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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.

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APPELLANTS REPLY BRIEF

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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 page 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. A full Statement of the Case can be found in Mr. Rigterink's Initial Brief.

SUMMARY OF ARGUMENT

Trial counsel was ineffective for failing to fully investigate Mr. Rigterink's drug abuse and mental health and present such evidence in either the guilt or penalty phase of trial.

Trial counsel was ineffective for failing to move to suppress Mr. Rigterink's confession on the basis of drug use or otherwise pursue intoxication.

Trial counsel failed to file a pre-trial motion to suppress Mr. Rigterink's custodial pre-*Miranda* statements made to police on October 16, 2003.

Trial counsel was ineffective for failing to file a comprehensive pretrial motion to suppress a knife found in Mr. Rigterink's home and in failing to object to the admission of the Nike shoes at trial.

Trial counsel failed to object to evidence that greatly diminished the lack of the significant criminal history mitigator.

Trial counsel failed to object to inappropriate prosecutorial comments.

Trial counsel was ineffective for conceding in its penalty phase argument to the applicability of the prior violent felony and HAC aggravators.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FULLY INVESTIGATE MR. RIGTERINK'S DRUG ABUSE AND MENTAL HEALTH AND PRESENT SUCH EVIDENCE IN EITHER THE GUILT OR PENALTY PHASE OF TRIAL.

The State argues that Mr. Rigterink fell short of demonstrating that his trial attorneys rendered deficient performance or that the deficient performance resulted in prejudice to Mr. Rigterink's case. However, the State's argument is misplaced.

a. Counsel Failed to Investigate Mr. Rigterink's Mental Health and Present Evidence in the Penalty Phase of trial.

First, the State characterizes Mr. Rigterink's trial counsel as "two very experienced defense attorneys." However, as the evidentiary hearing made clear, Mr. Carmichael had only experienced one full capital trial prior to representing Mr. Rigterink. (PC, p. 826-827). It is unclear how one capital trial could render Mr. Carmichael a "very experienced defense attorney." The State cites *Chandler v. United States*, 218 F. 3d 1305, 1316 (11th Cir. 2000) arguing that when courts examine the performance of an experienced trial attorney, "the presumption that his conduct was reasonable is even stronger." However, this has no application to Mr. Rigterink's primary penalty phase attorney, Mr. Carmichael, who had only experienced one capital trial prior to Mr. Rigterink's case.

Next, the State argues that trial counsel acted reasonably in regards to presenting mitigation during the penalty phase of trial. Specifically, the State

argues that trial counsel met its burden by undertaking reasonable investigation and hiring investigators to research/investigate Mr. Rigterink's background. However, the mere fact that trial counsel consulted with experts does not mean that trial counsel's actions were reasonable. Much more is required to ensure that a capital defendant receives effective assistance guaranteed by the Sixth Amendment and, ultimately a fair trial.

In fact, this Honorable Court has previously declared that "counsel must not ignore pertinent avenues for investigation of which he or she should have been aware . . . [t]his Court has found counsel's performance deficient where counsel 'never attempted to meaningfully investigate mitigation' although substantial mitigation could have been presented.'" *Shellito v. State*, 121 So. 3d 445, 454 (Fla. 2013). Furthermore, this Court has found deficient performance where trial counsel conducted no investigation and presented little to no evidence of mitigation. *State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000) (recognizing that an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence).

Florida case law has established that 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). *"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) (emphasis added).

Further, counsel's failure to present any witnesses regarding mental health mitigation when trial counsel has conducted little to no investigation about his client's mental health amounts to ineffective assistance of counsel. *Blackwood v. State*, 946 So. 2d 960, 971 (Fla. 2006) (finding the decision not to investigate the defendant's mental health or obtain a mental health expert for trial fell far short of prevailing professional standards in capital cases).

The testimony of Rosalie Bolin, the investigator/mitigation specialist hired in this case, at the evidentiary hearing demonstrated that Mr. Rigterink's trial counsel did little to no investigation of Mr. Rigterink's mental health and also failed to follow up on the information provided by Ms. Bolin.

Ms. Bolin testified that at the initial interview with Mr. Rigterink, 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). She 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 State claims that trial counsel originally consulted with mental health experts, but then reasonably decided to forego the mitigation all together after Mr. Rigterink changed his story. However, Mr. Rigterink's change in story did nothing to alleviate trial counsel from the responsibility to competently represent the client and present known mitigation. In fact, trial counsel's consultation with these experts should have made any competent attorney aware of the fact that mental health played an integral role in the offense and the mitigation that should have been presented at trial. Doctors McClane, Hartig, and Dantzler all testified regarding Mr. Rigterink's mental health at the evidentiary hearing.

Dr. McClane evaluated Mr. Rigterink in this case and testified that Mr. Rigterink's extensive drug use was relevant as chronic drug use can result in brain damage and long term effects on the brain. (PC, p. 1279). Not only did Dr. McClane relay all of this information to Mr. Rigterink's trial counsel, but he also recommended further brain studies and other examinations. (PC, p. 1293, 1286). However, despite the doctor's recommendation, trial counsel did not follow up or pursue the matter further. Dr. Hartig testified that upon her evaluation of Mr. Rigterink, she found that not only was Mr. Rigterink depressed, but he also evidenced psychopathology and bizarre thought processing. (PC, p. 1256). Dr.

Dantlzer testified that she treated Mr. Rigterink for his extensive drug abuse and addiction and that she believed the drugs were interfering with Mr. Rigterink's ability to function. (PC, p. 1065). Mr. Carmichael even 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).

The State argues that trial counsel acted reasonably simply by consulting with these experts. What the State fails to recognize, however, is that simply consulting with an expert does not mean trial counsel met its burden to provide competent representation, especially in a case with consequences as grave as Mr. Rigterink's. In accordance with Florida case law discussed more fully above, trial counsel had an obligation, based on trial counsel's knowledge of Mr. Rigterink's mental state, to adequately investigate the issue and obtain a mental health expert for purposes of trial. The doctors consulted in this case and the mitigaiton specialist, Ms. Bolin, made Mr. Rigterink's trial counsel fully aware of the mental health issues and drug abuse issues that Mr. Rigterink was suffering from at or near the time of the offense. The evidentiary hearing demonstrated that not only did trial counsel's actions amount to deficient performance, this deficient performance prejudiced Mr. Rigterink's case.

Dr. Krop, retained by post-conviction counsel, testified regarding his evaluations of Mr. Rigterink. Specifically, the results of Dr. Krop's evaluations were consistent with Mr. Rigterink's own reports of acute chronic drug abuse. (PC, p. 1201). Dr. Krop testified he diagnosed Mr. Rigterink with substance dependence. (PC, p. 1203). Dr. Krop explained that Mr. Rigterink's chronic and acute drug abuse resulted in unpredictable behavior, irritability, impulse control problems, and poor judgment. (PC, p. 1208). Dr. Krop opined that 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).

Dr. Buffington, a pharmacologist hired by post-conviction counsel, testified that the acute and chronic 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). Dr. Buffington's testimony explained that prolonged chronic drug abuse can cause altered psychiatric and cognitive mental states. (PC, p. 1112-1113). The doctor concluded 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).

This testimony demonstrates that if Doctors Hartig, McClane, Dantzler, or other mental health experts had been asked by trial counsel to conduct follow-up evaluations as suggested, or if mental health experts had been called as witnesses during the penalty phase of trial, these experts would have been able to assist the jury and provide insight as to whether the death penalty should have been imposed. The State argues that Mr. Rigterink failed to prove that additional follow up investigation would have led to any mitigating evidence. However, the testimony of the doctors who actually evaluated Mr. Rigterink at or near the time of the offense demonstrates that additional evaluations were needed and suggested. Moreover, despite the State's argument that additional follow up would not have led to mitigating evidence, the testimonies of Dr. Krop and Buffington demonstrate that Mr. Rigterink's capacity to conform his conduct to the law was significantly impaired and compromised. This additional mitigating factor would have played a significant role in outweighing the aggravating factors presented to the jury in this case.

As discussed more fully below, Mr. Rigterink testified at trial with the changed story based on trial counsel's failure to adequately advise Mr. Rigterink regarding perjury and other risks associated with his testimony. The State argues that trial counsel cannot be ineffective for following his client's wishes. However, this reasoning fails to recognize that trial counsel still must observe the

requirements of the Model Rules of Professional Responsibility regardless of the case. Specifically, the Model Rules confirm that "an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence" and that the attorney shall not assist the client in presenting such evidence. *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) (finding that counsel was effective and that the client's Sixth Amendment right to testify was not infringed when counsel refused to present the client's false testimony to the Court).

Even assuming the State is correct that the mental health and drug abuse mitigation had to be abandoned when Mr. Rigterink chose to testify during the guilt phase, if trial counsel properly advised Mr. Rigterink regarding his proposed testimony, trial counsel would have been in compliance with the applicable ethical standards and, ultimately, trial counsel would not have had to abandon the mental health and drug abuse mitigation. The State argues that trial counsel attempted to persuade Mr. Rigterink not to testify; however, counsel's actions fell short of the standards required by the applicable ethical standards. At the evidentiary hearing, Mr. Hileman admitted that he believed the testimony that Mr. Rigterink ultimately planned on presenting at trial was false. (PC, p. 1464).

Furthermore, the State fails to realize Mr. Rigterink's change in story during the guilt phase had no relevance to the penalty phase presentation as the primary goal of the penalty phase is to present *all* available mitigating evidence in an effort to save the client's life. Moreover, "the ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Hurst v. State*, 18 So. 3d 975, 1011 (Fla. 2009) (quoting the American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, guideline 11.4.1(C), at 93 (1989)).

In *Hurst v. State*, Hurst argued that had trial counsel properly investigated his mental health, Hurst would have been able to present testimony from mental health experts during the penalty phase which would have mitigated the aggravating factors. *Id*. at 1009. During the evidentiary hearing, Hurst presented several mental health experts who opined that mitigating circumstances could have been found had trial counsel bothered to have Hurst properly evaluated prior to trial. *Id*. There, the lower court deemed trial counsel "effective" despite the failure to investigate and present mental health mitigation because counsel simply "followed the wishes of his client" and because counsel believed that mental health mitigation would have conflicted with Hurst's claim of innocence at the guilt

phase. *Id.* However, the Florida Supreme Court reversed and recognized that "reasonable investigation into mental mitigation is part of defense counsel's obligation *where there is any indication that the defendant may have mental deficits*." *Id*. (emphasis added). The Florida Supreme Court expounded on this obligation stating:

> Although trial counsel testified that he personally saw nothing that would have required a psychiatric or psychological examination, in assessing the reasonableness of counsel's investigation and decision not to obtain a mental health evaluation in this case, the Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith,* 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). We conclude that *the evidence and information available to Hurst's counsel was sufficient to place him on notice that further investigation of mental mitigation was necessary*; *consequently, his decision not to pursue it was not reasonable under the circumstances of this case.* . . . [B]ecause counsel never had Hurst examined and could not know what a mental health expert might discover, he could not make an informed tactical decision that the mental mitigation would be inconsistent with the defense or with other mitigation.

Hurst v. State, 18 So. 3d 975, 1010 (Fla. 2009) (emphasis added).

Mr. Rigterink's case parallels *Hurst* closely in many respects. Like Hurst's counsel, Mr. Rigterink's counsel had multiple indications that Mr. Rigterink suffered from various mental health and drug abuse issues. Both the mitigation specialist and the doctors who evaluated Mr. Rigterink relayed this information to trial counsel. These reports would have prompted any other reasonable attorney to investigate further; therefore, trial counsel's decision not to pursue the issue was

not reasonable under the circumstances of Mr. Rigterink's case. Further, because trial counsel never pursued further evaluations or testing by the doctors, trial counsel could not know what might have been discovered; therefore, trial counsel could not have made an informed tactical decision that mental mitigation was not worth pursuing. The testimony of Dr. Krop and Dr. Buffington make clear that mental mitigation would most certainly have been discovered had Mr. Rigterink's trial counsel simply acted reasonably under the circumstances.

In Florida, the death penalty will only be imposed where the aggravating factors outweigh all mitigating circumstances. *Parker v. Dugger*, 498 U.S. 308 (1991). Here, the mental health mitigation would have been substantial and significant based on the numerous doctors evaluations and conclusions. If penalty phase counsel had bothered to pursue and present this significant evidence to the penalty phase jury, the mitigating circumstances would have outweighed the aggravating factors in this case and the death penalty would likely not have been imposed in this case. Of significance is the fact that as to each capital homicide, the jury only recommended death by a vote of 7-5. However, because the jury never even had the opportunity to hear evidence regarding Mr. Rigterink's mental health and mental state at the time of the offense, the jury was left with no explanation for Mr. Rigterink's behavior. Had the jury been afforded this opportunity, the jury likely would have come to a different conclusion in this case.

b. Mr. Rigterink presented more than sufficient evidence to demonstrate that his trial counsel knew that Mr. Rigterink abused serious drugs and presented corroborated expert testimony to that end.

Despite the State's argument, Mr. Rigterink presented a multitude of expert testimony at the evidentiary hearing demonstrating the fact that Mr. Rigterink was under the influence of a variety of serious drugs, such as methamphetamine, at or near the time of the offense. Further, these experts supplied ample testimony demonstrating the cognitive effects of both acute and prolonged drug use.

The State argues that the mere presentation of expert testimony inconsistent with the opinion of a mental health expert retained by trial counsel fails to rise to the level of prejudice necessary to warrant relief. However, the State fails to address the fact that the mental health experts who initially evaluated Mr. Rigterink were never afforded the opportunity to determine whether any mitigating circumstances were present in this case because trial counsel never followed up with the expert's recommendations. Had trial counsel followed up with these recommendations, the experts likely would have been able to provide opinions like those of Dr. Buffington and Dr. Krop who testified that Mr. Rigterink's ability to conform his conduct to the requirements of the law was substantially impaired.

The State argues that Dr. Buffington was cross-examined with reports from Mr. Rigterink's father, mother, and ex-girlfriend regarding Mr. Rigterink's "normal" behavior on the afternoon of the murders. 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 view Mr. Rigterink's impaired state and bizarre behavior as "normal." The State also fails to acknowledge the fact that the ex-girlfriend likely believed Mr. Rigterink's behavior was "normal" because she was a self-professed drug abuser who has actually taken drugs with Mr. Rigterink several times. (PC, p. 1397-1398). It is not surprising that a fellow drug addict would find Mr. Rigterink's withdrawn and bizarre behavior as "normal."

Moreover, neither Mr. Rigterink's father, mother, or ex-girlfriend are medical experts schooled in determining whether an individual is under the influence of drugs/alcohol. Ultimately, the State's contention that Dr. Buffington was extensively impeached by the testimony of a psychologist and non-expert family members with no medical background at the evidentiary hearing misrepresents the record.

The State also mischaracterizes Dr. Krop's testimony and argues that Dr. Krop did not find sufficient evidence to support the conclusion that mental mitigators applied in this case. On the contrary, 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).

The State claims that other witnesses, such as Mr. Rigterink's wife, testified that Mr. Rigterink only engaged in sporadic use of serious drugs. However, the State's argument fails to take into account the fact that Mr. Rigterink could have consumed drugs while not in his wife's presence. This fact was substantiated by Mr. Rigterink's ex-girlfriend, who testified that Mr. Rigterink consumed serious drugs such as methamphetamine, cocaine, mushrooms, and prescription pills such as Xanax. (PC, p. 1777-1779, 1787). The ex-girlfriend not only witnessed this on many occasions, but she also partook in the activity several times with Mr. Rigterink. (PC, p. 1397-1398).

In conclusion, trial counsel failed to adequately prepare for trial by outright ignoring the ample mental health mitigating evidence available at that time. Not only did this failure amount to deficient performance, but it also prejudiced Mr. Rigterink's case in that the penalty phase jury likely would not have imposed the

death penalty if they had heard the substantial mental health mitigating evidence abandoned by trial counsel.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS MR. RIGTERINK'S CONFESSION ON THE BASIS OF DRUG USE OR OTHERWISE PURSUE INTOXICATION.

Mr. Rigterink's trial counsel failed to investigate Mr. Rigterink's mental state at the time of the crime and failed to attempt to suppress Mr. Rigterink's confession on the basis of his altered mental state due to drugs/alcohol. The State argues that trial counsel investigated the possibility of suppressing the statement and, therefore, trial counsel could not have been deficient for making this "strategic" decision. However, 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. A "strategic" decision cannot be deemed reasonable when trial counsel fails to consider the options and make a reasonable decision. *Id.* at 1462.

In *Horton*, the defendant's trial counsel failed to call certain witnesses and justified this failure as a "tactical decision." *Id*. at 1462. The Eleventh Circuit Court of Appeals determined this "tactical" decision to be unreasonable and ultimately found that this failure amounted to deficient performance. *Id*. The Court

noted "[i]n the case at hand, the attorneys began to follow one path, based upon a misinterpretation of the law, without ever evaluating the merits of alternative paths." *Id*. Because of this failure, Horton's trial counsel's decision's could not have been reasonable under the circumstances and were, therefore, deficient. *Id*.

Florida case law has long established that a statement may be suppressed as involuntary when the circumstances surrounding the statement indicate that the mental state of the defendant is so impaired that the defendant could not possibly understand his or her rights. *Deconingh v. State*, 433 So.2d 501, 502 (Fla. 1983). In *Deconingh*, this Honorable Court declared that "if for any reason a suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be employed against him." *Deconingh*, 433 So. 2d at 503.

Had Mr. Rigterink's trial counsel understood the applicable case law regarding voluntariness of a confession, trial counsel would have understood the necessity for suppressing the statement. Instead, the jury heard the widely varying and prejudicial accounts provided by Mr. Rigterink while he was still under the influence of the drugs consumed at or near the time of his arrest. Trial counsel should have understood that Mr. Rigterink's statement qualified for suppression due to its involuntary nature. The State characterizes Mr. Rigterink's defense counsel as "very experienced trial attorneys." Therefore, these "very experienced

trial attorneys" should have recognized that Mr. Rigterink's statement could not possibly have been given voluntarily.

The State argues that trial counsel was not ineffective because trial counsel did consider whether to suppress the statement on the basis of voluntariness. However, neither of Mr. Rigterink's attorneys put any real effort into pursuing the issue despite statements from numerous sources, including the toxicology reports and various mental health experts, demonstrating the basis for doing so. The State argues that Mr. Rigterink's trial counsel asked Dr. Montgomery, a toxicologist, to attempt to extrapolate the amount of drugs in Mr. Rigterink's system at the time of his statement based on a blood test. However, the State fails to recognize that this blood test was taken days after the statement was made; therefore, the "extrapolation" could not have been exact by any means.

At the evidentiary hearing, 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 Mr. Rigterink's drug abuse, Mr. Hileman did not challenge the voluntariness of the statement. (PC, p. 1558-1559).

Additionally, the evidentiary hearing demonstrated that the 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 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 have been informed of Mr. Rigterink's drug use but may have simply forgot. (PC, p. 1400).

Mr. Carmichael claimed 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).

Doctors and mental health experts presented at the evidentiary hearing demonstrated that this issue could and should have been pursued further. 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 demonstrated that Mr. Rigterink showed indications of drug abuse, including long-term drug abuse. (PC, p. 1123).

Dr. Tracy Hartig testified at the evidentiary hearing that she evaluated Mr. Rigterink in October and November of 2003 and based on her evaluations of Mr.

Rigterink, which indicated 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).

The State claims that Dr. Buffington's testimony regarding the issue of voluntariness of the confession was rebutted by the allegedly "more credible testimony of the State's expert, Dr. Suarez." Dr. Suarez testified that the statement was made voluntarily; however, it is unclear how Dr. Suarez came to that conclusion when, by his own admission, he never performed any evaluations or testing on Mr. Rigterink for any purpose. (PC, p. 1647). Further, Dr. Suarez, self-admittedly, could not diagnose Mr. Rigterink, nor could he come to a definite conclusion on the matter. (PC, p. 1710). Lastly, Dr. Suarez is not a pharmacologist and has never been declared an expert in the field of pharmacology, rather he is a psychologist. (PC, p. 1639, 1684, 1685). Dr. Suarez's testimony failed to show that Mr. Rigterink's trial counsel acted reasonably under the circumstances.

The State argues that Dr. Buffington was not credible because he did not base his opinion on the recorded video of Mr. Rigterink's statements; however, Dr. Buffington did not need to view the video to form his opinion. Dr. Buffington based his opinion on the actual toxicology reports, which did indicate the presence of a multitude of substances in Mr. Rigterink's system. The toxicology reports are

a more exact tool of measurement than the body language relied upon by Dr. Suarez. Further, Dr. Buffington relied on reports provided by the other mental health experts in this case and reports from Mr. Rigterink as well.

III. TRIAL COUNSEL FAILED TO FILE A PRE-TRIAL MOTION TO SUPPRESS MR. RIGTERINK'S CUSTODIAL PRE-*MIRANDA* STATEMENTS MADE TO POLICE ON OCTOBER 16, 2003.

Mr. Rigterink's trial counsel failed to move to suppress Mr. Rigterink's custodial pre-*Miranda* statements made to police on October 16, 2003. The State relies heavily on the assertion that there was no coercion or improper influence asserted by police during this interrogation. However, this argument is misplaced and misguided as the landmark case of *Miranda v. Arizona*, 384 U.S. 436, 458 (1966) made clear that *all* custodial interrogations require an initial *Miranda* warning prior to custodial questioning, stating:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

Miranda v. Arizona, 384 U.S. 436, 458 (1966). The *Miranda* requirement ensures that all individuals, including the educated as well as the ignorant, know their rights prior to making potentially incriminating statements to the police.

Mr. Rigterink did not need to demonstrate that the nature of this questioning was coercive in order to warrant a proper *Miranda* warning as the State suggests. Rather, all that was required was for Mr. Rigterink to be "in custody." The State argues that the trial court determined that Mr. Rigterink was not in custody and, therefore, a *Miranda* warning was not required in this case. On the contrary, this Honorable Court has already determined that Mr. Rigterink was in custody for purposes of a *Miranda* warning in *Rigterink I.* Specifically, this 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,

> "[T]he 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). Furthermore, case law states that when police run afoul of the *Miranda* requirement, any statement obtained prior to the *Miranda* warning is inadmissible. *Miranda*, 384 U.S. at 494.

The evidentiary hearing in this case demonstrated that not only should Mr. Rigterink's trial counsel have moved to suppress the statements, but also that trial counsel's failure to do so was unreasonable under the circumstances. Testimony at the evidentiary hearing demonstrated trial counsel was aware that Mr. Rigterink was only given *Miranda* warnings by the police after three and a half hours of questioning; however, trial counsel never sought suppression of the pre-*Miranda* custodial statements. When asked about trial counsel's failure to seek suppression of the statements, Mr. Hileman acknowledged he was aware that Mr. Rigterink was questioned by police for three and a half hours and repeatedly confronted with evidence of his guilt and accused of lying prior to receiving a *Miranda* warning. (PC, p. 1405-1406; 1452).

Mr. Carmichael claimed this was a tactical/strategic decision. (PC, p. 891). It is hard to imagine exactly what about this failure was "strategic" as this failure did nothing more than allow the jury to hear highly prejudicial evidence. Specifically, 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. These inconsistent statements devastated Mr. Rigterink's

credibility while testifying.

In summation, the evidentiary hearing made clear that trial counsel's failure to properly and comprehensively raise this issue pretrial via a motion to suppress and/or a trial objection on Fourth and Fourteenth Amendment grounds is an omission which fell well below the standard that applies to counsel. Not only did these failures amount to ineffective assistance of counsel, but these failures also prejudiced Mr. Rigterink's case.

IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A COMPREHENSIVE PRETRIAL MOTION TO SUPPRESS A KNIFE FOUND IN MR. RIGTERINK'S HOME AND IN FAILING TO OBJECT TO THE ADMISSION OF NIKE SHOES AT TRIAL.

The evidentiary hearing in this case demonstrated that counsel was ineffective for failing to file a comprehensive pre-trial motion to suppress a knife found in Mr. Rigterink's home and in failing to object to the admission of the Nike shoes at trial.

a. Failure to Object to the Knife Found in Mr. Rigterink's Home.

Trial counsel should have moved to suppress the knife as this evidence was irrelevant and highly prejudicial to Mr. Rigterink's case. 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). 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."

Here, 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. Like many of the failures/omissions discussed above, it is hard to imaging any "strategic" or "tactical" reason for failing to challenge this highly prejudicial evidence. Admission of the knife could serve no other purpose than to confuse/mislead the jury into assuming that this was either the murder weapon or somehow involved in the crime. Moreover, the jury likely used this evidence as improper character evidence and simply believed that Mr. Rigterink was obviously a dangerous and violent person simply by way of owning a knife.

The State characterizes this argument as "absurd in light of the record." (Answer Brief of Appellee p. 82.) However, the record makes clear that even Mr. Rigterink's trial counsel recognized the prejudicial purposes of admitting the knife into evidence. During the evidentiary hearing, 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 even acknowledged the improper nature of the evidence stating, "it's not relevant, I agree." (PC, p. 1402).

Despite the State's argument, this testimony made clear that Mr. Rigterink's trial counsel was well aware of the improper, prejudicial, and irrelevant nature of the knife and yet chose to do nothing to seek its suppression. This cannot be deemed some kind of "tactic;" rather, this can only be seen as unreasonable under the circumstances. This failure amounted to ineffective assistance of counsel which prejudiced Mr. Rigterink's case.

Next, trial counsel should have challenged this evidence on Fourth Amendment grounds as the knife was obtained pursuant to an illegal search and seizure. See *Powell v. State*, 120 So. 3d 577, 580 (Fla. 1st DCA 2013) ("Our state and federal constitutions declare that homes—whether castles or cabins, mansions or mobile homes—are protected spaces that require a warrant or other lawful basis to justify a governmental intrusion . . . we know from its text that the Fourth Amendment grants explicit protection to a special place: one's home."); *see also Florida v. Jardines*, 133 S.Ct. 1409 (2013).

The State argues that trial counsel could not have challenged the seizure of the knife because this was not a search or seizure performed by government action.

The State cites *United States v. Jacobsen*, 466 U.S. 109 (1984) and argues the Fourth Amendment does not apply to "a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government." (Answer Brief of Appellee p. 81.) Conveniently, the State fails to mention that Mr. Rigterink's ex-girlfriend, Courtney Sheil, obtained the knife from Mr. Rigterink's home as a direct result of encouragement and requests made by the police officers in this case. The State would have this Honorable Court believe that the officers in this case had no knowledge and made no requests of Courtney Sheil to enter Mr. Rigterink's home and remove his personal property from the home. However, that is simply not true.

Courtney Sheil's testimony at the evidentiary hearing revealed that she did not live in the residence. (PC, p. 1775). Ms. Sheil clarified that she only had a spare key to Mr. Rigterink's home for the *limited purpose* of letting out the dog. (PC, p. 1802). After Mr. Rigterink's arrest, Ms. Sheil went to Mr. Rigterink's home for the purpose of letting the dog outside when police arrived. (PC, p. 1803-1805). At that time, the officers requested that she go into the residence and retrieve the knife. (PC, p. 1803-1805). This alone demonstrates that the Fourth Amendment did in fact apply to this unreasonable search and seizure. *See State v. Moninger*, 957 So. 2d 2 (Fla. 2d DCA 2007) (finding evidence inadmissible when

obtained by a private individual acting at the direction and encouragement of state police officers).

The evidentiary hearing demonstrated that trial counsel could and should have objected to the knife found in Mr. Rigterink's home on Fourth Amendment grounds. This failure can only be seen as unreasonable under the circumstances. This failure amounted to ineffective assistance of counsel which prejudiced Mr. Rigterink's case.

b. Failure to Object to the Admission of the Nike Shoes at Trial.

Trial counsel was ineffective for failing to object to the admission of Nike shoes at trial. As stated in Mr. Rigterink's initial brief, the State purchased Nike shoes that matched tread marks found at the scene of the crime for introduction into evidence at trial. These shoes were never actually found in Mr. Rigterink's home. Rather, detectives found a Nike shoe box in Mr. Rigterink's home that at one point may or may not have contained shoes with a tread similar to the ones at the scene.

Trial counsel should have recognized the prejudicial nature of this evidence and should also have recognized that the jury would likely use this evidence as improper circumstantial evidence of guilt. 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). The foregoing makes clear that trial counsel would not only have had a meritorious basis for objecting, but also likely would have been successful in excluding the improper evidence.

The State argues that trial counsel was not ineffective because trial counsel brought out during cross-examination that the Nike shoes introduced by the State had never been linked to Mr. Rigterink. However, the obvious purpose of entering the shoes into evidence was to confuse/mislead the jury into believing that Mr. Rigterink had a pair of shoes that matched the tread marks found at the scene of the crime, despite any evidence confirming as much. Despite any testimony brought out on cross-examination, the simple fact is that the jury was misled and confused by its admittance. Trial counsel should have recognized the improper purpose and the prejudicial effect this evidence would have on Mr. Rigterink's case.

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 Mr. Rigterink, Mr. Hileman hoped the jury would see that the State was "reaching." (PC, p. 1438). Apparently, despite Mr. Hileman's experience as a trial lawyer, Mr. Hileman believed that members of the

jury, with no legal training or knowledge, would understand that this evidence was circumstantial at best and had no connection with Mr. Rigterink.

V. TRIAL COUNSEL FAILED TO OBJECT TO EVIDENCE THAT DIMINISHED THE LACK OF SIGNIFICANT CRIMINAL HISTORY MITIGATOR.

Trial counsel was ineffective for failing to object to evidence that diminished Mr. Rigterink's lack of significant criminal history. At trial, 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. Additionally, at trial, Mr. Rigterink testified about driving on a suspended driver's license. 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."

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). However, the above-referenced evidence significantly diminished that argument. Additionally, 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).

The State argues that the evidence regarding previous crimes did little to diminish the mitigator of "no significant criminal history." However, as more fully discussed above, the evidentiary hearing showed that trial counsel went into the penalty phase with much less mitigation than was reasonably available because of trial counsel's failure to investigate Mr. Rigterink's mental health mitigation. This failure, coupled with the fact that trial counsel then failed to object to evidence of previous crimes, greatly diminished any mitigation with which trial counsel hoped to sway the jury. Trial counsel's failure to object to this previous crime evidence amounts to ineffective assistance of counsel and also greatly prejudiced Mr. Rigterink's case.

VI. TRIAL COUNSEL FAILED TO OBJECT TO INAPPROPRIATE PROSECUTORIAL COMMENTS.

As already referenced in Mr. Rigterink's Initial Brief, the State continuously called Mr. Rigterink "evil" and repeatedly made references to Mr. Rigterink's infidelity, among other things. The State argues that the prosecutor did not suggest that the jury consider non-statutory aggravation. However, the prosecutor took every opportunity to inflame the passions of the jury by continuously and repeatedly calling Mr. Rigterink "evil" and characterizing him as a liar and an unfaithful husband.

Contrary to the State's argument, the law clearly dictates that the State cannot argue a non-statutory aggravating circumstance to the jury. Further, it is

improper 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) (holding that the prosecutor's repeated use of the term "executioner" impermissibly inflamed the passions and prejudices of the jury with elements of fear and emotion); *See also 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).

The evidentiary hearing demonstrated that Mr. Rigterink's trial counsel appeared to not understand the improper nature of these arguments. 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). Additionally, Mr. Carmichael did admit that he failed to object to the State's argument that Mr. Rigterink was "shockingly evil." (PC, p. 951). Had trial counsel actually understood the above referenced case law, trial counsel would have understood that these comments were improper and, therefore, should have been objected to rather than simply letting the prosecutor provide a long-winded diatribe to the jury which only inflamed the juror's emotions and obviously influenced the jury in making its decision to impose the death penalty.

VII. TRIAL COUNSEL WAS INEFFECTIVE FOR CONCEDING IN ITS PENALTY PHASE ARGUMENT THE APPLICABILITY OF THE PRIOR VIOLENT FELONY AND HAC AGGRAVATORS.

As already referenced in Mr. Rigterink's Initial Brief, Mr. Carmichael actually conceded two aggravating circumstances during his closing: (1) prior violent felony and (2) that the capital felony was committed in a heinous, atrocious, or cruel manner. The State argues that trial counsel cannot be faulted for admitting these aggravators when this evidence was "overwhelmingly established" at trial. However, this argument fails to consider that trial counsel's concession practically encouraged the jury to impose the death penalty. This is even more egregious when coupled with counsel's failure to investigate or present mental health mitigation, more fully discussed above. Trial counsel's concessions not only encouraged the jury to impose the death penalty, but also assisted the State in proving its case. In no way can this be deemed "zealous advocacy" in favor of one's client. As stated in *U.S. v. Cronic*:

> [T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing . . . if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."

U.S. v. Cronic, 466 U.S. 648, 656-57 (1984). Trial counsel's concession essentially sacrificed Mr. Rigterink's chance of receiving the lesser sentence of life in prison

so that trial counsel could appear "credible." This concession helped the State to present an overwhelming amount of aggravating factors and also greatly diminished the already miniscule amount of mitigating evidence at the penalty phase of trial.

The evidentiary hearing demonstrated that even Mr. Hileman recognized the danger of conceding to the aggravating factors. Mr. Hileman testified he disagreed with Mr. Carmichael's concession that the State had proven these two aggravating factors. (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 "[i]f 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). Trial counsel's failure to subject the State's case to real adversarial testing was ineffective assistance of counsel which greatly prejudiced Mr. Rigterink's case.

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, Tenth Judicial Circuit, 255 North Broadway Avenue, Bartow, Florida 33830, 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 17th day of March, 2015.

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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