had experimented with other drugs." (PC, p. 991). Mr. Carmichael acknowledged that he was aware that Mr. Rigterink's sister, Mary Dzialo, had knowledge of Mr. Rigterink's extensive drug abuse as he testified that he spoke

with Ms. Dzialo about the matter. (PC, p. 853). Further, Mr. Carmichael testified that although he was aware that Ms. Enriquez, Mr. Rigterink's former wife, had additional information regarding Mr. Rigterink's drug abuse at the time of the offense, he chose not to pursue that angle. (PC, p. 949).

Despite the need to investigate Mr. Rigterink's mental health as affected by his drug abuse in an effort to develop mental mitigation, Attorney Carmichael admitted that he began working on the penalty phase of the trial without the assistance of any type of mental health professional or pharmacologist of any kind. (PC, p. 918-919). Furthermore, Attorney Carmichael testified that he did not pursue mental mitigation with any of the doctors who examined Mr. Rigterink for the purposes of mitigation during the penalty phase of trial. (PC, p. 1035).

Although Mr. Carmichael stated that he was the attorney primarily responsible for the penalty phase of the representation, he readily admitted that he never reviewed the initially appointed public defender's file. (PC, p. 834, 837). Rather than obtain an expert to assist in preparing mitigation for the penalty phase of the trial, Attorney Carmichael testified that he prepared for the penalty phase by researching case law, speaking with other attorneys, and reviewing statutes. (PC, p. 986). Mr. Carmichael testified that he decided not to present any evidence regarding Mr. Rigterink's drug abuse/mental mitigation and instead presented evidence that would "humanize" Mr. Rigterink. (PC, p. 924-925). Mr. Carmichael

admitted that he did not consider the statutory mitigating circumstance of “mental or emotional disturbance” or the “ability to conform conduct to the requirements of the law” for the purposes of mitigation at the penalty phase of the trial. (PC, p. 912). Mr. Carmichael stated that he and attorney Hileman chose to rely on the *Spencer* hearing, rather than the penalty phase of trial, to present experts and evidence of drug abuse. (PC, p. 926-927). However, when the time for the *Spencer* hearing approached, the appointment of an expert was denied as untimely and ultimately neither attorney attempted to present the testimony of any other experts who had previously examined Mr. Rigterink. (PC, p. 1382).

Mr. Carmichael stated that he considered reaching out to Mr. Rigterink’s drug abuse counselor for purposes of obtaining her testimony for the penalty phase, but ultimately decided not to even contact her. (PC, p. 948). When asked whether Mr. Carmichael ever requested a comprehensive report from the investigator/ mitigation specialist for purposes of mitigation, Mr. Carmichael stated, “I don’t know what that is.” (PC, p. 948).

Mr. Hileman also testified in support of these claims. When asked about the preparation for the penalty phase of the trial, Mr. Hileman stated that Mr. Carmichael did not want to pursue mental mitigation/drug abuse. (PC, p. 1446-1447). Mr. Hileman stated that although he initially wanted to approach the penalty phase of the trial with drug abuse/ mental mitigation evidence, he chose to defer to

Mr. Carmichael's judgment on the issue and refrain from presenting such evidence, despite his many more years of experience handling death penalty cases. (PC, p. 1446-1447, 1490). Accordingly, the chosen penalty phase strategy attempted by Mr. Hileman and Mr. Carmichael was to completely neglect the drug abuse/mental mitigation evidence and present Mr. Rigterink as a good person with no violent criminal history. (PC, p. 1530).

Mr. Hileman admitted that Dr. Hartig recommended that the attorneys seek further neurological testing and various other procedures for Mr. Rigterink. (PC, p. 1329-1330). Mr. Hileman recalled that Dr. Hartig informed him that Mr. Rigterink suffered from schizophrenic tendencies and paranoia. (PC, p. 1327). Mr. Hileman noted that although he initially spoke with various doctors, including Dr. Dantzler and Dr. McClane, he never followed up with them. (PC, p. 1331-1333).

Mr. Hileman conceded that oftentimes in death penalty cases, the attorneys must present evidence at the penalty phase that conflicts with the guilt phase, and that presenting some explanation of the behavior of the accused to a jury is better than presenting no explanation at all. (PC, p. 1456). Further, Mr. Hileman also conceded that when preparing for the penalty phase of a trial, it is important to have as many mitigating factors as possible. (PC, p. 1457). Further, Mr. Hileman agreed that based on the information he received on the case, extreme mental or emotional disturbance should have been investigated, but eventually that

investigation was abandoned. (PC, p. 1455). Further, Mr. Hileman stated that although he was aware that Ms. Sheil would testify that Mr. Rigterink had smoked methamphetamine at or near the time of the offense, he failed to procure her testimony or assess its significance. (PC, p. 1397-1398).

As to Claim 2(A)(1), the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness because counsel considered mental health issues and ultimately made a reasonable tactical decision. This ruling is contrary to the evidence presented at the evidentiary hearing and are not supported by law.

Here, although there were many "red flags" regarding Mr. Rigterink's drug abuse which affected his mental health, both trial attorneys failed to have Mr. Rigterink properly evaluated by a mental health professional for the purposes of developing mental mitigation. Mr. Rigterink presented multiple witnesses at the evidentiary hearing demonstrating the various avenues for uncovering mental mitigation that could have been used by trial counsel but were not. Mr. Rigterink also presented several experts/witnesses at the evidentiary hearing that had in fact made recommendations to trial counsel as to how to further pursue and develop mental mitigation, but again trial counsel rejected these recommendations.

Furthermore, the doctors that had treated or evaluated Mr. Rigterink were never utilized to assist the jury in understanding Mr. Rigterink's biological, social

and psychological history, drug abuse and other factors that might have a bearing on the jury's understanding of mental mitigating circumstances. The evidentiary hearing demonstrated that the doctors and experts who were initially contacted by trial counsel in this case wanted to pursue further testing and obtain records regarding Mr. Rigterink's mental health, but never had the opportunity to do so as trial counsel failed to follow-up or pursue this mitigation further. As such, the post-conviction court erroneously found that the record supported a finding that counsel did not ignore mental mitigation. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. Rigterink's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

As to Claim 2(A)(3), the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness not only because the defense did present some evidence of Defendant Rigterink's drug abuse during the penalty phase but also because trial counsel made a reasonable tactical decision not to emphasize the drug usage which trial counsel reasonably thought would have a negative impact on the jury. This ruling is contrary to the evidence presented at the evidentiary hearing and are not supported by law.

The evidentiary hearing made clear that Mr. Rigterink's history of drug abuse could have been utilized to show that his ability to conform his behavior to the requirements of the law was impaired (substantially or otherwise) and/or that he was under (extreme) mental or emotional disturbance. These mitigating circumstances would also have countered the aggravating circumstances presented by the State. In Mr. Rigterink's case, the penalty phase jury recommended the death penalty by a 7/5 vote, one vote short of receiving a life sentence. Had trial counsel simply followed the recommendations of mental health professionals and investigated this issue further, trial counsel could have presented these mitigating circumstances to the jury. If they had done so, the jury would have recommended a life sentence as to each count. However, because no effort was made by trial counsel to do so, the jury was left without an explanation for the events that took place on the date of the murders and were instead confronted with the State's overwhelming presentation of aggravating circumstances.

The evidentiary hearing made clear that this mitigating circumstance should have been investigated and presented to the jury during the penalty phase of trial. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. Rigterink's case is contrary to the law and not supported by competent, substantial evidence.

As to Claim 2(A)(5), the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness because Defendant Rigterink did not present any significant evidence at the evidentiary hearing that counsel was deficient. The court gave great weight to Attorney Carmichael's testimony that third party family observations and the observations of law enforcement who had contact with Mr. Rigterink did not convey any signs of impairment. However, as demonstrated by Dr. Buffington's testimony at the evidentiary hearing, "normal" behavior for Mr. Rigterink was a quiet and withdrawn demeanor. Furthermore, Mr. Rigterink likely did seem "normal" to his family as he had used drugs consistently up until the incident; therefore, Mr. Rigterink's family had likely come to expect Mr. Rigterink's impaired state and bizarre behavior as "normal."

Furthermore, Mr. Rigterink's sister, Mary Dzialo, was available and willing to testify at the penalty phase of trial. She would have been prepared to testify regarding Mr. Rigterink's extensive drug abuse at or near the time of the event as she was well able to testify to these issues at the evidentiary hearing. However, despite this knowledge, trial counsel chose not to call Ms. Dzialo.

In conclusion, the evidentiary hearing made clear that trial counsel failed to investigate Mr. Rigterink's drug abuse and mental health and failed to follow-up on the examinations that were undertaken early in the case and failed to follow the

recommendations of mental health professionals. Further, the evidentiary hearing demonstrated that trial counsel failed to properly investigate Defendant Rigterink's history of drug abuse, which could have been utilized to show that Mr. Rigterink's ability to conform his behavior to the requirements of the law was impaired (substantially or otherwise) and/or that he was under extreme mental or emotional disturbance. Lastly, the evidentiary hearing made clear that trial counsel failed to interview potential mitigation witnesses who would testify about Mr. Rigterink's drug abuse and bizarre conduct at or near the time of the offense. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. Rigterink's case is contrary to the law and not supported by competent, substantial evidence.

2) Failure to investigate Defendant Rigterink's drug abuse and mental health as it related to the guilt phase.

Claims 1B and 1I of Defendant Rigterink's 3.851 Motion addresses counsel's failure to investigate his drug abuse and mental health as it related to the guilt phase of trial. Claim 1B argues that trial counsel was ineffective for failing to file a comprehensive pretrial motion to suppress Defendant Rigterink's out of court statements made to police on October 16, 2003 in that trial counsel failed to challenge the voluntariness of Mr. Rigterink's statement. Claim 1I argues that trial counsel failed to thoroughly investigate the mental state of Defendant at the time of

the offense and failed to follow-up on the examinations that were undertaken and the recommendations of mental health professionals.

Defendant Rigterink presented several witnesses at the evidentiary hearing in support of these claims. At the evidentiary hearing, Mr. Hileman acknowledged that he filed a motion to suppress, but he did not raise the issue of the voluntariness of the statement due to drug use. (PC, p. 1362). Mr. Hileman testified that although he was aware of drug tests performed by the State Attorney's office proving that Mr. Rigterink had in fact used drugs around the time of his statements and had an active amount of drugs in his blood, and although Mr. Hileman had information from both Mr. Rigterink and his family regarding Defendant Rigterink's drug abuse, Mr. Hileman believed that the voluntariness of Mr. Rigterink's statements could not be challenged. (PC, p. 1558-1559).

Mr. Hileman did admit that he was aware of Mr. Rigterink's drug abuse, including his abuse of methamphetamine. (PC, p. 1321-1322). Additionally, Mr. Hileman acknowledged hiring an investigator/ mitigation specialist on the case. (PC, p. 1346). The investigator/ mitigation specialist's memorandum to Mr. Hileman relayed that Mr. Rigterink ingested Xanax and Darvocet and had not slept for two days prior to the police interview. (PC, p. 1361). Mr. Hileman denied ever receiving this information however and claimed that had he been informed, he would have moved to suppress Mr. Rigterink's statement on the grounds of

voluntariness. (PC, p. 1357-1358; 1359; 1361). Ultimately, Mr. Hileman conceded that he may truly have been informed of Mr. Rigterink's drug use but may have simply forgot. (PC, p. 1400).

Mr. Hileman admitted he was aware of various psychological issues affecting Mr. Rigterink because he made notes indicating that Dr. Hartig told him of Mr. Rigterink's paranoia and schizophrenic tendencies. (PC, p. 1327). Further, Mr. Hileman testified Dr. Hartig informed him of Mr. Rigterink's substance abuse and that Dr. Hartig wanted further neurological testing performed. (PC, p. 1329-1330). Mr. Hileman recounted that Dr. Hartig believed the offense was related to substance abuse. (PC, p. 1329-1330). When asked about his follow-up with Dr. Hartig, Mr. Hileman admitted that he did not follow up with the doctor despite her request for further information so that she could conduct a more accurate evaluation. (PC, p. 1331).

Mr. Hileman testified he hired Dr. McClane to perform an evaluation on Mr. Rigterink and that Dr. McClane wanted to see additional tests and reports regarding Mr. Rigterink, but admitted that he did not know whether Dr. McClane ever received the requested information. (PC, p. 1380). When asked why nothing further was provided to or requested from Dr. McClane, Mr. Hileman admitted that he did not know. (PC, p. 1384).

When asked why Dr. Hartig and Dr. McClane were not consulted further on the case, Mr. Hileman stated that he did not know why the two doctors were not retained further. (PC, p. 1381, 1384). Mr. Hileman admitted that he never consulted a pharmacologist, or any other expert, in an effort to further pursue this issue, but assumed that attorney Carmichael may have done so. (PC, p. 1412). Ultimately, Mr. Hileman viewed Mr. Rigterink's case primarily as a penalty phase case as he felt it was not possible for Mr. Rigterink to receive an acquittal and, therefore, did not attempt to defend the murders. (PC, p. 1507).

Mr. Hileman stated that at trial, he listed three doctors as witnesses, but never asked them to examine Mr. Rigterink. (PC, p. 1440-1441). Mr. Hileman also admitted that he knew that Courtney Sheil, Mr. Rigterink's girlfriend, would have testified that she and Mr. Rigterink smoked methamphetamine together, and that he never attempted to subpoena her testimony in Mr. Rigterink's defense. (PC, p. 1397-1398).

At the evidentiary hearing, Attorney Carmichael testified he never reviewed Mr. Rigterink's case file received from the initially appointed Public Defender, Pete Mills. (PC, p. 834). Attorney Carmichael also admitted he never spoke to Mr. Rigterink's drug counselor, Dr. Dantzler. (PC, p. 853-854). Further, Mr. Carmichael was aware of the extent of Mr. Rigterink's drug use as Mr. Carmichael noted discussions with Mr. Rigterink's family regarding Mr. Rigterink's drug

usage. (PC, p. 853-854). Mr. Carmichael did admit that he was completely aware of Mr. Rigterink's marijuana use as he had spoken with Mr. Rigterink about the matter. (PC, p. 965). Attorney Carmichael also admitted that he had spoken with Dr. Hartig about her interview with Mr. Rigterink, which indicated an escalated drug usage prior to the offense. (PC, p. 864).

Further, Mr. Carmichael admitted that he was aware of drug use at the time the statements were made as he had received the reports regarding Mr. Rigterink's blood analysis and drug screening after the representation began. (PC, p. 835). Mr. Carmichael claimed that he was unaware that Mr. Rigterink had been using methamphetamine prior to the offense and at the time of the statements; however, he admitted that he had seen the results of the drug tests indicating usage of an amphetamine of some kind. (PC, p. 856).

Attorney Carmichael testified that Dr. Hartig informed trial counsel that she found an increased drug usage prior to the offense and recommended that Mr. Rigterink be evaluated by an expert in illicit substances and by a neurologist or neuropsychologist, however, neither attorney made an attempt to do so. (PC, p. 864; 878, 881). Dr. Hartig recommended to Mr. Hileman and Mr. Carmichael that Mr. Rigterink be evaluated by an expert in illicit substances and by a neurologist or neuropsychologist, however, neither attorney made an attempt to do so as Mr. Rigterink's ability to waive his *Miranda* rights was not pursued. (PC, p. 878, 881).

Mr. Carmichael conceded that he never consulted a pharmacologist to determine the effect of the drugs on Mr. Rigterink at the time the statements were made to the police. (PC, p. 881).

Mr. Carmichael testified that he considered challenging the statements made to police based on Mr. Rigterink's inability to waive his *Miranda* rights voluntarily due to drug usage. (PC, p. 865). Mr. Carmichael spoke with Dr. McClane, but never followed up with the doctor regarding any results. (PC, p. 875). Mr. Carmichael spoke with Dr. Mark Montgomery to extrapolate the amount of drugs in Rigterink's system at the time of the statement based on the Rigterink's blood test. (PC, p. 867). Dr. Montgomery determined that there were drugs present in Mr. Rigterink's system at the time of the statement; however, Mr. Carmichael ultimately decided not to challenge the statements made to police. (PC, p. 869). When asked why, Mr. Carmichael responded that he believed there was no good faith basis for such a claim. (PC, p. 872-873).

Dr. Buffington testified that substance abuse could very well have influenced Mr. Rigterink's ability to give a voluntary statement and that the issue should have been raised by Mr. Rigterink's trial attorneys. (PC, p. 1120). Dr. Buffington testified that at the time of the statement, the reports indicated that Mr. Rigterink showed indications of drug abuse, including long-term drug abuse. (PC, p. 1123). Because of this, it was Dr. Buffington's testimony that the trial attorneys

should have consulted with a pharmacologist prior to trial to determine the voluntariness of the statement. (PC, p. 1125). Dr. Buffington noted that he could not determine the exact levels of drugs present in Mr. Rigterink's system at the time of the offense or at the time of the statements to police because of the delay between the dates of those incidents and the drug test. (PC, p. 1128). However, he stated that unless Mr. Rigterink received drugs in the Polk County jail he would have been under the influence at the time he gave the statements to police. (PC, p. 1127).

When asked how Mr. Rigterink could have been under the influence of drugs even though his parents remembered Mr. Rigterink as "normal" on the date of the offense, Dr. Buffington explained that "normal" for Mr. Rigterink meant quiet and withdrawn. (PC, p. 1136). Dr. Buffington also explained that Mr. Rigterink could have been in an altered state at the time of the offense, and then two hours later he could have seemed "normal" to his parents. (PC, p. 1141). This quiet and withdrawn state exhibited by Mr. Rigterink on the date of the offense is a characteristic that is consistent with someone who chronically abuses drugs. (PC, p. 1182).

Furthermore, despite the State's argument that Detective Connolly believed that Mr. Rigterink was responsive and alert while giving statements to the police, Dr. Buffington was not confident that the local police were able to determine Mr.

Rigterink's cognitive status based solely on Mr. Rigterink's apparent responsiveness or alertness during the interview. (PC, p. 1150-1151). While police may have been unaware that Mr. Rigterink was under the influence of drugs and mind-altering substances, the testing indicates that Mr. Rigterink did in fact have THC, Darvocet, and Xanax in his system at the time of the giving of the statements. (PC, p. 1181-1182).

Dr. Hartig testified at the evidentiary hearing that she recommended Mr. Carmichael have Mr. Rigterink evaluated by a neurologist or a neuropsychologist to investigate Mr. Rigterink's blackouts and seizures. (PC, p. 878). Based on the doctor's evaluations, she testified that Mr. Rigterink suffered from depression and significant substance abuse. (PC, p. 1255, 1256). Additionally, the doctor's testing also revealed some evidence of psychopathology and bizarre thought processing, such as hallucinations and strange thoughts. (PC, p. 1256). Despite Dr. Hartig's recommendations and evaluations, Mr. Carmichael admitted that he never retained a pharmacologist, toxicologist, or neurologist to meet with Mr. Rigterink and perform any type of evaluation. (PC, p. 881).

Dr. Hartig also testified that Mr. Rigterink's ability to give a voluntary statement should have been investigated by Mr. Rigterink's trial counsel. (PC, p. 1250). Dr. Hartig stated that, based on her evaluation of Mr. Rigterink, which indicated an increased substance abuse prior to the offense, she believes that it

would have been important to Mr. Rigterink's case to explore whether he had the ability to voluntarily waive his *Miranda* rights. (PC, p. 1250).

Dr. Dantzler, Defendant Rigterink's drug counselor prior to his arrest, testified that Mr. Rigterink's fifteen years of drug usage was "rampant and indiscriminate" and this drug use affected Mr. Rigterink's ability to function. (PC, p. 1062, 1063, 1065, 1074). Despite Dr. Dantzler's evaluation, neither Mr. Carmichael nor Mr. Hileman contacted the doctor during the course of Mr. Rigterink's representation or the trial. (PC, p. 1072).

Additionally, Dr. McClane testified that based on his evaluations of Mr. Rigterink, he determined Mr. Rigterink had an extensive drug history. (PC, p. 1278). Specifically, Mr. Rigterink noted that he had used drugs such as marijuana, cocaine, methamphetamine, MDMA, GHB, LSD, and Darvocet. (PC, p. 1278). Dr. McClane testified this was significant because drugs can alter a person's mental state substantially. (PC, p. 1278). It was also Dr. McClane's belief that due to the blackouts suffered by Mr. Rigterink, he may not have been able to accurately remember how many drugs he had taken prior to the interview. (PC, p. 1285).

Dr. McClane noted that methamphetamine specifically can lead to violence, rage, and irrational behavior. (PC, p. 1285). Dr. McClane opined that Mr. Rigterink was a chronic drug abuser and that he wanted to investigate Mr. Rigterink's drug abuse further as he was aware Mr. Rigterink had taken drugs near the time of the

offense. (PC, p. 1285). Doctor McClane testified he informed trial counsel that he wanted to continue investigating Mr. Rigterink's drug abuse and wanted to pursue brain studies on Mr. Rigterink. (PC, p. 1286). Despite this request, neither Mr. Hileman nor Mr. Carmichael provided Dr. McClane with collected information from witnesses like Ms. Sheil or Ms. Enriquez about how Defendant Rigterink acted while under the influence of drugs near the time of the crimes, nor did counsel retained Dr. McClane further. (PC, p. 1293). The investigator/mitigation specialist working on this case testified she interviewed Mr. Rigterink at Mr. Hileman's request. (PC, p. 1837). During the interview, Mr. Rigterink informed her that on the day of the offense, he used "ice," Darvocet, and Xanax. (PC, p. 1840). Mr. Rigterink also told her that while he was on "ice" he felt rage and had a short temper. (PC, p. 1845). The investigator/mitigation specialist testified that Mr. Rigterink's trial attorneys never asked her to interview Mr. Rigterink's wife or girlfriend about his drug use. (PC, p. 1850).

The investigator/mitigation specialist also testified that she informed Mr. Hileman of Mr. Rigterink's extensive drug use; however, Mr. Hileman never asked her to investigate the issue further. (PC, p. 1861). Furthermore, Neither Mr. Hileman nor Mr. Carmichael asked the investigator/mitigation specialist to investigate the toxicology reports further. (PC, p. 1876). The investigator/mitigation specialist made several recommendations to both Mr.

Carmichael and Mr. Hileman to retain a pharmacologist and a forensic psychologist; however, the trial attorneys did not follow these recommendations. (PC, p. 1875).

Dr. Suarez testified for the State at the evidentiary hearing. Dr. Suarez claimed that he determined Mr. Rigterink's statement was made voluntarily. (PC, p. 1656). However, Dr. Suarez is not a pharmacologist and has never been declared an expert in the field of pharmacology, rather he is a licensed psychologist. (PC, p. 1639, 1684, 1685). Dr. Suarez based his opinion partially on the fact that Mr. Rigterink did not state that he was under the influence of drugs at the time of the statement. (PC, p. 1654-1655). However, Dr. Suarez did not evaluate Defendant Rigterink. (PC, p. 1647). Dr. Suarez also testified that a person does not need to be on methamphetamine to feel the effects of the drug. (PC, p. 1688). Ultimately, Dr. Suarez recognized that he could not diagnose Mr. Rigterink, nor could he come to a definite conclusion on the matter. (PC, p. 1710).

The evidentiary hearing made clear that trial counsel should have properly investigated Defendant Rigterink's mental state and drug abuse at the time of the giving of the statements. Had trial counsel conducted a proper investigation, trial counsel would have been able to seek the suppression of Mr. Rigterink's statements to police on the basis that they were not made voluntarily. Additionally, such testimony would have assisted the jury in evaluating Defendant Rigterink's

inconsistent statements. The fact that Mr. Rigterink was under the influence of mind-altering substances could have been used to explain the inconsistencies in Mr. Rigterink's statements. Here, trial counsel failed to investigate the circumstances surrounding of the giving of the statements by talking to witnesses who saw Mr. Rigterink at or near the time of the statement and fully investigate the results of Mr. Rigterink's drug screenings.

After the evidentiary hearing, the post-conviction court found that the evidence at the evidentiary hearing regarding the defendant's drug use and ability to give a voluntary statement did not sufficiently demonstrate his statement to police was not given freely, knowingly, and voluntarily. Further, the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness because Defendant Rigterink did not allege his mental condition would support an insanity defense and diminished capacity is not a valid defense under Florida Law. This ruling is contrary to the evidence presented at the evidentiary hearing and is not supported by law.

Had counsel filed a comprehensive motion to suppress based on the involuntariness of Mr. Rigterink's statement, there is a reasonable probability that Mr. Rigterink would have been found not guilty or guilty of a lesser offense that was not punishable by death. Defendant's October 16, 2003 statements were the cornerstones of the State's case. Even if the trial court failed to suppress the

statements, a jury could have considered the voluntariness of the statement that was introduced into evidence. In this case, trial counsel presented the jury with no facts which would challenge the voluntariness of Mr. Rigterink's statements or explain the inconsistent statements. However, the jury was entitled to know this information in order to evaluate the voluntariness of Defendant Rigterink's statements as the jury would have been instructed to consider Defendant Rigterink's statements with caution and great care in order to make certain that Mr. Rigterink's statements were voluntarily made. The jury in this case would also have been instructed to disregard Mr. Rigterink's statement if, after considering the evidence, it determined Mr. Rigterink's statements were involuntary. However, the jury in Mr. Rigterink's case never had the opportunity to do so due to trial counsel's failure to challenge the issue.

Here, trial counsel should have sought to introduce expert testimony regarding Mr. Rigterink's active drug abuse and impaired mental state at the time of his interrogation by police as affecting the voluntariness of his statements at trial. The evidentiary hearing demonstrated that the failure to investigate and present such evidence fell below an objective standard of reasonableness and as a result, there is a reasonable probability that the result of the guilt phase and penalty phase of the trial would have been different. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor

prejudice to Mr. Rigterink's case is contrary to the law and not supported by competent, substantial evidence.

D. THE POST-CONVICTION COURT'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO FILE A PRETRIAL MOTION TO SUPPRESS DEFENDANT RIGTERINK'S CUSTODIAL PRE-*MIRANDA* STATEMENTS MADE TO POLICE ON OCTOBER 16, 2003 IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE OR THE LAW.

An evidentiary hearing was granted by the post-conviction court as to Claim 1B of Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence brought pursuant to Fla. R. Crim. Pro. 3.851. This claim deals with trial counsel's failure to file a comprehensive pretrial motion to suppress Defendant Rigterink's custodial pre-*Miranda* statements made to police on October 16, 2003. The post-conviction court held that counsel's performance did not fall below an objective standard of reasonableness because Defendant presented no evidence indicating that his earlier statements would have been suppressed if challenged. The post-conviction court stated that "even assuming counsel was somehow deficient in not seeking to suppress some of the non-recorded statements made by Defendant to law enforcement, the Court notes that the final statement that the Defendant provided law enforcement was found to be admissible and properly *Mirandized*." However, this ruling has no legal basis and is not supported by competent, substantial evidence.

In *Rigterink I,* the Florida Supreme Court held that Mr. Rigterink was "in custody" for purposes of triggering *Miranda* warnings, at a minimum during the tape recorded statement and sometime before the giving of *Miranda*. The Court stated,

> While the questioning of a suspect within the confines of a police station does not necessarily convert a voluntary interview into custodial interrogation, the manner in which these detectives conducted Rigterink's questioning—which included repeated accusations and confrontations over several hours that he was lying and was somehow involved in these murders (including confrontation with inculpatory evidence)—militates in favor of the conclusion that a reasonable person in Rigterink's position would not have believed that he or she was free to leave the BCI office or to terminate questioning. . . "the purpose, place, and manner" of Rigterink's interrogation indicate that a reasonable person would not have felt that he or she was free to simply terminate questioning and leave the premises. A four-plus-hour-long interview or interrogation, which included repeated accusations of lying and dissembling, and confrontation with incriminating evidence, all of which took place in a small sound-insulated interview room, with a closed door, in the presence of at least two interrogating detectives, is not conducive to a finding that the defendant was free to terminate the questioning process and leave the station house or that a "reasonable person" would have felt free to simply walk out.

Rigterink v. State, 2 So.3d 221, 250-52 (Fla. 2009).

Testimony at the evidentiary hearing demonstrated that trial counsel was aware that Mr. Rigterink was only given *Miranda* warnings by the police after three and one-half hours of questioning; however, trial counsel never sought suppression of the pre-*Miranda* custodial statement. When asked about trial counsel's failure to seek suppression of the statements, Mr. Carmichael claimed

this was a tactical/strategic decision. (PC, p. 891). Mr. Carmichael testified that Mr. Rigterink explained that he told the conflicting stories to the police because he felt pressure during the interview based on the officers' questions and accusations. (PC, p. 985).

Mr. Hileman acknowledged that he was aware that Mr. Rigterink was questioned by police for three and a half hours prior to receiving a *Miranda* warning. (PC, p. 1405-1406). Mr. Hileman was also aware that police repeatedly employed high-pressure tactics, such as confronting Mr. Rigterink with evidence of his guilt and accusing Mr. Rigterink of lying. (PC, p. 1406; 1542). Further, Mr. Hileman testified that he believed Mr. Rigterink was not in custody despite his own testimony that Mr. Rigterink was "confronted repeatedly with, 'we think you're lying, we think you're involved.' And then ultimately with [] fingerprints." (PC, p. 1409; 1542). Ultimately, Mr. Hileman believed that there was no basis for the suppression of the statements to police. (PC, p. 1543).

This evidence demonstrated that trial counsel should have challenged Mr. Rigterink's unrecorded statements to police as he was "in custody" and not given *Miranda* warnings prior to the recorded portion of his statement. In *Rigterink I,* the Florida Supreme Court held that Mr. Rigterink was "in custody" for purposes of triggering *Miranda* warnings at a minimum during the tape recorded statement and sometime before the giving of the warnings. Here, prior to receiving a *Miranda*

warning from the officers, Mr. Rigterink was confronted with the fact that his fingerprints matched the bloody latent fingerprints discovered at the scene and he was repeatedly told that he was lying. By any objective standard, Mr. Rigterink's trial counsel should have known that Mr. Rigterink was not free to leave at least by this juncture if not significantly sooner. As a result, trial counsel should have been aware that Mr. Rigterink was "in custody" and, as a result, should have determined that the police were required to give him constitutionally sufficient *Miranda* warnings well before they were given.

Here, the jury learned of Mr. Rigterink's conflicting pre-*Miranda* statements, made while Mr. Rigterink was "in custody," which made Mr. Rigterink's testimony seem ridiculous and incredible. As a result, these inconsistent statements devastated Mr. Rigterink's credibility while testifying. Had the statements been properly challenged, the statements would have been deemed inadmissible due to the failure to give any *Miranda* warnings immediately upon the circumstances amounting to an "in custody" interrogation and would have prevented the jury from hearing a significant portion of Defendant Rigterink's statement. Defendant Rigterink's October 16, 2003 statements were the cornerstones of the State's case and the State heavily relied upon this evidence to prove the case against Mr. Rigterink.

In summation, the evidentiary hearing made clear that trial counsel's failure to raise this issue pretrial via a motion to suppress and/or a trial objection on 4th and 14th Amendment grounds is an omission which fell well below the standard that applies to counsel. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. Rigterink's case is contrary to the law and not supported by competent, substantial evidence.

E. THE POST-CONVICTION COURT'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A COMPREHENSIVE PRETRIAL MOTION TO SUPPRESS A KNIFE FOUND IN DEFENDANT'S HOME AND IN FAILING TO OBJECT TO THE ADMISSION OF NIKE SHOES AT TRIAL IS NOT SUPPORTED BY THE LAW OR COMPETENT SUBSTANTIAL EVIDENCE.

An evidentiary hearing was granted by the post-conviction court as to Claims 1A and 1J of Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence brought pursuant to Fla. R. Crim. Pro. 3.851. These claims address trial counsel's failure to suppress and/or object to introduction of evidence by the State – specifically, a knife obtained from Mr. Rigterink's home and a pair of Nike shoes purchased by the State. After the evidentiary hearing, the post-conviction court denied this claim as to both the knife and the Nike shoes. With regard to the knife, the post-conviction court ruled that Ms. Sheil was a co-occupant of the residence and therefore the knife could not be suppressed; that this

evidence was not prejudicial because the State did not allege that the knife was the murder weapon; and that trial counsel's failure to object was strategic. As to the Nike shoes, the post-conviction court found that they were not overly prejudicial, and therefore no objection was warranted, because the State's analyst testified at trial that he could not link the shoes to any particular person. However, this ruling has no legal basis and is not supported by competent, substantial evidence.

A person's home "is accorded the full range of Fourth Amendment protections." *Lewis v. United States*, 385 U.S. 206 (1966). The Supreme Court has declared that a person has a reasonable expectation of privacy in a private residence. *Florida v. Jardines*, 133 S. Ct. 1409 (2013). The Court elaborated that at the very core of Fourth Amendment principles is the notion that person is free from government intrusion in his home.

Although typically Fourth Amendment protections only apply to government or state actors, the Fourth Amendment's protection against unreasonable searches and seizures will apply to private individuals who act at the direction of government or state actors. *See Bernovich v. State,* 272 So. 2d 505 (Fla. 1973) (finding the Fourth Amendment inapplicable to a private individual's search and seizure of evidence as there was no active participation by state actors); *State v. Moninger*, 957 So. 2d 2 (Fla. 2d DCA 2007). Specifically, Government or state action is present when "(1) a private party acts as an instrument or agent of the

state . . . and the government knows of or acquiesces to the conduct, and (2) the search is conducted solely in pursuit of a government interest." *State v. Butler*, 1 So. 3d 242, 246 (Fla. 1st DCA 2008) (finding state action where a court delegated video surveillance duties to a hospital); *see also Treadway v. State*, 534 So. 2d 825, 827 (Fla. 4th DCA 1988).

In *Moninger*, the appellate court reversed the lower court's denial of the defendant's motion to suppress because the evidence was obtained as the result of an illegal search. *Moninger*, 957 So. 2d at 2-3. More specifically, the daughter entered the home that she shared with her father at the request and encouragement of police officers for the purpose of obtaining evidence for the officers. *Id.* at 2-3. The daughter lived at the residence and had a key to the residence. *Id.* The police simply informed the daughter that she could go inside the residence to collect the evidence for the officers and proceeded to give her an evidence bag for proper handling of the evidence. *Id*. The daughter's actions became state action subject to the Fourth Amendment at the moment the government became involved as an encourager of a private citizen's actions. *Id.* at 4. The test was not whether the daughter was a co-occupant of the residence or whether the government's actions were reasonable, rather the test is "whether the person who obtained the evidence was acting as an agent or instrumentality of law enforcement." *Id.* at 6.

Furthermore, in Florida, all relevant evidence is admissible, unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. *Miller v. State,* 42 So.3d 204, 224 (Fla. 2010); *see also* Sections 90.402-403, Fla. Stat. (2008). "An appellate court will not disturb a trial court's determination that evidence is relevant and admissible absent an abuse of discretion." *McGirth v. State*, 48 So.3d 777, 786 (Fla. 2010). A trial court's discretion is limited by the rules of evidence and the principles of *stare decisis*. *Johnson v. State*, 969 So.2d 938, 949 (Fla. 2007). Further, According to Florida Statute 90.404 "evidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion." Although, evidence of other crimes, wrongs, or acts are admissible to prove issues such as motive, opportunity, or intent, this evidence is inadmissible when the evidence is used "solely to prove bad character or propensity." Fla. Stat. Section 90.404.

A tactical or strategic decision is unreasonable if it is based on a failure to understand the law. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). Further, simply invoking the wordy "strategy" does not automatically explain away counsel's errors – rather the determination must be based on reasonableness in light of all the circumstances. *Id.* at 1461. Additionally, a "strategic decision"

cannot be deemed reasonable when trial counsel fails to consider the options and make a reasonable choice between those options. *Id.* at 1462.

Specifically, in *Horton*, the defendant's attorneys failed to present certain types of evidence and make certain arguments based on the assumption that the "evidence was too weak." *Id.* However, the court admonished that when trial counsel follows only one path "based upon a misinterpretation of the law, without ever evaluating the merits of alternative paths," trial counsel has not made a reasonable choice between the options. *Id.*

1) **Claim 1A** argues that trial counsel failed to file a motion to suppress or otherwise object to the introduction of State's Exhibit 436, specifically a knife seized from Mr. Rigterink's home by his girlfriend, Courtney Sheil, at the request of local police officers.

As to Claim 1A, the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness because Ms. Sheil could be qualified as a co-occupant of the condominium with the ability and authority to enter the residence and bring out the knife in addition to the fact that the knife would likely have been admitted under the doctrine of inevitable discovery. This ruling is contrary to the evidence presented at the evidentiary hearing and are not supported by law.

Ms. Sheil testified she did not live in the residence, nor did she pay rent to live in the residence. (PC, p. 1775). Ms. Sheil had a spare key to Mr. Rigterink's home for the purpose of letting out the dog. (PC, p. 1802). After Mr. Rigterink's

arrest, Ms. Sheil was present at Mr. Rigterink's home for the purpose of letting the dog outside when police arrived; she notified the officers that there was a knife in Mr. Rigterink's home, and the officers requested that she go into the residence and retrieve the knife. (PC, p. 1803-1805). Ms. Sheil testified she complied with the officer's request. (PC, p. 1805).

Mr. Carmichael acknowledged that neither he nor Mr. Hileman filed a motion seeking exclusion of the knife. (PC, p.843-844). When asked why a motion to suppress was not filed, Mr. Carmichael admitted that although he did consider objecting to the knife and that he appreciated the prejudicial nature of the knife at trial, he and Mr. Hileman chose not to do so. (PC, p. 839-841). Mr. Carmichael admitted that he recognized the State's prejudicial purpose, "that's why the State was admitting it, was to say, he does have a propensity to use the knife for self-defense . . . I certainly would concede that the evidence is prejudicial." (PC, p. 841-842).

Mr. Hileman, on the other hand, admitted that he did not consider the possibility that the knife could be used in a prejudicial manner by the jury. (PC, p. 1401-1402). In fact, Mr. Hileman recounted that he considered the knife a "non-issue" and stated that "we kind of shrugged our shoulders and said 'you know, if [the State] introduce[s] it, the jury is going to wonder why the heck they're

introducing it." (PC, p. 1401-1402; 1544). Mr. Hileman further added about the knife, "it's not relevant, I agree." (PC, p. 1402).

The evidentiary hearing made clear that trial counsel should have moved to suppress the knife as the knife was obtained via an illegal search and seizure. The fact that Ms. Sheil is a private individual does not preclude the Fourth Amendment's application to her search and seizure of the knife at the officers' request. The post-conviction court determined that the search was not illegal simply because Ms. Sheil could be considered a co-occupant of the residence. The lower court relied on the fact that Ms. Sheil spent the night at Mr. Rigterink's residence a few nights per week and had a spare key in making its determination. However, Ms. Sheil was not a co-occupant and, furthermore, the fact that Ms. Sheil could possibly be considered a co-occupant is irrelevant to the issue of whether she was acting at the direction and encouragement of law enforcement when she personally entered Mr. Rigterink's home and seized the knife for law enforcement officers. Ms. Sheil acted as an instrument or agent of the State in doing so. Here, the post-conviction court erred as the test is not whether Ms. Sheil was a co-occupant of the residence, rather the test is "whether the person who obtained the evidence was acting as an agent or instrumentality of law enforcement."

Additionally, trial counsel should have moved to suppress the knife as this evidence was irrelevant and highly prejudicial to Mr. Rigterink's case. The knife was not relevant to the murders as the knife was not the murder weapon, nor was it used during the commission of the crime, nor was it found at the scene. Further, the knife was not relevant to prove that Mr. Rigterink was the person who committed the crime. Had a proper objection been made, based on relevancy or based on the fact that probative value was outweighed by prejudice etc., admission of these items would have constituted an abuse of discretion.

The post-conviction court suggested that this evidence was not prejudicial because the State did not allege that the knife was the murder weapon. However, any attorney should have realized the detrimental effect that the knife would have on Mr. Rigterink's case. Admission of the knife into evidence unfairly prejudiced Mr. Rigterink's case by suggesting to the jurors that Mr. Rigterink was the type of person to own dangerous and deadly weapons and, therefore, likely committed the offense. This evidence was presented to the jury despite the fact that it was improper character evidence and led the jury to believe that because Mr. Rigterink owned a large knife, he was more likely to have committed the crime.

The knife also confused the jury because although the State did not outright present the knife as the murder weapon, it was certainly suggested that it could be the murder weapon as both victims were stabbed prior to their deaths. As

highlighted by Mr. Hileman's own testimony, the jury likely did wonder why the knife was presented and its presentation confused and misled the jury and, as a result, the jury may have simply assumed the knife was related to the murders and/or was the murder weapon. The introduction of the knife, coupled with the State's suggestion, not only hopelessly confused the issues, but also confused the culpability of the parties, and mislead the jury as to Mr. Rigterink's culpability.

Accordingly, the evidentiary hearing made clear that trial counsel had no basis for believing that that an objection could not be made or that there was no good faith basis for an objection. Yet, trial counsel made no attempt to suppress the evidence and simply hoped the jurors, who were not legally trained, would see the evidence as a stretch. The post-conviction court found that Mr. Hileman's failure to object was strategic. However, Mr. Hileman's "strategy" to let in any and all evidence dealing with the irrelevant knife in an effort to make the State look as though it was "reaching" was neither valid nor informed. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. Rigterink's case is contrary to the law and not supported by competent, substantial evidence.

2) **Claim 1J** argues that trial counsel was ineffective for failing to object to the introduction of Nike shoes, purchased by the State, which had a shoe tread similar to those found at the crime scene.

As to Claim 1J, the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness and that even if their performance was deficient, there was no reasonable probability that the results would have been different but for the introduction of the Nike shoes. This ruling is contrary to the evidence presented at the evidentiary hearing and are not supported by law.

According to Mr. Hileman, an empty shoebox was discovered in Mr. Rigterink's closet that allegedly could have matched the description of the shoes used at the crime scene. (PC, p. 1545-1546). The State then purchased the same type of shoes and entered them into evidence. (PC, p. 1545-1546). Despite Mr. Hileman's testimony that there was a mere "circumstantial connection" between the pairs of shoes, neither attorney sought to suppress the shoes. (PC, p. 1546).

When asked why neither he nor Mr. Carmichael sought the exclusion of the Nike shoes purchased by the State, Mr. Hileman replied that this was a strategy. (PC, p. 1438). Mr. Hileman believed that rather than viewing this evidence as suggesting the shoes belonged to Defendant Rigterink, Mr. Hileman hoped the jury would see that the State was "reaching." (PC, p. 1438). Mr. Hileman added, "if the State wants to introduce extraneous evidence, which clearly the jury is going to perceive as irrelevant or probably not very important, I think that muddies the water, and unless it's highly prejudicial in some way, I'm going to let them go

forward." (PC, p. 1438). Mr. Hileman conceded, however, that the shoes were in fact harmful to Mr. Rigterink's case. (PC, p. 1439).

The post-conviction court found that the trial counsel's performance was not defective at trial because the State's analyst testified that he could not link the shoes to any particular person. However, the only purpose of admitting the shoes to the jury was to suggest that Mr. Rigterink was the true culprit because he also owned a pair of Nike shoes just like the ones introduced. The State implied to the jury that the shoes allegedly owned by Mr. Rigterink would have matched the Nike shoes that left the tread marks found at the scene. However, despite the State's suggestion, the State did not present any competent witness regarding this issue to make the evidence relevant. Further, trial counsel never sought suppression of the shoes despite the ability and good faith basis for doing so and simply hoped that the jury would view the evidence as "irrelevant or probably not very important."

Trial counsel's failure to seek suppression of the irrelevant/prejudicial Nike shoes did not constitute a strategic decision where alternate courses of conduct were properly considered and then rejected. Rather, these decisions amounted to deficient performance by trial counsel. Trial counsel attempted to explain this failure as a strategy, however, simply using the word "strategy" does not explain away trial counsel's shortcomings. Trial counsel's failure to object to the highly

prejudicial evidence was unreasonable and fell below the objective professional standards.

The evidentiary hearing made clear that had Mr. Rigterink's trial counsel made a proper objection to the relevancy of the shoes demonstrating that the probative value of the shoes was far outweighed by unfair prejudice, admission of these items would have constituted an abuse of discretion. However, because trial counsel failed to object to the shoes, trial counsel prevented appellate review of the issue and, therefore, trial counsel's performance fell below an objective standard of reasonableness. Had trial counsel objected to the shoes, the State would not have been able to argue that the shoes were admissible to prove the identity of the culprit as the shoe marks found at the scene were never proven to be the same shoes allegedly owned by Mr. Rigterink. Despite trial counsel's speculation that the shoes would show the jury that the State was "reaching," trial counsel admitted the shoes were harmful to Mr. Rigterink's case.

The evidence regarding the shoes was detrimental to Mr. Rigterink's case in that the shoes misled the jury and/or confused the jury as to the identity of the true culprit. The post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. Rigterink's case is contrary to the law and not supported by competent substantial evidence.

F. THE POST-CONVICTION COURT'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CONDUCT ADEQUATE CLIENT INTERVIEWS AND PREPARE DEFENDANT RIGTERINK FOR HIS TRIAL TESTIMONY IS SUPPORTED NEITHER BY THE LAW NOR COMPETENT SUBSTANTIAL EVIDENCE.

An evidentiary hearing was granted by the post-conviction court as to Claims 1D, 1E, and 2(A)(4) of Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence brought pursuant to Fla. R. Crim. Pro. 3.851. These claim address trial counsel's failure to conduct adequate client interviews as well as adequately prepare Defendant Rigterink to testify at trial. After the evidentiary hearing, the post-conviction court denied this claim finding that evidence of uncharged crimes went to motive and that there is no reasonable probability that the outcome of the trial would have been different had this testimony not come in. The post-conviction court also found it persuasive that Mr. Rigterink testified against his counsel's advice. However, this ruling has no legal basis and is not supported by competent, substantial evidence.

In Florida, unless a defendant first puts his character into evidence, the State cannot introduce evidence of the defendant's bad character. *See Wyatt v. State*, 641 So. 2d 355, 358 (Fla. 1994); *Flanagan v. State*, So. 2d 827 (Fla. 1993); *Jackson v. State*, 598 So. 2d 303 (Fla. 3d DCA 1992); Fla. Stat. Section 90.404. Evidence of previous crimes can be admissible if used for purposes of impeachment; however,

this evidence is inadmissible if used to prove bad character or the propensity to commit crimes. *See* Fla. Stat. Section 90.404; Fla. Stat. Section 90.608.

Furthermore, a basic principle of a defendant's 6th Amendment right to counsel is adequate communication which allows the defense attorney to know and understand issues surrounding what the client knows about the offense and communication in which counsel imparts information and advice regarding what counsel learns in the discovery of the case, the client's chances of prevailing at trial, plea bargains extended to the client, and the defense attorney's advice regarding the above stated matters. Failure to spend an adequate amount of time with the client to develop a trusting relationship and to impart sufficient information which will allow an accused to make intelligent choices regarding his course of action, including whether or not to testify or whether or not to go to trial, results in a denial of the 6th Amendment right to counsel.

1) **Claim 1D** argues that counsel was ineffective for failing to object to the cross-examination of Mr. Rigterink regarding the reasons why he was terminated from his previous employment (theft). Failure of trial counsel to object allowed the State to improperly place Mr. Rigterink's character into evidence.

As to Claim 1D, the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness and that even if their performance was deficient, there was no reasonable probability that the results would have been different but for the introduction of such character

evidence. This ruling is contrary to the evidence presented at the evidentiary hearing and are not supported by law.

Attorney Carmichael's testimony at the evidentiary hearing supported this claim. Mr. Carmichael testified he did not remember making an attempt to suppress the reason for Mr. Rigterink's termination at his previous employment and claimed that he had "no recollection of any discussions about a motion in limine on that issue." (PC, p. 891-892). Mr. Carmichael testified that he believed the evidence to be irrelevant as it was not at all similar to the charged offense. (PC, p. 1025). Mr. Carmichael conceded that the evidence of the theft was damaging and prejudicial to Mr. Rigterink's case and claimed he did not recall why the attorneys failed to object to the admittance of the evidence. (PC, p. 893, 1003). When asked whether Mr. Carmichael failed to object because he actually believed the evidence was admissible, he responded, "I'm telling you that I'm sure that it would not have been." (PC, p. 894). Mr. Carmichael admitted that he was primarily responsible for handling suppression of evidence at the guilt phase of the trial. (PC, p. 964).

Attorney Carmichael failed to object to this evidence despite the fact that he believed the best trial strategy would be to present Mr. Rigterink as a person with minimal criminal history. (PC, p. 988). Yet, Mr. Carmichael did concede that the presentation of evidence regarding Mr. Rigterink's theft form his previous

employer would in fact undermine any future argument regarding a lack of significant criminal history as a mitigating circumstance. (PC, p. 893).

Furthermore, Mr. Hileman's testimony at the evidentiary hearing also supported this claim. Mr. Hileman did not recall warning Mr. Rigterink against testifying about uncharged criminal conduct, such as the alleged theft from his employer. (PC, p. 1436). In fact, Mr. Hileman could not recall why neither he nor Mr. Carmichael failed to filed a motion seeking the exclusion of such evidence. (PC, p. 1436). Further, when asked whether he believed the issue was important regarding any penalty phase arguments regarding a lack of significant criminal history as a mitigating circumstance, Mr. Hileman responded, "I'm not sure that I think it's terribly significant." (PC, p. 1436).

Here, Mr. Rigterink's credibility during his guilt phase testimony was improperly impeached by reference to an uncharged offense involving dishonesty. Under no circumstances should the jury have heard this evidence.

The prejudice was evidenced by the State's closing argument that "what's in [Mr. Rigterink's] heart is nothing but evil . . . A man who would steal from his employer, taking a paycheck in one hand and stealing from him with the other." (DIR. ROA, p. 4425). The State also argued the following: "During that summer time period working for Mr. Abel it came to the attention of the Natives that he was stealing from them which is understandable . . . so to make up the financial

difference and to continue the he was living, he stole, for which he was caught and fired on August 22nd." (DIR. ROA, p. 4455).

The only witness called by defense counsel was Mr. Rigterink. Thus, this improper character evidence was highly prejudicial to the defense and undermined Mr. Rigterink's testimony at trial. Furthermore, the evidentiary hearing demonstrated that trial counsel should have objected to the State's closing argument as it was improper. Rather than simply using the evidence to impeach Mr. Rigterink's testimony, the State relied heavily on this uncharged offense in its closing argument for the purposes of showing the jury that Mr. Rigterink had a bad character and a propensity to commit crimes. Trial counsel should have been aware that this was improper and should have interjected an objection.

Absent introduction of this evidence, there is a reasonable probability that Mr. Rigterink would have been found not guilty, or guilty of a lesser offense not punishable by death, or would have received a recommendation of life from the penalty phase jury. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice Mr. Rigterink's case is contrary to the law and not supported by competent substantial evidence.

2) **Claim 1E** argues that counsel was ineffective for failing to conduct adequate attorney-client interviews/communications with Mr. Rigterink at the Polk County Pretrial Detention Center or any other confidential venue. Claim 1E also argues that trial counsel failed to adequately prepare Mr. Rigterink for his direct testimony and the subsequent cross-examination by the State.

As to Claim 1E, the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness because Mr. Hileman testified that he had discussed possible cross-examination questions with Mr. Rigterink and Mr. Rigterink never expressed dissatisfaction during the representation. However, this ruling has no legal basis and is not supported by competent, substantial evidence.

At the hearing, Mr. Carmichael admitted that he had only met with Mr. Rigterink probably a "handful" of times prior to trial and noted that this amount was much less than he normally meets with clients. (PC, p. 843-844). Mr. Hileman believes that he had met with Mr. Rigterink approximately six or eight times during the representation, but had no notes verifying this claim. (PC, p. 1416). Further, the investigator/mitigation specialist testified that at one point Mr. Hileman refused to visit Mr. Rigterink in jail to speak about the case, and that Mr. Rigterink's parents threatened not to pay Mr. Hileman's fee unless he actually started working on the case. (PC, p. 1904-1905).

Additionally, Mr. Carmichael admitted that neither he nor Mr. Hileman ran through a practice cross-examination with Mr. Rigterink in order to prepare him to

testify at trial. (PC, p. 900-901). Additionally, neither attorney ever went through the crime scene photos with Mr. Rigterink for the purpose of preparing Mr. Rigterink for his trial testimony. (PC, p. 900-901).

Neither attorney ever recalled ever warning Mr. Rigterink against testifying as to uncharged criminal conduct, such as his suspended driver's license or the alleged theft from his employer. (PC, p. 937, 1436). Mr. Hileman admitted that he believed the testimony that Mr. Rigterink ultimately planned on presenting at trial was false. (PC, p. 1464). However, Mr. Hileman never advised Mr. Rigterink regarding the concept of perjury. (PC, p. 1429). Mr. Hileman conceded that he never stated on the record that his client, Mr. Rigterink, was testifying at trial against his advice. (PC, p. 1569).

Here, properly preparing Mr. Rigterink for his trial testimony was essential in that it would have alerted him to potential questions that would be asked and it would have allowed him to think through his answers to the question in advance. Had trial counsel properly prepared Mr. Rigterink, trial counsel would have known Mr. Rigterink's answers in advance, which would have allowed trial counsel to prepare proper follow-up questions and would have alerted trial counsel to what should not have been inquired into on direct examination. Further, had trial counsel properly prepared Mr. Rigterink for trial testimony, trial counsel would have been able to advise Mr. Rigterink about what he should not testify to because the

testimony would be contrary to Mr. Rigterink's interests. Lastly, proper preparation would have allowed Mr. Rigterink to reasonably determine whether he should testify at all in his case.

However, because of the fact that trial counsel failed to adequately prepare Mr. Rigterink for his trial testimony, Mr. Rigterink's testimony negatively impacted mitigation at the penalty phase of trial. Specifically, the mitigating factors of no significant prior history of criminal activity, the ability to conform conduct to the requirements of the law, and that he was under extreme mental or emotional disturbance were negated because Mr. Rigterink was not adequately prepare for his testimony and gave answers contrary to his interest.

Furthermore, because neither trial attorney went through a mock cross-examination, Mr. Rigterink was totally unprepared for questions posed by the State. This type of preparation is a procedure taught in basic trial advocacy courses. As a result of trial counsel's failure, Mr. Rigterink provided improbable, unresponsive, and incredible answers while testifying, which left the jurors believing Mr. Rigterink was not credible.

The evidentiary hearing made clear that trial counsel inadequately prepared Mr. Rigterink for his trial testimony. Furthermore, the evidentiary hearing made clear that had trial counsel properly prepared and counseled Mr. Rigterink there is a reasonable probability that the result of the proceedings would have different.

Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice Mr. Rigterink's case is contrary to the law and not supported by competent, substantial evidence.

3) **Claim 2(A)(4)** argues that counsel failed to properly investigate potential mitigation in that counsel attempted to develop statutory mitigation that Mr. Rigterink had no significant history of criminal activity but then allowed Mr. Rigterink to testify in the guilt phase about uncharged criminal activity including theft and driving on a suspended license.

As to Claim 2(A)(4), the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness because evidence of uncharged crimes went to motive and that there because there was no reasonable probability that the outcome of the trial would have been different had this testimony not come in. The post-conviction court also found it persuasive that Mr. Rigterink testified against his counsel's advice. However, this ruling has no legal basis and is not supported by competent, substantial evidence.

At the evidentiary hearing, Mr. Carmichael testified that he had planned on approaching the penalty phase by presenting Mr. Rigterink as a good person with minimal criminal history. (PC, p. 988). Mr. Carmichael testified he discussed the difficulties that a defendant faces when testifying in his own case with Mr. Rigterink. (PC, p. 846-847). Attorney Carmichael also claimed he told Mr. Rigterink what to expect on cross-examination. (PC, p. 847).

However, Mr. Carmichael conceded he never objected to the admittance of Mr. Rigterink's previous uncharged theft from his employer into evidence, even though he was the attorney primarily responsible for seeking suppression of these matters. (PC, p. 891-892, 964). Mr. Carmichael stated that he never sought an evidentiary hearing on the matter either. (PC, p. 1026). Moreover, Mr. Carmichael stated that he did not recall ever warning Mr. Rigterink that he should refrain from mentioning his suspended driver's license or other criminal activity while testifying. (PC, p. 937). Mr. Carmichael also conceded that evidence of Mr. Rigterink's prior theft was "candidly damaging" for the penalty phase, and that he could not recall why he failed to object to the admittance of the evidence. (PC, p. 893). Further, Mr. Carmichael admitted that he never went through a practice direct-examination with Mr. Rigterink to prepare him for his testimony at trial. (PC, p. 900-901).

Mr. Hileman's testimony at the evidentiary hearing supported this claim. Mr. Hileman testified that although he did suggest possible cross-examination questions to Mr. Rigterink, he did not recall warning Mr. Rigterink to refrain from testifying about uncharged criminal conduct. (PC, p. 1435-1436). However, Mr. Hileman did concede that this information was relevant to mitigation – specifically, his attempt to argue that Mr. Rigterink had no prior criminal history at the penalty phase of the trial. (PC, p. 1436). Ultimately, Mr. Hileman admitted that Mr.

Rigterink's testimony about his previous uncharged theft and Mr. Rigterink driving on a suspended driver's license negated the argument that Mr. Rigterink had a minimal criminal history prior to the offense. (PC, p. 1457).

Here, The post-conviction court found significant that the defendant testified against his counsel's advice; however, Mr. Rigterink was exercising his constitutional right to testify on his own behalf. The mere fact that Mr. Rigterink chose to exercise his right to testify does not excuse his trial counsel from properly preparing his client regarding trial testimony. Further, Mr. Rigterink had no history of arrests or convictions and should have qualified as having no significant history of criminal activity. This is a statutory mitigating circumstance and is generally given great weight by a jury. However, at trial during direct examination, Mr. Rigterink admitted that he drove his father's vehicle on a suspended license in response to a question by Mr. Rigterink's trial counsel. This was due to the failure on part of defense counsel to adequately caution Mr. Rigterink against mentioning that his license was suspended. The suspension of Mr. Rigterink's license was irrelevant to his trial testimony and was damaging to his mitigation at the penalty phase of trial.

Additionally, during cross-examination, Mr. Rigterink was asked by the State whether or not he used goods or services of his employer without permission – an act constituting theft. However, no objection was interposed by trial counsel.

Subsequently, the court relied on each of these admitted criminal acts to dilute the weight of the mitigating factor of "no significant criminal history."

This evidence presented at the evidentiary hearing made clear that counsel was deficient for failing to properly prepare Mr. Rigterink for his testimony at the guilt phase, which negated statutory mitigation at the penalty phase. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice Mr. Rigterink's case is contrary to the law and not supported by competent, substantial evidence.

G. THE POST-CONVICTION COURT'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO THE STATE'S INFLAMMATORY REMARKS DURING PENALTY PHASE CLOSING ARGUMENT IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

An evidentiary hearing was granted by the post-conviction court as to Claim 2(C) of Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence brought pursuant to Fla. R. Crim. Pro. 3.851. This claim alleges trial counsel's performance was deficient for failing to object to inflammatory remarks by the State during penalty phase closing argument.

Section 921.141 of the Florida Statutes specifically delineates the aggravating circumstances that may be considered and specifically limits the aggravating circumstances to those listed in the Statute. The Statute does not include the aggravating circumstances of self-centeredness, lack of appreciation for

others, manipulation of family, wife, employer, the police and the jurors, his drug use which caused financial problems for his family, his drug use which caused his marriage to fail, his infidelity which caused his marriage to fail, his theft from his employer, or that a defendant is “shockingly evil.”

The Florida Supreme Court has consistently held that “where the State presents evidence that constitutes inadmissible non-statutory aggravation, the error is not harmless. *Poole v. State*, 997 So. 2d 382 (Fla. 2008); *see also Perry v. State*, 801 So. 2d 78, 89 (Fla. 2001); *Kormondy v. State*, 703 So. 2d 454, 463 (Fla. 1997) (concluding that the admission of impermissible evidence of non-statutory aggravation was not harmless error and stating that the jury is “charged with formulating a recommendation as to whether [the defendant] should live or die [and] turning a blind eye to the flagrant use of non-statutory aggravation jeopardizes the very constitutionality of our death penalty statute”); *Gerald v. State*, 601 So. 2d 1157, 1162-1163 (Fla. 1992). Further the Florida Supreme Court stated in *Heyne v. State*, 88 So. 3d 113 (Fla. 2012), “the HAC aggravator applies when “the capital felony was especially heinous, atrocious, or cruel.” Further, for this factor to apply, “the murder must be conscienceless or pitiless and unnecessarily tortuous to the victim.” *Diaz v. State*, 860 So. 2d 960, 996 (Fla. 2003).

The law is clear that the State cannot argue a non-statutory aggravating circumstance to the jury. Nor is it proper to characterize a Defendant in derogatory

terms in an effort to inflame the passions of the jury. *Brooks v. State*, 762 So.2d 879, 900 (Fla. 2000). In *Brooks*, the prosecutor used the terms "executed" and "executioner" multiple times. The Court held the prosecutor impermissibly inflamed the passions and prejudices of the jury with elements of fear and emotion. The Court went on to say these types of comments have been condemned by the Court over the last fifty years, citing to *Garron v. State,* 528 So.2d 353, 359 (Fla. 1988), *King v. State,* 623 So.2d 486, 488 (Fla. 1993), and *Bertolotti v. State,* 476 So.2d 130, 133 (Fla. 1985).

Florida law was also clear at the time these comments were made that closing argument must not be used to inflame the minds and passions of jurors so that their verdict reflects an emotional response to the crime or the defendant. *King v. State*, 623 So.2d 486, 488 (Fla. 1993); *Berlotti v. State*, 476 So.2d 130,133 (Fla. 1985). Indeed as early as 1951, the Florida Supreme Court held that "the trial of one charged with a crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament." *Adams v. State*, 192 So.2d 762, 763 (Fla. 1966), quoting *Stewart v. State*, 51 So.2d 494, 495 (Fla. 1951).

1) **Claim 2(C)** argues that penalty phase counsel failed to object to argument by the State that the jury should consider non-statutory aggravating factors of: self-centeredness, lack of appreciation for others, manipulation of family, wife, employer, the police and the jurors, his drug use which caused financial problems for his family, his drug use which caused his marriage to fail, his infidelity which caused his marriage to fail, his theft from his employer, and that Mr. Rigterink himself was "shockingly evil." The argument of the

> prosecutor was also objectionable in that it was designed to inflame the passions of the jury.

As to Claim 2(C), the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness because Defendant had not shown the statements during closing arguments were improper or designed to inflame the passions of the jury because the State presented them as non-statutory aggravators. This ruling has no legal basis and is not supported by competent, substantial evidence.

Specifically, at trial, the prosecutor argued *inter alia* the following:

> …there is a second type of evil that emanates from within an individual. It is an evil that is within that person…It's produced by the individual. And its consequences come from the choices that the individual makes without being affected by others. …That is the type of evil that we're talking about here. When they tell you heinous means extremely wicked or shockingly evil, that's what we're talking about…There were a series of events which gave you an insight, an insight into what's inside Thomas Rigterink, the defendant in this case. There was an insight into the self-centeredness, the lack of appreciation for his conduct on others. There was a—there was manipulation—in fact, lies was part of that manipulation—to his family, to his wife, his parents, his wife, the police, his employer, and he attempted to do it to you. Mr. Rigterink's behavior goes back in terms of the drug use is—is just an example of doing what he wants without concerned [sic] about the consequences of others. . . Sort of begs the—or doesn't really address the issue of what his wife was doing that time working two jobs. Working two jobs. You know, she is the one that's making the effort here, and there doesn't seem to be any responsible attitude on his part. And the thanks she gets is on September—on May the 3rd she moves out….Infidelity failed—made his marriage fail. And it's this same self-centeredness that caused it, what I want, how I choose to resolve problems that I perceive. That's the self-centeredness that's at the heart of this case…It was an

> appetite for drugs and the loss of his wife's financial support that caused the theft from The Natives…It's that same self-centered behavior that he doesn't care if somebody else is even giving his a paycheck for his work, he's going to take what he wants.

(DIR. ROA, p. 4976-4980).

The prosecutor later characterized Mr. Rigterink as manipulating the jury during his trial testimony.

> I would suggest to you when he sat in this chair right here, right there, that chair last week and looked at you dead in the eye and said, "God knows what's in my heart, I did not kill these people," I heard him say it and each one of you heard him say it, no drugs were influencing him…That was the product of what evil is within him. It is a product of the same motivation that caused the death of Allison Sousa and Jeremy Jarvis.

(DIR. ROA, p. 489-90).

At the evidentiary hearing, Mr. Carmichael conceded that he was the attorney primarily responsible for the penalty phase of the trial and handling suppression related issues. (PC, p. 964). Mr. Carmichael testified that he believed that the best trial strategy would be to present Mr. Rigterink as a good person with minimal criminal history. (PC, p. 988). However, despite this belief, Mr. Carmichael did admit that he failed to object to the State's argument that Mr. Rigterink was "shockingly evil." (PC, p. 951). Mr. Carmichael explained, "I did not object to the term "evil," despite my own feelings about it, simply because it's a term that's been in the jury instructions . . . as far as unfair characterization and it being an aggravating factor, I did not consider that at the time." (PC, p. 951-952).

Mr. Hileman testified that despite his beliefs about the importance of the penalty phase, Mr. Hileman acknowledged that neither he nor Mr. Carmichael objected to the State's argument. When asked whether he should have objected to the State's argument that the murders were the product of the evil within Mr. Rigterink, Mr. Hileman stated, "I would feel that should be objected to . . . I don't remember if I even heard it." (PC, p. 1475). When asked why he failed to object to the State's argument that the jury should consider self-centeredness and infidelity, Mr. Hileman claimed he did not object because he believed that these attributes were a "fair inference from the evidence." (PC, p. 1475).

Here, the State attempted to characterize Mr. Rigterink in derogatory terms in an effort to inflame the passions of the jury. As a result, the jurors recommendation that Mr. Rigterink receive the death penalty was solely a result of the jurors' emotional response to the improper consideration of the non-statutory aggravating circumstances argued by the State. The State attempted to conceal this improper argument under the guise of suggesting that these aspects of Defendant's history and character fell within the penumbra of heinous, atrocious, or cruel aggravating circumstance. However, aspects of the Defendant's character and background do not affect the applicability of the HAC aggravating factor and, therefore, the evidentiary hearing made clear that trial counsel should have objected to the State's argument as it was designed to inflame the passions of the

jury. The post-convictions court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice Mr. Rigterink's case is contrary to the law and not supported by competent, substantial evidence.

H. THE POST-CONVICTION COURT'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE DESPITE TRIAL COUNSEL'S CONCESSION TO TWO AGGRAVATING CIRCUMSTANCES DURING CLOSING ARGUMENT TESTIMONY IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

An evidentiary hearing was granted by the post-conviction court as to Claim 2(B) of Defendant's Motion to Vacate Judgments of Conviction and Sentence brought pursuant to Fla. R. Crim. Pro. 3.851. This claim argues that trial counsel was ineffective for conceding two aggravating circumstances during closing arguments with discussing such a strategy with Defendant Rigterink.

"[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648 (1984). Further, as seen in *Horton v. Zant*, 941 F.2d 1449, 1463 (11th Cir. 1991), counsel's concessions during the penalty phase closing argument can result in ineffective assistance. In *Horton*, the defendant's counsel virtually encouraged the jury to impose the death penalty by emphasizing negative attributes of the defendant's character. *Id.* at 1462. Specifically, trial counsel conceded that the State's argument made him hate his own client. *Id.* As a result,

the appellate court found this performance unreasonable. *Id.* Furthermore, defense counsel's mission in a penalty phase is to persuade the trier of fact that his client's life should be spared. *Florida v. Nixon*, 543 U.S. 175, 191 (2004).

1) **Claim 2(B)** argues that penalty phase counsel's closing argument in the penalty phase conceded the State had proven two aggravating circumstances: prior violent felony, and the capital felony was committed in a heinous, atrocious, or cruel manner. Counsel failed to discuss these concessions with Mr. Rigterink.

As to Claim 2(B), the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness as this was part of trial counsel's strategy because the aggravating circumstances could not be refuted and/or the jury would have found that the aggravators applied regardless of trial counsel's concession. However, this ruling has no legal basis and is not supported by competent, substantial evidence.

Specifically, during the penalty phase argument, counsel stated:

> You see, there were aggravating factors proven by the State's office. They indicated to you that there were two that applied for Jeremy Jarvis, that there were what I refer to as contemporaneous homicides. There were two homicides. They happened simultaneously, or very close to simultaneously, but two people are dead. Heinous, atrocious, and cruel. We believed that you can conclude that the State has met their burden regarding that, although I have a few remarks in that regard. And in the added case of Ms. Alison Sousa, what I call witness elimination.

(DIR. ROA, p. 4996-4997).

At the evidentiary hearing, Mr. Carmichael testified that he did, in fact, concede that the State had proven the two aggravating factors at trial because he believed that he could not make any argument to refute the matter – specifically, he stated "I think based on the elements of the offenses, they had both been proven . . . why not argue that you made those points?" (PC, p. 1006-1007). Further, Mr. Carmichael believed it would boost his credibility with the jury. (PC, p. 1007).

Mr. Carmichael initially testified that he wanted to humanize Mr. Rigterink at the penalty phase and present him as a good person and an individual with minimal criminal activity, yet he conceded during his closing argument to the jury that the State had proven two aggravating factors. (PC, p. 924-925). Mr. Carmichael claimed that he discussed conceding these two points with Mr. Rigterink; however, there was no documentation to reflect this discussion. (PC, p. 950).

Mr. Carmichael's testimony appeared to be in conflict with Mr. Hileman's testimony as Mr. Hileman testified he disagreed with Mr. Carmichael's concession that the State had proven these two aggravating factors and stated, "it's against my religion to stipulate to those things." (PC, p. 1471). In fact, Mr. Hileman stated that he did not discuss the concession with Mr. Rigterink and was unaware that Mr. Carmichael had either. (PC, p. 1472). Further, It was unclear whether Mr. Carmichael ever discussed the concession with Mr. Hileman prior to the closing

argument as Mr. Hileman noted that "If I had. . . know about it, I would have asked for a colloquy, because that, obviously, is making a admission of an element of this case that is very prejudicial." (PC, p. 1472).

Mr. Hileman testified that when preparing for a capital case, it is imperative to have as many mitigating factors as possible. (PC, p. 1457). Further, Mr. Hileman acknowledged that in death penalty cases, attorneys often have to present evidence during the penalty phase that conflicts with the guilt phase because giving some type of explanation for the defendant's conduct is preferable to no explanation at all. (PC, p. 1456).

Here, as a result of these concessions, counsel for Defendant did not even make an attempt to rebut or minimize two significant statutory aggravating circumstances. Mr. Carmichael's concession did not promote the objective of saving Mr. Rigterink's life. Further, Mr. Carmichael's decision to concede that the state had proven two aggravating circumstances, rather than disputing the argument with available evidence, especially the concept of Defendant Rigterink being in a drug induced frenzy, discussed *supra,* amounted to a failure to subject the prosecution's case to any meaningful adversarial testing.

Further, Mr. Carmichael's concession virtually encouraged the jury to impose the death penalty as the concession only supported the State's case and arguments. Further, while *Nixon* holds that a defendant does not have to

affirmatively and explicitly agree to a strategy to concede guilt, here the concession was never even discussed with Mr. Rigterink. As such, Mr. Rigterink never gave any type of permission to trial counsel to concede these aggravating circumstances.

The post-conviction court found that this concession was not deficient as this was a "tactical decision" by trial counsel. However, trial counsel's duty under the law during a penalty phase is to convince the jury and the court that his client's life should be spared. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice Mr. Rigteirnk's case is contrary to the law and not supported by competent substantial evidence.

I. THE POST-CONVICTION COURT'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO INVESTIGATE ALTERNATIVE SUSPECTS IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

An evidentiary hearing was granted by the post-conviction court as to Claim 1F of Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence brought pursuant to Fla. R. Crim. Pro. 3.851. This claim addresses trial counsel's failure to timely and adequately investigate Mark Mullins and William Farmer as alternative suspects and that trial counsel failed to make a proper presentation to the court to satisfy the requirements of Section 90.405 and 90.804 Florida Statutes.

In Florida, trial counsel's failure to investigate possible witnesses in a defendant's case can constitute ineffective assistance of counsel. *See Tyler v. State*, 793 So.2d 137 (2001). Further, failure to call witnesses who could provide exculpatory information constitutes ineffective assistance of counsel. *Brown v. State*, 892 So. 2d 1119 (Fla. 2d DCA 2004).

1) **Claim 1F** argues that counsel was ineffective for failing to timely and adequately investigate information Mr. Rigterink provided regarding Marshall Mark Mullins and William Farmer as alternate suspects and was thus prohibited from presenting any meaningful evidence to the jury regarding the alternative suspects. Further, Claim 1F also argues that trial counsel failed to make a proper presentation to the court to satisfy the requirements of Section 90.405 and 90.804 Florida Statutes.

As to Claim 1F, the post-conviction court specifically held that counsel's performance did not fall below an objective standard of reasonableness because it was mere speculation as to whether any investigation into these matters would be fruitful. However, this ruling has no legal basis and is not supported by competent, substantial evidence. Neither attorney Carmichael or Hileman asked the only eye-witnesses to the crime identify Marshall Mullins or William Farmer as the culprit at trial. (PC, p. 903, 1425). Additionally, at trial, neither of the eye-witnesses were asked to identify the composite sketch of the perpetrator. (PC, p. 904). Because of this failure, the composite drawing could not be introduced by the defense in its case in chief and compared to photographs of Mullins and/or Farmer. Mr.

Carmichael was unable to explain this discrepancy at the evidentiary hearing. (PC, p. 904).

Mr. Hileman claimed that he never attempted to introduce the composite sketch through either of the eye-witnesses because he felt that it was not relevant to the case. (PC, p. 1426). Further, Mr. Hileman testified that although he knew of a number of individuals associated with Mr. Rigterink, he did not recall ever interviewing, or asking the investigator/mitigation specialist to interview, these individuals in order to corroborate Mr. Rigterink's testimony. (PC, p. 1390-1392).

Further, Mr. Hileman testified that although he knew of a number of individuals associated with Mr. Rigterink, he did not recall ever interviewing, or asking the investigator/mitigation specialist to interview, these individuals in order to corroborate Mr. Rigterink's testimony. (PC, p. 1390-1392). Mr. Hileman identified a multi-page memo from his own file listing a number of alternative suspects named and interviewed by police in the investigation. (PC, p. 1392). Mr. Hileman did not recall ever interviewing these alternate suspects; however, he conceded that interviewing alternative police suspects is oftentimes helpful in building a defense. (PC, p. 1394). Because of trial counsel's failures, the jury was left with absolutely no description of the man that Mr. Rigterink claimed was the true killer.

Mr. Carmichael testified as to the letter found at Mr. Rigterink's parents' home prior to trial that would corroborate Mr. Rigterink's testimony at trial. Mr. Carmichael claimed that the attorneys did want to find corroborating evidence to support Mr. Rigterink's testimony at trial; however, the attorneys chose not to admit the letter because they questioned the letter's authenticity. (PC, p. 1014-1015). However, neither Mr. Carmichael nor Mr. Hileman ever had the letter analyzed for handwriting or fingerprints to confirm their suspicions. (PC, p. 1033, 1563-1564). Attorney Hileman acknowledged that they called William Farmer to testify *in camera* at Mr. Rigterink's trial, and conceded that the presentation of the testimony failed to corroborate Mr. Rigterink's testimony. (PC, p. 1430).

Ultimately, Mr. Hileman testified that instead of attempting to defend Mr. Rigterink at the guilt phase, he viewed the case as "a predominantly penalty phase case." (PC, p. 1507). Mr. Hileman described the guilt phase as "a rather unpromising situation," which prompted Mr. Hileman to focus mainly on mitigation for the penalty phase of trial. (PC, p. 1515).

Mr. Hileman and Mr. Carmichael originally presented Mr. Farmer's testimony for the purpose of demonstrating that Mullins made statements against his penal interest. However, the trial court excluded the testimony on the basis that his testimony presented conflicting hearsay that was not sufficiently corroborated to satisfy the requirements of Fla. Stat. 90.804(2)(c) (2005). The defense again

attempted to admit Mr. Farmer's testimony at trial on the basis that the testimony would show Mr. Farmer's knowledge of the drug trade and many individuals involved in the drug trade, and Mr. Farmer's knowledge of the reputation of Mark Mullins. However in *Rigterink II*, the Florida Supreme Court held that the defense did not properly present this testimony in the form of reputation evidence sufficient to satisfy the requirements of Section 90.405 Florida Statutes, and thus, exclusion of the testimony by the trial court was proper.

Further, trial counsel failed to conduct an adequate interview of Farmer prior to calling him as a witness and failed to conduct adequate legal research to understand the requirements of either Sections 90.804 or 90.405, Florida Statutes so that adequate questioning could have been done which would satisfy the basic predicate for the introduction of the testimony. Further, the trial court indicated that it would allow the defense to present additional testimony in an attempt to satisfy the proper predicate for the admissibility of the witness' testimony. (DIR. ROA, p. 4209). However, trial counsel did not recall the witness in an effort to lay the proper predicate for his trial testimony. As a result, Mr. Rigterink was denied an opportunity to present any witnesses at trial that would corroborate his version of the events.

Trial counsel failed to adequately investigate the circumstances surrounding Mr. Rigterink's discovery of the victims. Counsel failed to adequately investigate

threats made to Mr. Rigterink by Mullins by interviewing family and/or friends of Mulllins. Had trial counsel actually investigated the other possible suspects and other witnesses, trial counsel would have been able to present other witnesses and testimony corroborating Mr. Rigterink's account of the events, or confront Mr. Rigterink with the implausible nature of his intended testimony.

In summation, the evidentiary hearing demonstrated that a number of individuals were identified as possible witnesses who could corroborate Mr. Rigterink's version of the events. The hearing also demonstrated neither attorney ever attempted to have the eye-witnesses to the crime identify Marshall Mullins or William Farmer, Mr. Rigterink's suspects. Ultimately, trial counsel failed to present evidence that would support Mr. Rigterink's testimony at trial. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice Mr. Rigterink's case is contrary to the law and not supported by competent substantial evidence.

CONCLUSION

Thomas Rigterink prays this Honorable Court reverse and remand the trial court's denial of his Amended Motion to Vacate Judgments of Conviction and Sentence entered on April 11, 2014, thereby entitling Mr. Rigterink to a new trial and/or penalty phase proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has, been provided to the Cass Castillo, Esq., Office of the State Attorney, Fourth Judicial Circuit, 200 W. Bay St. Jacksonville, Florida by e-service; and to Scott Browne, Esq., Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Road., Suite 200, Tampa, FL, 33607-7013 by e-service this 23rd day of October, 2014.

CERTIFICATE OF COMPLIANCE REGARDING FONT

I HEREBY CERTIFY that this Appellant's Initial Brief is submitted using Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure, Rule 9.210. Further, the undersigned, pursuant to Florida Rule of Appellate Procedure, Rule 9.210(a)(2), gives this his Notice and files this Certificate of Compliance regarding the font in this Initial Brief.

Respectfully Submitted,

/s/ Ann E. Finnell______________

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