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94-132124

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY,
FLORIDA.
CRIMINAL DIVISION 08
CASE NO. 87-42355

STATE OF FLORIDA,
Plaintiff,

vs.

DIETER RIECHMANN,
Defendant.
_____/

ORDER ON MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

THIS MATTER comes before the Court on Defendant's motion, filed pursuant to Fla.R.Crim.P. 3.850, to vacate and set aside the judgment rendered against him of first degree murder and unlawfully displaying a firearm, and the sentence of death imposed on one count of first degree murder. During the post conviction proceedings, the Defendant was represented by James C. Lohman, Esquire, and Bruce A. Alter, Esquire. The State was represented by Catherine Vogel and Joel Rosenblatt, Assistant State Attorneys for Dade County, Florida.

I. INTRODUCTION

1. The Defendant, Dieter Riechmann ("Defendant") was charged by indictment, filed on January 20, 1988, with one count of first degree murder of Kersten Kischnick ("Victim") by shooting her with a hand gun on October 25, 1987, and one count of unlawfully displaying a firearm. A superseding indictment was filed on January 27, 1988. Following a plea of not guilty, the Defendant was tried by jury. The jury trial was preceded by a suppression hearing which commenced on July 5, 1988. Jury selection began on July 13, 1988, and the trial concluded on August 12, 1988. The jury returned a

verdict of guilty on both counts as previously charged. A judgment of conviction on both counts was entered on August 30, 1988. Following the penalty phase, the jury recommended a death sentence by a vote of nine-to-three. The trial court sentenced the Defendant to death on November 4, 1988. The trial court found the murder was committed for pecuniary gain and was cold, calculated, and premeditated without any pretense of legal or moral justification. Although the Defendant presented no mitigating evidence, the trial judge found, as a nonstatutory mitigating circumstance, which people in Germany told police they considered him a "good person."

2. The conviction and sentence of death were affirmed on appeal by the Florida Supreme Court in Riechmann v. State, 581 So.2d 133 (Fla. 1991). The Defendant then filed a petition for writ of certiorari to the United States Supreme Court after the Florida Supreme Court affirmed his convictions and sentence on direct appeal. The United States Supreme Court denied certiorari on November 2, 1992. Riechmann v. Florida, 113 S.Ct. 405 (1992).

3. On September 30, 1994, the Defendant filed the subject motion to vacate. The Defendant's motion consists of fourteen separate claims, eleven of which (consisting of 32 subparts) assert that trial counsel, Mr. Edward Carhart, rendered ineffective assistance of counsel. The remaining claims allege newly discovered evidence entitling the Defendant to a new trial; a Brady claim based on the State's withholding of material exculpatory evidence, and a final claim that the sentence was invalid because the trial

judge's findings were not written by the judge but by the prosecutor and provided to the judge ex parte. In response, the State, on August 15, 1995, filed a "Preliminary Response to Defendant's Motion to Vacate," and the Defendant, on September 22, 1995, filed a reply. On November 3, 1995, the court heard argument about whether an evidentiary hearing was required. At the hearing, counsel for the Defendant conceded that: "Claim Number XII does not require evidentiary development, but is a record based claim." By order dated November 21, 1995, the Court granted an evidentiary hearing on the Defendant's Claims I through XI and XIII through XIV.

4. Pursuant to order of the Chief Justice of the Florida Supreme Court, the undersigned was designated to preside over the post conviction proceedings as successor to the original trial judge who was called by the State as a witness in response to Defendant's Claim Number XI.

5. The evidentiary hearing commenced on May 13, 1996, and continued through May 17, 1996. Further hearings were held on June 11 and 12, and July 18 and 19, 1996. At the evidentiary hearings, the Defendant called 28 witnesses and introduced Exhibits A through WWW in evidence. The defense witnesses were Marlene Seager; Doris Dessaner; Monica Seager; Wolfgang Walitzki; Doris Rindelaub; Martin Karpischek; Dr. Alex Brickler, a gynecologist; Ulrike Karpischek, Stuart James, a blood spatter expert; Raymond Cooper, a firearms identification and gunshot residue expert;

Richard Cosner; Dr. Karen McElreth, a criminologist; David Arthur; Richard Mueller, Richard Klugh, Esquire; Edith Georgi, Esquire; Gabor Harrach; Hittrud Bopthy; Cris Cox; Micheal Klopf; Steven Potolski, Esquire; Early Stitt; Hilton Williams; Richard Ecott, a Metro Dade police officer; George Travis, a Metro Dade police officer; Fleata Douglas, a City of Miami Beach police officer; Lydia Shows, a Metro Dade police officer; Thomas Quirk, a Metro Dade firearms examiner, and Hans Lohse, a former prisoner with the Defendant at the Miami Correctional Center. The State called Elizabeth Sreenan, a former Assistant State Attorney who assisted with the prosecution; Edward Carhart, the former defense attorney; Judge Harold Solomon, the former trial judge, and Kevin Di Gregory, the former chief prosecutor.

6. No issue was raised by the State as to the Court's jurisdiction over the subject matter.

Based upon the Court's review of: (i) the entire transcript of the original trial proceedings; (ii) the briefs presented to the Florida Supreme Court; (iii) the Florida Supreme Court's opinion in Riechmann v. State, supra, 581 So.2d 133; (iv) the testimony and evidence presented at the post conviction proceedings, and (v) argument of counsel, together with the Court's opportunity to consider the credibility of the witnesses who testified during the post conviction proceeding, the Court hereby enters the following findings of fact and conclusions of law:

II. DEFENDANT'S CLAIMS AS TO INEFFECTIVE

REPRESENTATION OF COUNSEL.

A. General Allegations.

7. In his Rule 3.850 motion, as amended, the Defendant raised twelve claims, with numerous subparts, pertaining to ineffective representation of counsel. The claims, as stated and numbered by the Defendant, are: (1) trial counsel was ineffective by failing to conduct any independent investigation in this factually complex case and by failing to present abundant available evidence of the Defendant's innocence; (2) trial counsel was ineffective by failing to use available expertise to rebut and disprove crucial prosecution testimony erroneously and unprofessionally asserting that bloodstain and gunshot residue evidence obtained from the automobile proved the Defendant was guilty; (3) trial counsel was ineffective by his sudden, unilateral and patently unreasonable decision that the Defendant testify at trial; (4) trial counsel was ineffective by failing to suppress illegally obtained evidence; (5) trial counsel was ineffective by unreasonably deciding to prevent the jury from knowing about the Defendant's acquittal of a federal gun charge before his arrest on the instant murder charge; (6) trial counsel was ineffective by failing to object to countless instances of flagrant prosecutorial misconduct; (7) trial counsel was ineffective by refusing to comply with the Defendant's expressed desire to seat African-American jurors; failing to conduct appropriate death qualification inquiry, and by seating manifestly biased jurors; (8) trial counsel was ineffective by

making unreasonable errors and omissions on cross-examination of the State's witnesses; (9) trial counsel was ineffective by his closing argument at the guilt phase of the trial; (10) trial counsel was ineffective by failing to bring the Defendant to speedy trial; (11) trial counsel was ineffective by failing to investigate and present mitigating evidence which omission resulted directly in the jury's recommendation and the Court's imposition of the death sentence, and (12) trial counsel was ineffective by failing to request a second counsel to assist in the trial of the death penalty case.

B. Strickland.

8. In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated a two-prong test for determining whether a defendant was denied his Sixth Amendment right to effective assistance of counsel. The Florida Supreme Court has adopted Strickland in Downs v. State, 453 So.2d 1102 (Fla. 1984) and in State v. Bucherie, 468 So.2d 229 (Fla. 1985). [1]

9. Under Strickland, the Defendant must prove the following to require reversal of a conviction or death sentence:

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[1] Prior to Strickland, the Florida Supreme Court had adopted a four prong standard in Knight v. State, 394 So.2d 997 (Fla. 1981). Florida courts have applied both Knight and Strickland, finding Knight to be virtually identical. Downs v. State, supra, 453 So.2d 1102, 1109 n.2; Martinez v. State, 655 So.2d 166, (Fla. 3rd DCA 1995).

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showing, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

(i) First Prong of Strickland Test.

10. The inquiry under the first prong of the test focuses upon defense counsel's performance. The Strickland standard requires that defense counsel provide "reasonably effective assistance", Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, or, simply, representation the evinces "reasonableness under prevailing professional norms." Id. at 688, 104 S.Ct at 2065. This first component requires the movant to demonstrate that counsel's performance "fell below an objective standard of reasonableness." Id. at 2065. Under this component, the movant must identify the act or omission of counsel that is alleged not to have been the result of reasonable professional judgment; and, the reviewing court must consider the act or omission in light of all the circumstances to decide whether the conduct falls outside the wide range of professionally competent assistance. Id. at 694, 104 S.Ct. at

2066. [2] See also Williamson v. Dugger, 651 So.2d 84, 88 (Fla. 1994), cert. denied, 116 S.Ct. 146 (citing Strickland to the same effect).

In evaluating this prong, courts are required to: (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on the movant to show otherwise. This is because the craft of trying cases is far from an exact science; in fact, it is replete with uncertainties and obligatory judgment calls. Strickland, supra, 104 S.Ct at 2065). See also Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987); Downs v. State, supra, 453 So.2d 1102 (ineffectiveness of counsel claims should be regarded as extraordinary and be the exception rather than the rule).

(ii). Second Prong of Strickland Test.

11. Under the second prong of the test, the defendant must prove that he was prejudiced by his counsel's alleged deficient performance:

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[2] It has been recognized, however, that this standard "[i]s no high standard." Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir. 1992), cert. denied, 115 S.Ct. 2624, 132 L.Ed. 2d (1995), ("We must not determine what the ideal attorney might have done in a perfect world or even what the average attorney might have done on an average day; instead, our case-by-case inquiry focuses on whether a particular's counsel's conduct was reasonably effective in context.")

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.... When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."

Strickland, 466 U.S. at 687, 104 S.Ct. at 2069-70, 80 L.Ed.2d at 699. See also Lockart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993) (holding that under Strickland, the movant must show that "counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair"); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989)("...the clear, substantial deficiency shown must further be demonstrated to have so effected the fairness and the reliability of the proceeding that confidence in the outcome is undermined.")

(iii) Reliance on Prong Two Alone.

12. In applying Strickland, the Florida Supreme Court has recognized an exception to the application of the two part test. It has held that a court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when the prejudice component is not clearly satisfied. Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986), cert. denied, 479 U.S. 972, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986).

In Strickland, the Court previously had adopted the exception

by stating:

> " [a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."
>
> Strickland, 466, U.S. at 687, 104 S.Ct. at 2069-70, 80 L.Ed at 699.

C. Strickland Applied to Defendant's Guilt Phase Ineffectiveness Claims.

13. The Court concludes that only the following ineffective assistance claims require substantive comment:[3]

(i) Ineffectiveness for Failure to Call Rebuttal Blood Spatter Expert. (Claims III(A) and III(B).

14. In Claim III, the Defendant argues that trial counsel was deficient by failing to call an expert witness to rebut the trial testimony of the Metro Dade crime lab serologist, David Rhodes. Mr. Rhodes' testimony was summarized by the Florida Supreme Court in affirming the Defendant's conviction, as follows:

> "Serologist David Rhodes testified that high-velocity blood splatter found on the driver-side door inside the car could not have gotten there if the driver's seat was occupied in a normal driving position when the shot was fired from outside the passenger window. The pattern of blood found on a blanket that had been folded on the driver's seat was consistent with high-velocity blood splatter and aspirated blood, rather than other kinds

[3] The Court has taken the liberty of restating the order of claims for purposes of addressing the most substantive ones first.

of blood stains, the serologist said."

Riechmann, supra, 581 So.2d at 136.

In closing argument, the prosecutor cited Mr. Rhode's finding as proof that the Defendant was the murderer. (R. 4994-99; 5003-04; 5007, 5089-90). Because of the blood splatter patterns, the State argued to the jury that: "This defendant ... was not in that seat when the fatal shot that killed Kersten Kischnick was fired as he said he was") (R.4999), and that: "He wasn't sitting in the driver's seat at the time of the shooting because he was outside the passenger window firing ....." (R. 5007).

(a) First Prong of Strickland Applied.

15. At the post-conviction proceeding, Mr. Carhart testified that Mr. Rhodes' deposition testimony was initially "benign," but that his trial testimony later became the "lynch pin" of the State's case. (T. July 18, 1996, Carhart, page 29, 93, 94). He testified that he saw no need to call a serology expert initially, and that the importance of Mr. Rhodes' testimony was not evident to him until "... it was showering down on me at trial." (Id. at 94). He agreed that if favorable expert testimony for the Defendant was available, it would have been important to call such an expert (Id. at 97).

Given the central importance of Metro-Dade Serologist Rhode's testimony at the post conviction hearing, the Defendant called Mr. Stuart H. James, an expert in death scene reconstruction and bloodstain interpretation, to establish the rebuttal testimony that

would have been available at trial if trial counsel had elected to call such an expert. Mr. James testified that there was no possibility that the blood on the driver's door resulted from high velocity blood splatter in that no exit wound existed on the left side of the Victim's head (T. May 14, 1996, Stuart James, pages 33, 35, 48, 55, 136); that high velocity blood droplets could not have ricocheted to the driver's side of the vehicle as suggested by Mr. Rhodes (Id. 37, 54); that it was very unlikely that exhaled blood from the Victim traveled farther to her left than the right edge of the driver's seat or the right trouser of the Defendant due to her position in the vehicle (Id. 47, 48, 54, 138); that the presumptive blood stains on the driver's door could have resulted from the Defendant's shaking of his hand containing the Victim's blood which was consistent with his trial testimony (Id. 52, 53, R. 4496); that the string test used by Mr. Rhodes was not an accurate or viable experiment consistent with scientific principles (Id. 55, 61), and that his conclusions relative to the blanket were inaccurate and unscientific (Id. 66, 67, 69, 141).

16. Although at least one Florida appellate court, without explanation, has recognized that failure to present the testimony of an expert can constitute ineffective assistance, Morris v. State, 624 So.2d 864, 865 (Fla. 2nd DCA 1993) ("It is possible that such an omission could constitute ineffective assistance"), such post conviction arguments must be reviewed with caution in applying the first prong of Strickland. Clearly, not every failure to call

an expert is ineffective assistance. In considering such a claim, certain limitations should be considered.

First, the decision may be a tactical choice by trial counsel. See Lightbourne v. State, 471 So.2d 27, 28 (Fla. 1985)("Counsel was not ineffective for failure to request appointment of expert witnesses. In this instance, counsel was merely making a tactical choice that was within the standard of competency expected"); State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987), cert. denied, 108 S.Ct. 209 ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected").

Second, even if trial counsel should have called an expert in retrospect, his failure to do so is not deficient performance within the meaning of Strickland, where cross-examination at trial was effective to show the weaknesses in the witness' testimony, and where such weaknesses were argued to the jury in closing. See Rose v. State, 617 So.2d 291, 197 (Fla. 1993), cert. denied, 501 U.S. 903, 114 S.Ct. 279, 126 L.Ed 2d 230 (1993) Card v. Singletary, 911 F.2d 1494 (11th Cir. 1990), cert. denied, 114 S.Ct. 121, 126, L.Ed 2d 86, ("We agree with the district court that even if counsel should have impeached the serologist with the report showing blood type, his failure to do so was not deficient performance within the meaning of Strickland, as cross-examination at trial was sufficient to show the weaknesses in the witness's testimony.")(citation omitted); Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986),

modified, 816 F.2d 1493 (11th Cir. 1987), reversed on other grounds, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989) (defense counsel not ineffective for failing to obtain expert pathologist where defense counsel cross-examined state expert and argued weaknesses in testimony to jury in closing argument).

Third, to establish ineffective assistance, a defendant must prove that an expert similar to the one eventually produced could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent efforts. If such a result was not reasonably probable, the Defendant would not be prejudiced by counsel's failure to investigate. Merely proving that someone-years later-located an expert who will testify favorably is irrelevant. Elledge v. Dugger, 823 F.2d 1439, 1466 (11th Cir. 1987), cert. denied, 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed 2d 715 (1988).

Applying these principles, the Court concludes that trial counsel's performance was not deficient. Admittedly, trial counsel offered no tactical reason why he did not retain or call an expert serologist. His testimony was that he initially considered Mr. Rhodes' testimony to be benign. Before trial, which commenced on July 5, 1988, trial counsel deposed Mr. Rhodes three times. The three depositions were offered into evidence at the post conviction hearing. At the May 24, 1988 deposition, Mr. Rhodes advised defense counsel that, based on his examination of blood stains on the driver's side door, it would be unlikely for the Defendant to be in the driver's seat at the time of the shooting. At the June 29th

deposition, Mr. Rhodes testified that, since the prior deposition, he performed "spray" and "string" tests, which further substantiated his conclusion that the driver's seat was empty at the time of the shooting. At the July 7th deposition, Mr. Rhodes testified that he had reexamined the blanket on the driver's seat, and using a scientific test, found twenty-one areas that tested positive for presumptive blood.

By July 7th, 1988, trial counsel was certainly on notice that Mr. Rhodes' testimony was a "moving target," and ultimately problematic. The Defendant claims that a reasonable attorney, consistent with community standards, would have taken steps to present an "available" expert to rebut Mr. Rhodes' conclusions. In support of this position, the Defendant offered the testimony of Mr. Steven Potolski, Esquire, an expert in capital defense litigation. (T. May 16, 1996, Potolski, pages 120-125). While the Court is not bound by such an opinion, see Downs v. State, supra, 453 So.2d 1102, 1105-1106, it may be considered in applying the Strickland standards. See Parker v. State, 542 So.2d 356, 357(Fla. 1989)("...we find no merit in Parker's fourth claim that the trial court improperly admitted expert testimony concerning the effectiveness of his trial counsel").

Notwithstanding Mr. Potolski's testimony, the Defendant has failed to sufficiently meet his burden by demonstrating that, based on reasonable probability, Mr. James, or a similar expert, would have been found by an ordinary competent attorney using diligent

efforts, and that such expert would have been prepared to rebut the State's serologist at trial. The fact that Mr. James was found years later, and has worked on the case since 1994, is irrelevant. Rather, the "reasonable probability" standard must be measured from trial counsel's prospective at the time, without resort to distorting hindsight. No testimony was offered that, given the time limitations immediately before trial, Mr. James could have rendered the same opinions as offered at the post conviction hearing. At best, Mr. James merely "presumed" that he would have been available if contacted "depending on scheduling." (T. May 14, 1996, Stuart James, page 74).

The Court also concludes that trial counsel's comprehensive and extensive cross-examination of Mr. Rhodes (R. 3802 to 3892; 3930 to 3946) was effective in showing the weaknesses of the witnesses' testimony, and that such weaknesses were argued to the jury at closing. (R. 5038, 5041). The primary focus of Mr. Rhodes' testimony was that high velocity blood spatter found on the driver's side door inside the car could not have gotten there if the driver's seat was occupied in a normal position when the shot was fired from outside the passenger window. On cross-examination, Mr. Rhodes admitted that he did not know how the blood got onto the driver's side door (R. 3832); that deflection was a possibility but not a probability (R. 3821); that he did not have any other explanation how blood got from the right side of the Victim's head to the left side of the car (R. 3832); that he did not know if

blood was deposited in the car in one event (R. 3831); that it was possible that the acceleration of the car with the passenger window open and the wind blowing could account for blood splatter being found on the left side of the car (R. 3834 -3835); that it was possible that the blood on the blanket resulted from aspirated blood from the Victim (R. 3840); that he did not know how the blood specks on the driver's door occurred in a line (R. 3862), and that he did not know if the blood on the blanket was human blood or animal blood (R. 3881).

As summarized by Mr. Carhart:

> " So then am I correct, Mr. Rhodes, that instead of having one incident which placed blood splatter in this car's interior, there actually may have been a number according to the evidence in this case, including the initial firing of the shot into the skull, wind blowing, blood dripping from the headliner and the -- just above the passenger window, blood being aspirated from the mouth and nose of Ms. Kischnick as she struggled for breath before she died, and blood being thrown about the car when her seat flopped back as her weight rested against the back rest of the seat; is that correct?"
>
> Answer: "Those are all possibilities, yes." (R. 3843).
>
> * * *
>
> Question by Mr. Carhart: "Mr. Rhodes, can you tell us that there was nobody seated in the driver's seat when Ms. Kischnick was shot in the head?"
>
> Answer: "No, I can't say that, can't say that conclusively, no."
>
> * * *

Question: "Is that because there are too many variables in the situation for you?"

Answer: "Yes, there are many variables in the situation."

* * *

Question: "Assume, if you will, for a moment that Mr. Riechmann was seated in the driver's seat at the time Ms. Kischnick was shot in the head. Would the movement of the upper torso of his body such as crimping down to get out of the way or something, would that affect whether or not he could be in the seat and still have specks of what may be blood on the driver's door?"

Answer: "Yes, that would affect that if he could sufficiently get his body out of the way by bending over, then that would account for the specks on the door like that." (R. 3930 to 3931).

* * *

Question by Mr. Carhart: "And is it not a fact that you can't tell whether the specks you saw in ... the blanket, arrived there directly from blood being aspirated from a nose or arrived there from blood aspirated from nose that hit air current from an air conditioner and then fell upon the surface you tested, or if it is from a gunshot wound; is that not correct?"

Answer: "That's correct. I can't tell the difference between -- I can't say anything about how the specks got on the blanket." (R. 3938 to 3939).

* * *

Question by Mr. Carhart: Let me go, Mr. Rhodes, to the string test. The string test is nothing more than drawing a straight line from point A to point B, is that correct?"

Answer: "That's correct."

* * *

Question: "And what you did was you drew a straight line from the driver's door and the location of a particular speck on it that you believed might be blood to where a passenger's head might have been, is that correct?"

Answer: "That's exactly what I did."

* * *

Question: "And, in order for that to have any real validity, you would have to assume one thing, that the blood traveled in a straight line, correct?"

Answer: "That's correct."

* * *

Question by Mr. Carhart: "Can you tell us within reasonable scientific certainty that any of this blood you looked at moved in a straight line?"

Answer: "No, I have no idea." (R. 3942 to 3943).

In sum, the Court concludes, after considering all the circumstances, that the Defendant has failed to carry his burden by demonstrating a substantial and serious deficiency measurably below that of reasonably competent counsel under prevailing professional norms in existence at the time.

(b) Prong Two of Strickland Applied.

17. The Court further finds that Defendant failed to prove that, even if Mr. James had testified at trial, the jury would have reached a different result. Many of Mr. James' points were already addressed through trial counsel's cross-examination of Mr. Rhodes.

In addition, the record contains other significant circumstantial evidence upon which guilt could be based. The Florida Supreme Court, in Riechmann v. State, supra, 581 So.2d 11, identified such evidence as: (i) bullets recovered from Defendant's motel room that matched the type used to kill the Victim; (ii) the Defendant possession of two of the only three types of weapons that could have been used to kill the Victim, showing his preference for that particular type of weapon; (iii) expert testimony that particles found on the Defendant's hands established a reasonable scientific probability that the Defendant fired the gun; (iv) insurance policies, reciprocal wills, and other evidence that established a motive; (v) the considerable evidence offered by the State to impeach the Defendant on the stand, and (vi) testimony by a fellow inmate, Walter Smykowski, to the effect that the Defendant was pleased with the prospect of becoming rich from the proceeds of the insurance policies and the Victim's will. Id. at 137, 141.

Irrespective of the blood splatter evidence, the jury's determination of guilt can stand on the remaining circumstantial evidence admitted at trial, and their own evaluation of the Defendant's credibility following his testimony. The Court does not find that, but for the claimed deficiency, the results of the proceedings would have been different, or that, based on reasonable probability, the jury would have had a reasonable doubt of the Defendant's guilt. In so finding, the Court, has, as it must, considered the total evidence before the judge and jury. See Downs,

supra, 453 So.2d 1102, 1109-1109, and Bucherie, supra, 468 So.2d 229, 231.

(ii) Ineffectiveness Claims Based on Counsel's Failure to Use Existing Available Expertise to Discredit the State's Incriminating Gun shot Residue Testimony (Claim III(C).

18. In Claim III(C), the Defendant further argues that trial counsel was ineffective in failing to use available authoritative information contained in published periodicals in cross-examining the State's gunshot residue expert. At trial, the State presented Metro Dade residue analysis Gopinath Rao who testified, to a reasonable degree of scientific probability, that the Defendant had fired a gun at the time of the shooting. (R. 3545-46). In rebuttal, the defense called its own expert, Dr. Vincent P. Guinn, to refute the State's testimony. The testimony of the two experts was summarized by the Florida Supreme Court in its decision affirming the Defendant's conviction and death sentence, as follows:

> "While questioning Riechmann at the scene, police "swabbed" his hands for gunpowder residue. An expert for the state, Gopinath Rao, testified that numerous particles typically found in gunpowder residue were discovered in the swab of Riechmann's hand. Based on the number and nature of the particles, Rao concluded that there is a reasonable scientific probability that Riechmann had fired a gun. Rao also said he would not have expected to find the same type and number of particles on Riechmann's hands if Riechmann had merely sat in the driver's seat while somebody else fired a shot from outside the passenger-side window. An expert for the defense, Vincent P. Guinn, testified that the particles of gunpowder residue found on Riechmann's hand proved only that

> Riechmann was in the vicinity of a gun when it was fired-not that he actually fired a gun-and that Rao's opinion was not scientifically supported."
>
> Riechmann v. State, supra, 581 So.2d at 136.

At the post conviction hearing, the Defendant called Raymond Cooper, a firearm and tool mark examiner at Southwestern Institute of Forensic Sciences who was qualified as an expert in firearms identification and gunshot residue analysis. (T. Cooper, May 14, 1996, page 157). Mr. Cooper identified certain publications of the Federal Bureau of Investigation and other law enforcement agencies on gunshot residue, which he testified were authoritative and readily available at the time of the trial (T. Cooper, May 14, 1996, page 163, 167, 171). These included: "Gunshot Residues and Shot Pattern Tests," which was reprinted in the FBI Law Enforcement Bulletin in September, 1970, and revised in 1979, and "Final Report on Particle Analysis for Gunshot Residue Detection," published in 1977 for the National Institute of Law Enforcement and Criminal Justice (T. May 14, 1996 Cooper page 172-173). According to Mr. Cooper, such publications substantiate that gunshot residue found on a subject's hands can result from a person being in close proximity to a discharged weapon (T. May 14, 1996 Cooper page 192). The Defendant claims that trial counsel's failure to use these documents to impeach Mr. Rao is ineffective representation.

Normally, cross-examination is a tactical choice within trial counsel's discretion. Washington v. State, 397 So.2d 285, 287

(Fla. 1981). When the issue has been raised regarding ineffective assistance claims, trial counsel usually had failed to cross-examine at all, or only had engaged in limited cross-examination of a key witness. See, e.g. Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Scott v. State, 513 So.2d 653 (Fla. 1987). Here, trial counsel extensively cross-examined Mr. Rao. (T. 3588-3635, 3650-3659, 3681-3695). The issue, therefore, is whether his performance through cross-examination was unreasonable under the circumstances and prevailing professional norms by failing to use available authoritative literature for impeachment purposes as permitted under Section 90.706, Florida Statutes. The Court concludes that trial counsel's performance was neither deficient nor prejudicial.

During his cross-examination, Mr. Rao conceded that the presence of gunshot residue on a person's hands did not mean that person was the shooter. (T. 3618, 3625)("So when you find gunshot residue on somebody's hands, that doesn't mean they are a shooter, does it?" Answer [Mr. Rao]: "Well, no, I never said that they are the shooter.") He further agreed that other possibilities could explain its presence, such as if a person's hands were in close proximity to a gun when it was fired (R. 3618), or if such person had previously handled a discharged weapon (R. 3625). Under such circumstances, any failure to use authoritative publications to obtain the same concessions was not deficient performance within the meaning of Strickland, since cross-examination at trial was already sufficient to show the weaknesses in the witnesses'

testimony. Card v. Dugger, supra, 911 F.2d 1494, 1507. Moreover, based on the testimony of the Defendant's own expert, Dr. Quinn, and the other circumstantial evidence enumerated above, the Court concludes that there is no reasonable probability that, but for the claimed error, the results of the proceeding would have been different.

(iii) Ineffective Assistance Claim Based on Trial Counsel's Failure to Rebut Incorrect and Misleading Firearms and Bullet Examination Testimony. (Claim III(D).

19. The evidence at trial established that the bullet that killed the victim was a .38 caliber with six lands and grooves and a right twist. Forty of the bullets were found in a fifty-shell box in the Defendant's possession. At trial, the State's expert, Mr. Quirk, identified only three main weapons that could have fired the bullet. Using information relied on by the State's expert, Mr. Cooper, who testified at the post conviction hearing for the Defendant, stated that there were fourteen different manufacturers that made weapons that could have fired the bullet, only three of which were not commonly available. (T. May 14, 1996 Cooper, pages 187-188). According to Mr. Cooper, this information was available from the FBI at the time of trial.

The Defendant now claims that trial counsel was ineffective in not making use of available FBI information to impeach, or by not calling an expert to rebut, Mr. Quirk's testimony. Such information

could have established that there were eleven manufacturers who made weapons locally available that could have fired the bullet, not just three as claimed by Mr. Quirk. Even if such rebuttal evidence were available, the Court concludes, after considering all the evidence at trial, that the Defendant has failed to prove prejudice. The Defendant has failed to demonstrate under Strickland that, but for the claimed error, the results of the proceedings would have been different.

(iv) Ineffective Assistance Claims Based on Failure to Investigate During the Guilt Phase. (Claim I).

20. The Defendant contends in Claim I that: (i) trial counsel failed to investigate the facts and circumstances of the actual offense and to prove his innocence; (ii) trial counsel failed to investigate and present evidence of the Defendant's relationship with the Victim; (iii) trial counsel failed to discredit the testimony of "jailhouse informant" Walter Smykowski; (iv) trial counsel failed to transcribe and introduce the secretly-held four-hour tape of the Defendant's October 29 interview with Miami Beach Police Sergeant Matthews; (vi) trial counsel failed to deal effectively with a client from a different culture, to identify and explain relevant cultural factors to the jury, and to present evidence that prostitution is a legal regulated profession in Germany, and (v) trial counsel failed to present evidence rebutting the State's theory that the murder was all about the Victim's "cervical erosion."

After considering each of these claims in context of the evidence presented, the Court concludes that the Defendant has failed to demonstrate a requisite deficiency or prejudice under Strickland as to Claim I (i), (iii), (iv), and (v). As to Claim I (ii), the Court finds that counsel has failed to establish requisite prejudice. No findings are made concerning any deficiency in the guilt phase.

According to Strickland, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. at 2066. The general standard is: "{i}n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Even if trial counsel's strategic choices were made after less than complete investigation, they "'...are reasonable to the extent professional judgment supports the limitations on investigation.'" Burger v. Kemp, 483 U.S. 766, 794, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)(quoting Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066). Indeed, the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even

harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. Id.

Based on the post conviction testimony of Mr. Carhart, the Court concludes that he was hampered in his ability to locate witnesses due to the Defendant's inability to specify the exact scene of the incident (T. July 18, 1996, Carhart, pages 32-34); that he did use the services of a local private investigator (Id. at 34-36, 56); that he examined the vehicle and other physical evidence (Id. at 50-51), and that he discussed with the Defendant the possibility of calling other inmates to impeach Walter Smykowski and made a reasonable tactical decision not to do so (Id. at 40-42, 113-114).

The remainder of Claim I, including subpart (ii)(addressing trial counsel's failure to present evidence of the Defendant's relationship with the Victim), focuses on evidence which new counsel asserts should have been presented at trial; however, most of this evidence had already been presented to the jury, although in a manner different from now desired. Such tactical and strategic decisions, made before and during trial, are not transformed into ineffective assistance simply because new counsel posits that trial counsel should have done more or done it differently. e.g. Cherry v. State, 659 So.2d 1069 (Fla. 1995); Bryon v. Dugger, 641 So.2d 61

(Fla. 1994). [4]

(v) Trial Counsel was Ineffective for Requiring the Defendant to Testify, and Doing So Without Reasonable Notice and Preparation. (Claim V).

21. The Defendant, who did not testify at the post conviction proceeding, argues that his counsel's decision requiring him to testify was sudden, unilateral, and patently unreasonable. The testimony presented by Mr. Carhart supports a contrary conclusion. Mr. Carhart testified that the decision to put the Defendant on the stand was one that evolved over the course of the trial. (T. Carhart, July 18, 1996, page 117); that he had conversations with the Defendant about testifying, and, although he was aware that the Defendant did not want to testify (Id. at 37-40), trial counsel decided that it was a risk that had to be taken, due to the incident that occurred at trial where a juror spoke to a journalism student about the beliefs of some jurors as to the Defendant's guilt. (Id. at 37-40).

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[4] For instance, in regard to the cervix erosion, trial counsel, during cross-examination, established that the erosion of the cervix was neither unusual in one sexually active, nor life threatening. In regard to the relationship between the Defendant and Victim, the Defendant played certain videos for the jury, including those taken on the day of the shooting. In addition, through cross-examination of Dina Moeller, a self-professed prostitute called by the State, trial counsel established that prostitution was legal where practiced by the Victim; that the Victim did not regard the Defendant as her "pimp;" that the Victim was self-supporting and not dependent on the Defendant, and that the Victim and Defendant loved each other although they did not get along well.

Simply put, trial counsel made a reasonable tactical decision, based on facts known to him at the time and his extensive experience in the field of capital death cases. He thought it was necessary "...for Mr. Riechmann to testify if we hoped to win the case." (Id. at 37), despite the Defendant's past criminal record and his exposure to cross-examination. (Id. at 110). While he acknowledged that the Defendant's testimony was an "unmitigated disaster" (Id. at 110), he did not expect it to be so when he called the Defendant to the stand. (Id. at 111).

He described his thought process in the following manner:

> "My recollection is it [his decision that the Defendant should testify] came on slowly. You know. I didn't just suddenly say, "I am putting you on the stand." But a series--you know, a trial is a living thing and it changes day-to-day. And it came on slowly. It was not my first choice, to be honest, to put Mr. Riechmann on the stand for some of the reasons that Mr. Alter has so nicely highlighted on my behalf. So it is one of those hard choices you make." .... I will say this, as I told Mr. Alter, I did not believe it would go as badly as it went." (Id. at 117, 118).

While the Defendant has presented testimony from Ms. Georgi-Houlihan and Mr. Steven Potolski, both qualified as experts in capital and criminal defense representation, to the effect it was unreasonable to call the Defendant to testify, the Court nonetheless concludes otherwise. The Court finds that such decision, when viewed in light of all the circumstances, was not shown to be outside the broad range of reasonably competent performance under prevailing professional standards as applied to

trial counsel's perspective at the time. As noted in Strickland, every effort must be made to eliminate the "distorting effects of hindsight." 466 U.S. at 689; 104 S.Ct. at 2065. Accordingly, the Court finds no deficiency under Strickland.

The Defendant also claims ineffective representation based on trial counsel's failure to prepare him to testify. The decision regarding the Defendant's testimony was made during the lunch break before his testimony commenced. To convince the Defendant to testify, Mr. Carhart requested help from Richard Klugh, Esquire, who had represented the Defendant during prior federal criminal proceedings. Admittedly, no effort was made to prepare the Defendant for his testimony before commencement of his direct examination that afternoon. However, the Defendant testified over five court days, August 2, 3, 8, 9, and 10, 1988 (R. 4250-4781). He was recalled to testify on August 11, 1988. (R. 4909-4916). No evidence was presented that he and Mr. Carhart were unable to prepare before each subsequent trial day, or that such preparation would have avoided or mitigated his impeachment on cross-examination. Accordingly, the Court finds that the Defendant has failed to prove either deficiency or prejudice based on this argument.

(vi) Trial Counsel Was Ineffective By Failing To Request Appointment of Second Counsel.

22. The Defendant claims that he received ineffective assistance of counsel because his attorney did not request, and the

trial judge otherwise did not appoint, two attorneys to represent him in this case. The Florida Supreme Court has rejected this argument as an invalid basis for post conviction relief. As stated in Larkins v. State, 20 Fla.L.Weekly S228, S229 (Fla. May 11, 1995), "Larkins also argues that he received ineffective assistance of counsel and was denied equal protection because the trial judge refused to appoint two attorneys to represent him in this case. We disagree. In a recent decision, we rejected this precise argument. See Armstrong v. State, 642 So.2d 730 (Fla. 1994)...." (remaining citations omitted).

(vii) Claims Procedurally Barred and Summarily Denied.

23. As to the Defendant's remaining ineffectiveness claims, the Court concludes that Claims VI, VII, VIII, IX, and XIII are procedurally barred. The Florida Supreme Court has consistently held that allegations of ineffective assistance of counsel cannot be used to circumvent the rule that post conviction proceedings cannot serve as a second appeal. Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995). Claims that were raised or could have been raised on direct appeal cannot be litigated again in a post conviction proceeding. Krishnan v. State, 21 Fla.L.Weekly S387, S388 (Fla. September 19, 1996).

Claims VII and XIII could have been raised on direct appeal but were not. In regard to Claim VII, Defendant's own motion for rehearing, paragraph 14, assigned as error: "[t]he refusal of the

court to permit the Defendant to present evidence of his arrest on federal firearms charges on October 29, 1987, and the disposition of such charges (an acquittal by a jury of his peers), and, at the same time, permitting the State to introduce, over the Defendant's objection, ... [evidence] which was the essence of the federal charges without giving the jury a proper limiting instruction as to the purpose of such evidence." R.535. This, in essence, is the basis of Claim VII that is now restated as an ineffective assistance of counsel claim.

Regarding Claim XIII, the Defendant's speedy trial argument could and should have been raised on direct appeal and, consequently, was improperly raised pursuant to Rule 3.850. Gardner v. State, 550 So.2d 176 (Fla. 1st DCA 1989).

Regarding Claims VI and VIII, the Defendant, on direct appeal, specifically raised, and the Florida Supreme Court rejected, that the trial court should have suppressed his statements both because he was not informed of his Fifth Amendment rights, and because the statements were coerced by improper and harassing police procedures; that the evidence seized in Germany was inadmissible, arguing that his constitutional rights were violated because the searches did not comply with German or American law, and that numerous incidents of prosecutorial misconduct denied him a fair trial. Riechmann, supra, 581 So.2d at 133, 137. Although the Defendant has rephrased these claims in terms of ineffective assistance of counsel, the Court concludes such arguments

collaterally litigate issues already known and specifically considered and rejected on direct appeal. In addition, to the extent that these issues can be characterized as different issues, the Court concludes that they are insufficient to establish prejudice under Strickland to merit relief.

In regard to Claims IX, X and XII, the Court summarily concludes that the Defendant has failed to carry his burden to sufficiently prove either a deficiency or prejudice as required by Strickland.

(viii) Cumulative Effect Rule Applied to Ineffectiveness Claims and Other Claims.

24. As discussed above, the Defendant has raised numerous ineffectiveness of counsel claims, a number of which directly relate to the circumstantial evidence offered by the State to prove evidence of guilt. While each such claim independently has been evaluated, the Court also concludes, after considering the cumulative effect of the testimony and evidence at the trial and at the post conviction hearing, that confidence in the outcome of the guilt phase has not been undermined, and that no reasonable probability exists of a different outcome. Such analysis is consistent with, if not required by, the decision of the Florida Supreme Court in State v. Gunsby, 670 So.2d 920 (Fla. 1996).

III. Defendant's Claims to Newly Discovered Evidence Entitling Him to a New Trial

A. Defendant's Claims to Newly Discovered Evidence.

25. Defendant raises three claims based on newly discovered evidence entitling him to a new trial. These claims are: (i) newly discovered eyewitnesses to the murder of the victim Kersten Kischnick; (ii) newly discovered evidence that the testimony of "jail house informant" Walter Smykowski was knowingly false, and (iii) newly discovered evidence of subsequent similar murders confirming the Defendant's account of the murder of the Victim. Each claim is addressed separately below.

B. Applicable Law.

26. In Jones v. State, 591 So.2d 911 (Fla. 1991)(hereinafter "Jones I"), the Florida Supreme Court left in tact the Hallman definition of newly discovered evidence, as that which "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known them by the use of [reasonable] diligence." Jones v. State, supra, 591 So.2d 911, 916; Jones I, receded from Hallman v. State, 371 So.2d 482 (Fla. 1979) to the extent that, now, to obtain relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal or retrial. Jones v. State, supra, 591 So.2d at 915.

At a Rule 3.850 hearing, a trial judge, in applying the Jones I standard, should consider all newly discovered evidence that would be admissible and determine whether such evidence, had it been introduced at trial "...would have probably resulted in an acquittal. In reaching this conclusion, the judge will necessarily

have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial." Jones, supra, 591 So.2d at 916.

C. LAW APPLIED.

A. Newly Discovered Eyewitnesses to the Murder of Kersten Kischnick (Claim IIA).

(i) Defendant's Testimony At Trial Regarding the Shooting.

27. The Defendant testified that, after he and the Victim left Bayside, they were going to stop and videotape the "Welcome to Miami Beach" sign on I-195, as a vacation souvenir. (R. 4483). He said he was driving. (R. 4484). He said "we did not watch where we were going, so we landed someplace where we hadn't even wanted to go, and I do not know where this place was. (Id.).

The Defendant further testified that he told the Victim that he was going to ask for directions. (R. 4485). He said he saw someone standing by the road, drove over to the right, put the window down about halfway and called to the man. (Id.) He said the man came over to the car, and that he told him in his broken English that they were looking for Miami Beach, and that the man was very friendly and spoke to them; that the man was on the right side of the car, that he pushed his seat back a little bit and unbuckled his seat belt to reach for a suitcase to get his video camera because he assumed the man would direct him to where they wanted to go; that he took the video camera out; that the Victim said that we should give the man some money because he had been so

nice, he said "I think from her purse she took her money," and that he put the camera in the Victim's lap (R. 4486-4488). He then testified that the man went away and suddenly he was at the window again holding something in his hand, and the man said something; that he "thought it was a threat or something like that," but that he wasn't sure, "but I think I hit the gas pedal and I put my hand in a protective manner and kind of in front of me." (R. 4489). He said there was an explosion, he hit the gas pedal, and that the Victim fell over. (R. 4490).

(ii). **Testimony of Defendant's Newly Discovered Eye Witnesses, Early Leon Stitt and Hilton Williams.**

28. Early Stitt described an incident that occurred in 1983 or 1984 (T. May 17, 1996, Early Stitt, page 9). He stated it happened around 10:00 or 10:30 P.M. (Id. at 11), although he previously told the prosecutor, Ms. Vogel, that it occurred after midnight. (Id. at 28). He was standing on the corner of Biscayne Boulevard and 63rd Street, selling crack along the Boulevard (Id. at 11-12), when he heard a shot further down the street. (Id. at 11). He did see two people in a car whom he believed wanted to purchase drugs. (Id. at 11, 12). He did not pay close attention because he was selling drugs to a female. (Id. at 14, 15). Nonetheless, he testified he saw several men approach the car. (Id. at 11). He did not see the shooter (Id. at 36), cannot describe the color of the car (Id. at 23), nor did he see Mr. Hilton Williams who also is known as "Pookie," that night. (Id. at 16). He was not even certain if

anyone shot into the car. (Id. at 15). He said he ran north on Biscayne Boulevard from the scene. (Id. at 13). He saw the car in question pass him as he ran. Two days later he heard about the killing of a German tourist near Biscayne Boulevard on the news. (Id. at 13). He did not report what he saw because he thought it would jeopardize his crack business. (Id. at 14). He remembered the incident because, at that time, it was unusual for anyone to be killed instead of robbed, and because he thought the shot was fired at him. (Id, at 17). He acknowledged that he was uncertain as to the date and time or even the year that the shooting happened (Id. at 35). He acknowledged he was under the influence of drugs that night (Id. at 24, 25) and had taken drugs since then which affected his memory. (Id. at 9, 21). He acknowledged that his memory was refreshed by the Defendant's private investigator, Mr. Clay, who visited with him the night before he testified. (Id. at 20). He had given a statement several years ago after being located by "Pookie," who brought Defendant's private investigator to his house. (Id. at 8, 15, 31). He acknowledged thirty-eight felony convictions and four aliases. (Id. at 22).

29. The Defendant called Hilton Williams, who is currently incarcerated with the Florida Department of Corrections. (T. May 17, 1996, Hilton Williams, page 37). Mr. Williams testified that he was living at the Shalimar Hotel on 63rd Street and Biscayne Boulevard in 1987, when he saw a red car with a rental tag drive down 63rd Street. It was occupied by a man and woman. (Id. at 39,

40). He could not specify the exact date. At the time, he was selling drugs and was accompanied by his girlfriend (now wife) and other friends, including Early Stitt, known as "Twin." (Id. at 55). He said Twin was behind him when the incident occurred. (Id. at 71). He and his friends thought the occupants of the car were looking to buy drugs. Someone hollered to them. The driver did not respond but continued down the street, then made a U-turn, and returned in their direction. (Id. at 81). As the car came back, it stopped. He and the others came to the driver's side. The window was down. He saw jewelry on the woman, "...so we say with them that's money. We can come up, take it to the pawn shop." (Id. at 88). He stated that the man did not speak English. (Id. at 88). He said he stepped away and saw "...Mark stuck around with the pistol and shot in the car."(Id. at 88). He thought "Mark" was behind him on the driver's side. (Id. at 66, 80). After the shot, the car accelerated and proceeded north on Biscayne Boulevard. Everyone at the scene ran. He remembers the night because it was a joke on the street that the shooter, who he identified as "Mark," shot the passenger, not the driver, and did not succeed in robbing the passenger. He stated:

> "Because all the jewelry that the people had on around the neck, ain't nobody get any, so it was like a joke-- "You let all the money get away, you're that damn dumb, you -- you supposed to shoot the driver. Then if you shoot the driver, then you don't have to worry about the car going nowhere." Id. at 40.

Upon cross-examination, Mr. Williams admitted that he had been

convicted of ten felonies, was presently serving time, and was known by six aliases. He also admitted he would lie if it suited his purpose. (Id. at 57). He acknowledged that he was contacted by Defendant's investigator and agreed to help him locate other persons who witnessed the shooting. At first he denied working for the investigator and receiving compensation (Id. at 75), but, when confronted by defense counsel to tell the truth (Id. at 78), acknowledged that he was paid for his hotel room for "months" (Id. at 79) while he helped in the investigation. (Id. at 74-79).

30. The exculpatory testimony of Hilton Williams and Early Stitt was discovered after trial, would have been admissible at the trial, and is material to Defendant's guilt or innocence. Under the Jones I test, their testimony constitutes newly discovered evidence.

The Court further concludes that these witnesses were not previously known to the Defendant or trial counsel and were not discoverable in the exercise of due diligence. Trial counsel was not able to determine the location of the shooting with any precision. (T. July 18, 1996, Carhart, page 33). As a result, he could not reasonably investigate potential witnesses. (Id. at 33). Even if these witnesses could have been found, they would have been reluctant to testify at the time for fear of prosecution by the State for drug or other offenses, or from possible retribution. See McCullum v. State, 559 So.2d 233, 234-235.

In Jones v. State, 21 Fla.L.Weekly S163 (Fla. April 11,

1996)(hereinafter "Jones II"), which followed remand of the first Jones I case, the Supreme Court applied the test which it had earlier adopted in Jones I. In determining whether the newly discovered evidence was of such a nature that it would probably produce an acquittal on retrial, Id. at S163, the Supreme Court concurred with the trial court, who found the testimony of the exculpatory witnesses to be less than credible because of prior felony convictions and their close relationship with the accused. Additionally, upon its own review of the proceedings, the Supreme Court found their testimony was "rife with inconsistencies." Id. at S165. Based on these and other factors discussed, the Supreme Court concurred that: "...it is not probable that the testimony of Cole, Reed, and Bell, without more, would have created a reasonable doubt in the minds of the jury....", and that: "None of this evidence weakens the case against Jones so as to give rise to a reasonable doubt as to his culpability." Id.

The Court finds the testimony of Mr. Stitt and Mr. Williams to be less than credible and "rife with inconsistencies" with the Defendant's own testimony at trial. Mr. Stitt suffers from a drug problem that affects his memory. Mr. Williams has multiple convictions, is currently incarcerated for robbery, and initially had lied to the Court during his testimony. He worked for the Defendant's investigator and received compensation, which he first denied, but then admitted. Finally, his testimony is inconsistent with the Defendant's own recollection of the events as well as the

undisputed physical evidence that the Victim was shot through the passenger window, not the driver's window. Furthermore, the Defendant mentioned only one person, the shooter, on the street at the time described, not several as described by Mr. Williams. ..

Applying the Jones I and II test, the Court concludes that the testimony of Mr. Stitt and Mr. Williams, without more, would probably not have created a reasonable doubt in the minds of the jury. The Court reaches this conclusion after evaluating the weight of both the newly discovered evidence and the totality of the evidence at trial. In so ruling, the Court must candidly acknowledge that the new evidence directly supports the Defendant's explanation of events. The prosecutor made the issue of whose story to believe the primary question for the jury to decide. The prosecutor repeatedly urged the jury to disbelieve the Defendant's testimony because he was a convicted felon and liar, and because his story was unsupported by any other evidence. (R. 4983-4984; 5094, 5097).(Emphasis added).

(iii) Defendant's Claims of Newly Discovered Evidence that the Testimony of "Jailhouse Informant" Walter Smykowski was Knowingly False, and of Newly Discovered Evidence of Subsequent Similar Murders Confirming the Defendant's Account of the Murder. (Claims IIB and IIC).

31. The Court concludes that both claims do not meet the Jones I test as applied. Regarding the testimony of Dr. Karen McElrath, which was based on newspaper articles and other such sources, the Court finds that such evidence does not constitute new evidence.

Even if it did so qualify, the Court further finds that it would probably not produce an acquittal or retrial.

Regarding the Smykowski matter, there is express testimony at trial regarding the possibility of the prosecutor writing a letter to the federal parole authorities on his behalf. (R. 4097, 4135-4136) as well as defense counsel's argument to the jury about it (R. 5170). At the post conviction hearing, both prosecutors testified that there was no deal with Mr. Smykowski. Given that the newly discovered evidence with respect to Mr. Smykowski is only of an impeaching nature, and not evidence of any false statement, it presents no basis for relief. Williamson v. Dugger, 651 So.2d 84 (Fla. 1994), cert. denied, 116 S.Ct. 146; Lighbourne v. State, 644 So.2d 54 (Fla. 1994), cert. denied, 115 S.Ct. 1406. Finally, it would probably not produce an acquittal or retrial.

IV. DEFENDANT'S CLAIMS TO BRADY VIOLATIONS ENTITLING HIM TO A NEW TRIAL (CLAIMS IV A THROUGH H).

32. The Defendant in Claim IV contends that the State deliberately withheld material exculpatory evidence and thereby deprived him of a fair trial. The evidence claimed to be withheld included: (i) exculpatory police reports, namely, reports concerning the car window, the activities of the Defendant and victim immediately before the shooting, and statements of the victim's father about the Defendant; (ii) exculpatory German investigative materials and documents; (iii) undisclosed deals with prosecution witness, Walter Smykowski (iv) probative and

exculpatory photographs; (v) forensic notes and reports; (vi) correspondence from the Miami Beach police to the German authorities, and (vii) undisclosed testimony from German police officers concerning searches of both the victim and Defendant's apartment in Rheinfelden, German.

A. APPLICABLE LAW.

The prosection must disclose evidence favorable to the accused if evidence is material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963). In United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the United States Supreme Court discussed three situations in which a Brady claim may arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured; second, where the State failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, and, third, where the State failed to volunteer exculpatory evidence never requested, or requested only in a general way.

To establish a Brady violation, the Defendant would have to prove: (i) that the State possessed evidence favorable to him; (ii) that he did not possess the favorable evidence nor could he obtain it with any reasonable diligence; (iii) that the State suppressed the favorable evidence, and (iv) that had the evidence been disclosed to the Defendant, a reasonable probability exists that the outcome of the proceedings would have been different. See

Hildwin v. State, 20 Fla.L.Weekly S39 (Fla. January 27, 1995); Mexdyk v. State, 592 So.2d 1076, 1079 (Fla. 1992). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." Cherry v. State, 659 So.2d 1069 (Fla. 1995); Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990)(quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)); Kyles v. Whitley, 115 S.Ct. 1555, 1566 (1995)("The question is not whether the defendant would have more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial.'")(citation omitted).

B. LAW APPLIED.

34. Applying these principles, the Court finds no Brady violation, except as to certain exculpatory statements obtained by the German Democratic Republic Police. As to the other six (6) enumerated grounds, the Court, after considering each separately, and then all cumulatively, concludes that, even if these documents were disclosed to the Defendant, there is no reasonable probability that the outcome of the proceedings would be different. At best,

they would not have revealed any material information to the jury that was not addressed through cross-examination or evidence presented in the Defendant's case. See Routly v. State, 590 So.2d 397, 399-400 (Fla. 1991)(citing cases).

The Court concludes that: (i) there was no undisclosed deal with Walter Smykowski; (ii) the missing photographs never existed, but rather, were a product of the difference between the number of exposures on the roll of film, and the number of pictures actually taken, and (iii) that the prosecutors were unaware that a German court had suppressed evidence at the time they decided not to offer that evidence at trial.

The only significant information withheld was the unredacted report of Detective Trujillo which stated, "Crime lab stated that the window had to be all down but subject claimed window as half down for security." While this statement could have been used to impeach Detective Trujillo, had he testified inconsistently at trial, the Defendant did not establish at the post conviction hearing whether the statement was a mistake of the crime lab or Trujillo's report. There is no reasonable probability that the results at trial would have been different had the additional evidence been disclosed, or that its omission had undermined confidence in the outcome of the trial.

Regarding the German and Swiss statements, the evidence at the post conviction proceedings established that the German police took thirty-seven (37) such statements of persons in Germany and

Switzerland who knew the Defendant and the Victim. (T. July 19, 1996 Kevin Di Gregory, page 49, 51). Defense counsel learned of their existence during discovery and requested copies of twenty-seven statements that he did not possess. (Id. at 49). When the prosecutor refused to comply, trial counsel moved the court to turn the statements over to the defense after an in camera inspection. (Id. at 52). Evidently, the Court did not rule on the motion, and trial counsel did not renew it. Nonetheless, at sentencing, the trial judge announced that he independently had reviewed the reports at issue, commented that they were "good reports;" and relied upon as mitigation in his sentencing order. At that point, trial counsel objected that he had never seen them. (R.5321-5322).

At the post conviction hearing, only nine (9) reports were introduced in evidence (see Def. Exs. EE, FF, GG, HH, II, JJ, LLL, MMM, and OOO), while the whereabouts of the remaining reports were unknown. The materials introduced were exculpatory in nature and described the Defendant and his relationship with the Victim in favorable terms. Mr. Di Gregory, the former prosecutor, conceded that these materials were mitigating and would have been helpful to the defense, but explained: "...it may be favorable evidence that the accused has reasonable access to." (Id. at 46, 55). He did not recall why the materials were not turned over. (Id. at 58, 63-64). In response to the Court's question, he agreed that: "...those statements would have been important to defense counsel to view them to determine whether or not to present mitigation evidence."

(Id. at 64).

In sum, the twenty-seven German statements were known to the State and, without dispute, were favorable to the defense. Yet, the prosecutor, for reasons unknown to him at the post conviction proceedings, failed to accede to the Defendant's request for disclosure. The Defendant did not otherwise have ready access to the Swiss and German persons involved (even assuming he knew who they all were). Under such circumstances, their non-disclosure raises a Brady question in the sentencing phase where the trial judge, admittedly, regarded the reports as material to his sentencing order. With access to these reports, the defense would have had the opportunity to present some mitigating evidence to the jury that, without any mitigating evidence, only voted nine to three for death. In sentencing Defendant to death, the trial judge said he was giving great weight to the jury's recommendation [9 to 3 vote] .... "as juries are the conscience of the community." (R.5322). Under such circumstances, the State's evidentiary suppression undermines confidence in the outcome of the penalty phase, although there is no reasonable probability of a different result in the guilt phase.

Although a Brady violation had occurred during the penalty phase, the Court concludes that the Defendant may not collaterally raise it during these post conviction proceedings because it could have been raised on direct appeal. Kirshman v. State, supra, 21 Fla.L.Weekly S387, S388. The sentencing order states that, in

imposing sentence, the trial judge had considered only information and evidence known to the defendant and/or his counsel of record, which the defendant or his counsel had the opportunity to explain or deny. No issue was presented on direct appeal challenging this aspect of the sentencing order when, in point of fact, trial counsel had objected at sentencing to the trial judge's reliance on favorable statements not provided to him.

V. PENALTY PHASE CLAIMS.

A. THE TRIAL COURT'S SENTENCING ORDER WAS INVALID BASED UPON POST-CONVICTION PUBLIC RECORD INFORMATION DEMONSTRATING A VIOLATION OF SECTION 921.141, FLORIDA STATUTES (1985) (Claim XI).

35. Following his post-conviction request pursuant to Florida's Public Records Act, Chapter 119, Florida Statutes, the files of the State Attorney were made available to the Defendant. The files contained a rough draft of the trial judge's sentencing order that was virtually identical to the sentencing order filed by the trial judge on November 4, 1988. The post conviction testimony of the prosecutor establishes that he, and not the trial judge, prepared the draft order in response to the ex parte direction of the trial judge following the conclusion of the penalty phase of the proceedings. (T. July 19, 1996, Di Gregory, pages 12, 13, 40-44). The trial judge's brief oral instruction to prepare the death order included no findings of fact or conclusions of law. Rather, the prosecutor, and not the trial judge, drafted all findings as required by Section 921. 141, Florida Statutes (1985). Neither the

ex parte communication, nor the draft order, were disclosed to defense counsel during any stage of the penalty phase. [5]

At sentencing, the judge read several paragraphs from "findings" as were originally included in the draft order and then read the last two pages of the sentencing order as filed in the case. A comparison of the sentencing order with the draft order reveals that it is verbatim, with the only significant exception being the addition of one mitigating factor, namely that certain persons in Germany believed the Defendant to be a good person. Other than as stated, the trial judge did not make his own oral findings in support of the death sentence on the record.

The Defendant asserts, and the Court finds, that the issue presented in Claim XI could not have been raised on direct appeal, because the State's files did not become available as "public records" pursuant to Chapter 119, until after the direct appeal was decided and the Defendant's judgment had become final. See Kokal v. State, 562 So.2d 324, 327 (Fla. 1990). As such, this Court is permitted to determine under Fla.R.Crim.P. 3.850(a) whether the death sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida. Based on the evidence presented, the Court concludes that the Defendant's claim is well-founded and relief is warranted.

[5] After the jury rendered its sentencing recommendation, and was dismissed, there was no discussion of "proposed orders" and no request by the court for the submission of findings, from either side. (R. 5304).

Section 921.141, Florida Statutes (1985), required the trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant. On the evidence presented, the Court finds that the trial judge "improperly delegated to the prosecutor the responsibility to prepare the sentencing order." Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1987). The trial judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Id. Unlike the cases distinguished in Patterson, the record contains no oral findings independently made by the trial judge, which satisfies the weighing process required by Section 921.141(3), nor did defense counsel know that the State had prepared a sentencing order to which he failed to object. Compare Id. at 1261 to 1263.

Moreover, the trial judge's oral direction to the prosecutor, together with the drafts submitted to the trial judge by the prosecutor, constitute impermissible ex parte communications. Except as authorized by law, a judge may neither initiate nor consider ex parte communications concerning a pending matter. Canon 3(A)(4), Code of Judicial Conduct. In re Inquiry Concerning a Judge: Clayton, 504 So.2d 394, 395 (Fla. 1987); Spencer v. State, 615 So.2d 688, 690 (Fla. 1993) ("This Court has stated that there is nothing more dangerous and destructive of the impartiality of

the judiciary than a one-sided communication between a judge and a single litigant.'")(citation omitted).

No matter how pure the intent of one who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks. The very intrusion of ex parte communication in a penalty phase raises fundamental concerns about the basic fairness, let alone the legality, of the proceedings. The State may not be allowed the advantage of presenting matters to, or having matters decided by, the trial judge without notice to the Defendant. Such basic admonitions apply with even greater weight, where, by statute, the trial judge is the one who is required to independently weigh aggravating and mitigating circumstances to determine death or life imprisonment. See Spencer v. State, supra, 615 So.2d at 691 (where the Supreme Court ordered a new trial before a new judge when, in addition to an error in the guilt phase, the trial judge discussed a proposed death sentence order with the prosecutors without defense counsel present or having an opportunity to be heard). [6]

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[6] The Court is aware that the Supreme Court's decision in Spencer v. State, supra, is not to be applied retroactively as to sentencing procedures. See Armstong v. State, 642 So.2d 730, 738 (Fla. 1994). The Court's reliance on Spencer is not based on whether the trial judge prepared the sentencing order before the Defendant had an opportunity to be heard and present evidence. Rather, it is based on the prejudicial effect of the ex parte communication and the improper delegation of statutory responsibility to the prosecutor for preparing the sentencing order.

B. TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE BY FAILING TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE (Claim IX).

36. The Defendant claims that trial counsel was ineffective during the penalty phase for failing to investigate and present any evidence of mitigation. In this context, the burden is on the Defendant to demonstrate that counsel's performance was deficient, and that counsel's deficient performance affected the outcome of the sentencing proceeding. Otherwise stated, the Defendant must demonstrate that but for counsel's errors he would have probably received a life sentence. Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995).

During the penalty phase, the trial judge instructed the jury about evidence they would hear relative to aggravating and mitigating factors. The trial judge stated:

> "The state and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence when considered with the evidence you've already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exists that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any...." (R. 5245).

The State announced that it would rest on the evidence presented during the guilt phase. (Id.) Trial counsel for the

Defendant then announced, "We have no additional evidence if the court please." (Id.). A review of the record fails to disclose that trial counsel renewed his motion for access to the German and Swiss statements that previously were requested. Oral argument then proceeded. Defense counsel briefly argued to the jury, discussing the philosophical aspects of the death penalty, reviewing the trial evidence, and suggesting to the jury that the Defendant was an intelligent man who had many decent qualities. (R. 5274 to 5484). He emphasized the qualities seen by the jury on the video tape; those heard from the police regarding the Defendant's interest in flowers, birds and literature, and the testimony of Dina Moeller, who told the police that the Defendant loved the Victim. (R. 5283). Finally, he argued that the Defendant once saved the Victim's life by telling her not to sit in a bathtub with a blower nearby (Id.) and concluded by asking for mercy. (Id.)

The Court concludes that trial counsel's performance at sentencing was deficient. First, trial counsel failed to renew or pursue his motion to obtain the German and Swiss statements which would have provided him with mitigating evidence to present to the jury. To not do so vigorously when he lacked any mitigating evidence of his own was unreasonable and below community standards, especially where his closing argument contained little, if anything, of a mitigating nature. (T. May 16, 1996 Potolsky, pages 153-154, 156).

Second, trial counsel's sentencing investigation was patently

inadequate. At the post conviction hearing, he offered no reasonable explanation as to why he did not independently act in the best interest of his client to search for potential mitigating evidence. See Blanco v. Wainwright, 507 So.2d 1377, 1382 (Fla 1987). He spoke to no witnesses in Germany (T. July 18, 1996, Carhart, page 54), and only spoke to members of the Defendant's family about efforts to raise funds, but not "much about the facts of the case." (Id.). Regarding family members being helpful as witnesses, he stated, "I was able to determine that they weren't really available to me." (Id. at 55). He conceded he did not send an investigator to Germany, and clarified that he was not prohibited by the Defendant from conducting such an investigation. (Id. at 86-88). His file contained the Defendant's hand written list of persons in Germany for him to contact, but he did not recollect calling anyone on the list. (Id. at 91-92)(Exhibit QQQ).

Consequently, trial counsel failed to unearth a large amount of mitigating evidence as to the Defendant's character, family history and relationship with the Victim, which could have been presented at sentencing. At the post conviction hearing, the Defendant presented the testimony of fifteen (15) individuals from Germany who were willing and able to testify at the Defendant's trial had they been contacted and asked to do so. The Court heard from landladies and neighbors Monika and Marlene Seeger, friends Martin and Ulrike Karpischek and Wolfgang Walitzky, and former relationship partners Doris Dessauer and Doris Rindelaub. All

traveled from Germany at their own expense to speak for the Defendant. The Court also received written statements from many other individuals who would have made every effort to attend the trial, but who were unable to attend the post conviction hearing: friend and associate Otmar Fritz, friends Angelika Fritz, Sabine Plott, and Thomas Woehe; neighbor Modersohn; the Defendant's mother, Martha, and brother, Hans-Henning, and trial witness Ernst Steffen.

The Court concludes that the Defendant was prejudiced by his counsel's failure to present available mitigation as to his positive character traits, personal history and family background. It is well settled that such matters may be considered in mitigation. Stevens v. State, 552 So.2d 1082, 1087 (Fla. 1989). With such evidence presented, there is reasonable probability the outcome of the case would have been different, as against a jury, who without any mitigating evidence, was already ambivalent about their recommendation.

Moreover, when the cumulative effect of the trial counsel's deficiency is viewed in conjunction with the improper actions of the trial judge and prosecutor during the penalty phase, the Court is compelled to find, under the circumstances of this case, that confidence in the outcome of the Defendant's penalty phase has been undermined, See Gunsby v. State, supra, 670 So.2d 920 (cumulative effect of errors may constitute prejudice), and that the Defendant has been denied a reliable penalty phase proceedings. Hildwin v.

Dugger, 654 So.2d 107, 110 (Fla. 1995).

VI. ORDERS OF THE COURT.

1. The Defendant's motion to vacate judgment of conviction is denied.

2. The Defendant's motion to vacate sentence is granted, and a new penalty phase proceedings shall be held before a new judge and jury.

ORDERED this 4 day of November, 1996.

ALAN S. GOLD
CIRCUIT COURT JUDGE

ALAN S. GOLD
CIRCUIT COURT JUDGE

cc: Clerk of the Court;
James Lohman, Esq., 2017 Atapha Nene, Tallahassee, Fla 32301;
Bruce Alter, Esq., 2937 S.W. 27th Ave., Suite 202, Miami, Fla 33133, and
Joel Rosenblatt, Esq., and Catherine Vogel, Esq., Dade County State Attorney's Office, 1350 N.W. 12th Ave., Miami, Fla 33136.

A-8

777 So.2d 342
Supreme Court of Florida.

STATE of Florida, Appellant, Cross-Appellee,
v.
Dieter RIECHMANN, Appellee, Cross-Appellant.
Dieter Riechmann, Petitioner,
v.
STATE of Florida, Respondent.

Nos. SC89564, SC93236.
|
Feb. 24, 2000.
|
Rehearing Denied Jan. 31, 2001.

Synopsis

Defendant was convicted in the Circuit Court, Dade County, Harold Solomon, J., of murder and was sentenced to death. He appealed. The Supreme Court, Barkett, J., 581 So.2d 133, affirmed. Defendant moved for post-conviction relief. The Circuit Court, Alan S. Gold, J., granted the motion in part and ordered a new sentencing proceeding. Appeal and cross-appeal were taken, and defendant petitioned for writ of habeas corpus. The Supreme Court held that: (1) failure to investigate or present any mitigating evidence was ineffective assistance of counsel at the penalty phase; (2) sentencing order that prosecutor prepared in response to ex parte request by trial judge deprived the defendant of an independent weighing of aggravating and mitigating circumstances; (3) calling the defendant as a witness was not ineffective assistance; (4) other claims of ineffective assistance lacked merit; (5) no newly discovered evidence warranted a new trial; and (6) Brady claims that the state suppressed evidence lacked merit.

Affirmed and remanded.

Wells, J., concurred in the result as to sentence.

West Headnotes (49)

[1] **Criminal Law** ⇐ Adequacy of investigation of mitigating circumstances

Criminal Law ⇐ Presentation of evidence in sentencing phase

Failure to investigate or present any mitigating evidence was ineffective assistance of counsel prejudicial to a foreign defendant at the penalty phase of a capital murder prosecution; although some evidence existed that the defendant did not want defense counsel to go to Germany, defense counsel conceded that the defendant did not preclude him from investigating further or presenting mitigating evidence. U.S.C.A. Const.Amend. 6.

17 Cases that cite this headnote

[2] **Criminal Law** ⇐ Effective assistance

Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[3] **Criminal Law** ⇐ Adequacy of investigation of mitigating circumstances

An attorney in a capital case has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence. U.S.C.A. Const.Amend. 6.

28 Cases that cite this headnote

[4] **Sentencing and Punishment** ⇐ Manner and effect of weighing or considering factors

Sentencing and Punishment ⇐ Decision, and order or judgment

Sentencing order that prosecutor prepared in response to ex parte request by trial judge deprived the defendant of an independent weighing of aggravating and mitigating circumstances; no evidence indicated that the trial judge specifically determined the aggravating or mitigating circumstances that applied or weighed the evidence before delegating the authority to write the order. West's F.S.A. § 921.141(3).

8 Cases that cite this headnote

[5] **Criminal Law** ⇐ Presentation of evidence in sentencing phase

Sentencing and Punishment ⇐ Decision, and order or judgment

Confidence in the outcome of the penalty phase of a capital murder prosecution was undermined by defense attorney's ineffective assistance by failing to present mitigating evidence at penalty phase and by sentencing order that prosecutor prepared in response to ex parte request by trial judge. U.S.C.A. Const.Amend. 6.

9 Cases that cite this headnote

[6] **Criminal Law** ⇐ Subsequent Appeals

Claims on appeal from denial of post-conviction relief were procedurally barred where the defendant had raised them on direct appeal and in his motion for rehearing, even though he now couched them in terms of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[7] **Criminal Law** ⇐ Preparation for death penalty matters

Attorney's allegedly ineffective failure to investigate the legality of German searches for the defendant's address books did not prejudice him in a capital murder prosecution, where the books led to contacts with people who knew the defendant and the victim. U.S.C.A. Const.Amend. 6.

[8] **Criminal Law** ⇐ Other offenses and prior misconduct

Attorney's allegedly ineffective failure to inform the jury of acquittal on federal gun charges did not prejudice the defendant in a capital murder prosecution; even though the defendant believed that the evidence was necessary to inform jury that the defendant made statements to an informant before being charged with murder, he knew arrest was imminent. U.S.C.A. Const.Amend. 6.

[9] **Criminal Law** ⇐ Experts; opinion testimony

Failure to call an expert witness to rebut the testimony of the state's crime lab serologist on blood spatters inside car was not shown to be deficient performance or prejudicial to the defendant in a capital murder prosecution; the defendant failed to show the availability of an expert, the defense attorney elicited the weaknesses in the serologist's testimony on cross-examination, and evidence supported the conviction. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[10] **Criminal Law** ⇐ Experts; opinion testimony

To determine whether counsel was ineffective for failing to call expert to rebut state's expert, a number of factors required consideration, including: first, the attorney's reasons and tactical decisions; second, cross-examination of the state's expert and a jury argument on the expert's weaknesses; and availability of a defense expert to rebut the state's expert. U.S.C.A. Const.Amend. 6.

7 Cases that cite this headnote

[11] **Criminal Law** ⇐ Experts; opinion testimony

Defense attorney did not render ineffective assistance by failing to use information in published journals to challenge the state's gunshot residue expert, where cross-examination showed the weaknesses in the expert's testimony concerning gunpowder on the defendant's hands. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[12] **Criminal Law** ⇐ Impeachment or contradiction of witnesses

Counsel is not necessarily ineffective for failing to impeach a witness with a report, if cross-examination is used to bring out the weaknesses in the witness's testimony. U.S.C.A. Const.Amend. 6.

[13] **Criminal Law** ⇐ Impeachment or contradiction of witnesses

Failing to present cumulative impeachment evidence does not necessarily constitute ineffective assistance. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[14] **Criminal Law** ⇐ Experts; opinion testimony

Defense attorney did not render ineffective assistance by failing to rebut the state's ballistic expert with information that fourteen, rather than three, different types of gun could have fired the bullet that killed the defendant's companion; nothing indicated the availability of that information at the time of trial, the defendant had more gunshot residue than the victim even though she was allegedly closer to the shooter, and the defendant possessed bullets of the same type as the fatal bullet. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[15] **Criminal Law** ⇐ Introduction of and Objections to Evidence at Trial

Defense attorney did not render ineffective assistance by failing to present evidence that had already been admitted in a different manner. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[16] **Criminal Law** ⇐ Presentation of witnesses

Defense attorney did not render ineffective assistance by failing to call waiter to present cumulative evidence that the defendant and victim were in a festive mood and intoxicated state on the night of the murder. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[17] **Criminal Law** ⇐ Presentation of witnesses

Failure to present testimony of eyewitnesses was not shown to be ineffective assistance in capital murder prosecution; foreign defendant was unable to tell attorney where the crime occurred and allegedly drove around the city with victim in his car and became lost, the eyewitnesses avoided the crime scene, and defendant thus failed to show that he could have located the witnesses. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[18] **Criminal Law** ⇐ Impeachment or contradiction of witnesses

Defense attorney's tactical decision not to call inmate to rebut jailhouse informant's testimony that the defendant was elated about receiving insurance on victim's life was reasonable and was not ineffective assistance; the defendant claimed that no inmate overheard the conversation with the informant, and the inmate was himself subject to impeachment. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[19] **Criminal Law** ⇐ Declarations, confessions, and admissions

Defense attorney did not render ineffective assistance by failing to introduce a secretly-recorded four hour tape of an interview allegedly showing police harassment and the defendant's sincerity after the crime; the attorney argued against admissibility of the tape, a similar tape was introduced at trial and played to the jury, and the attorney showed on cross-examination that the detective used a fictitious story in an attempt to elicit a confession. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[20] **Criminal Law** ⇐ Defendant as witness

Calling the defendant as a witness was a reasonable tactical decision and not ineffective assistance in a capital murder prosecution, even though the defense attorney later believed that his decision turned out to be an "unmitigated disaster"; the attorney encouraged the defendant

to testify after hearing that a juror had informed a journalist that the jury was prepared to convict. U.S.C.A. Const.Amend. 6.

[21] **Criminal Law** ⇦ Adequacy of Representation

Criminal Law ⇦ Determination

In determining deficiency, a fair assessment requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. U.S.C.A. Const.Amend. 6.

[22] **Criminal Law** ⇦ Indigent's or incompetent's counsel and public defenders

Defense attorney did not render ineffective assistance by failing to request appointment of two attorneys in capital murder prosecution. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[23] **Criminal Law** ⇦ What constitutes newly discovered evidence in general

Criminal Law ⇦ Probable effect of new evidence, in general

A potential witness' testimony that the local newspaper indicated a pattern of murders involving tourists in South Florida was not newly discovered evidence in a capital murder prosecution against a foreign defendant who claimed that his companion was the victim of street violence, and the testimony would probably not have produced an acquittal on retrial; the witness acknowledged that she had not read all relevant newspaper articles and had not considered official records regarding tourist crimes.

1 Cases that cite this headnote

[24] **Criminal Law** ⇦ Credibility

Newly-discovered eyewitnesses who were selling drugs when a car passenger was shot would not have produced an acquittal in prosecution against driver for killing his companion; one eyewitness suffered from a drug problem affecting his memory, the other eyewitness had multiple convictions, had lied to the court, and presented a version inconsistent with the defendant's version, and neither eyewitness was credible.

[25] **Criminal Law** ⇦ Impeachment of Witness

Newly discovered evidence that jailhouse informant's testimony for prosecution was false did not entitle the defendant to relief in a capital murder prosecution; its only value was as impeachment of testimony that the state gave no benefit for testifying, and the defense attorney had presented evidence and argument at trial about the state writing a letter to federal parole authorities.

1 Cases that cite this headnote

[26] **Criminal Law** ⇦ Presentation of Issue in Prior Proceedings

Brady claim that the prosecutor withheld photographs of crime scene was procedurally barred in postconviction proceeding because the defendant could and should have raised the issue on direct appeal.

[27] **Criminal Law** ⇦ Matters Already Adjudicated

Brady issue that the State withheld forensic notes and reports of ballistics and serology evidence was procedurally barred in postconviction case since the issue was litigated before trial.

[28] **Constitutional Law** ⇦ Evidence

Prejudice element of *Brady* claim under the due process clause is measured by determining whether the favorable evidence could reasonably be taken to put the whole case in such a different

light as to undermine confidence in the verdict. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[29] **Constitutional Law** ⇦ Evidence

Court applying elements of Brady claim under the due process clause must consider in the context of the entire record. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[30] **Constitutional Law** ⇦ Particular Items or Information, Disclosure of

Criminal Law ⇦ Other particular issues

Police and laboratory reports on how far the passenger side car window was open were immaterial in prosecution of driver for capital murder of passenger whom the defendant claimed was shot through the window, and, thus, withholding the reports did not violate the due process clause; as to the issue of how the driver got gunpowder residue on his hands, a six inch opening noted in one report did not differ significantly from the evidence of a three and one-half inch opening, and although one report stated that the window was completely open, the defendant testified that the window was open halfway. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[31] **Constitutional Law** ⇦ Witnesses

Criminal Law ⇦ Statements of witnesses or prospective witnesses

Withholding cumulative evidence of waiter's statements to the police that the defendant and victim were in a festive mood on the night of the murder did not violate the due process clause. U.S.C.A. Const.Amend. 14.

[32] **Constitutional Law** ⇦ Witnesses

Criminal Law ⇦ Statements of witnesses or prospective witnesses

Withholding statement by victim's father telling the police that the defendant and murder victim had a loving relationship did not violate the due process clause since the father never testified and the defendant introduced no evidence that the father would have done so if asked and that the defendant could have use the statement. U.S.C.A. Const.Amend. 14.

[33] **Constitutional Law** ⇦ Proceedings

Criminal Law ⇦ Statements of witnesses or prospective witnesses

Sentencing and Punishment ⇦ Notice of evidence and witnesses

Statements from witnesses establishing that the defendant and victim had a loving relationship were material to penalty phase of capital murder prosecution, and, thus, state's suppression of them violated the due process clause. U.S.C.A. Const.Amend. 14.

[34] **Criminal Law** ⇦ Deliberate bypass; matters known to movant or petitioner

Brady claim of suppression of statements that the defendant and victim had a loving relationship was procedurally barred as it related to the guilt phase of a capital murder prosecution, where the defendant became aware of the statements by the end of the trial and could and should have raised the issue on direct appeal.

1 Cases that cite this headnote

[35] **Constitutional Law** ⇦ Witnesses

Criminal Law ⇦ Statements of witnesses or prospective witnesses

State's suppression of statements from witnesses establishing that the defendant and victim had a loving relationship did not prejudice the defendant in the guilt phase of a capital murder prosecution and, therefore, did not violate the due process clause; no reasonable probability existed that a different result would have occurred. U.S.C.A. Const.Amend. 14.

[36] **Constitutional Law** ⇐ Agreements

Criminal Law ⇐ Impeaching evidence

Evidence supported trial court's finding that no undisclosed deal existed between prosecution witness and the state and that withholding the prosecutor's letter to the U.S. Parole Commission and handwritten notes did not violate the due process clause; the witness testified at trial that he hoped for a letter by the prosecutor on his behalf, and the prosecutor testified that the notes were simply a request by the witness' intermediary that he be permitted to remain. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[37] **Habeas Corpus** ⇐ Appeal, Error, or Other Direct Review of Conviction

Claim that was raised or should have been raised on direct appeal was not cognizable in a habeas corpus petition.

1 Cases that cite this headnote

[38] **Habeas Corpus** ⇐ Post-Conviction Motions or Proceedings

Claim raised in a motion for postconviction relief could not be raised in a petition for habeas corpus. West's F.S.A. RCrP Rule 3.850.

[39] **Habeas Corpus** ⇐ Particular Issues and Problems

Ineffective assistance of counsel claims must be raised in the court in which the alleged ineffectiveness occurred, not in a habeas corpus proceeding. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[40] **Criminal Law** ⇐ Appeal

The criteria for proving ineffective assistance of appellate counsel parallel the standard used for ineffectiveness of trial counsel claims. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[41] **Criminal Law** ⇐ Mootness

New sentencing proceeding rendered moot claim of ineffective assistance of appellate counsel by failing to raise penalty phase issues. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[42] **Habeas Corpus** ⇐ Appeal, Error, or Other Direct Review of Conviction

Issues raised on direct appeal during which counsel argued different grounds were barred in habeas corpus petition.

[43] **Homicide** ⇐ Motive

Evidence of a motive to kill was relevant.

1 Cases that cite this headnote

[44] **Criminal Law** ⇐ Raising issues on appeal; briefs

Appellate counsel's failure to raise the issue regarding the manner in which the trial court responded to the jury's request for the transcript of prosecution witnesses' testimony was not shown to be ineffective assistance, where the defendant failed to assert how the trial court's decision and appellate counsel's failure to challenge that decision would have changed the outcome on appeal, especially since a repetition of the testimony would have further prejudiced the defense. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[45] **Criminal Law** ⇐ Reading minutes of or restating testimony

Trial judges have broad discretion in deciding whether to read back testimony.

5 Cases that cite this headnote

[46] **Criminal Law** ⇐ Relief; Dismissal or Discharge

In order to claim a violation of speedy trial rights, a defendant must move for a discharge. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[47] **Criminal Law** ⇐ Delay caused by accused

Defendant waived his right to a speedy trial by taking a continuance. U.S.C.A. Const.Amend. 6.

7 Cases that cite this headnote

[48] **Criminal Law** ⇐ Preservation of error for appeal

Appellate counsel could not be deemed ineffective for failing to raise issue that was not raised or preserved at trial. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[49] **Criminal Law** ⇐ Raising issues on appeal; briefs

Appellate counsel did not render ineffective assistance by the manner in which he raised the issue of the legality of German searches; different grounds or legal arguments could not be used to render appellate counsel ineffective. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

PER CURIAM.

The State appeals the trial court's order vacating Dieter Riechmann's death sentence and granting a new sentencing proceeding pursuant to Riechmann's Florida Rule of Criminal Procedure 3.850 motion. Riechmann cross-appeals the denial of his remaining claims and also petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the following reasons, we affirm the trial court's order in its entirety.

PROCEEDINGS TO DATE

The facts in this case are set forth in *Riechmann v. State,* 581 So.2d 133 (Fla.1991). Briefly stated, the evidence established that Riechmann and Kersten Kischnick, "life companions," came to Miami, Florida from Germany in early October 1987, and Kischnick was shot to death as she sat in the passenger seat of an automobile driven by Riechmann. Riechmann was charged with her murder. At trial, the State's theory was that Kischnick was a prostitute who worked for Riechmann, and when she no longer wanted to work as a prostitute, Riechmann killed her in order to recover insurance proceeds.

Riechmann maintained that they were riding around videotaping some of Miami's sights when they got lost and asked for directions. He contended that the stranger whom they asked fired the shot that killed Kischnick. Riechmann sped away looking for help, driving several miles before he found a police officer.

At trial, an expert for the State testified that numerous particles usually found in gunpowder residue were discovered on Riechmann's hand and, accordingly, there was a reasonable scientific probability that Riechmann had fired a gun. In Riechmann's hotel room, the police found three handguns and several rounds of ammunition, and an expert firearms examiner testified that the bullets were the same type as used to kill Kischnick. The examiner testified that the bullet that killed Kischnick could have been fired from any of the three makes of guns found in Riechmann's room. A serologist testified that the high-velocity blood spatter found on the driver's seat could not have gotten there if the driver's seat was occupied in a normal driving position when the shot was fired from outside the passenger-side window. Riechmann was convicted of first-degree murder.

At the penalty phase, Riechmann's attorney presented no mitigating evidence. Subsequently, the jury recommended the death penalty by a vote of nine to three. The trial

judge followed the jury's recommendation and sentenced Riechmann to death, finding two aggravating factors.[1] On appeal, this Court affirmed Riechmann's conviction and sentence,[2] and the U.S. Supreme Court denied Riechmann's petition for writ of certiorari.[3]

1 The two aggravating factors found by the trial court were: (1) murder committed for pecuniary gain; (2) murder committed in a cold, calculated, and premeditated manner.

2 Although we found that the trial court abused its discretion in admitting Riechmann's involuntary manslaughter and negligent bodily harm conviction connected with an automobile accident, we concluded that this error was harmless. *See Riechmann v. State,* 581 So.2d 133, 140 (Fla.1991).

3 *Riechmann v. Florida,* 506 U.S. 952, 113 S.Ct. 405, 121 L.Ed.2d 331 (1992).

On September 30, 1994, Riechmann filed his initial 3.850 motion.[4] On May 13-17, ***348** June 11, and July 17-19, 1996, the court conducted an evidentiary hearing on all of the fourteen claims except claim twelve.[5] Subsequently, the trial judge vacated Riechmann's sentence and ordered a new sentencing proceeding, concluding that Riechmann had received ineffective assistance of counsel at the penalty phase and that the sentencing order had been improperly written by the prosecutor instead of the judge. The judge denied the remainder of Riechmann's claims.

4 This motion contained fourteen claims, eleven of which asserted ineffective assistance of counsel. The remaining claims consisted of newly discovered evidence, a *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) violation, and a final claim that the sentence was invalid because the trial judge's findings were written by the prosecutor instead of the judge and were provided to the judge *ex parte.*

5 Riechmann does not challenge the summary denial of this claim.

APPEAL

In these proceedings, the State appeals the trial court's order, while Riechmann challenges the denial of his other claims[6] as well as seeks habeas corpus, alleging primarily ineffective assistance of appellate counsel.[7]

6 These claims include: (1) ineffective assistance of counsel at the guilt phase; (2) newly discovered evidence; (3) *Brady* claims; (4) ineffective assistance of counsel for failing to investigate legality of German searches; (5) ineffective assistance of counsel for failing to present evidence of acquittal on federal gun charges; (6) ineffective assistance of counsel for not objecting to improper comments in closing argument; (7) ineffective assistance of counsel during voir dire; and (8) ineffective assistance of counsel for failing to cross-examine key state witnesses.

7 Specifically, the petition for writ of habeas corpus raises five claims: (1) ineffective assistance of appellate counsel; (2) the propriety of the trial court's rulings; (3) *Brady* violation and perjured testimony; (4) violation of Riechmann's equal protection by this Court and (5) ineffective assistance of postconviction counsel.

I. RULE 3.850 MOTION[8]

8 Judge Alan S. Gold was designated by this Court to preside over the postconviction proceedings in this case after the original trial judge was called as a witness in the case with regard to the *ex parte* communication and delegation of authority to the prosecutor to prepare the sentencing order. We commend Judge Gold for the thoroughness of the order rendered in this case. Although this case presents challenging and complex issues, Judge Gold's order provides a thorough and detailed analysis of the issues and serves as a model order for other trial judges.

A. State's Appeal

INEFFECTIVE ASSISTANCE AT PENALTY PHASE

[1] In his 3.850 motion, Riechmann alleged that defense counsel was ineffective at the penalty phase of the trial in

failing to investigate or present any evidence of mitigation. At the penalty phase of the trial, defense counsel presented no evidence to counter the State's claims of aggravation or in support of mitigation. Thereafter, in argument, defense counsel reviewed the guilt-phase evidence with the jury, argued to the jury that Riechmann was an intelligent person with many decent qualities, and emphasized the testimony of Dina Moeller, a witness who had told the police that Riechmann loved Kischnick. He also discussed several aspects of the death penalty with the jury and told the jury how Riechmann had once saved Kischnick's life by telling her not to sit in the bathtub with the blower nearby.

At the evidentiary hearing, however, Riechmann presented seven witnesses[9] who testified in detail about the positive personal qualities Riechmann showed during the extensive period that they knew him. They also established that he had a long-lasting "loving relationship" with Kischnick. They testified that they were available, willing and would have testified at Riechmann's trial if they had been contacted and requested to do so. The court also accepted affidavits of other witnesses ***349** who were unable to testify, including Riechmann's mother and brother, in praise of the earlier portions of his life. In addition, Riechmann presented Steven Potolsky,[10] an attorney specializing in criminal law, as an expert witness. Potolsky testified that based on his review of the trial record, counsel's performance fell "well below effective representation." Moreover, he testified that he would not refer to the penalty portion of the trial as a penalty phase proceeding because no evidence was presented. Finally, defense counsel testified that he was unable to provide an explanation as to why he did not contact any of the witnesses contained in a handwritten list prepared by Riechmann entitled "Please Take in Germany Deposition."

9 These seven witnesses consisted of four business acquaintances (his two landladies, his hairdresser and the hairdresser's wife), two ex-girlfriends and a long-time friend.

10 In the record, this witness' name was spelled as Potolski. However, it has been brought to our attention that the correct spelling is with a "y." Therefore, we have issued a corrected opinion to reflect the correct spelling.

Based primarily on the evidence discussed above, the evidentiary hearing court made the following findings:

The Court concludes that trial counsel's performance at sentencing was deficient. First, trial counsel failed to renew or pursue his motion to obtain the German and Swiss statements which would have provided him with mitigating evidence to present to the jury. To not do so vigorously when he lacked any mitigating evidence of his own was unreasonable and below community standards, especially where his closing argument contained little, if anything, of a mitigating nature.

Second, trial counsel's sentencing investigation was patently inadequate. At the post conviction hearing, he offered no reasonable explanation as to why he did not independently act in the best interest of his client to search for potential mitigating evidence. He spoke to no witnesses in Germany, and only spoke to members of the Defendant's family about efforts to raise funds, but not "much about the facts of the case." Regarding family members being helpful as witnesses, he stated, "I was able to determine that they weren't really available to me." He conceded he did not send an investigator to Germany, and clarified that he was not prohibited by the Defendant from conducting such an investigation. His file contained the Defendant's hand written list of persons in Germany for him to contact, but he did not recollect calling anyone on the list.

Consequently, trial counsel failed to unearth a large amount of mitigating evidence as to the Defendant's character, family history and relationship with the Victim, which could have been presented at sentencing. At the post conviction hearing, the Defendant presented the testimony of fifteen (15) individuals from Germany who were willing and able to testify at the Defendant's trial had they been contacted and asked to do so. The Court heard from landladies and neighbors Monika and Marlene Seeger, friends Martin and Ulrike Karpischek and Wolfgang Walitzky, and former relationship partners Doris Dessauer and Doris Rindelaub. All traveled from Germany at their own expense to speak for the Defendant. The Court also received written statements from many other individuals who would have made every effort to attend the trial, but who were unable to attend the post conviction hearing: friend and associate Otmar Fritz, friends Angelika Fritz, Sabine Plott, and Thomas Woehe; neighbor Mödersohn; the Defendant's mother, Martha, and brother, Hans-Henning, and trial witness Ernst Steffen.

The Court concludes that the Defendant was prejudiced by his counsel's failure to present available mitigation

as to his positive character traits, personal history and family background.... With such evidence presented, there is reasonable probability the outcome of ***350** the case would have been different, as against a jury, who without any mitigating evidence, was already ambivalent about their recommendation.

Order on Motion to Vacate Judgment of Conviction and Sentence (hereinafter cited as Order) at 53-55 (citations omitted).

[2] In order to prove an ineffective assistance of counsel claim, a defendant must establish two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Rutherford v. State,* 727 So.2d 216 (Fla.1998); *Rose v. State,* 675 So.2d 567 (Fla.1996). In *Maxwell v. Wainwright,* 490 So.2d 927 (Fla.1986), this Court further explained the application of the *Strickland* standard:

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. 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.

Id. at 932 (citing *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Downs v. State,* 453 So.2d 1102 (Fla.1984)). Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the *Strickland* test. *See Rose v. State,* 675 So.2d 567, 571 (Fla.1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

[3] As stated above, the record and evidence presented at the evidentiary hearing clearly support the trial court's factual findings that defense counsel's conduct was deficient. The trial court's obvious concern was that counsel conducted no investigation and presented no evidence of mitigation. In this vein, we have recognized that an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence. *See Rose,* 675 So.2d at 571 (citing *Porter v. Singletary,* 14 F.3d 554, 557 (11th Cir.1994)). The failure to investigate and present available mitigating evidence is of critical concern along with the reasons for not doing so. *See Rose,* 675 So.2d at 571.

Although there was some evidence suggesting that Riechmann did not want defense counsel to go to Germany, defense counsel conceded that Riechmann did not instruct him or preclude him from investigating further or presenting mitigating evidence. Moreover, defense counsel was unable to provide any explanation as to why he did not conduct an investigation or contact witnesses available to him.

Thus, it is apparent that the trial court's factual findings are supported by competent and substantial evidence and its legal conclusions are supported by our prior opinions in *Mitchell v. State,* 595 So.2d 938, 941 (Fla.1992) (holding that penalty phase representation was ineffective where defense counsel presented no evidence of mitigation but where evidence was presented at the evidentiary hearing that could have supported statutory and nonstatutory evidence); *Bassett v. State,* 541 So.2d 596, 597 (Fla.1989) (holding that defense counsel's failure to discover material nonstatutory evidence of mitigation consisting of defendant's domination ***351** by other individuals and the difference in age between him and his codefendant raised a reasonable probability that the jury's recommendation would have been different); and *Stevens v. State,* 552 So.2d 1082, 1087 (Fla.1989) (holding

that defense counsel's failure to investigate defendant's background, failure to present mitigating evidence during the penalty phase, and failure to argue on defendant's behalf rendered defense counsel's conduct at the penalty phase ineffective). It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital case.

EX PARTE COMMUNICATION AND IMPROPER DRAFTING OF ORDER

[4] The trial court also concluded that Riechmann was denied an independent weighing of aggravating and mitigating circumstances because the trial judge, through an *ex parte* communication with the prosecutor, delegated the responsibility to the prosecutor to write the order sentencing Riechmann to death.

The postconviction testimony of the prosecutor established that he, and not the trial judge, prepared the draft order at the *ex parte* request of the trial judge following the conclusion of the penalty phase of the trial. Specifically, the prosecutor testified that he was asked by the trial judge to prepare the sentencing order as they crossed in the hall, and that he took no notes and had no recording device with him at the time. Moreover, he testified that he was responsible for providing the legal support for the order and that he drafted the aggravating factors and excluded any mitigating factors.

The postconviction trial court found that neither the *ex parte* communication nor the draft order was disclosed to defense counsel during any stage of the penalty phase. [11] Further, upon a review of the draft order and the subsequent final order, the evidentiary hearing judge concluded that they were virtually identical. In *Patterson v. State,* 513 So.2d 1257, 1261 (Fla.1987), we specifically held that the trial judge improperly delegated to the state the responsibility of preparing the sentencing order because the judge did not independently determine the specific aggravating and mitigating circumstances that applied in the case before directing the preparation of the order. We further found that the trial judge's actions raised a serious question concerning the weighing process that must be conducted before imposing a death penalty. *See id.* at 1262.

11 Riechmann did not become aware of the State's role until he received the State's files pursuant to a public records request under chapter 119, Florida Statutes, and there discovered a rough draft of the sentencing order.

Section 921.141, Florida Statutes (1985), required the trial judge to independently weigh the aggravating and mitigating circumstances to determine what penalty should be imposed upon the defendant. [12] This section also requires the trial judge to draft the order.

12 This is still required today. *See* § 921.141(3), Fla. Stat. (1999).

In this case, the judge's actions were further compounded by his *ex parte* communication with the prosecutor to prepare the order. Canon 3B(7) of the Code of Judicial Conduct provides that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." Based on this principle, this Court has repeatedly stated that there is nothing "more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant." *Spencer v. State,* 615 So.2d 688, 691 (Fla.1993) (quoting *Rose v. State,* 601 So.2d 1181, 1183 (Fla.1992)).

***352** In *Spencer,* we reversed the defendant's conviction and remanded based on reversible error occurring in both the jury selection process and the sentencing portion of the penalty phase. Our decision was predicated in part on the trial judge's error of formulating his decision prior to giving the defendant an opportunity to be heard and in part on an improper *ex parte* communication. [13]

13 The State argues that *Spencer* does not apply to this case because in *Armstrong v. State,* 642 So.2d 730, 738 (Fla.1994), we held that our decision in *Spencer,* as far as it pertained to the procedure to be followed by the trial judges (i.e., giving defendants an opportunity to be heard before formulating the sentencing decision), was a change in procedure and should not be applied retroactively. However, it is clear that our bar on retroactive application as discussed in *Armstrong* does not apply to the portion of the opinion dealing with *ex parte* communication.

The State further alleges that under *Card v. State,* 652 So.2d 344 (Fla.1995), a new sentencing proceeding or hearing should not automatically be ordered solely because the prosecutor prepares the order for the judge (allegedly pursuant to an *ex parte* communication). In *Card,* the defendant made a similar claim to the one made by Riechmann. There, we remanded for an evidentiary hearing for the judge to determine whether the defendant was deprived of an independent weighing of aggravating and mitigating circumstances. *See id.* at 345. In so doing, we instructed the judge to consider the nature of the contact between the judge and the prosecutor, when the judge was given the order, and when he gave copies to the defendant. *See id.* at 346.

In the present case, the trial court's order reflects that the evidentiary hearing judge considered these factors in concluding that Riechmann was denied an independent weighing of the aggravating and mitigating circumstances. Specifically, the judge found: "Unlike the cases distinguished in *Patterson,* the record contains no oral findings independently made by the trial judge, which satisfies the weighing process required by Section 921.141(3), nor did defense counsel know that the State had prepared a sentencing order to which he failed to object." Order at 50. The record supports the trial judge's findings.

In this case, there is no evidence in the record that the trial judge specifically determined the aggravating or mitigating circumstances that applied or weighed the evidence before delegating the authority to write the order. In fact, at the evidentiary hearing, the prosecutor testified that the judge asked him to prepare the order, but that the judge did not give him any specifics as to what he had or had not found. The judge, on the other hand, testified that he could not remember what he told the prosecutor. Moreover, the trial transcript reflects that at the sentencing hearing, the trial judge merely read from the order and articulated no specific findings for this Court to review.

[5] We therefore approve the evidentiary hearing judge's findings and conclusion, which he summarized as followed:

> [W]hen the cumulative effect of the trial counsel's deficiency is viewed in conjunction with the improper actions of the trial judge and prosecutor during the penalty phase, the Court is compelled to find, under the circumstances of this case, that confidence in the outcome of the Defendant's penalty phase has been undermined, and that the Defendant has been denied a reliable penalty phase proceedings [sic].

Order at 55 (citation omitted). Although the people of Florida have approved of the death penalty for the worst of crimes, this punishment cannot be imposed in an arbitrary or capricious manner. In fact, as we have previously stated, the Legislature has gone to great lengths to adopt a procedure consisting of aggravation and mitigation, and which requires a careful balancing and weighing of these circumstances. *See State v. Dixon,* 283 So.2d 1, 7 (1973). We agree with the trial court that confidence in the outcome of the penalty phase was ***353** substantially undermined by the performance of defense counsel and the conduct of the sentencing court.

B. Riechmann's Appeal

[6] **[7]** **[8]** As previously mentioned, Riechmann raises eight issues in his cross appeal of the trial court's denial of his claims. We conclude that these claims are either procedurally barred or without substantial merit. [14] However, some merit further explanation.

14 Claims (1), (2), (3), (4), (5), (7) and (8) are without merit. Alternatively, claims (4), (5) and (6) are procedurally barred in that Riechmann is raising the same claims raised on direct appeal and in his motion for rehearing, but is couching them in terms of ineffective assistance of counsel. *See Medina v. State,* 573 So.2d 293, 295 (Fla.1990) (stating that claims of ineffective assistance of counsel should not be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal.)

In claim (4) (ineffective assistance of counsel for failing to investigate the legality of the German searches), Riechmann alleges that if defense counsel had investigated the German searches and seizures, he could have obtained suppression of the items introduced as a result. This claim fails the prejudice prong of the test because

the evidence introduced from these searches, consisting primarily of Riechmann's address books which led to contacting people who knew him and Kischnick, does not undermine confidence in the outcome of the trial.

As claim (5) (ineffective assistance of counsel for failing to present evidence of acquittal of federal gun charges), Riechmann alleges that due to counsel's failure to inform the jury that he was acquitted of the federal gun charges, the jury had no way of knowing that the statements made to informant Walter Smykowski were made at a time when Riechmann had not been charged with the murder of Kischnick. Even if defense counsel had instructed the jury that Riechmann was acquitted of these charges, there is no reasonable probability that the outcome would have been different because the evidence shows that Riechmann knew of the likelihood of being arrested for the murder soon after the murder. Further, this evidence could have been used to show that although he had not been arrested for the murder at the time he assigned the insurance policies, he was aware that his arrest was imminent.

As claim (6) (ineffective assistance of counsel for failing to object to improper comments during closing argument), Riechmann alleges that defense counsel's failure to object to the State's improper comments during closing argument affected the outcome of the trial. On direct appeal, we wrote: "[T]he alleged acts of misconduct, individually or collectively, did not deny Riechmann his right to a fair trial." *Riechmann v. State,* 581 So.2d 133, 139 (Fla.1991). In this same manner, after a second review of the comments made by the prosecutor, we agree with the trial court's findings that the failure to object to these comments does not undermine confidence in the outcome of the trial.

As claim (7) (ineffective assistance of counsel during voir dire), Riechmann alleges that defense counsel was ineffective and prejudiced Reichmann in denying him the right to pick his jurors and in failing to allow an appropriate African-American representation. We agree with the trial court's finding that Riechmann failed to satisfy his burden of proving either deficiency or prejudice. At the evidentiary hearing, Riechmann only presented the testimony of the interpreter, Brophy, who stated that Riechmann and defense counsel had argued over the seating of a juror, and the testimony of defense counsel, who testified at the hearing that he made the final decision, after consulting with Riechmann, of who to seat as jurors. However, Brophy was unable to name any specific jurors over whom they had a disagreement. Moreover, as to his claim that he did not have enough minority representation on the jury, the rule is that although petit juries must be drawn from a source fairly representative of the community, there is no requirement that the juries chosen must mirror the community and reflect the various distinctive groups in the population. *See Taylor v. Louisiana,* 419 U.S. 522, 538, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Notwithstanding, the record reflects that several African-Americans were seated as jurors in the case.

As claim (8), (ineffective assistance of counsel for failing to cross-examine key State witnesses), Riechmann alleges that counsel's failure to challenge the State's witnesses undermines confidence in his trial. We do not agree. As we discuss in our analysis of issue (1), counsel extensively cross-examined Smykowski and the State's blood and gunshot experts. Therefore, this claim fails as to those witnesses. As to the remaining witnesses allegedly not cross-examined, Riechmann has failed to allege what evidence, if any, counsel could have discovered or used to cross-examine these witnesses.

Although we also find claims (1) (ineffective assistance of counsel during the guilt phase); (2) (newly discovered evidence claim); and (3) (*Brady* claim) to be without merit, we will address them in greater detail below.

*354 INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Riechmann's first claim of ineffective assistance of counsel challenges counsel's performance during the guilt phase of the trial and raises five subissues that merit discussion: (1) failure to challenge blood spatter evidence; (2) failure to use existing expertise to discredit the state's gunshot residue and ballistic evidence; (3) failure to investigate during the guilt

phase; (4) error in calling Riechmann as a defense witness; and (5) failure to request appointment of second counsel. We address each in turn.

1. Blood Spatter Evidence

[9] First, Riechmann argues that defense counsel was deficient for failing to call an expert witness to rebut the trial testimony of the State's crime lab serologist, David Rhodes, who testified at trial that high velocity blood spatter found on the driver side door inside the car in which Kischnick was shot could not have gotten there if the driver's seat was occupied in a normal driving position when the shot was fired from outside the car. Rhodes also testified that blood found on a blanket folded on the driver's seat was also consistent with high-velocity blood spatter and aspirated blood.

At the evidentiary hearing, Riechmann presented the testimony of Mr. Stuart James, who testified that the small specks of blood on the driver's side door could have gotten there a number of different ways, especially due to the amount of activity occurring in the car after the shooting. James challenged the reliability of the string test used by Rhodes to determine the origin of the blood on the door, asserting that there was no possible way that blood from a wound on the right side of the passenger's head could reach that portion of the door. Finally, he challenged the reliability of the finding that blood found on the blanket was from blood spatter, because blood spatter does not drip through anything and dries immediately. Therefore, James concluded that since there was blood on both sides of the blanket, it was precluded from being blood spatter. Riechmann also presented the testimony of attorney expert Potolsky, who testified that given the nature of the case, it would have been necessary to call an expert in the area of blood spatter interpretation.

[10] To determine whether counsel was ineffective, a number of factors should be considered. First among these are the attorney's reasons for performing in an allegedly deficient manner, including consideration of the attorney's tactical decisions. *See State v. Bolender,* 503 So.2d 1247, 1250 (Fla.1987); *Lightbourne v. State,* 471 So.2d 27, 28 (Fla.1985). A second factor is whether cross-examination of the State's expert brings out the expert's weaknesses and whether those weaknesses are argued to the jury. *Card v. Dugger,* 911 F.2d 1494 (11th Cir.1990). *See Rose v. State,* 617 So.2d 291, 297 (Fla.1993); The final factor is whether a defendant can show that an expert was available at the time of trial to rebut the State's expert. *See Elledge v. Dugger,* 823 F.2d 1439, 1446 (11th Cir.1987).

The evidentiary hearing court's order provides:

> On cross-examination, Mr. Rhodes admitted that he did not know how the blood got onto the driver's side door; that deflection was a possibility but not a probability; that he did not have any other explanation how blood got from the right side of the Victim's head to the left side of the car; that he did not know if blood was deposited in the car in one event; that it was possible that the acceleration of the car with the passenger window open and the wind blowing could account for blood splatter [sic] being ***355** found on the left side of the car; that it was possible that the blood on the blanket resulted from aspirated blood from the Victim; that he did not know how the blood specks on the driver's door occurred in a line, and that he did not know if the blood on the blanket was human blood or animal blood.

Order at 16-17 (citations omitted). The evidentiary hearing court also found that in light of the time constraints immediately before trial, Riechmann had not met his burden of proving that James or another expert would have been available or prepared to testify at the time of trial. Order at 16.

The record supports the trial court's findings. In fact, the trial record reflects that Rhodes testified that he could not say conclusively that there was no one seated in the driver's seat when Kischnick was shot. Further, the weaknesses elicited from Rhodes on cross-examination were essentially the same weaknesses that James testified to at the evidentiary hearing. Therefore, the jury was aware of the points that James made. As to his availability at trial, James speculated that he presumed, depending on scheduling, that he or his associates would have come to court to testify.

As to the prejudice prong of the analysis, the court found that the jury's determination of guilt was supported by

the circumstantial evidence admitted at trial and the jury's own evaluation of Riechmann's credibility following his testimony. This evidence included: the bullets recovered from Riechmann's motel room that matched the type used to kill Kischnick; Riechmann's possession of two of the only three types of weapons that could have been used to kill Kischnick, showing his preference for that type of weapon; expert testimony that particles found on Riechmann's hands established a reasonable probability that Riechmann fired the gun; insurance policies, reciprocal wills, and other evidence that established a motive; the considerable evidence offered by the State to impeach Riechmann on the stand; and testimony by a fellow inmate that Riechmann was pleased with the prospect of becoming rich from the proceeds of the insurance policies and the victim's will.

We find that the trial court's legal conclusions are supported by the case law. *See Adams v. Dugger,* 816 F.2d 1493 (11th Cir.1987) (holding that defense counsel was not ineffective for failing to obtain expert pathologist where defense counsel cross-examined State expert and argued weaknesses in testimony to jury in closing argument); *Jones v. Smith,* 772 F.2d 668, 674 (11th Cir.1985) (holding that defense counsel's failure to offer opinion of qualified expert as to the unreliability of eyewitness testimony did not constitute ineffective assistance of counsel where counsel pointed out the likelihood of mistaken identification during cross-examination); *Rose v. State,* 617 So.2d at 297 (holding that defense counsel was not ineffective for failing to obtain expert in eyewitness identification when, instead, he pointed out inconsistencies between the eyewitnesses' testimony as well as differences in the trial testimony of each witness and his or her earlier statements); *Wilkins v. State,* 685 So.2d 957, 958-59 (Fla. 4th DCA 1996).

2. Gunshot Residue and Ballistic Evidence

[11] Riechmann alleges that defense counsel was ineffective in failing to use information contained in published journals to challenge the State's gunshot residue expert, Mr. Gopinath Rao. At trial, Mr. Rao testified to a reasonable degree of scientific probability that based on the gunshot residue on Riechmann's hands, Riechmann fired a gun at the time of the shooting. Defense counsel conducted a cross-examination wherein Rao admitted that the gunshot residue could have come from handling a gun or being near a gun, and that it did not necessarily mean that the person had fired a gun. Defense counsel also presented the testimony of Dr. Vincent P. Guinn, an expert, who testified that the particles found on Riechmann's ***356** hands proved only that Riechmann was in the vicinity of a gun when it was fired, not that he had actually fired a gun. He also testified that Rao's conclusion had no scientific support.

At the evidentiary hearing, Riechmann presented the testimony of Mr. Raymond Cooper, an expert in firearms identification and gunshot residue analysis, who testified that several FBI publications support the view that gunshot residue can result simply from being in close proximity to a discharged weapon. The evidentiary hearing court concluded:

> During his cross examination, Mr. Rao conceded that the presence of gunshot residue on a person's hands did not mean that person was the shooter. He further agreed that other possibilities could explain its presence, such as if a person's hands were in close proximity to a gun when it was fired, or if such person had previously handled a discharged weapon. Under such circumstances, any failure to use authoritative publications to obtain the same concessions was not deficient performance within the meaning of *Strickland,* since cross-examination at trial was already sufficient to show the weaknesses in the witnesses' testimony.

Order at 23-24 (citations omitted).

[12] **[13]** Counsel is not necessarily ineffective for failing to impeach a witness with a report, if cross-examination is used to bring out the weaknesses in the witness's testimony. *See Card v. Dugger,* 911 F.2d 1494, 1507 (11th Cir.1990). Moreover, failing to present cumulative impeachment evidence does not necessarily constitute ineffective assistance. *See Valle v. State,* 705 So.2d 1331, 1334-35 (Fla.1997); *Provenzano v. Dugger,* 561 So.2d 541, 545-46 (Fla.1990).

[14] Riechmann also asserts that counsel was ineffective for failing to rebut the State's ballistic expert at trial, Mr. Quirk, who testified that only three main weapons could have fired

the bullet that killed Kischnick. At the evidentiary hearing, Quirk testified that the data he used to make this finding was limited to those guns that passed through the Metro-Dade Crime Lab, instead of the more inclusive FBI crime lab. At the hearing, Cooper testified that fourteen different types of guns could have been used to fire the bullet that killed Kischnick. However, neither Quirk nor Cooper was able to state whether the list that provided the fourteen different types of weapons was available at the time of Riechmann's trial. Moreover, in regard to prejudice, the court found that there was no reasonable probability that this new evidence would have affected the result of the proceeding. The evidence presented at trial also established that Kischnick had less gunshot residue than Riechmann, although she was closer to the shooter and Riechmann moved considerably more after the incident and had more opportunities for the gunshot residue to disappear. The evidence also established that forty bullets of the same type that killed Kischnick were found in a fifty-shell box in Riechmann's motel. We approve the trial court's factual findings and legal conclusions on this issue.

3. Failure to Investigate

[15] As his third subissue, Riechmann complains of counsel's failure to conduct further investigation into certain aspects of his case. [15] The trial court found that for *357 all but one of these claims, Riechmann failed to demonstrate the requisite deficiency or prejudice. As for the claim concerning Riechmann's relationship with Kischnick, the court found a lack of prejudice because it concerned evidence which was already admitted at trial, only in a different manner than now asserted. For example, at trial, counsel secured testimony from a State's witness of Riechmann's love for Kischnick. The jury was also presented with a videotape of the couple the night of the murder that showed them involved in a loving relationship. Again, we find that the trial judge's factual findings are supported by competent and substantial evidence, and his legal conclusions are supported by our prior case law. Furthermore, counsel could not be held ineffective for failing to present witnesses from a list withheld from him. *See Roberts v. State,* 568 So.2d 1255, 1259 (Fla.1990) ("Counsel cannot be considered deficient in performance for failing to present evidence which allegedly has been improperly withheld by the state."). [16] We conclude that Riechmann's remaining subclaims on the issue of counsel's failure to investigate also fail because counsel either had a tactical reason for each choice or the evidence allegedly not presented had already been presented to the jury, albeit in a different manner.

15 These areas include: (1) counsel's failure to investigate facts of Riechmann's innocence; (2) counsel's failure to investigate times and distances concerning the night of the crime and the crime scene itself; (3) counsel's failure to present evidence of Riechmann's relationship with Kischnick; (4) counsel's failure to investigate information that would have discredited the state's jailhouse informant; (5) counsel's failure to introduce the secretly recorded four hour tape of the interview with police; (6) counsel's failure to explore cultural differences between Germany and the United States; and (7) counsel's failure to rebut the state's theory of Kischnick's physical condition. These claims were grouped together by the trial court.

16 As part of his *Brady* claim, counsel claimed that this list was withheld from him.

[16] Riechmann claims that counsel should have called the waiter who attended the couple on the night of the murder and two newly found eyewitnesses who testified at the evidentiary hearing. However, the evidence shows that counsel attempted to locate the waiter but was unable to do so. In addition, this evidence would have been cumulative because the jury was shown a videotape of the couple on the night of the murder that reflected their festive mood and intoxicated state.

[17] As to the two eyewitnesses, defense counsel testified that Riechmann was unable to tell them where the crime had occurred. In fact, the witnesses testified that the crime occurred just west of Biscayne Boulevard and 63rd Street, roughly 100 blocks away from where Riechmann had told counsel that he thought he had gotten lost. Moreover, one of the two eyewitnesses testified that he avoided the area for about a month after the crime, and the other witness testified that he did not wish to become involved in the investigation at the time of the crime. Therefore, Riechmann has failed to prove that these witnesses could have been located at the time of trial through the use of due diligence or investigation.

[18] Riechmann also claims that defense counsel was deficient for failing to investigate evidence that would have discredited the State's jailhouse informant, Smykowski, who testified that Riechmann was elated at the prospect of becoming a millionaire from Kischnick's insurance policies.

During trial, defense counsel received a letter from an inmate offering himself as a witness to testify as to Smykowski's lack of credibility and reputation of being a "snitch" around the jail. At the evidentiary hearing, defense counsel testified that he read the letter, but after conversing with Riechmann, he made the tactical decision not to call this witness or any other inmate to rebut Smykowski's testimony. His main reasons were that any inmate presented would be vehemently impeached concerning his prior criminal records, and Riechmann had represented to counsel that any conversation with Smykowski occurred in private and was not overheard by any inmates. Based on this testimony, the trial court found that counsel's decision was a reasonable one under the circumstances. The trial court's conclusion is supported by our prior decision in *Rose v. State,* 675 So.2d 567, 570 (Fla.1996) (holding that counsel's decision not to call certain witnesses was a reasoned decision since it was apparent that the State could have successfully impeached them).

***358 [19]** Next, Riechmann alleges that counsel was ineffective for failing to introduce a secretly-recorded four hour tape of an interview with Detective Matthews of the Miami Beach Police Department, which Riechmann claims could have been used at trial to show the extent to which the police harassed him and to show Riechmann's sincerity after the crime. We agree with the trial court that counsel was not ineffective in this regard. In fact, at a suppression hearing before trial, counsel argued against the admissibility of this tape. Moreover, Riechmann has not established the requisite showing of prejudice because the evidence shows that a similar tape, recorded the day before, was introduced at trial and played to the jury. Through cross-examination, counsel also showed that Detective Matthews used a fictitious story in that tape to attempt to elicit a confession from Riechmann.

Riechmann also claims that counsel failed to explore and present to the jury cultural differences between Germany and the United States; specifically that prostitution is legal in Germany. This claim is also without merit. This evidence had already been presented to the jury through the testimony of Kischnick's working partner. Moreover, Riechmann has failed to show a reasonable probability of how this would have affected the outcome of the trial. Riechmann's final subclaim, that defense counsel was ineffective for failing to investigate the extent and seriousness of Kischnick's gynecological condition, is also without merit. At trial, the medical examiner testified that many sexually active and pregnant women suffer from this condition and that the condition can be treated successfully with medication; therefore, the jury was aware that she could have continued working as a prostitute.

The judge examined each claim individually and also considered each claim in light of the total evidence. *See generally State v. Bucherie,* 468 So.2d 229, 231 (Fla.1985); *Downs v. State,* 453 So.2d 1102, 1109 (Fla.1984). The record supports the judge's factual findings and his conclusions of law are supported by our prior decisions. *See, e.g., Torres-Arboleda v. Dugger,* 636 So.2d 1321, 1324 (Fla.1994); *Jackson v. Dugger,* 633 So.2d 1051, 1054 (Fla.1993).

4. Calling Riechmann as Defense Witness

[20] Riechmann alleges that counsel erred in calling him as a witness at trial. At the hearing, counsel conceded that he did not initially plan on calling Riechmann. However, after hearing that a juror had informed a journalist that the jury was prepared to convict, he encouraged Riechmann to testify. [17] He felt that putting Riechmann on the stand was necessary if he hoped to prevail. Although he testified that Riechmann's testimony turned out to be an "unmitigated disaster," he did not expect it to be so when he made his decision to put him on the stand.

17 This juror was subsequently removed from the jury.

[21] In determining deficiency, "[a] fair assessment ... requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052; *see also Cherry v. State,* 659 So.2d 1069 (Fla.1995). In its order, the evidentiary hearing court determined that counsel was not ineffective in calling Riechmann as a witness because, based on the facts known to him at the time and his extensive experience in the field of capital cases, counsel made a reasonable tactical decision. This finding is supported by the evidence. Moreover, the trial court's legal conclusion is supported by our prior decisions. *See, e.g., Koon v. Dugger,* 619 So.2d 246, 249 (Fla.1993) (holding that counsel's decision not to present a voluntary intoxication defense was a reasonable trial tactic predicated on counsel's experience, his assessment of the case, and defendant's expressed desires).

*359 5. Failing to Request Appointment of Second Counsel

[22] Finally, Riechmann alleges that counsel provided ineffective assistance because his attorney did not request, and the trial judge did not appoint, two attorneys to represent him in the case. However, Riechmann has not specifically shown how counsel's solo representation affected his performance at trial; therefore, the trial court correctly found this claim to be without merit based on our decision in *Armstrong v. State,* 642 So.2d 730, 737 (Fla.1994), wherein we held that a defendant is not denied effective assistance of counsel merely because he has only one attorney.

NEWLY DISCOVERED EVIDENCE

[23] Riechmann alleges three categories of newly discovered evidence: (1) two newly discovered eyewitnesses to the murder (Early Stitt and Hilton Williams); (2) newly discovered evidence that the testimony of jailhouse informant Smykowski was knowingly false; and (3) newly discovered evidence of subsequent similar murders confirming Riechmann's accounts of the murder. [18]

18 In support of this third category, Riechmann presented the testimony of Dr. Karen McElrath at the evidentiary hearing who testified that there was a recognizable pattern of similar murders involving tourists occurring in South Florida. However, she acknowledged that the only research she had conducted in determining this pattern was from newspaper articles in the *Miami Herald,* the local newspaper. She further testified that she had not read all of these articles and, more importantly, she had not considered official records regarding tourist crimes. Based on her testimony, we find that the trial court correctly concluded that her testimony did not qualify as newly discovered evidence, and if it did it would probably not have produced an acquittal on retrial.

This Court has held that defendants must satisfy two requirements in order to have a conviction set aside on the basis of newly discovered evidence:

> First ... newly discovered ... evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of due diligence."
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial....
>
> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility.... The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

Jones v. State, 709 So.2d 512, 521 (Fla.1998) (quoting *Torres-Arboleda v. Dugger,* 636 So.2d at 1324-25) (alteration in original) (citations omitted).

1. Testimony of Two Newly Discovered Eyewitnesses

[24] The first eyewitness presented by Riechmann, Early Stitt, testified at the evidentiary hearing that he was standing on the corner of Biscayne Boulevard and 63rd Street selling crack when he heard a shot fired further down the street. Although he saw two people in a car that was approached by several men, he testified that he was not paying close attention because he was in the process of a drug transaction. Upon hearing gunfire, he ran north on Biscayne Boulevard and saw the car in question pass him as he ran. At the hearing, he acknowledged that he did not see the shooter, nor could he describe the color of the car. He further acknowledged that he was under the influence of drugs the night of the murder, and that although his memory has been affected by drug use, Riechmann's private investigator visited with him before he testified at the hearing. He also admitted to thirty-eight felony convictions.

*360 The second eyewitness, Hilton Williams, a prison inmate, testified that at the time of the incident, he was selling drugs and was accompanied by his girlfriend and other friends including Stitt. [19] He testified that he saw a red rental car with a man and a woman inside. Believing that they were looking to buy drugs, someone in his group hollered to them, prompting the car to make a "u-turn" and return in their direction. He and his friends approached the driver's side of the car and noticed a lot of jewelry on the woman passenger. He testified that someone by the name of Mark, whom he

thought was behind him on the driver's side, fired a shot. The car then sped away. He admitted to being convicted of ten felonies and admitted that he would lie if doing so suited his purposes. At first, he denied receiving compensation from Riechmann's investigator, but on cross-examination, he acknowledged that he was paid for his hotel room throughout the investigation. Both of these witnesses testified that they did not want to be involved in the investigation of the case when it happened.

19 Stitt, however, testified that he did not see Williams on the night of the murder.

The trial court comprehensively analyzed this claim and found:

> The exculpatory testimony of Hilton Williams and Early Stitt was discovered after trial, would have been admissible at the trial, and is material to Defendant's guilt or innocence....
>
> The Court further concludes that these witnesses were not previously known to the Defendant or trial counsel and were not discoverable in the exercise of due diligence. Trial counsel was not able to determine the location of the shooting with any precision. As a result, he could not reasonably investigate potential witnesses. Even if these witnesses could have been found, they would have been reluctant to testify at the time for fear of prosecution by the State for drug or other offenses, or from possible retribution.

Order at 39 (citations omitted). Notwithstanding, in applying the materiality prong of the *Jones* test, the court found:

> The Court finds the testimony of Mr. Stitt and Mr. Williams to be less than credible and "rife with inconsistencies" with the Defendant's own testimony at trial. Mr. Stitt suffers from a drug problem that affects his memory. Mr. Williams has multiple convictions, is currently incarcerated for robbery, and initially had lied to the court during his testimony. He worked for the Defendant's investigator and received compensation, which he first denied, but then admitted. Finally, his testimony is inconsistent with the Defendant's own recollection of the events as well as the undisputed evidence that the victim was shot through the passenger window, not the driver's window. Furthermore, the Defendant mentioned only one person, the shooter, on the street at the time described, not several as described by Mr. Williams.
>
> ... [T]he Court concludes that the testimony of Mr. Stitt and Mr. Williams, without more, would probably not have created a reasonable doubt in the minds of the jury. The Court reaches this conclusion after evaluating the weight of both the newly discovered evidence and the totality of the evidence at trial.

Order at 40-41. As discussed above, the trial court's findings are supported by competent and substantial evidence presented at the hearing. Moreover, the trial court's conclusions on the effect of the outcome of the trial are supported by our decisions in *Melendez v. State,* 718 So.2d 746, 748 (Fla.1998) (holding that testimony of convicted felons did not support claim of newly discovered evidence because the trial court did not find them to be credible witnesses); *Jones v. State,* 709 So.2d 512 (Fla.1998) (affirming trial court's decision that there was no reasonable probability, given the lack of the witnesses' credibility, that a retrial would have resulted in defendant's ***361** acquittal); and *Blanco v. State,* 702 So.2d 1250, 1252 (Fla.1997) (finding that testimony of newly discovered witnesses did not warrant a new trial where trial judge found that witnesses' lack of credibility would preclude any probability that a retrial would result in defendant's acquittal).

2. Evidence that Smykowski's Testimony was False

[25] In support of Riechmann's second category of newly discovered evidence alleging that Smykowski's testimony was false, Michael Kloof testified at the evidentiary hearing that Smykowski told him that the prosecutors in the case asked Smykowski to testify that Riechmann had told him that he had killed Kischnick. He also testified that the prosecutors had told him that they would help him get out of his federal sentence. Riechmann alleges that this evidence could have been used at trial to impeach Smykowski, who testified at trial that he was getting no benefits from the State for testifying because the prosecutors had no authority over his federal sentence. However, at trial, Smykowski acknowledged that he was hoping that the State would write a letter to the judge who was sentencing him, and defense counsel asserted at closing argument that his testimony was motivated by his desire for such a letter. Moreover, although a letter was eventually written, the prosecutor testified at the evidentiary hearing that he had not promised to write one.

In its order the court made the following findings:

> Regarding the Smykowski matter, there is express testimony at trial regarding the possibility of the prosecutor writing a letter to the federal parole authorities on his behalf[,] as well as defense counsel's argument to the jury about it. At the post conviction hearing, both prosecutors testified that there was no deal with Mr. Smykowski. Given that the newly discovered evidence with respect to Mr. Smykowski is only of an impeaching nature, and not evidence of any false statement, it presents no basis for relief.

Order at 42 (citations omitted). These findings are supported by the evidence presented at the hearing and at trial.

BRADY

[26] **[27]** Riechmann alleges numerous categories of *Brady* materials withheld by the State: (1) exculpatory police reports; (2) exculpatory German investigative materials and documents; (3) an undisclosed deal between prosecutors and Smykowski; (4) exculpatory photographs of the automobile; (5) notes and reports of forensic experts; and (6) telexes and communications with German authorities. [20]

20 As to category (4) (missing photographs from the scene), Riechmann alleges that the State suppressed photographs taken by police of the interior of the car. He claims that few crime scene photos have been produced in comparison to the amount of photos that were taken. He further alleges that when he examined the negatives at trial, numbered photos in the middle and beginning of rolls were missing. To the extent that this claim pertains to the trial record, it is procedurally barred because Riechmann could and should have raised the issue on direct appeal. *See Francis v. Barton,* 581 So.2d 583 (Fla.1991). Notwithstanding, the claim also fails on its merits because Riechmann has presented no evidence of any photographs withheld. More importantly, he has failed to show how these allegedly withheld photographs, if disclosed, would create a reasonable probability that the outcome of the trial would have been different.

As to category (5) (withheld notes and reports of forensic experts), Riechmann claims that the State withheld forensic notes and reports of ballistics and serology evidence. However, as pointed out by the State in its brief, this issue was litigated before trial; therefore, Riechmann is procedurally barred from raising it here. *See Francis v. Barton,* 581 So.2d 583 (Fla.1991). On its merits, the claim also fails. The record reflects that Riechmann obtained the notes from Rao, the State's gunshot residue expert. Moreover, as to Rhodes' records, the trial court ruled that they were not subject to discovery. Further, the trial court reviewed the notes and found that Riechmann had already been provided with the information contained therein.

With regard to category (6) (suppression of telexes between the Miami Beach Police Department and the German police), Riechmann claims this evidence could have been used to show that the German searches were invalid. This claim is without merit because at the time of trial, Riechmann had at least some of the telexes, as is evidenced by his introduction of them at the suppression hearing. As far as Riechmann's claim that the State misled the court regarding the legality of the German searches, Ms. Sreenan, one of the prosecutors in the case, testified that she was unaware that a German court had invalidated one of the German searches until after the 3.850 motion was filed.

We will address categories (1), (2), and (3) in greater detail in the text below.

***362** **[28]** **[29]** Recently, the United States Supreme Court announced three components that a defendant must show to assert a *Brady* violation successfully:

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State,

> either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). This prejudice is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Id.* at 1952 (quoting *Kyles v. Whitley,* 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). In applying these elements, the evidence must be considered in the context of the entire record. *See Haliburton v. Singletary,* 691 So.2d 466, 470 (Fla.1997) (quoting *Cruse v. State,* 588 So.2d 983, 987 (Fla.1991)).

1. Police Reports

[30] Riechmann alleges that the State withheld or deleted portions of police reports concerning the height of the passenger side car window, the portion of the reports dealing with an interview with the waiter who attended them on the night of the murder, and a statement made by Kischnick's father. The amount of the opening of the window is relevant because at trial, the theory of the State's expert, Rhodes, was that the narrower the opening of the window, the more significant the gunshot residue found on Riechmann's hands became. The greater the opening, the more likely that gunshot residue could be found on Riechmann's hands without him having fired the gun. At trial, it was established that the window was only open 3 ½ inches. However, three police reports provided different measurements of the opening of the window. In one of the police reports, authored by Detective Hanlon, Rhodes had stated that the passenger window was no more than 6 inches from being fully closed. In the other two reports, serologists reiterated this six-inch measurement based on blood spattered on the passenger door window. In yet another police report, prepared by Detective Trujillo, a statement provided by the crime lab that the window was completely down had been whited-out.

The State concedes that it possessed the reports and that it did not turn them over to Riechmann. The trial court found that the only significant information withheld by these police reports was the crime lab's representation in Trujillo's report which stated that the window had to have been all the way down. However, the court found that there was no reasonable probability that the results of the trial would have been affected had this evidence been disclosed.

These findings are supported by the evidence presented at the hearing. Any evidence that the window was open no more than 6 inches is not much different from that presented at trial that the window was open 3 ½ inches. Moreover, the statement by the crime lab that the window was completely down would not be completely favorable to Riechmann, because he testified at trial that the window was only open half-way. Additionally, it would have also been inconsistent with the testimony of his expert, who stated that the window was only 3 ¾ inches open. Therefore, Riechmann ***363** has not satisfied the materiality prong of the test.

[31] **[32]** As far as the waiter's statements made to the police that Riechmann and Kischnick were in a festive mood the night of the murder, this evidence does not establish a *Brady* claim because it serves as cumulative evidence. Lastly, with regard to Kischnick's father's statement to the police that Kischnick and Riechmann had a loving relationship, Riechmann failed to show how he could have used this report (or the statement therein) at trial, since the father never testified and Riechmann introduced no evidence that the father would have done so if asked.

2. Exculpatory German Investigative Materials and Documents

[33] Riechmann claims that the State suppressed statements from witnesses establishing that Riechmann and Kischnick had a loving relationship. The German police took 37 statements from people in Germany who knew Riechmann and Kischnick. However, the evidence shows that before trial, defense counsel learned of these statements during discovery and requested copies of the statements that he did not already possess. When the State did not comply, Riechmann moved the court to conduct an *in camera* inspection and then to turn them over to Riechmann. The court never ruled on this motion, and defense counsel never renewed his motion until the trial judge later stated that he relied on the statements to find that Riechmann was a good person. In his order, the trial court found that these statements would have been material to Riechmann in the sentencing phase because they would have allowed counsel the opportunity to present some mitigating evidence. We agree, and for the new penalty phase, these statements will be made available to Riechmann.

[34] **[35]** However, Riechmann's claim on this issue, as it relates to the guilt phase, is procedurally barred because he could and should have raised it on direct appeal, since by trial's end he was aware of the statements. *See Francis v. Barton,* 581 So.2d 583 (Fla.1991). Notwithstanding, the trial court found that even if disclosed, there was no reasonable probability that a different result would have occurred. We agree.

3. Undisclosed Deal with Informant Smykowski

[36] Here, Riechmann claims that the State withheld evidence of a deal offered by the State to Smykowski in return for his testimony. This claim is predicated on a letter written by the prosecutor on Smykowski's behalf to the U.S. Parole Commission, acknowledging his assistance in Riechmann's trial, and on handwritten notes discovered in the state attorney's file stating that the prosecutor was supposed to contact a federal magistrate so that Smykowski might be rewarded. The letter, which was written after the verdict and the jury's recommendation of death, but before sentencing, was not disclosed to Riechmann. At trial, Smykowski denied that he had entered into a deal with the State or that he had been promised anything by the State in return for his testimony. However, he did testify that he was hoping the State would write such a letter on his behalf. At the evidentiary hearing, the prosecutor testified that he did not promise Smykowski anything in return for his testimony. As to the handwritten letters, the prosecutor testified that the notation was simply a request by Smykowski's intermediary that he be permitted to remain, and that the last word on the note was "remain," not "reward." The trial court found that there was no undisclosed deal between Smykowski and the State. These findings are supported by competent, substantial evidence from the record.

Accordingly, we affirm the trial court's denial of Riechmann's *Brady* claim in its entirety.

*364 II. HABEAS CORPUS

[37] **[38]** **[39]** In his petition for writ of habeas corpus, Riechmann raises five claims.[21] All of these issues are either not cognizable in a habeas petition[22] or are simply without merit.[23] Notwithstanding, we will address Riechmann's claim of ineffective assistance of appellate counsel.

21 These claims include: (1) ineffective assistance of appellate counsel; (2) the trial court's abuse of discretion regarding the propriety of its rulings at trial; (3) the state's suppression of favorable evidence under *Brady;* (4) this Court's denial of Riechmann's equal protection rights by failure to review the entire record and by denying his request to file an oversize brief; and (5) ineffective assistance of postconviction counsel.

22 Claim (2) is not cognizable in a habeas corpus petition because it was raised or should have been raised on direct appeal. *See Hardwick v. Dugger,* 648 So.2d 100, 105 (Fla.1994).

Claim (3) also cannot be raised in a petition for habeas corpus because it was properly raised in a 3.850 motion. *See Kokal v. Dugger,* 718 So.2d 138 (Fla.1998); *see also Blanco v. Wainwright,* 507 So.2d 1377, 1384 (Fla.1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.").

Claim (5) is likewise not cognizable in a petition for habeas corpus. Ineffective assistance of counsel claims must be raised in the court in which the alleged ineffectiveness occurred. *See Shere v. State,* 742 So.2d 215 (Fla.1999) (citing *Knight v. State,* 394 So.2d 997 (Fla.1981); *Richardson v. State,* 624 So.2d 804 (Fla. 1st DCA 1993); *Turner v. State,* 570 So.2d 1114 (Fla. 5th DCA 1990)). Moreover, we have not recognized ineffective assistance of postconviction counsel claims. *See Lambrix v. State,* 698 So.2d 247, 248 (Fla.1996) (citing *Murray v. Giarratano,* 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), and *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)), *cert. denied,* 522 U.S. 1122, 118 S.Ct. 1064, 140 L.Ed.2d 125 (1998).

23 Claim (4) is clearly without merit. The decision of this Court reflects that the Court reviewed the sufficiency of the evidence presented and the propriety of the penalty imposed. *See Riechmann,* 581 So.2d at 141 ("There is substantial competent evidence in the record to support the convictions.").

> Additionally, Riechmann has not alleged what portion of the record was not considered by the Court. Although the Court denied Riechmann's request to file oversized briefs, the Court did allow him to file a supplemental brief wherein Riechmann raised nine new issues.
>
> Finally, as part of this claim, Riechmann alleges that appellate counsel failed to communicate and consult with him on legal issues. However, in response, Riechmann filed a letter in which he complained of the issues not raised in his initial brief. After this letter, appellate counsel filed a supplemental brief which raised all the issues complained of by Riechmann, and Riechmann filed no more complaints. Therefore, Riechmann has not alleged any prejudice resulting from appellate counsel's conduct.

INEFFECTIVE ASSISTANCE
OF APPELLATE COUNSEL

[40] This Court has stated that the criteria for proving ineffective assistance of appellate counsel parallel the standard used for ineffectiveness of trial counsel claims. *See Williamson v. Dugger,* 651 So.2d 84, 86 (Fla.1994). Specifically, defendants must show

> 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla.1985) (citing *Johnson v. Wainwright,* 463 So.2d 207 (Fla.1985)).

[41] **[42]** Under this heading, Riechmann raises eleven points of error.[24] All ***365** of these points are without merit. Point (1) has been rendered moot as a result of our approval of the trial court's ruling ordering a new sentencing proceeding. Points (3), (4), (9), and (11) are without merit because appellate counsel indeed raised these issues on direct appeal. Finally, points (2), (5), (6), (7), (8) and (10) either fail on their merits, are barred because counsel raised the issue on appeal but simply argued different grounds, or involve an issue that was simply not preserved for appeal. However, we will address this final category below.

24 These points of error include: (1) failure to raise penalty phase issues; (2) failure to raise improper admission of motive evidence; (3) failure to raise introduction of "dirty" magazine; (4) failure to raise improper comments made by the prosecutor; (5) failing to raise issue that record on appeal was incomplete; (6) failure to raise trial judge's improper response to jury; (7) failure to raise speedy trial issue; (8) failure to raise issue of Riechmann's rights under the Vienna Convention; (9) failure to raise issue concerning the admission of prior convictions through wrong records custodian; (10) failing to raise additional arguments concerning the legality of German searches; and (11) failure to raise issue of statements made after acquittal on federal gun charges.

[43] As point (2), Riechmann alleges that appellate counsel was ineffective for failing to argue that the State had improperly presented evidence that Riechmann had a motive to kill. This Court has held that evidence may be admitted in a criminal case if it is relevant as to the motive for the crime involved. *See, e.g., Sims v. State,* 681 So.2d 1112, 1115 (Fla.1996). Therefore, we conclude that appellate counsel cannot be deemed ineffective for failing to raise this issue.

As point (5), Riechmann asserts that appellate counsel was ineffective for failing to assert that the record on appeal was missing seven pages. This claim is without merit. Although the record presented by appellate counsel was missing seven pages, the State's copy of the record included these missing pages.

[44] As point (6), Riechmann asserts that appellate counsel was ineffective for failing to raise the issue regarding the manner in which the trial court responded to the jury's request for the transcript of the testimony of prostitute Dina Mohler and Kischnick's sister, Regina Kischnick.

[45] This claim is without merit. Trial judges have broad discretion in deciding whether to read back testimony. *See Henry v. State,* 649 So.2d 1361, 1365 (Fla.1994); *Coleman v.*

State, 610 So.2d 1283, 1286 (Fla.1992). In the instant case, the judge met with both parties in chambers before responding to the jury's request. Additionally, although the testimony in the case lasted four weeks, Riechmann has failed to assert how the trial court's decision and appellate counsel's failure to challenge that decision would have changed the outcome on appeal, especially since both of the witnesses testified on behalf of the State and a repetition of their testimony would have further prejudiced the defense. *See Gonzalez v. State,* 624 So.2d 300 (Fla.App.1993).

[46] **[47]** As point (7), Riechmann alleges that appellate counsel was ineffective for failing to raise an alleged violation of his speedy trial rights. In order to claim a violation of speedy trial rights, a defendant must move for a discharge. Riechmann failed to do this before the start of trial; therefore, he was precluded from raising the issue on direct appeal. Furthermore, Riechmann waived his right to a speedy trial by taking a continuance. *See Rutledge v. State,* 374 So.2d 975, 979 (Fla.1979). Therefore, appellate counsel cannot be deemed ineffective for failing to raise this issue.

[48] As point (8), Riechmann alleges that appellate counsel was ineffective for failing to raise the alleged failure of the police to inform Riechmann of his right to have contact with the German Consulate under the Vienna Convention on Consular Relations. However, appellate counsel cannot be deemed ineffective for failing to raise this issue because it was not raised or preserved at trial. *See Williamson v. Dugger,* 651 So.2d 84, 86 (Fla.1994).

[49] Finally, point (10) was raised on appeal, but on different grounds. In this issue, Riechmann alleges that appellate counsel was ineffective for the manner in ***366** which he raised the issue of the legality of the German searches. This claim is without merit because different grounds or legal arguments cannot be used to render appellate counsel ineffective. *See San Martin v. State,* 705 So.2d 1337, 1345 (Fla.1997); *Steinhorst v. State,* 412 So.2d 332, 338 (Fla.1982). As part of this claim, Riechmann also argues that the prosecutors should have known that a German court had held the search on January 14, 1988, to be unlawful and had ordered the fruits of the search suppressed. However, at the evidentiary hearing, the prosecutor testified that she was not aware of the German court's order and it had no bearing on the State's decision not to introduce any evidence seized from this search. Additionally, the record reflects that no evidence was introduced concerning this search; therefore, appellate counsel could not be deemed ineffective for failing to raise this issue.

CONCLUSION

In sum, we affirm the trial court's order in its entirety and remand with directions that a new sentencing proceeding be promptly conducted by a different trial judge and before a newly empaneled jury.

It is so ordered.

HARDING, C.J., and SHAW, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

WELLS, J., concurs as to conviction, and concurs in result only as to sentence.

All Citations

777 So.2d 342, 25 Fla. L. Weekly S163, 25 Fla. L. Weekly S242

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A-9

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO: F87-42355

STATE OF FLORIDA,

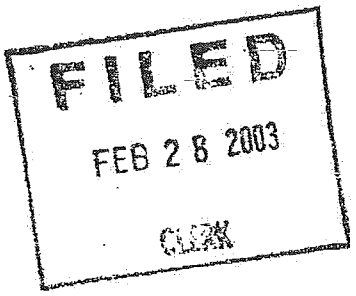
JUDGE JERALD BAGLEY

Plaintiff,

v.

DIETER RIECHMANN,

Defendant.
_____/



ORDER DENYING DEFENDANT'S SECOND MOTION TO VACATE JUDGMENT OF CONVICTION

THIS CAUSE came before the Court on defendant's November 30, 1999 Second Motion, filed pursuant to Fla. R. Crim. P. 3.850, to vacate and set aside the judgment rendered against him as to First Degree Murder and Unlawful Possession of a Firearm While Engaged in a Criminal Offense. During the post conviction proceeding, Terri L. Backhus, Esquire, represented the defendant, Dieter Riechmann. Assistant Attorney General Sandra S. Jaggard and Assistant State Attorneys Reid Rubin and Joel Rosenblatt represented the State. The Court having reviewed the defendant's motion, the State's Response, holding an evidentiary hearing and having reviewed the written post conviction hearing memorandum from counsel for the defendant and State, hereby finds:

INTRODUCTION

1. The facts in this case are set forth in Riechmann v. State, 581 So.2d 133, 135-137 (Fla. 1991), and as presented in State v. Riechmann, 777 So.2d 342, 347 (Fla. 2000) are as follows:

> Briefly stated, the evidence established that Riechmann and Kersten Kischnick, "life companions," came to Miami, Florida from Germany in early October 1987, and Kischnick was shot to death as she sat in the passenger seat of an automobile driven by Riechmann. Riechmann was charged with her murder. At trial, the State's theory was that Kischnick was a prostitute who worked for Riechmann, and when she no longer wanted to work as a prostitute, Riechmann killed her in order to recover insurance proceeds.
>
> Riechmann maintained that they were riding around videotaping some of Miami's sights when they got lost and asked for directions. He contended that the stranger whom they asked fired the shot that killed Kischnick. Riechmann sped away looking for help, driving several miles before he found a police officer.
>
> At trial, an expert for the State testified that numerous particles usually found in gunpowder residue were discovered on Riechmann's hand and, accordingly, there was a reasonable scientific probability that Riechmann had fired a gun. In Riechmann's hotel room, the police found three handguns and several rounds of ammunition, and an expert firearms examiner testified that the bullets were the same type as used to kill Kischnick. The examiner testified that the bullet that killed Kischnick could have been fired from any of the three makes of guns found in Riechmann's room. A serologist testified that the high-velocity blood spatter found on the driver's seat could not have gotten there if the driver's seat was occupied in a normal driving position when the shot was fired from outside the passenger-side window.

2. On August 12, 1988, the jury found the defendant guilty of first-degree murder and unlawful possession of a firearm while engaged in a criminal offense and recommended a sentence of death by a vote of nine to three. The presiding trial judge then sentenced the defendant to death for the first-degree murder, finding two aggravating circumstances: (1) the murder was committed for pecuniary gain, and (2) the murder was cold, calculated and premeditated without any pretense of legal or moral justification. The trial judge also "found as a nonstatutory mitigating circumstance that people in Germany who know the defendant told police they consider him to be a 'good person'." On appeal, the Florida Supreme Court affirmed. 581 So.2d at 141.

3. On September 30, 1994, the defendant filed his initial 3.850 motion, raising fourteen claims,

eleven of which asserted ineffective assistance of counsel and the remaining claims which consisted of newly discovered evidence, a Brady v. Maryland, 373 U.S. 83 (1963) violation and a final claim that the sentence was invalid because the trial judge's findings were written by the prosecutor instead of the judge and were provided to the judge ex parte. See State v. Riechmann, 777 So.2d at 348, footnote 4.

4. On November 4, 1996, Judge Alan Gold denied the motion with an evidentiary hearing. After Judge Gold denied defendant's motion, the defendant appealed the denial of relief to the Florida Supreme Court, and he also moved twice for relinquishment of jurisdiction. The **first** request consisted of defendant's claim that the State had pressured crime scene officer Hillard Veski, who did not testify at trial, to give a false statement about the location of the blanket and of a flashlight in the car, notwithstanding that the evidence regarding the flashlight was not presented at trial and that the position of the blanket at the time of the crime was documented by crime scene photographs and corroborated by the testimony of the crime scene personnel and the defendant's own testimony. The Supreme Court denied the defendant's first motion to relinquish jurisdiction.

5. The defendant's **second** motion to relinquish jurisdiction, along with the original version of his second motion for post conviction relief, was filed on November 30, 1999. The defendant asserted that he had newly discovered evidence which consisted of an alleged confession from "Mark Dugen" to journalist Peter Mueller that Dugen committed the murder. Once again, the Supreme Court denied the defendant's motion to relinquish jurisdiction.

6. The Florida Supreme Court affirmed Judge Gold's order in its entirety and remanded with directions that a new sentencing proceeding be conducted by a different trial judge and before a newly

empaneled jury. Id. at 366.

Furthermore, the Supreme Court denied defendant's petition for writ of habeas corpus. Id. at 364. In the habeas petition, the defendant asserted the following five claims:

> (1) ineffective assistance of appellate counsel; (2) the trial court's abuse of discretion regarding the propriety of its rulings at trial; (3) the state's suppression of favorable evidence under *Brady*; (4) the Supreme Court's denial of Riechmann's equal protection rights by failure to review the entire record and by denying his request to file an oversize brief; and (5) ineffective assistance of postconviction counsel.

777 So.2d at 364. In denying the habeas petition, the Supreme Court stated, in part: "[a]ll of these issues are either not cognizable in a habeas petition or are simply without merit." id.

7. On remand, the undersigned was assigned to preside over the defendant's new sentencing proceeding before a newly empaneled jury. However, pending before this Court was the defendant's second motion for post conviction relief filed during his appeal of Judge Gold's 3.850 order. The State filed a response to the second motion for post conviction relief. Thereafter, this Court granted defendant's motion for continuance to investigate and depose Walter Smykowski's daughter concerning a letter she sent to the State Attorney's Office inquiring about whether her father was entitled to a reward for his trial testimony against the defendant.

8. On September 14, 2001, the defendant filed an amended second motion to vacate judgment of conviction with special request for leave to amend. In that motion, the defendant raised the following claims:

I.

NEWLY-DISCOVERED EVIDENCE SHOWS THAT MR. RIECHMANN IS INNOCENT.

II.

THE CUMULATIVE EFFECT OF THE NEWLY-DISCOVERED EVIDENCE WARRANTS A NEW TRIAL.

III.

THE STATE DELIBERATELY WITHHELD MATERIAL EXCULPATORY EVIDENCE AND KNOWINGLY USED FALSE EVIDENCE TO DECEIVE THE COURT AND THE JURY. NEWLY DISCOVERED EVIDENCE SHOWS THAT PROSECUTORIAL MISCONDUCT PREVENTED MR. RIECHMANN FROM RECEIVING DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

IV.

LAW ENFORCEMENT'S CONDUCT IN THIS CASE WAS SO OUTRAGEOUS THAT IT DEPRIVED MR. RIECHMANN OF DUE PROCESS AND SHOULD HAVE BARRED THE GOVERNMENT FROM INVOKING JUDICIAL PROCESS TO OBTAIN A CONVICTION AGAINST HIM. MR. RIECHMANN IS ENTITLED TO HAVE HIS CONVICTION AS TO GUILT PHASE VACATED AND HIS CASE DISMISSED.

V.

MR. RIECHMANN IS ENTITLED TO DNA TESTING OF THE PRESUMPTIVE BLOOD EVIDENCE.

VI.

MR. RIECHMANN IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. RIECHMANN'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF FLA. R. CRIM. P. 3.852; AND CHAPTER 119, FLA. STAT.

9. Although the State asserts that all of the defendant's claims are procedurally barred and legally insufficient, this Court granted an evidentiary hearing on two claims: Claim I (regarding the alleged confession of Mark Dugen) and Claim III (regarding the alleged Brady violation relating to Walter Smykowski).

10. At the evidentiary hearing, the Court heard testimony from the following thirteen witnesses: Hilton Williams, James Lohman, the first post conviction relief attorney; Edward Carhart, the former defense attorney; Kevin DiGregory, the former chief prosecutor; Elizabeth (Beth) Sreenan, a former Assistant State Attorney who assisted with the prosecution; Deborah Schaeffer, the daughter of Walter Smykowski; John Skladnick, friend of Walter Smykowski; Joseph Matthews, a former Miami Beach Police Department Detective; Robert Hanlon, a former Miami Beach Police Department Detective; Donald Williams; Doreen Bezner-Glenn; Cathy Vogel, the former Miami-Dade Assistant State Attorney who handled defendant's first motion to vacate; and Terri L. Backhus, counsel for defendant.

After receipt of the evidence, counsel for each side submitted a written closing memorandum. In his memorandum, the defendant once again amended his Rule 3.850 motion asserting the following three claims conform with the evidence he presented at the evidentiary hearing:

I.

THE STATE VIOLATED DUE PROCESS BY NOT DISCLOSING AT TRIAL AND IN THE POST CONVICTION PROCESS EVIDENCE REGARDING SMYKOWSKI'S STATE ARRANGED VISIT WITH HIS DAUGHTER THAT WAS FAVORABLE TO MR. RIECHMANN BECAUSE IT PROVIDED IMPEACHMENT OF HIS TRIAL TESTIMONY. (Lightbourne v. State, 742 So.2d 238 (Fla. 1999)).

II.

THE STATE KNOWINGLY ALLOWED MISLEADING OR FALSE TESTIMONY TO BE PRESENTED WITHOUT CORRECTION WHEN SMYKOWSKI TESTIFIED THAT HE HAD NO CONTACT WITH LAW ENFORCEMENT BETWEEN MARCH 1988, AND JULY 27, 1988, TWO DAYS BEFORE HE TESTIFIED IN FRONT OF DEFENDANT'S JURY AND THAT HE RECEIVED NO BENEFIT FOR HIS TESTIMONY OTHER THAN POSSIBLY A LETTER. (Giglio v. United States, 405 U.S. 105 (1972)).

III.

NEWLY DISCOVERED EVIDENCE OF INNOCENCE IN THE FORM OF AN EYEWITNESS ACCOUNT OF THE SHOOTING OF KERSTEN KISCHNICK. (Jones v. State, 591 So.2d 911 (Fla. 1991)).

11. The Court concludes that the defendant has not shown that he exercised due diligence in pursuing his successive motion and amended claims. See Swafford v. State, 828 So.2d 966 (Fla. 2002). Specifically, a lack of due diligence is evident from the following: (1) trial counsel's testimony at the 1996 and 2002 post conviction evidentiary hearing and trial counsel's pre-trial deposition of Smykowski revealed trial counsel (Edward Carhart) and first post conviction counsel (James Lohman) were aware of Smykowski's concern and security for his daughter; (2) the existence of the March 27, 1988 letter from Smykowski to Sreenan which could and should have been discovered before defendant's first Rule 3 motion filed by post conviction counsel James Lohman in 1994; (3) first post conviction counsel's inadequate search for Smykowski; (4) second post conviction counsel's (Backhus) failure to request information from journalist Peter Mueller concerning the whereabouts of Smykowski; and (5) second post conviction counsel's delay in requesting a copy of Mueller's investigative report or tape concerning confession by Mark Dugen, as well as her failure to request from Mr. Mueller copy of raw footage of Mark Dugen's taped interview.

Under the circumstances, the Court finds the defendant did not exercise due diligence in presenting his claims for consideration on the merits. Therefore, the Court concludes that defendant's successive motion is time barred.

Even assuming his motion is not time barred, the Court concludes the defendant's claims are without merit and he is not entitled to relief. The Court now addresses the merits of defendant's claims, including the amended claims raised in his closing argument memorandum.

After having reviewed: (1) the testimony of the thirteen witnesses who testified at the nine day evidentiary hearing; (2) all matters and exhibits introduced in that hearing; (3) other matters presented to the Court through the file, record and transcripts; (4) the Florida Supreme Court's opinions in Riechmann v. State, supra 581 So.2d 133; and State v. Riechmann, supra 777 So.2d 342; and (5) written argument of counsel, together with the Court's opportunity to consider the credibility of the witnesses who testified during the post conviction proceeding, the Court hereby finds:

NEWLY DISCOVERED EVIDENCE

12. The Florida Supreme Court previously noted in State v. Riechmann, 777 So.2d at 359, that:

> Riechmann alleges three categories of newly discovered evidence: (1) two newly discovered eyewitnesses to the murder (Early Stitt and Hilton Williams); (2) newly discovered evidence that the testimony of jailhouse informant Smykowski was knowingly false; and (3) newly discovered evidence of subsequent similar murders confirming Riechmann's accounts of the murder.
>
> The Court has held that defendants must satisfy two requirements in order to have a conviction set aside on the basis of newly discovered evidence:
>
> > First . . . newly discovered . . . evidence "must have been unknown by the trial court, by the party, or by counsel at the time of

> trial, and it must appear that defendant or his counsel could not have known [of it] by the use of due diligence."
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial . . . .
>
> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility . . . . The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.
>
> Jones v. State, 709 So.2nd 512, 521 (Fla. 1998) (quoting Torres-Arboleda v. Dugger, 636 So.2d at 1324-25) (alteration in original) (citations omitted).

13. Once again, the defendant asserts three categories of newly discovered evidence: (1) two newly discovered eyewitnesses to the murder (Donald Williams and Doreen Bezner-Glenn) and newly discovered evidence showing that Mark Dugen confessed to Peter Mueller that he murdered Kersten Kischnick; (2) newly discovered impeachment evidence (Smykowski's State arranged visit with his daughter) establishing defendant's innocence; and (3) the State knowingly allowed misleading or false testimony.

1. NEWLY-DISCOVERED EVIDENCE OF INNOCENCE IN THE FORM OF AN EYEWITNESS ACCOUNT OF THE SHOOTING OF KERSTEN KISCHNICK

14. In 1994, the defendant in his first motion to vacate asserted two newly discovered eyewitnesses to the murder (Early Stitt and Hilton Williams). The Florida Supreme Court found that the evidence presented at the hearing presided by Judge Alan Gold would not have produced an acquittal in the prosecution against the defendant. The Supreme Court further concluded that Judge Gold's findings were supported by competent and substantial evidence, which he summarized as followed:

> The exculpatory testimony of Hilton Williams and Early Stitt was discovered after trial, would have been admissible at the trial, and is material to Defendant's guilt or innocence . . . .
>
> The Court further concludes that these witnesses were not previously known to the Defendant or trial counsel and were not discoverable in the exercise of due diligence. Trial counsel was not able to determine the location of the shooting with any precision. As a result, he could not reasonably investigate potential witnesses. Even if these witnesses could have been found, they would have been reluctant to testify at the time for fear of prosecution by the State for drug or other offenses, or from possible retribution.

State v. Riechmann, 777 So.2d at 360.

The Supreme Court further cited to Judge Gold's application of the materiality prong of the Jones test:

> The Court finds the testimony of Mr. Stitt and Mr. Williams to be less than credible and "rife with inconsistencies" with the Defendant's own testimony at trial. Mr. Stitt suffers from a drug problem that affects his memory. Mr. Williams has multiple convictions, is currently incarcerated for robbery, and initially had lied to the court during his testimony. He worked for the Defendant's investigator and received compensation, which he first denied, but then admitted. Finally, his testimony is inconsistent with the Defendant's own recollection of the events as well as the undisputed evidence that the victim was shot through the passenger window, not the driver's window. Furthermore, the Defendant mentioned only one person, the shooter, on the street at the time described, not several as described by Mr. Williams.
>
> The Court concludes that the testimony of Mr. Stitt and Mr. Williams, without more, would probably not have created a reasonable doubt in the minds of the jury. The Court reaches this conclusion after evaluating the weight of both the newly discovered evidence and the totality of the evidence at trial.
>
> *Order On Motion To Vacate Judgement of conviction and Sentence(hereinafter cited as Order) at pages 40-41. id.*

15. As to the two newly-discovered eyewitnesses to the murder (Donald Williams and Doreen Bezner-Glenn), the defendant presented at the evidentiary hearing the testimony of **Donald Williams** (no relation to Hilton Williams), who explained that he vaguely recalled an incident at 63rd Street and Biscayne Boulevard in October 1987. Although Donald Williams stated that he was present in the

area, he explained that he did not witness the shooting; but rather, he heard people discuss the crime at a bar. He also testified that he observed Mark Dugen and his girlfriend, Doreen Bezner, in the area.

Moreover, on cross examination, Donald Williams admitted stating in his deposition that: (1) he was homeless; (2) he did not recall the exact month and year of the crime; and (3) he has had a fifty-year drug and alcohol addiction.

16. The defendant also presented the testimony of **Doreen Bezner-Glenn** who testified that she lived in a hotel on Biscayne Boulevard with Mark Grey since March 1987. Ms. Bezner explained that she witnessed a crime that was committed at 62nd Street and Biscayne Boulevard during the early evening hours between 6:00 p.m. and 7:00 p.m. She described this location as a "dope hole." She further testified that she was positioned ten to fifteen feet away in some bushes, smoking crack cocaine, when she saw a blonde lady, who was wearing a lot of gold jewelry, and man pull up in a car. She stated that her boyfriend, Mark Grey, instructed the blonde lady and man to stop. She then described how two young "jits" or black boys ran to the side of the car where she heard a shot and saw the car drive off.

Ms. Bezner further explained that her boyfriend locked her in their hotel room, where he threatened her if she told anyone about the crime.

She stated that Mark Grey talked earlier about having lots of money, and that they would not have to work anymore. She also testified that for one week the police had not come by the area to investigate the crime.

On cross examination, Ms. Bezner further testified that Mark Grey whom she never heard

referred to as Mark Dugen, was her pimp and a drug dealer. She explained that she has lived on the streets since the age of seven, has worked as a prostitute, and that she has at least eleven (11) felony convictions, including several prostitution and/or misdemeanor convictions. She also stated in her deposition that she saw the same man, who she described as having black hair with gray in it, and the lady earlier in the day at a Denny's parking lot talking to Mark Grey about what she assumed was drugs.

Ms. Bezner again explained that she always used crack cocaine and that she witnessed the shooting from the bushes while smoking crack cocaine. She stated that she did not remember the type or color of the car which was occupied by the lady and man when the two young black boys approached. Moreover, Ms. Bezner testified that Mark Grey did not fire any shots into the car.

The Court concludes that the testimony of Donald Williams and Doreen Bezner qualify as newly discovered evidence under the test enunciated in Jones v. State, 591 So.2d at 915. Their testimony was discovered after trial, would have been admissible at trial, and is material to defendant's guilt or innocence.

The Court further concludes that the defendant or his counsel could not have known of these witnesses by the exercise of due diligence because trial counsel was not able to determine the location of the shooting, and these witnesses testified that they were homeless and addicted to drugs. Therefore, trial counsel could not reasonably investigate or locate Mr. Williams and Ms. Bezner.

The Court now addresses whether the defendant has shown that the testimony of Donald Williams and Doreen Bezner, in conjunction with the evidence introduced in defendant's first 3.850 post conviction hearing, as well as the evidence introduced at trial, would have probably produced

an acquittal. Swafford v. State, 828 So.2d 966 (Fla. 2002).

The Court concludes that the defendant has not demonstrated this prong of his newly discovered evidence claim. Donald Williams clearly testified that he did not witness the crime, and that he only heard about it from others at a local bar. Although his testimony could corroborate the fact that Doreen Bezner frequented the area of 62nd Street and Biscayne Boulevard, his testimony is less than credible due to his fifty-year drug addiction and his inability to reliably recall the time of day, month or year of the crime.

The Court finds the testimony of Doreen Bezner utterly unreliable and full of inconsistencies. Ms. Bezner is an eleven-time convicted felon and drug addict. The details of her testimony, as previously discussed, are inconsistent with (1) the description and appearance of both defendant and Kersten Kischnick; (2) the trial testimony of the defendant; and (3) the evidence presented at trial and the 1996 and 2002 post conviction hearings.

After considering, comparing and weighing the newly discovered eyewitness evidence, the totality of the evidence presented both at trial and the first post conviction hearing, the court concludes that the testimony of Ms. Bezner, in conjunction with the other evidence presented at the evidentiary hearing, would probably not produce an acquittal. See Kyles v. Whitley, 514 U.S. 419 (1995).

CONFESSION OF MARK DUGEN

17. Post conviction hearing counsel, Terri L. Backhus, testified at the evidentiary hearing that she was retained by the defendant to represent him in his appeal of Judge Gold's 3.850 order in late 1997 or early 1998. Ms. Backhus further testified that sometime before December 1998, she was

informed that there would be a German radio broadcast aired on December 10, 1998, disclosing a confession by someone who was involved in the murder of Kersten Kischnick. She explained that she requested from Peter Mueller, a German freelance investigative reporter who produced the aforementioned story, a copy of the tape.

Ms. Backhus also testified that she filed defendant's second motion for post conviction relief in 1999, and a motion to relinquish jurisdiction.

Ms. Backhus further testified about her attempts to locate witnesses and her actual meetings or conversations with several witnesses, including Mark Dugen, Donald Williams, Doreen Bezner, Peter Mueller, Walter Smykowski and Hilton Williams. In fact, Ms. Backhus explained that she met or spoke with Peter Mueller, Hilton Williams, Doreen Bezner and Donald Williams.

18. As to **Hilton Williams**, Ms. Backhus testified that she had her first face to face meeting with him in April 2002. She admitted that she lied to Mr. Williams about providing money to a Charitable Defense Fund to help him bond out of jail on several criminal cases pending in Leon County, Florida. Ms. Backhus also explained that she chose not to present Hilton Williams as a witness, that she did not believe everything he said and that she unsuccessfully tried to corroborate his story.

19. As to **Peter Mueller**, Ms. Backhus testified that she had a meeting with Mr. Mueller in the middle of 1998. She stated that she enlisted his help in trying to locate Mark Dugen. Ms. Backhus further testified that she did not request from Mr. Mueller the raw footage of his interview with Mark Dugen or Hilton Williams. She also explained that she was not able to personally confirm the existence of Mark Dugen or Mark Grey nor was she able to present Mark Dugen or Mark Grey

at the evidentiary hearing. However, Ms. Backhus stated that an investigator, Frank Clay, previously hired by Peter Mueller, did locate and speak to Mark Dugen on her behalf.

As to Ms. Backhus' testimony concerning Smykowski's affidavit which asserts he provided untruthful testimony at trial and received several benefits from the State, the Court finds this evidence unreliable and inadmissible for consideration by the Court.

After evaluating and weighing the newly-discovered evidence presented at the first post conviction hearing and the evidence presented at trial, the Court concludes that the defendant, as it relates to an alleged confession by Mark Dugen, has failed to satisfy the second prong of the Jones test. Specifically, the defendant presented evidence that was not only unreliable, but evidence that clearly would not be admissible at trial. The investigative report and/or tape prepared by journalist Peter Mueller is hearsay. More importantly, this evidence of a confession by Mark Dugen is totally unreliable. Hilton Williams, who not only recanted his prior testimony presented before Judge Alan Gold at the first post conviction hearing, testified that he staged or fabricated this story, as presented by his hand picked cast, for Mr. Mueller. The primary motive of Mr. Williams' admittedly and sickeningly fabricated story was solely to reap a monetary benefit from the publicized reward ($15,000) by the defendant for information regarding the crime.

Undoubtedly, Mr. Williams' testimony presented at the second post conviction hearing further affirms Judge Gold's findings that Mr. Williams' testimony is "less than credible and rife with inconsistencies", and it would probably not have created a reasonable doubt in the minds of the jury. Under the circumstances, the court further concludes that the prior testimony of Mr. Hilton Williams no longer supports the defendant's explanation of events as candidly acknowledged by Judge Gold.

Therefore, the Court finds that this newly-discovered evidence would not produce an acquittal at retrial. This claim is without merit and denied.

2. NEWLY DISCOVERED IMPEACHMENT EVIDENCE
(Smykowski's State Arranged Visit With His daughter)
and
3. THE STATE KNOWINGLY ALLOWED MISLEADING OR FALSE TESTIMONY

20. In his initial motion to vacate, the defendant claimed newly discovered evidence alleging that Mr. Smykowski's testimony was false regarding his claim that he was getting no benefits from the State for testifying because the prosecutors had no authority over his federal sentence. In citing to Judge Gold's Order at page 42 (citations omitted), the Supreme Court held that the following findings were supported by the evidence presented at the hearing and trial:

> Regarding the Smykowski matter, there is express testimony at trial regarding the possibility of the prosecutor writing a letter to the federal parole authorities on his behalf, as well as defense counsel's argument to the jury about it. At the post conviction hearing, both prosecutors testified that there was no deal with Mr. Smykowski. Given that the newly discovered evidence with respect to Mr. Smykowski is only of an impeaching nature, and not evidence of any false statement, it presents no basis for relief.
>
> State v. Riechmann, id. at 361.

In his amended motion to vacate, the defendant asserts that the State failed to disclose, at trial and in the first post conviction hearing, evidence that Mr. Smykowski received a State arranged visit with his daughter that provided impeachment of his trial testimony that he received no benefits from the State for testifying. Furthermore, the defendant asserts that the State knowingly allowed misleading or false testimony to be presented without correction when Smykowski testified that he had no contact with law enforcement between March 1988, and July 1988, two days before he

testified in front of defendant's jury and that he received no benefit for his testimony other than possibly a letter. In support of these two claims, which the Court consolidates for its finding and conclusion, the defendant presented a March 27, 1988 letter from Walter Smykowski addressed to former trial prosecutor Beth Sreenan, which states:

> Dear Ms. Beth Sreenan,
>
> I am writing to you with a request of a favour. As you know my ex-wife is in jail, and my daughter is staying with friends.
> However, it appears that this arrangement may not be acceptable for much longer, as this particular friend is experiencing difficulty in coping with her job, and looking after children.
> Can I be so bold, as to ask you if you can suggest anyone who could take my daughter in instead.
> I do not wish to send her to any institution or boarding school.
> I will of course pay well for this facility and will value your suggestion greatly.
> Also, if it is possible, can you give me an indication when approximately do you (word not legible) me being sent to Miami.
>
> Yours Sincerely
> Walter Smykowski

See Defendant's Exhibit C, Letter from Smykowski addressed to Ms. Beth Sreenan, dated 3-27-88, with an Eglin Air Base Stamp of March 28, 2988, and stamped RECEIVED, Oct. 4, 1988, Sexual Battery Unit, State Attorney, 11th Circuit.

The defendant also presented the testimony of Beth Sreenan who testified that she participated in an interview of Mr. Smykowski in March 1988. Ms. Sreenan further explained that "we did nothing for Walter Smykowski," and Smykowski's request in his letter was not the type of thing "we got involved in." She stated that she would remember if she did.

As to Smykowski's trip to visit his daughter with detectives Joseph Matthews and Robert Hanlon, Ms. Sreenan testified that she had no knowledge from detective Matthews, detective Hanlon

or Smykowski of this arranged visit, and that she did not know that the detectives also purchased chicken for them to eat during the visit with Smykowski's daughter. Ms. Sreenan further testified that had she known about this information, she would have disclosed it to trial counsel. Moreover, Ms. Sreenan emphatically maintained that the State nor the police promised or offered Smykowski anything for his testimony because he was a federal prisoner whom they had no control regarding his sentence, notwithstanding Smykowski's hope for a letter from the prosecutor to the Judge presiding over his case.

The Court concludes that the evidence is indisputable that detectives Hanlon and Matthews failed to reveal to the State an arranged visit by Mr. Smykowski with his daughter and the purchase of chicken for that visit. Although this information was not disclosed to the prosecutors, "the State Attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers." Gorham v. State, 597 So.2d 782, 784 (Fla. 1992). The Court, however, finds that this withheld evidence is not material.

As noted in United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985), evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

The Court concludes that the defendant did not lack an ability to impeach Mr. Smykowski with ample evidence as demonstrated by trial counsel's exhaustive cross examination. As noted in the State's Post Hearing Memorandum, at 29:

> At trial, the jury knew that Smykowski had once pleaded guilty to two bad check charges where Smykowski's wife had actually written the check because he wanted his wife to be able to be with his daughter. (D.A.R. 4113-14) The jury knew

> that Smykowski was concerned about his daughter's welfare because both Smykowski and his wife were incarcerated. (D.A.R. 4144) The jury knew that Stitzer's wife had taken custody of Smykowski's daughter for a period of time. Mr. Smykowski was impeached with the fact that he regularly acted as an informant, that he hoped he might receive a favorable letter from the State, that he had been convicted of 17 counts of fraud, as well as 3 state convictions for writing bad checks, and that he had previously earned a living selling things to people. (D.A.R. 4096-97, 4124, 4133). (D.A.R. refers to the record on direct appeal in Riechmann v. State, 581 So.2d 133 (Fla. 1991)).

Furthermore, it must be remembered that:

> Bullets recovered from Riechmann's motel room matched the type used to kill Kischnick. Riechmann possessed two of the only three types of weapons that could have been used to kill Kischnick, showing his preference for that particular type of weapon. An expert testified that particles found on Riechmann's hands established a reasonable scientific probability that Riechmann had fired a gun. Evidence of blood splatter and stains on the car, blanket, and clothes was consistent with the state's theory of what transpired that night. Insurance policies, reciprocal wills, and other evidence established a motive. Meanwhile, the state's scientific evidence about blood and gunpowder residue was inconsistent with Riechmann's theory of defense, and the state offered considerable evidence to impeach Riechmann on the witness stand.
>
> Riechmann v. State, 581 So.2d at 141.

In applying the Jones test, the Court concludes that this evidence was not known by the trial court, the defendant or his trial counsel and the State. At the evidentiary hearing, former prosecutors Kevin DiGregory and Beth Sreenan each steadfastly maintained that they did not promise Mr. Smykowski anything in return for his testimony. Therefore, the Court, having considered and weighed the newly discovered evidence, the totality of the evidence presented both at trial and the first post conviction hearing, concludes that this impeachment evidence would have not produced an acquittal had the evidence been known to the jury.

With regard defense exhibit C, Smykowski's letter to Ms. Sreenan, a close review of this

exhibit does not conclusively establish that the State received this letter before Smykowski testified at trial. The envelope in which the letter was received plainly shows a receipt date, by the Sexual Battery Unit, State Attorney 11th Circuit, of October 4, 1988, nearly two months after the jury returned its guilty verdicts for first degree murder and the weapons charge on August 12, 1988, notwithstanding an affixed Eglin Air Force Base, Fla. post mark, dated March 28, 1988. With no contrary evidence to dispute the State's receipt of this letter two months after the jury found the defendant guilty, the court does not find that this letter is material nor impeachment evidence withheld from the defendant.

As to defendant's assertion that Smykowski presented false testimony, the court concludes that the State did not knowingly mislead the jury, the Court or defense counsel with false testimony presented by Smykowski. Rather, the Court finds that a review of the trial testimony of Walter Smykowski clearly demonstrate a significant and difficult language barrier between trial counsel and Smykowski, whose verbal command of the English language was at best marginal. Unfortunately, Smykowski, who is a native of Russia, testified without the benefit of a court certified Russian interpreter. Trial counsel, who deposed Smykowski before trial and was aware of his native language, as well as knew Smykowski's level of fluency of the English language, did not request a Russian interpreter either for the witness' deposition or trial. Consequently, trial counsel's cross examination of Smykowski proved to be excruciatingly grueling, resulting in a lack of communication or misunderstanding between trial counsel and Smykowski. (See DAR 4112-4184).

Therefore, the Court concludes that if the newly discovered and/or withheld evidence, which could have been used to impeach Smykowski, had been turned over to the defendant, the outcome

of the case would have been the same. Morever, the Court reaches this conclusion after having evaluated and weighed each claim cumulatively to one another, as well as with defendant's previously presented claims coupled with the evidence presented at trial and the 1996 and 2002 evidentiary hearings. See State v. Gunsby, 670 So.2d 920 (Fla. 1996). Therefore, defendant's motion is without merit. Under the circumstances, the defendant's consolidated claims are without merit and denied.

As to claims IV (Law Enforcement conduct was outrageous) and VI (Denial of due process and equal protection) raised in defendants amended second motion to vacate judgment, the Court finds these claims are procedurally barred because they were either raised or could and should have been raised in his first post conviction motion and direct appeal.

IT IS THEREFORE ORDERED AND ADJUDGED that the defendant's Motion to vacate judgment of conviction for First Degree Murder is without merit and denied.

The defendant is hereby advised that he has thirty(30) days of the signing and filing of this order to appeal.

DONE AND ORDERED in Miami-Dade County, Florida, this 28 day of February 2003.

Jerald Bagley
Circuit Court Judge

A-10

966 So.2d 298
Supreme Court of Florida.

Dieter RIECHMANN, Appellant,
v.
STATE of Florida, Appellee.

No. SC03–760.
|
April 12, 2007.
|
As Revised on Denial of Rehearing Sept. 20, 2007.
|
Rehearing Denied Nov. 30, 2007.

Synopsis

Background: Following appellate affirmance of first-degree murder conviction and death sentence, 581 So.2d 133, defendant filed motion for postconviction relief. The Supreme Court, 777 So.2d 342, granted the motion in part and ordered a new sentencing proceeding. While the appeal on the first postconviction motion was pending, defendant filed a second postconviction motion. The Circuit Court, Dade County, Jerald Bagley, J., denied motion. Defendant appealed.

Holdings: The Supreme Court held that:

[1] defendant was procedurally barred from raising claim of outrageous police conduct;

[2] defendant could not establish *Giglio* or *Brady* claim based on officer testimony at pretrial deposition;

[3] defendant was not entitled to grant of motion to take deposition to perpetuate testimony of witness located in the United Arab Emirates;

[4] defendant could not establish *Giglio* or *Brady* claim based on evidence of pre-trial contacts between police and prosecution witness;

[5] defendant was not entitled to new trial based on testimony of newly discovered witnesses; and

[6] defendant was not entitled to recusal of trial judge based on judicial assistant's ex parte communication with State.

Affirmed.

West Headnotes (27)

[1] **Amicus Curiae** ⇐ Powers, functions, and proceedings

Amici are not permitted to raise new issues.

3 Cases that cite this headnote

[2] **Criminal Law** ⇐ Particular issues and cases

Capital defendant filing successive postconviction motion was procedurally barred from raising claim of outrageous police conduct, where defendant failed to properly assert claim on direct appeal or in prior postconviction motion, and defendant failed to demonstrate that claim could not have been asserted earlier. West's F.S.A. RCrP Rule 3.850.

2 Cases that cite this headnote

[3] **Criminal Law** ⇐ Necessity for Hearing

Criminal Law ⇐ Successive Post-Conviction Proceedings

Movant filing postconviction motion in a capital case is entitled to an evidentiary hearing unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or a particular claim is legally insufficient; however, when a claim is raised in a successive postconviction motion, the movant has the additional burden of demonstrating why the claim was not raised before. West's F.S.A. RCrP Rule 3.850.

2 Cases that cite this headnote

[4] **Criminal Law** ⇐ Review De Novo

Because a court's decision whether to grant an evidentiary hearing on a postconviction motion filed in a capital case is ultimately based on written materials before the court, its ruling is

tantamount to a pure question of law, subject to de novo review. West's F.S.A. RCrP Rule 3.850.

[5] **Criminal Law** ⇐ Use of False or Perjured Testimony

Capital defendant could not establish *Giglio* claim based on police officer's assertion that he testified falsely during his pretrial deposition and was subjected to alleged pressure by the State, where the State never offered officer as a witness at trial or relied upon his testimony in any way in securing defendant's conviction.

[6] **Criminal Law** ⇐ Use of False or Perjured Testimony

Criminal Law ⇐ Duty to correct false or perjured testimony

"*Giglio* violation" is demonstrated when it is shown (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material.

[7] **Criminal Law** ⇐ Use of False or Perjured Testimony

False evidence is deemed material, for purposes of claim of *Giglio* violation, if there is any reasonable probability that it could have affected the jury's verdict; the State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt.

[8] **Criminal Law** ⇐ Statements of witnesses or prospective witnesses

Capital defendant could not establish *Brady* claim based on police officer's assertion that he testified falsely during his pretrial deposition and was subjected to alleged pressure by the State, where the State never offered officer as a witness at trial or relied upon his testimony in any way in securing defendant's conviction, and defense counsel was aware of officer's assertions prior to trial.

[9] **Criminal Law** ⇐ Constitutional obligations regarding disclosure

Brady requires the State to disclose material information within its possession or control that is favorable to the defense.

2 Cases that cite this headnote

[10] **Criminal Law** ⇐ Materiality and probable effect of information in general

To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced.

7 Cases that cite this headnote

[11] **Criminal Law** ⇐ Materiality and probable effect of information in general

To establish prejudice or materiality under *Brady*, a defendant must demonstrate a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial; in other words, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

6 Cases that cite this headnote

[12] **Criminal Law** ⇐ Discovery and disclosure

Criminal Law ⇐ Materiality and probable effect of information in general

For purposes of *Brady*, questions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence.

4 Cases that cite this headnote

[13] **Criminal Law** ⇐ Depositions

Criminal Law ⇐ Discovery and disclosure

Rule of criminal procedure governing motion to take deposition to perpetuate testimony applies to trials, not to postconviction proceedings where discovery is limited and substantial discretion is afforded the trial court. West's F.S.A. RCrP Rules 3.190(j), 3.850.

2 Cases that cite this headnote

[14] **Criminal Law** ⇐ Depositions

Decision whether to grant a motion to perpetuate testimony lies within the discretion of the trial court. West's F.S.A. RCrP Rule 3.190(j).

2 Cases that cite this headnote

[15] **Criminal Law** ⇐ Discovery and disclosure

Capital defendant in postconviction proceedings was not entitled to grant of motion to take deposition to perpetuate testimony of witness, a fugitive located in the United Arab Emirates, where whereabouts of witness were unknown, defendant's motion was neither under oath nor accompanied by sworn affidavits, oath administered over the telephone from the United States to the United Arab Emirates would not have subjected witness to the penalty of perjury or otherwise have been effective in assuring a minimum level of reliability, and there was no extradition treaty between the United Arab Emirates and the United States. West's F.S.A. RCrP Rules 3.190(j), 3.850.

1 Cases that cite this headnote

[16] **Criminal Law** ⇐ Impeaching evidence

Capital defendant could not establish *Giglio* or *Brady* claim based on State's failure to disclose or correct allegedly false testimony regarding pre-trial contacts between police and prosecution witness who was being held in State's custody; undisclosed impeachment evidence that police took witness to see his daughter and bought fried chicken for the occasion was not sufficiently material to have changed outcome of the case, in light of significant other witness impeachment evidence, and substantial evidence of defendant's guilt.

[17] **Criminal Law** ⇐ Newly Discovered Evidence

For defendant to obtain a new trial based on newly discovered evidence, (1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence, and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

3 Cases that cite this headnote

[18] **Criminal Law** ⇐ Newly discovered evidence

Defendant seeking to vacate a sentence based on newly discovered evidence must establish that the newly discovered evidence would probably yield a less severe sentence.

2 Cases that cite this headnote

[19] **Criminal Law** ⇐ Newly Discovered Evidence

In determining whether newly discovered evidence compels a new trial, the trial court must consider all newly discovered evidence which would be admissible, and must evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.

3 Cases that cite this headnote

[20] **Criminal Law** ⇐ Newly Discovered Evidence

In determining whether newly discovered evidence compels a new trial, trial court should consider whether the evidence goes to the merits of the case or whether it

constitutes impeachment evidence, and whether the evidence is cumulative to other evidence in the case.

[21] **Criminal Law** ⇐ Materiality

Criminal Law ⇐ Conflicting or contradicted evidence

In determining whether newly discovered evidence compels a new trial, trial court should consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

1 Cases that cite this headnote

[22] **Criminal Law** ⇐ Evidence

When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, appellate court reviews the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence.

1 Cases that cite this headnote

[23] **Criminal Law** ⇐ Particular evidence or cases

Capital defendant was not entitled to new trial based on testimony of newly discovered witnesses, given that testimony of the two witnesses would probably not have produced an acquittal on retrial; first witness's testimony consisted primarily of hearsay that would not be admissible at trial, witnesses' statements were inconsistent with defendant's trial testimony, and witnesses' criminal and drug histories raised substantial credibility concerns.

[24] **Judges** ⇐ Bias and Prejudice

Capital defendant was not entitled to recusal of trial judge in postconviction proceedings based on judicial assistant's ex parte communication with prosecutor's secretary seeking to obtain copies of depositions of certain evidentiary hearing witnesses, where ex parte communication was not substantive, and ex parte communication did not result in any improper or nonrecord material being considered by the court.

1 Cases that cite this headnote

[25] **Judges** ⇐ Determination of objections

In considering a motion to disqualify judge, the trial court is limited to determining the legal sufficiency of the motion itself and may not pass on the truth of the facts alleged. West's F.S.A. R.Jud.Admin.Rule 2.330(f).

1 Cases that cite this headnote

[26] **Judges** ⇐ Sufficiency of objection, affidavit, or motion

In determining legal sufficiency of motion to disqualify judge, the question is whether the alleged facts would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial. West's F.S.A. R.Jud.Admin.Rule 2.330(f).

1 Cases that cite this headnote

[27] **Judges** ⇐ Standards, canons, or codes of conduct, in general

Judges should be careful to avoid ex parte contacts of any kind, even through the use of judicial assistants, that could be perceived to have been made without the knowledge of all parties. West's F.S.A. Code of Jud.Conduct, Canon 3(B)(7).

1 Cases that cite this headnote

Attorneys and Law Firms

***301** Terri L. Backhus and Martin J. McClain of Backhus and Izakowitz, P.A., Tampa, FL, for Appellant.

Bill McCollum, Attorney General, Tallahassee, FL, and Sandra S. Jaggard, Assistant Attorney General, Miami, FL, for Appellee.

Michael Tarre, Miami, FL, on behalf of the Federal Republic of Germany, as Amicus Curiae.

Opinion

PER CURIAM.

This case is before the Court on appeal from an order denying a motion to vacate a judgment of conviction of first-degree murder and a sentence of death under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons set forth below, we affirm the trial court's denial of Riechmann's postconviction motion.

FACTUAL AND PROCEDURAL HISTORY

The facts in this case are set forth in Riechmann's direct appeal in *Riechmann v. State,* 581 So.2d 133 (Fla.1991) (*Riechmann I*), and in the subsequent appeal on his first rule 3.850 postconviction motion in *State v. Riechmann,* 777 So.2d 342 (Fla.2000) (*Riechmann II*):

> Briefly stated, the evidence established that Riechmann and Kersten Kischnick, "life companions," came to Miami, Florida from Germany in early October 1987, and Kischnick was shot to death as she sat in the passenger seat of an automobile driven by Riechmann. Riechmann was charged with her murder. At trial, the State's theory was that Kischnick was a prostitute who worked for Riechmann, and when she no longer wanted to work as a prostitute, Riechmann killed her in order to recover insurance proceeds.
>
> Riechmann maintained that they were riding around videotaping some of Miami's sights when they got lost and asked for directions. He contended that the stranger whom they asked fired the shot that killed Kischnick. Riechmann sped away looking for help, driving several miles before he found a police officer.
>
> At trial, an expert for the State testified that numerous particles usually found in gunpowder residue were discovered ***302** on Riechmann's hand and, accordingly, there was a reasonable scientific probability that Riechmann had fired a gun. In Riechmann's hotel room, the police found three handguns and several rounds of ammunition, and an expert firearms examiner testified that the bullets were the same type as used to kill Kischnick. The examiner testified that the bullet that killed Kischnick could have been fired from any of the three makes of guns found in Riechmann's room. A serologist testified that the high-velocity blood spatter found on the driver's seat could not have gotten there if the driver's seat was occupied in a normal driving position when the shot was fired from outside the passenger-side window. Riechmann was convicted of first-degree murder.

Riechmann II, 777 So.2d at 347. At the penalty phase, Riechmann's attorney presented no mitigating evidence, and subsequently, the jury recommended the death penalty by a vote of nine to three. *Id.* The trial judge sentenced Riechmann to death, finding two aggravating factors: (1) the murder was committed for pecuniary gain, and (2) the murder was committed in a cold, calculated, and premeditated manner. *Id.* at 347 n. 1. Although Riechmann presented no mitigation, the trial judge "found as a nonstatutory mitigating circumstance that people in Germany who know Riechmann told police they consider him to be a 'good person.' " *Riechmann I,* 581 So.2d at 137. On appeal, this Court affirmed Riechmann's conviction and sentence, *id.* at 141, and the United States Supreme Court denied Riechmann's petition for writ of certiorari. *Riechmann v. Florida,* 506 U.S. 952, 113 S.Ct. 405, 121 L.Ed.2d 331 (1992). [1]

1 Riechmann argued seven claims on direct appeal: (1) the trial court should have excluded statements taken from Riechmann because the State failed to carry its burden of showing that Riechmann knowingly, intelligently, and voluntarily waived his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and gave such statements; (2) the State was guilty of prosecutorial misconduct and thereby violated Riechmann's rights to a fair trial and due process under the United States and Florida Constitutions; (3) the trial court erred in failing to require the State to make available its discovery on a timely basis; (4) the trial court erred in failing to exclude evidence seized from Riechmann in violation of the United States and Florida Constitutions; (5) the trial court erred in admitting Riechmann's more-than-ten-year-old prior German criminal convictions and in refusing to instruct the jury that it could only consider them with reference to the matter of the credibility of Riechmann; (6) under the totality of the circumstances involved in the case, the judgment and sentence should be reversed in the interest of justice; and (7) the evidence

was legally insufficient to support the guilty verdicts, judgment, and the imposition of the death penalty. *See Riechmann I,* 581 So.2d at 137–41. With the exception of our conclusion that the trial court abused its discretion in admitting Riechmann's conviction for involuntary manslaughter and negligent bodily harm, but committed harmless error in doing so, this Court found no error and affirmed the death sentence. *Id.* at 140–41.

On September 30, 1994, Riechmann filed his initial rule 3.850 motion for postconviction relief.[2] After an evidentiary hearing, ***303** the trial judge vacated Riechmann's sentence and ordered a new sentencing proceeding, concluding that Riechmann received ineffective assistance of counsel at the penalty phase and that the sentencing order had been improperly written by the prosecutor instead of the judge. *Id.* at 348. The judge denied the remainder of the claims. *Id.* This Court affirmed the trial court's order in its entirety, and remanded for a new sentencing proceeding before a new trial judge and jury. *Id.* at 366.[3] This Court also denied Riechmann's petition for writ of habeas corpus. *Id.* at 364.[4]

2 This motion, as amended, contained claims that trial counsel was ineffective for: (1) failing to conduct any independent investigation and failing to present abundant available evidence of Riechmann's innocence; (2) failing to use available experts to rebut and disprove crucial prosecution testimony erroneously and unprofessionally asserting that bloodstain and gunshot residue evidence obtained from the car proved Riechmann guilty; (3) his sudden, unilateral and patently unreasonable decision that Riechmann was to testify at trial; (4) failing to suppress illegally obtained evidence; (5) unreasonably deciding to prevent the jury from knowing about Riechmann's acquittal of a federal gun charge before his arrest on the instant murder charge; (6) failing to object to countless instances of flagrant prosecutorial misconduct; (7) refusing to comply with Riechmann's expressed desire to seat African–American jurors, failing to conduct appropriate death qualification inquiry, and seating manifestly biased jurors; (8) making unreasonable errors and omissions on cross-examination of the State's witnesses; (9) making an ineffective closing argument at the guilt phase of trial; (10) failing to bring Riechmann to speedy trial; (11) failing to investigate and present mitigating evidence, omission of which resulted directly in the jury's recommendation and the Court's imposition of the death sentence; and (12) failing to request additional counsel to assist in the trial. The remaining claims alleged: (1) newly discovered evidence entitling Riechmann to a new trial; (2) a *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), claim based on the State's withholding of material exculpatory evidence; and (3) a claim that the sentence was invalid because the trial court's findings were not written by the judge but by the prosecutor and provided to the judge ex parte.

3 Riechmann moved twice for this Court to relinquish jurisdiction during this appeal, and this Court denied both motions. The first request involved Riechmann's claim that the State pressured crime scene officer Hilliard Veski, who did not testify at trial, to give a false statement about the location of a blanket and flashlight in the car in which the victim was murdered. Riechmann's second motion to relinquish jurisdiction asserted newly discovered evidence consisting of an alleged confession from an individual named Mark Dugen to journalist Peter Mueller that Dugen, not Riechmann, had committed the murder.

4 In his petition for writ of habeas corpus, Riechmann raised five claims: (1) ineffective assistance of appellate counsel; (2) the trial court's abuse of discretion regarding the propriety of its rulings at trial; (3) the State's suppression of favorable evidence under *Brady;* (4) this Court's denial of Riechmann's equal protection rights by failure to review the entire record and by denying his request to file an oversize brief; and (5) ineffective assistance of postconviction counsel. *Riechmann II,* 777 So.2d at 364.

While the appeal on the first rule 3.850 motion was pending, Riechmann filed a second postconviction motion in the circuit court. This successive 3.850 motion, the subject of the current appeal,[5] raised the following claims (paraphrased): (1) newly discovered evidence involving an alleged confession from Mark Dugen; (2) the State deliberately withheld material exculpatory evidence and knowingly used false evidence regarding State witness Walter Smykowski; (3) the conduct

of law enforcement officers in this case was so outrageous that it deprived Riechmann of due process; (4) Riechmann is entitled to DNA ***304** testing of the presumptive blood evidence; (5) Riechmann was denied his rights to due process and equal protection because access to the files and records pertaining to Riechmann's case had been withheld by certain state agencies; and (6) the cumulative effect of newly discovered evidence warrants a new trial.

5 After this Court issued its opinion in the first rule 3.850 appeal, the trial court determined that the second postconviction motion should be resolved before the resentencing would be conducted. After conducting an evidentiary hearing on the second postconviction motion, the trial court entered an order denying relief and scheduled the resentencing for June 16, 2003. The trial court denied a motion for rehearing on the order and denied a motion to stay the resentencing proceedings. Riechmann filed a notice in this Court appealing the trial court's order denying relief, and on April 29, 2003, he filed an emergency motion to stay proceedings in the circuit court in order to hear his appeal of the denial of rule 3.850 relief. This Court denied the State's motion to dismiss or permit the lower court to exercise concurrent jurisdiction, but granted Riechmann's emergency motion to stay proceedings in the circuit court pending disposition of this appeal.

[1] After a *Huff*[6] hearing on October 19, 2001, the trial court granted an evidentiary hearing on the claims concerning the alleged confession of Mark Dugen and the State's conduct involving Walter Smykowski. After numerous delays, the evidentiary hearing was held; subsequently, counsel for each side submitted a written closing memorandum.[7] The trial court thereafter concluded that Riechmann did not exercise due diligence in pursuing his successive motion and amended claims on the merits, and the motion was therefore time-barred; further, the court held that even if the motion were not time-barred, Riechmann's claims were without merit and he was not entitled to relief. Riechmann now asserts five claims of trial court error on appeal.[8]

6 *Huff v. State,* 622 So.2d 982 (Fla.1993). There is no transcript available in the record provided to this Court concerning the *Huff* hearing or the trial court's ruling on this matter.

7 In his memorandum, Riechmann attempted to amend his rule 3.850 motion yet again, asserting three additional claims that purportedly conformed with the evidence presented at the evidentiary hearing: (1) the State violated due process by not disclosing evidence regarding Smykowski's state-arranged visit with his daughter that was favorable to Riechmann because it provided impeachment of Smykowski's trial testimony; (2) the State knowingly allowed misleading or false testimony to be presented without correction when Smykowski testified that he had no contact with law enforcement officers between March 1988 and July 1988, before he testified in front of Riechmann's jury that he received no benefit for his testimony other than possibly a letter; and (3) newly discovered evidence of innocence in the form of an eyewitness account of the shooting of the victim.

8 The Federal Republic of Germany filed an amicus curiae brief alleging that the State of Florida did not follow proper international protocol in the form of Letters Rogatory when obtaining evidence in Germany used against Riechmann during his trial. Despite Germany's amicus brief, which was filed nearly seventeen years after Riechmann's murder conviction, Riechmann has not raised any issue on this appeal regarding the propriety of the searches in Germany. Furthermore, it is axiomatic that amici are not permitted to raise new issues. *Dade County v. Eastern Air Lines, Inc.,* 212 So.2d 7, 8 (Fla.1968); *Michels v. Orange County Fire Rescue,* 819 So.2d 158, 159–60 (Fla. 1st DCA 2002). Therefore, this issue is not properly before this Court.

Further, this Court has already twice determined, both on direct appeal and in Riechmann's first habeas proceeding, that Riechmann was not entitled to suppression of the evidence seized in Germany, and the continued litigation of this issue is procedurally barred. *Riechmann II,* 777 So.2d at 365–66; *Riechmann I,* 581 So.2d at 138.

OFFICER VESKI'S TESTIMONY

Riechmann's first claim is that the lower court erred in refusing to allow Officer Hilliard Veski's proffered testimony at the evidentiary hearing below. This testimony concerns his inventory notes reflecting his recovery of a flashlight

and a blanket from Riechmann's car and his recollection of the State's pressuring him to testify at trial in a certain fashion. At the evidentiary hearing, the State objected to Veski testifying for the defense, asserting his testimony was irrelevant to the two claims on which an evidentiary hearing had been granted. Riechmann's counsel responded that the court must consider Veski's testimony cumulatively with the claim involving Smykowski. The court sustained the State's objection and did not permit Veski to testify. ***305** [9] We find no error in the trial court's ruling refusing to allow Veski's proffered testimony.

9 The defense proposed to have Veski testify by telephone.

Riechmann now argues that Veski's testimony should be considered as part of his argument that the State's "outrageous conduct" in this case violated both *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and that furthermore, the trial court erred in failing to grant an evidentiary hearing on this claim. He asserts alternatively that Veski's testimony could have served as an impeachment of the prosecutor who testified on the Smykowski claim at the evidentiary hearing. As noted, the lower court did not grant an evidentiary hearing on Riechmann's claim of outrageous law enforcement conduct, and Riechmann did not advance the "impeachment" argument at the hearing.

[2] **[3]** **[4]** We find no error in the trial court's denial of an evidentiary hearing on the "outrageous conduct" claim and possible *Brady* and *Giglio* violations, and we agree with the State's assertion that the claim was procedurally barred for not having been properly asserted earlier in the case. The movant in a rule 3.850 motion filed in a capital case is entitled to an evidentiary hearing unless "(1) the motion, files, and records in the case conclusively show that the [movant] is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." *Freeman v. State,* 761 So.2d 1055, 1061 (Fla.2000); *see also* Fla. R.Crim. P. 3.850(d). However, when a claim is raised in a successive motion, the movant has the additional burden of demonstrating why the claim was not raised before. *See Owen v. Crosby,* 854 So.2d 182, 187 (Fla.2003) ("A second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion."). Because a court's decision whether to grant an evidentiary hearing on a rule 3.850 motion filed in a capital case is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. *See State v. Coney,* 845 So.2d 120, 137 (Fla.2003).

The State asserts that Riechmann failed to demonstrate why this "outrageous conduct" claim in relation to Veski's testimony had not been asserted in the prior 3.850 motion, citing transcripts from the trial and the first postconviction proceedings demonstrating that Riechmann's trial counsel knew early on, even before trial, about Veski's role in securing the blanket and flashlight from Riechmann's car as well as Veski's claim of being pressured by the State.

The State is correct that this current claim is procedurally barred and was properly summarily denied by the trial court. The record reflects that Veski performed an inventory of the car in which the murder occurred. Veski initially stated at a pretrial deposition that he found a flashlight with bloodstains on it in the trunk of the car during his inventory search. After this deposition, but before trial, Veski informed Riechmann's trial counsel that he had testified falsely about the flashlight during the deposition and that he had refused to testify for the State at trial because of alleged improper pressures the State placed upon him to accommodate the State's case. Despite these revelations, Riechmann's counsel did not call Veski as a defense witness at trial, and Veski never testified at the trial in any capacity.

***306** In addition, during the trial, the State placed a folded blanket recovered from the front seat of the car into evidence. [10] Riechmann's trial counsel conducted a voir dire of Detective Robert Hanlon when the State attempted to introduce the blanket. During the voir dire, Detective Hanlon stated that he saw the blanket on the driver's seat of the car when he secured the car the night of the murder and did not see it again until he submitted the blanket to William Rhodes, the State's serology expert, for serology testing eight or nine months later. Detective Hanlon stated that Veski inventoried the car two days after the murder and took the blanket out of the car and delivered it to the Miami Beach Police Property Room. Riechmann's counsel further inquired:

10 The crime scene photographs depict this blanket being in the driver's seat. The State's serology expert, William Rhodes, testified that specks of blood found on the blanket in that position could only have reached the blanket during the shooting if the driver's seat was unoccupied at that time.

Riechmann himself, however, maintained that he had been sitting on the blanket while driving the car. In both parties' opening statements at trial, they stated the blanket was found on the driver's seat. Defense counsel also asserted:

> The evidence is going to show things were pulled out of the backseat onto the front seat, stacked up on the hood of the car and then bagged in mass. So we don't know what had blood on it initially and where that blood was initially as opposed to where and what had blood on it and where it had blood on it in June of 1988, eight months later, bullets, blood spots, gunshot residue.

Officer Charles Serayder, among the first policemen at the scene of the crime, testified that the blanket was on the driver's seat when he first entered the car to check if the victim was still alive and had a pulse. Riechmann himself subsequently testified that he believed the blanket was on the driver's seat folded the way it appeared in the crime scene photographs, although he claimed that the twenty-one specks of blood on the top of the blanket facing the ceiling of the car could have come from his dog, which underwent surgery and laid on the blanket afterwards.

Q. And do you know why the records show that it was recovered from the right front seat of the car?

....

A. I don't believe it is in my records, sir, I don't know.

Q. How about the records of the Miami Beach Police Department?

A. I'm not privy to that, sir, I don't know.

Q. You did not take the blanket out of the car, correct?

A. No, sir.

Q. So you don't know what happened or what was done or what was laid on that blanket from the time you saw it on the night of October 25th until you got it from the property room and gave it to Mr. Rhodes on June what?

A. June 29th, sir.

Q. Do you?

A. No, sir.

Q. All right. There were other blood stained articles in that car, weren't there?

A. Yes, sir, there was.

Q. Towels, shawls, robes, correct?

A. That's correct.

Q. Do you know whether they—well, first, do you know if this is the original container that Veski put this blanket in?

A. I don't know sir. You've got to ask Veski.

Q. Okay. So you don't know whether this has been rebagged since the time he collected it from the car and put it into the property room, is that correct?

A. No, sir.

Q. Do you know whether or not this blanket was placed in a bag, a large bag with a number of other blood stained articles?

***307** A. No, sir, I don't.

....

Q. So how can you tell us under oath then, Mr. Hanlon, that this blanket is in the same condition that you saw it on the night of October 25th?

A. It looks like the same blanket that was on the seat of the car.

Q. Oh, it looks like the same blanket?

A. Yes, sir.

Q. Okay. How can you tell us that it has—it is in the same condition as when you collected it or when you saw it rather?

A. I can't tell you that, sir.

In short, the record is clear that the defense had long been aware of Veski's role in the case, including his claims of pressure from the prosecution. However, no legal justification for failing to assert this claim at an earlier time was offered to the trial court below to overcome the procedural bar for claims raised in successive postconviction motions. Accordingly,

relief on this claim of "outrageous conduct" was properly summarily denied by the trial court.

Regardless of this procedural bar, we also agree with the State's assertion that Riechmann could not have established a *Brady* or *Giglio* claim even if Veski's proffered testimony is considered.

Giglio Claim

[5] **[6]** **[7]** A *Giglio* violation is demonstrated when it is shown (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. *Guzman v. State,* 941 So.2d 1045, 1050 (Fla.2006). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable probability that it could have affected the jury's verdict. *Id.* Under this standard, the State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt. *Id.; see also Mordenti v. State,* 894 So.2d 161, 175 (Fla.2004).

The *Giglio* claim here fails fundamentally because it is undisputed that Veski never testified, falsely or otherwise, at trial. *See Buenoano v. State,* 708 So.2d 941, 948 (Fla.1998) (holding that because the witness the defendant claimed presented "misleading, inaccurate, and perjured testimony" did not testify at trial, the defendant's *Giglio* claim was baseless).

Brady Claim

[8] **[9]** **[10]** **[11]** **[12]** *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. *Mordenti,* 894 So.2d at 168 (citing *Guzman v. State,* 868 So.2d 498, 508 (Fla.2003)). To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence—either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *See Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

> To establish prejudice or materiality under Brady, a defendant must demonstrate "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." *Smith v. State,* 931 So.2d 790, 796 (Fla.2006) (citing *Strickler v. Greene,* 527 U.S. 263, 289[, 119 S.Ct. 1936, 144 L.Ed.2d 286] (1999)). "In other words, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Id.* (quoting *Strickler,* 527 U.S. at 290[, 119 S.Ct. 1936]).

***308** *Ponticelli v. State,* 941 So.2d 1073, 1084–85 (Fla.2006). With regards to *Brady's* second prong, this Court has explained that "[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense ... had the information." *Provenzano v. State,* 616 So.2d 428, 430 (Fla.1993) (citing *Hegwood v. State,* 575 So.2d 170, 172 (Fla.1991); *James v. State,* 453 So.2d 786, 790 (Fla.1984)). Questions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence. *Way v. State,* 760 So.2d 903, 911 (Fla.2000). This Court then reviews de novo the application of the law to these facts. *Lightbourne v. State,* 841 So.2d 431, 437–38 (Fla.2003).

As we have already discussed, the record affirmatively demonstrates that Riechmann's counsel knew in advance of trial of Veski's role in securing evidence from the crime scene and knew of Veski's assertions that he had testified falsely during his pretrial deposition and was subjected to alleged pressure by the State. Riechmann's trial counsel testified at the initial postconviction evidentiary hearing in this case that Veski "had been pressured to testify that way but he wasn't going to do it because it wasn't true." In fact, no testimony concerning the flashlight recovered from Riechmann's car was presented at trial. In addition, during the first postconviction hearing, although Riechmann's trial counsel stated he did not recall seeing Veski's handwritten notes from his inventory search of the car, he did not dispute that those notes were found in trial counsel's file. Hence, the record affirmatively reflects defense counsel's awareness of Veski's controversial role in the case. More importantly, it is also apparent from the record that Riechmann could have called Veski to testify at trial regarding the flashlight, the location of the blanket, or the alleged pressure from the State. Moreover, since Veski did not testify at trial, it also is apparent that any "pressure" on him never resulted in any benefit to the State.[11] Finally, because all of this information was not only equally accessible but was actually known to defense counsel, any *Brady* claim based upon its existence must also fail.

11 Riechmann also asserts that a cumulative analysis of Veski's proffered testimony along with other allegations of State misconduct would demonstrate prejudice similar to that found in *Mordenti,* where this Court granted relief when the cumulative effect of withheld *Brady* material cast doubt on the State's key witness, causing the confidence in the outcome of the trial to be undermined. *Mordenti,* 894 So.2d at 175. However, in *Mordenti,* the State admitted suppressing evidence; indeed, both pieces of evidence that were evaluated cumulatively to warrant relief were individually found to constitute *Brady* violations. *Mordenti,* 894 So.2d at 173–74.

> In contrast, as noted above, Veski did not testify at trial, and the defense knew of Veski's inventory notes as well as Veski allegedly testifying falsely at his deposition and being pressured by the State. This Court has held that when the individual claims are procedurally barred or without merit, a claim of cumulative error also fails. *See Griffin v. State,* 866 So.2d 1, 22 (Fla.2003) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit, and [the defendant] is not entitled to relief on this claim."); *Downs v. State,* 740 So.2d 506, 509 n. 5 (Fla.1999) (examining all the defendant's claims including a *Brady* claim and finding none of them sufficient to warrant an evidentiary hearing; therefore, there was no cumulative error).

We conclude, therefore, that the lower court did not err in excluding Veski's testimony at the limited evidentiary hearing as not being relevant to the claims being tried. We also find no error in the trial ***309** court's summary denial of any *Brady* or *Giglio* claim predicated upon the State's withholding of Veski's evidence or alleged pressure placed upon him by the State.

WALTER SMYKOWSKI

Riechmann next argues that the lower court should have allowed him to perpetuate the testimony of Walter Smykowski by a deposition in Dubai, or alternatively, the court should have allowed him to introduce Smykowski's affidavit at the evidentiary hearing. He also asserts that the trial court erred in its ruling denying his *Brady* and *Giglio* claims based on the State's failure to disclose all of its pretrial contacts with Smykowski.

In his first rule 3.850 postconviction motion, Riechmann raised two claims regarding Smykowski. First, he alleged that his trial "counsel was deficient for failing to investigate evidence that would have discredited the State's jailhouse informant, Smykowski, who testified that Riechmann was elated at the prospect of becoming a millionaire from Kischnick's insurance policies." *Riechmann II,* 777 So.2d at 357. Another inmate had offered to testify during trial as to Smykowski's lack of credibility, but Riechmann's counsel had decided not to call this witness. *Id.* This Court affirmed the trial court's conclusion that Riechmann's trial counsel's decision not to call the witness was reasonable. *Id.* Riechmann also claimed that Smykowski testified only because prosecutors had told him that they would help him get out of his federal criminal sentence. *Id.* at 361. Riechmann argued that this evidence had not been disclosed and could have been used at trial to impeach Smykowski. *Id.*

> However, at trial, Smykowski acknowledged that he was hoping that the State would write a letter to the judge who was sentencing him, and defense counsel asserted at closing argument that his testimony was motivated by his desire for such a letter. Moreover, although a letter was eventually written, the prosecutor testified at the evidentiary hearing that he had not promised to write one.

Id. at 361. This Court affirmed the trial court's findings in denying postconviction relief that there had been express testimony at trial regarding the possibility of the prosecutor writing a letter to the federal parole authorities, and hence this allegedly withheld or newly discovered evidence presented no basis for relief. *Id.*

Deposition of Smykowski

In the current proceedings, postconviction counsel asserted that Smykowski, while a fugitive from U.S. authorities, had given a statement to a German journalist that his trial

testimony was false. Terri Backhus, Riechmann's current counsel, testified that she learned from Peter Mueller, a German journalist, that Smykowski had given an affidavit recanting his testimony from trial. Thereafter, Backhus met with Smykowski in Dubai, United Arab Emirates, in March 2002 and showed him his affidavit that she had obtained from Mueller. Smykowski told her that he had lied at Riechmann's trial and that the State told him what his testimony should be. However, Smykowski would not return to the United States to testify because there was an outstanding warrant for his arrest.

Riechmann moved to perpetuate the testimony of Smykowski by asking the trial court to accept his deposition in lieu of live testimony at the postconviction evidentiary hearing. Counsel stated that she proposed an investigative trip to Dubai, and that while there she would arrange a deposition, *assuming she could locate Smykowski,* and the State could appear by overseas telephone and Smykowski could testify while being videotaped and recorded. ***310** The State objected to this proposal because a definite location as to Smykowski's whereabouts was not then known and, further, because Riechmann was asking the court to accept testimony that had none of the reliability and procedural safeguards set out in Florida Rule of Criminal Procedure 3.190(j) concerning depositions to perpetuate testimony. The trial court denied postconviction counsel's motion on the basis that there was no witness available at that point, but it did so without prejudice and held that if the witness was later located, it would revisit the matter.

[13] **[14]** Rule 3.190(j) states in relevant part:

> (j) Motion to Take Deposition to Perpetuate Testimony.
>
> (1) After the filing of an indictment or information on which a defendant is to be tried, the defendant or the state may apply for an order to perpetuate testimony. The application shall be verified or supported by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that the witness's testimony is material, and that it is necessary to take the deposition to prevent a failure of justice. The court shall order a commission to be issued to take the deposition of the witnesses to be used in the trial and that any nonprivileged designated books, papers, documents, or tangible objects be produced at the same time and place. If the application is made within 10 days before the trial date, the court may deny the application.

Fla. R.Crim. P. 3.190(j). Of course, rule 3.190(j) applies to trials, not to postconviction proceedings where discovery is limited and substantial discretion is afforded the trial court. "The decision whether to grant a motion to perpetuate testimony lies within the discretion of the trial court." *Cherry v. State,* 781 So.2d 1040, 1054 (Fla.2000). Hence, we review such a decision by the trial court for abuse of discretion. *Jackson v. State,* 575 So.2d 181, 187 (Fla.1991).

[15] In the present case, Riechmann's motion was neither under oath nor accompanied by sworn affidavits. Importantly, there was no assertion as to where Smykowski was actually then residing, and the motion essentially asserts, "If counsel finds Mr. Smykowski," a deposition can be arranged. Riechmann filed his motion to perpetuate the testimony of Smykowski on January 28, 2002, and proposed that the deposition be taken sometime between February 1 and 3, 2002. The State asserts that the defense did not allow the State adequate notice to attend Smykowski's deposition even if it had occurred or could be arranged. At the hearing on the matter, counsel admitted she had no address or phone number for Smykowski and did not know if he could be found.

The State points out that any oath administered over the telephone from the United States to Dubai would not have subjected Smykowski to the penalty of perjury or otherwise have been effective in even assuring a minimum level of reliability. *See Harrell v. State,* 709 So.2d 1364, 1371 (Fla.1998) (stating that an oath is one of the additional safeguards of the Confrontation Clause and that "an oath is only effective if the witness can be subjected to prosecution for perjury upon making a knowingly false statement"). Further, *Harrell* held that it must be established that an extradition treaty exists between the witness's country and the United States. *Id.* Here, it is undisputed that there is no extradition treaty between the United Arab Emirates and the United States. *See* 18 U.S.C. § 3181 (2000). ***311** Hence, these fundamental safeguards are wholly lacking here.

We agree that the circumstances presented to the trial court do not demonstrate an abuse of discretion in the court's rulings. The defense was presenting a speculative scenario to the trial court fraught with concerns of reliability. Not only would the defense attorney be traveling to a country with which the United States has no extradition treaty in an attempt to find a convicted felon and depose him with no enforceable oath, but at the time the request was ripe there was only a three-day window of opportunity, with a state attorney presumably on standby via phone in the United States.

Further, although Riechmann's counsel testified that she met with Smykowski in March 2002 (two months after Riechmann's initial motion to perpetuate testimony was denied), she waited until the end of the day on July 11, 2002, the day before the evidentiary hearing was scheduled to conclude, to renew this motion, which again was denied. Rule 3.190(j)(1) specifically states that requests to perpetuate testimony made within ten days of the evidentiary proceeding may be denied. *See* Fla. R.Crim. P. 3.190(j)(1) ("If the application is made within 10 days before the trial date, the court may deny the application.").

Finally, Riechmann's counsel continuously acknowledged throughout the proceedings that she could not state with any confidence where Smykowski might be at any given time. Therefore, we conclude the trial court did not abuse its discretion in finding Riechmann's motion to perpetuate Smykowski's testimony insufficient and denying the motion without prejudice so that Riechmann could renew the motion if Smykowski was actually located and the requirements of the rule could be satisfied. *See Pope v. State,* 569 So.2d 1241, 1246 (Fla.1990) (holding that a "party offering the deposition must show it has exercised due diligence in its search for the deponent") (citing *Pope v. State,* 441 So.2d 1073, 1076 (Fla.1983)). Those circumstances were never demonstrated to exist here.

We also find no error in the trial court's ruling that Smykowski's affidavit could not be introduced into evidence instead of a deposition because it is hearsay. *See Randolph v. State,* 853 So.2d 1051, 1062 (Fla.2003) (finding that an affidavit cannot be admitted into evidence in a postconviction proceeding unless it falls under one of the four hearsay exceptions by which the statement of a declarant who is unavailable as a witness may be presented into evidence). Riechmann has failed to identify a proper legal predicate for admission of the affidavit.

Brady/Giglio Violations

[16] Riechmann next argues that even without Smykowski's deposition, the trial court erred in denying his *Brady* and *Giglio* claims predicated upon the State's failure to disclose all of its contacts with Smykowski prior to trial. He argues that the State failed to disclose false testimony concerning police contact with Smykowski and Smykowski's recently discovered pretrial visit with Detectives Hanlon and Matthews to see his daughter, Smykowski's letter to the State Attorney's Office asking for assistance in caring for his daughter, and the existence of reward money allegedly promised to Smykowski for testifying. [12]

12 Riechmann also relies upon evidence previously presented at the 1996 evidentiary hearing in the initial postconviction proceedings. This includes: (1) character statements from thirty-seven German witnesses the State admitted to withholding; (2) portions of Detective Trujillo's police report containing statements that were favorable to the defense which the trial court at the first postconviction proceedings found to be improperly withheld by the State but not undermining confidence in the reliability of the jury's verdict; (3) police reports from Detective Hanlon; (4) evidence involving the trial prosecutor's letter to the United States Parole Commission stating that Smykowski was instrumental in achieving Riechmann's guilty verdict and death sentence; and (5) other previously undisclosed evidence presented in 1996.

This Court held in *Riechmann II* that Riechmann's claim concerning the thirty-seven German witnesses was "procedurally barred because he could and should have raised it on direct appeal, since by trial's end he was aware of the statements." *Riechmann II,* 777 So.2d at 363. This Court rejected Riechmann's *Brady* claim regarding Trujillo's police reports because "there was no reasonable probability that the results of the trial would have been affected had this evidence been disclosed." *Riechmann II,* 777 So.2d at 362. This Court affirmed the trial court's finding "that there was no undisclosed deal between Smykowski and the State." *Id.* at 363. Because all these claims were found to be procedurally barred or meritless, they cannot be considered in cumulative analysis.

***312** Specifically, Riechmann asserted that the State failed to disclose at trial and during the first postconviction hearing that Smykowski had gone on a State-arranged visit to see his daughter and that law enforcement officers had bought fried chicken for the occasion. Riechmann also presented a letter that Smykowski had written to the prosecutor asking for help in suggesting someone who could take care of his daughter while he was imprisoned. He alleged that the State knowingly allowed misleading or false testimony to be presented without

correction when Smykowski testified that he had no contact with law enforcement officers between March and July 1988.

Prosecutor Sreenan testified at the evidentiary hearing below that Smykowski had sought out the State and volunteered his testimony against Riechmann. She also asserted that she did not recall seeing any letter from Smykowski concerning his daughter before Riechmann's trial, and that while she later became aware of the letter, the State did nothing for Smykowski's daughter, and his request for assistance was something the State would not get "involved in." She also testified that if she had known about Smykowski's visit to his daughter and the officers' purchase of fried chicken, she probably would have disclosed this to the defense.

Also at the evidentiary hearing below, Detectives Robert Hanlon and Joe Matthews confirmed that they had taken Smykowski on a trip to see his daughter pursuant to his request. Detective Matthews testified that he and Hanlon had secured Smykowski's custody from jail in order to conduct further investigation on the Riechmann case and, on the way back to jail, they allowed him a brief visit with his daughter. Detective Hanlon testified that they bought fried chicken to eat and that Smykowski was grateful. John Skladnik, a friend of Smykowski's from Poland, testified that he saw Smykowski and two men walk towards the house for this visit. Deborah Schaefer, Smykowski's daughter, testified that she remembered her father coming to visit her once when she was a child. Edward Carhart, Riechmann's trial counsel, testified that he did not know of Smykowski's letter to Sreenan, and had no indication that Smykowski had visited his daughter. He said he would have used this visit as impeachment of Smykowski.

The trial court concluded first that this claim was time-barred because Riechmann did not demonstrate that he exercised due diligence in pursuing his successive motion and amended claims.[13] However, the trial ***313** court held that even if the newly discovered or withheld evidence, which could have been used to impeach Smykowski, had been turned over to the defendant, the outcome of the case would not have been affected. The trial court reached this conclusion after having evaluated and weighed each claim individually and cumulatively to one another, as well as cumulatively with Riechmann's previously presented claims and the evidence presented at trial and in the 1996 and 2002 evidentiary hearings. The trial court agreed that there was evidence that Detectives Hanlon and Matthews failed to reveal their taking Smykowski to see his daughter and that the State was charged with constructive knowledge of this event. But the trial court held that this impeachment evidence would not have sufficient import to undermine confidence in the outcome of the proceedings or otherwise merit postconviction relief. The trial court also held that it could not conclude on the evidence presented that the State knowingly misled the jury in any way with Smykowski's testimony.

13 The trial court concluded in its order denying postconviction relief that Riechmann had not exercised due diligence in pursuing his successive motion and amended claims, citing specific instances of a lack of due diligence on issues concerning Smykowski:

> Specifically, a lack of due diligence is evident from the following: (1) trial counsel's testimony at the 1996 and 2002 post conviction evidentiary hearing and trial counsel's pre-trial deposition of Smykowski revealed trial counsel (Edward Carlhart) and first post conviction counsel (James Lohman) were aware of Smykowski's concern and security for his daughter; (2) the existence of the March 27, 1988 letter from Smykowski to Sreenan which could and should have been discovered before Defendant's first Rule 3.850 motion filed by postconviction counsel James Lohman in 1994; (3) first postconviction counsel's inadequate search for Smykowski; (4) second post conviction counsel's (Backhus) failure to request information from journalist Peter Mueller concerning the whereabouts of Smykowski; and (5) second post conviction counsel's delay in requesting a copy of Mueller's investigative report or tape concerning confession by Mark Dugen, as well as her failure to request from Mr. Mueller copy of raw footage of Mark Dugen's taped interview.

As explained above in relation to Veski, *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. To meet the materiality prong, the defendant must demonstrate a reasonable probability that had the suppressed evidence been disclosed the jury would have reached a different verdict. *Strickler,* 527 U.S. at 289, 119 S.Ct. 1936. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Way,* 760 So.2d at 913; *see also Strickler,* 527 U.S. at 290, 119 S.Ct. 1936. Also as explained previously, a

Giglio claim alleges that a prosecutor knowingly presented false testimony against the defendant. The false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. *Guzman,* 941 So.2d at 1050.

On the merits, we concur with the trial court's conclusion that the impeachment evidence against Smykowski, considered cumulatively with the evidence already presented in prior proceedings, does not undermine confidence in the outcome of Riechmann's trial or otherwise demonstrate an entitlement to a new trial. The jury heard at trial that Smykowski had once pled guilty to two bad check charges, that he was concerned about his daughter's welfare because both he and his wife were in jail, that he regularly acted as an informant, that he hoped he might receive a letter favorable to him from the State, and that he had been convicted of seventeen counts of fraud. The additional evidence about Smykowski's daughter adds very little to an evaluation of Smykowski's ***314** credibility. Furthermore, concerning Smykowski's State-arranged trip to see his daughter, it is difficult to ascertain if the State actually presented false testimony when Smykowski testified at trial concerning whether he had any other conversations with the authorities about the case. It is apparent from the trial record that Smykowski was having difficulty understanding questions on the stand because English was not Smykowski's first language. Whether Smykowski would have understood these questions to include the visit with his daughter is unclear.

It is true that the State is assumed to know the activities of law enforcement officers. *See Guzman v. State,* 868 So.2d 498, 505 (Fla.2003) (concluding that reward money a detective paid to a testifying witness was imputed on the prosecutor who tried the case). However, even if this constituted false testimony, we hold that it was not sufficiently material to merit a new trial when compared to the substantial evidence presented against Riechmann at trial by the State. The record also reflects evidence to support the trial court's finding that Riechmann did not conclusively prove the State actually had Smykowski's letter to the State before trial. Nevertheless, even accepting its nondisclosure, we find any harm to be inconsequential and insufficient to meet the prejudice prongs of either *Brady* or *Giglio.* [14]

14 As to the issue of reward money promised to Smykowski, Riechmann failed to produce evidence to substantiate the claim at the evidentiary hearing.

NEWLY DISCOVERED EVIDENCE

Riechmann also asserts that the lower court erred in denying his newly discovered evidence claim based upon the testimony of allegedly newly discovered witnesses Donald Williams and Doreen Bezner. [15]

15 At Riechmann's first postconviction proceeding, he introduced the testimony of Early Stitt and Hilton Williams. Stitt testified that he was selling crack along Biscayne Boulevard when he heard a shot. He saw several men approach a car but did not see the shooter and could not describe the color of the car. He was not sure of the year of this occurrence, admitted to having his memory refreshed by Riechmann's private investigator, acknowledged thirty-eight felony convictions and four aliases, and stated that he was under the influence of drugs the night he witnessed the incident.

Williams, who was incarcerated at the time of his testimony, testified that he was selling drugs with his girlfriend and Stitt (even though Stitt testified he was *not* with Williams at this time) when he saw a red car with a rental tag, but he could not remember the date. He thought the occupants of the car wanted to buy drugs. Someone yelled at the car, the car made a U-turn, and someone named Mark Dugen shot into the passenger side of the car. Williams also apparently introduced Mark Dugen to a German journalist, and stated that Dugen committed the shooting. Williams admitted having been convicted of ten felonies and that he would lie if it suited his purpose. The trial court found these individuals' testimony "to be less than credible and rife with inconsistencies with [Riechmann's] own testimony at trial." This Court affirmed the trial court's determination in Riechmann's first postconviction proceeding that Williams' testimony was "less than credible and 'rife with inconsistencies' with the Defendant's own testimony at trial." *Riechmann II,* 777 So.2d at 360.

Williams testified at the second postconviction evidentiary hearing that the man he produced to a German journalist was not Mark Dugen but was a drug addict on the street whom he

paid out of money he received from Riechmann's counsel and the German journalist. He stated that he had no personal knowledge of the crime, except that told to him by Riechmann's first postconviction counsel. He stated that the State had promised him no money, and that he had lied in his testimony in the first postconviction evidentiary hearing and arranged for others to lie. A tape was also played at the second postconviction evidentiary hearing in which he was discussing "charitable contributions to the Hilton Williams Be Free Fund" with Riechmann's current counsel. The trial court was entitled to consider this prior evidence cumulatively with Williams' current evidence in resolving the credibility and weight of the evidence presented on the newly discovered evidence claim.

Riechmann's claim on appeal regarding "Kool," an alleged drug dealer and associate of Williams who allegedly was overheard by Williams bragging about "ripping off and wasting someone," was not raised as an issue in Riechmann's second postconviction motion. In fact, it was not raised until Riechmann's written closing argument after the second evidentiary hearing. Under these circumstances, we conclude the trial court acted properly in rejecting any claim relating to "Kool" as both untimely and improperly pled.

***315** At the evidentiary hearing below, Williams testified that he was unemployed, homeless, and sixty-four years old. He testified that he had heard of an incident that occurred in the alleged area of the shooting, but did not see anything firsthand. He further stated that he heard people discussing the incident at a bar, and that he observed Mark Dugen and Doreen Bezner in the area. No one from law enforcement spoke to Williams regarding the incident, and he testified that he never heard of a person named Mark Gray, Bezner's boyfriend. On cross-examination, Williams admitted he was not sure of the month or year of the incident he heard about, and he admitted to having a fifty-year drug and alcohol abuse problem.

Bezner, also homeless, testified at the evidentiary hearing that she was living with her boyfriend Mark Gray in October 1987. She stated that knew she was in Miami at this time because she "left [her] kids." Bezner further testified that she witnessed an incident off 62nd and Biscayne around dusk: "I was in a dope hole shooting in a bush and a car pulled up and my old man [Mark Gray] sold dope, so he held up his hands to stop the people and when the car pulled up two GITS [young black boys] ran up to the car and shot and the car took off." She stated that she was approximately ten to fifteen feet away, and that Mark Gray did not fire shots into the car. Bezner testified that after this incident, Mark Gray locked her in their hotel room and threatened her if she ever told anyone about the shooting, and that he had indicated to her prior to the incident that he was expecting a heroin deal to go through that night so they would have a lot of money and would not need to "work anymore." Bezner stated that she remained in the hotel for a week until she escaped because Gray had become abusive since the incident.

Bezner further testified at the hearing below that she did not notice what color the car was but that she recognized the two occupants of the car because she had seen them earlier in the day at a Denny's restaurant. In describing the occupants of the car, she stated, "The lady was blond. A lot of gold. That's all I can say about the lady." She stated that the man at Denny's had "a bleach kind of job, whatever it was," but then said he had "black hair with gray in it." At the evidentiary hearing, Bezner could not identify anyone in the courtroom as being an occupant of the car, even though Riechmann was present. However, upon being shown a magazine with a picture of Riechmann in it, she was able to identify the person in the picture as the driver of the car.

On cross-examination, Bezner stated that she had never known her boyfriend to be called Mark Dugen, but she "wasn't into his business." Concerning her crack cocaine habit, Bezner stated that she was smoking crack cocaine at the time of the incident and was constantly using crack then and now. She also admitted that she was a prostitute and Mark Gray was her pimp, and that she has been convicted of over ten felonies.

***316** Following the evidentiary hearing, the trial court agreed that the testimony of both witnesses would qualify as newly discovered evidence and, furthermore, that Riechmann could not have known of these witnesses any earlier by exercising due diligence. However, the trial court ultimately denied relief and concluded that the testimony of the witnesses, when considered in conjunction with the evidence introduced at Riechmann's first rule 3.850 postconviction hearing and the evidence introduced at trial, would probably not have produced an acquittal as required by the standard for

prejudice set out in *Jones v. State,* 591 So.2d 911 (Fla.1991) (*Jones I*).

[17] **[18]** To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State,* 709 So.2d 512, 521 (Fla.1998) (*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones II* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II,* 709 So.2d at 526 (quoting *Jones v. State,* 678 So.2d 309, 315 (Fla.1996)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones I,* 591 So.2d at 915.

[19] **[20]** **[21]** **[22]** In determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id.* at 916. This determination includes

> whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether this evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

Jones II, 709 So.2d at 521 (citations omitted). When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, we review the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence. *Melendez v. State,* 718 So.2d 746, 747–48 (Fla.1998); *Bianco v. State,* 702 So.2d 1250, 1251 (Fla.1997). As with rulings on other postconviction claims, we review the trial court's application of the law to the facts de novo. *Cf. Hendrix v. State,* 908 So.2d 412, 423 (Fla.2005) (reviewing de novo the trial court's application of the law to the facts in ruling on a postconviction claim that the government withheld material evidence); *Gore v. State,* 846 So.2d 461, 468 (Fla.2003) (reviewing de novo the application of the law to the facts on a claim of ineffective assistance of trial counsel).

[23] Consistent with the governing law, we conclude that the trial court's finding that the testimony of these two witnesses would probably not have produced an acquittal on retrial as required by *Jones II* is supported by competent, substantial evidence. Williams testified that he was not a witness to the crime; he simply heard about it at a local bar. In addition, most of his testimony consisted of hearsay that would not have been admissible at trial. Further, his testimony was ***317** actually inconsistent with Riechmann's testimony at trial concerning the relevant events. [16] The trial court was also entitled to find that Williams' testimony was less than credible because of his drug addiction and his inability to recall any details regarding the year, month, or time of day of the crime. Bezner's testimony may have been slightly more relevant, but still had many inconsistencies. Also, she conceded she was high on crack cocaine at the time of the alleged incident and had been convicted of many felonies, making her credibility a substantial issue. Moreover, her testimony as to the incident was also inconsistent with Riechmann's trial testimony. Under our case law, the credibility of these two witnesses was a matter for the trial court's evaluation, and Riechmann has been unable to demonstrate any flaw in that evaluation.

16 Riechmann testified at trial that he and the victim had gotten lost so they stopped and asked a lone black man for directions. The man provided the directions and Riechmann turned to the back seat of the car to get his video camera. As he turned back, the man fired the shot. Then Riechmann sped away and looked for help.

Riechmann further contends that the trial court erred in failing to conduct a cumulative error analysis; however, the trial court's order states that it considered the evidence in connection with "the totality of the evidence presented both at trial and at the first postconviction hearing." Given that the trial judge properly "applied the law, and its findings are supported by competent substantial evidence, ... this Court is precluded from substituting its judgment for that of the trial court on this matter." *Melendez,* 718 So.2d at 748. Given that the asserted individual errors are without merit, any claim of

cumulative error is similarly without merit, and Riechmann is not entitled to relief. *See Griffin,* 866 So.2d at 22.

In short, because this claim rests substantially upon an evaluation of the credibility of the newly produced witnesses, we will not substitute our evaluation for that of the trial court. Therefore, we affirm the trial court's rejection of this claim as failing to meet the requirements of *Jones.*

MOTION TO RECUSE THE TRIAL COURT

[24] Finally, Riechmann argues that Judge Bagley engaged in improper and prejudicial ex parte communications with the State during the postconviction proceedings and should have been disqualified. Specifically, Riechmann claims that on February 27, 2003, one of the prosecutors handling Riechmann's postconviction proceedings sent a letter to Judge Bagley and copied Riechmann's counsel. The letter stated that Judge Bagley's judicial assistant had contacted the prosecutor's secretary to obtain copies of depositions of certain evidentiary hearing witnesses. The prosecutor responded to the request by letter to Judge Bagley, declining to provide the requested material. Riechmann claims his counsel did not receive the letter until the day after Judge Bagley denied postconviction relief; thereafter, Riechmann's counsel immediately filed a "motion to get the facts" and a motion to disqualify Judge Bagley because the judge sought nonrecord evidence ex parte.

[25] **[26]** In considering a motion to disqualify, the trial court is limited to "determining the legal sufficiency of the motion itself and may not pass on the truth of the facts alleged." *Rodriguez v. State,* 919 So.2d 1252, 1274 (Fla.2005); Fla. R. Jud. Admin. 2.330(f). In determining legal sufficiency, the question is whether the alleged facts would "create in a reasonably prudent person a well-founded fear of not ***318** receiving a fair and impartial trial." *Rodriguez,* 919 So.2d at 1274.

The Code of Judicial Conduct prevents judges from initiating or considering ex parte communications concerning a pending proceeding. Fla.Code Jud. Conduct, Canon 3(B)(7). In addition to this prohibition, this Court has also denounced improper ex parte communication: "[A] judge should not engage in *any* conversation about a pending case with only one of the parties participating in that conversation. Obviously, ... this would not include *strictly* administrative matters not dealing in any way with the merits of the case." *Rose v. State,* 601 So.2d 1181, 1183 (Fla.1992). Without setting forth a bright-line rule, this Court has provided insight into what may (and may not) be permissible, administrative ex parte communication. *See Rodriguez,* 919 So.2d at 1275 (concluding that the ex parte communication was purely administrative when the state attorney, on the public records request, informed the judge that the hearing was not a status hearing, but an evidentiary hearing); *Arbelaez v. State,* 775 So.2d 909, 916 (Fla.2000) (determining that the ex parte communication was purely administrative when the communications related to the time period for the State to file its 3.850 response and set dates for an evidentiary hearing and the defendant's public records hearing).

Riechmann contends that the prosecutor-judge communication demonstrates that Judge Bagley was conducting an independent investigation into the case by seeking access to depositions that had not been introduced into evidence. However, Riechmann's only support of this "theory" is his speculation that because Judge Bagley communicated about obtaining depositions, he may also have communicated about other topics. Further, it is undisputed that the State rebuffed Judge Bagley's request for the depositions, and Riechmann has not pointed to any indication in the record that Judge Bagley made any other requests for information or considered any improper information in resolving the pending claims.

[27] We reject Riechmann's assertion that the contact here was similar to that we disapproved in *Smith v. State,* 708 So.2d 253, 255 (Fla.1998) (concluding that the trial court's ex parte communication was improper when the judge telephoned the state attorney to prepare the order denying 3.850 relief, called the state attorney again requesting him to make a deletion in the order, and discussed a motion to disqualify with the state attorney). We find no error in the trial court's denial of the motion to recuse. There simply is no indication in this record that the trial court had any substantive ex parte contact with the State, and the inquiry concerning the depositions, communicated by the court's judicial assistant, did not result in any improper or nonrecord material being considered by the court. Nevertheless, we again caution that trial judges should be careful to avoid ex parte contacts of any kind, even through the use of judicial assistants, that could be perceived to have been made without the knowledge of all parties.

CONCLUSION

In light of the above analysis, we affirm the trial court's denial of postconviction relief.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

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(The decision of the Supreme Court of Florida is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
Supreme Court of Florida.

Dieter Riechmann
v.
James R. McDonough

NO. SC06-117
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September 21, 2006

Opinion

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The STATE of Florida, Appellee.

No. 3D10–605.
|
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An Appeal from the Circuit Court for Miami–Dade County, Sarah Zabel, Judge.

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Opinion

Before SUAREZ, CORTIÑAS and EMAS, JJ.

***1** PER CURIAM.

Affirmed.

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