IN THE SUPREME COURT OF FLORIDA

ROBERT IRA PEEDE,

Appellant,

vs. CASE NO. 90,002

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM DENIAL OF RULE 3.850 MOTION
THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
ORANGE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

PAGE NO.:

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

In 1984, the appellant/defendant, Robert Ira Peede, was convicted and sentenced to death for the first-degree murder of his estranged wife, Darla Peede. In Peede v. State, 474 So.2d 808 (Fla. 1985), this Court summarized the facts of this case:

> Intent on getting Darla to come back to North Carolina with him to act as a decoy to lure his former wife Geraldine and her boyfriend Calvin Wagner to a motel where he could kill them, Peede, on March 30, 1983, traveled from Hillsboro, North Carolina, to Jacksonville, Florida, on his motorcycle. He sold his motorcycle near Ormond Beach, took a cab to the airport, and flew to Miami. He attempted to call Darla at her daughter's residence several times, each time speaking with Darla's daughter Tanya because Darla was not at home. At 5:15 p.m., he called back and spoke with Darla who agreed to pick him up at the airport. Prior to leaving for the airport, however, Darla left very strict instructions with Tanya to call the police if she was not back by midnight and to give them the license plate number of her car because she may have been forced into the car. She was afraid of being taken back to North Carolina and being put with the other people he had threatened to kill. She gave Tanya the telephone numbers of Geraldine and the police in Hillsboro, North Carolina. She left her residence with only her purse and took no other belongings that would evidence her intention not to return home that evening. Although she would normally call Tanya if she were going somewhere and not coming back for the evening, Tanya received no such call.
>
> According to Peede, when Darla picked him up at the airport, she informed him that she planned to go back to her apartment and then to the beach the next day. He then directed her to drive north on Interstate 95, but, after gassing up Darla's car, they mistakenly got on the turnpike heading for Orlando. As they left the Miami area and the song "Swinging" came on the radio, Peede took his lock-blade knife and inflicted a superficial cut in Darla's side. In his confession, Peede described his belief that Darla and Geraldine had mutually advertised

for sexual partners in a nationally publicized, pictorial "Swinger" magazine which he had seen while imprisoned in California.

Peede said that on the way to Orlando they stopped and picked up a hitchhiker who drove the car while they had intercourse in the backseat. The hitchhiker was dropped off in Orlando and Peede drove east on I-4 toward Daytona Beach. As they drove, the conversation again returned to the subject of Peede's belief that Geraldine and Darla had advertised in "Swinger" magazine. Approximately five to six miles outside of Orlando, Peede stopped the car on the shoulder of the road, jumped into the backseat, and, with his lock-blade hunting knife, stabbed Darla in the throat which resulted in her bleeding to death within five to fifteen minutes. Still determined to get back to North Carolina to kill Geraldine and Calvin, he proceeded up I-95. He left Darla's body in a wooded area in Camden, Georgia, and he threw the murder weapon out of the car window on his way to North Carolina. When he returned to his home in Hillsboro, North Carolina, he decided that he would kill Geraldine and Calvin while they were on their way to work. He loaded his shotgun and placed it beside the door. Before he could carry out his plan, the police arrived, and he was arrested. Darla's heavily bloodstained car was parked at his residence. In addition to his lengthier confession to the authorities, Peede wrote out and had witnessed the following short confession:

> My name is Robert Peede, on March 31, 1983, I killed my wife Darla, by stabbing her in the neck with a Puma folding knife. This occurred on Hwy. 4 (interstate) about six miles east of Orlando Fla., in the back seat of Darla's 71 Buick.
>
> I ask for the death penalty in this crime, to be carried out as soon as possible.
>
> Robert Peede
> D.O.B. 6-30-44

Darla's body was found in the woods. She had a stab wound in the throat area which continued into the chest and into the superior vena cavae, a second stab wound nine inches below her shoulder in her side, and bruising on various parts of her legs and arms which the medical

examiner characterized as defensive bruising. The contusions on her wrists evidenced a struggle.

Peede v. State, 474 So.2d at 809-810 (Fla. 1985)

Trial Proceedings

On May 25, 1983, Robert Ira Peede was charged by Indictment with the first degree murder of Darla Peede, committed on March 31, 1983. (TR 1008)[1]. On October 10, 1983, the trial court granted the defendant's motion for a psychiatric examination and Dr. Robert Kirkland, M.D., was appointed to conduct the psychiatric examination. (TR 1054).

During voir dire, Peede complained that his trial attorneys were not presenting the issue of his insanity (TR 212-216). Defense counsel affirmed that Peede had requested that an insanity defense be asserted, but trial counsel had no basis for asserting this defense. (TR 213). Peede inquired of the trial court,

> MR. PEEDE: Is it, is it possible for me to talk to you off the record?
>
> THE COURT: Have to be with your attorney and the prosecutor. Have you talked with your attorney?
>
> MR. DuROCHER[Defense Counsel]: I know the subject.
>
> MR. PEEDE: Have a minute to talk to him? Something

[1]References to the original trial record on appeal will be designated by the letters "TR" followed by the appropriate page number. References to the postconviction record will be designated by the letter "R" followed by the appropriate volume/page number.

come up got me a little rattled.

MR. DuROCHER: I think it would be appropriate outside the presence of the jury to bring this up, say this, and the Judge would allow you to speak.

In the course of examining the last prospective juror Ms. Sedgwick referenced the fact that while there was a plea of not guilty there was no plea of insanity in this case, which is true. There's been none, pursuant to the rules. An earlier discussion with both Mr. Bronson and myself, --

THE COURT: Have a seat.

MR. DuROCHER: -- Mr. Peede has asked that we assert the insanity defense on his behalf.

The Court may recall, and the record will reflect, that he was examined by Dr. Kirkland, Dr. Robert Kirkland. We have Dr. Kirkland's report, which was given to us in confidence and which we've shared with Mr. Peede.

We also have the basis of our own observations over an extended period of time. We've been observing him and discussing the matters with him. And as his attorneys, we told him we had no basis for asserting the defense of insanity; asserting a defense, rather, the murder was not premeditated. And that's the way we come, in this posture in trial.

This is what concerns him. I think this is what he wants to speak to. That's what he says has him rattled at this time.

THE COURT: Is that the concern that you have at this point?

MR. PEEDE: Yes, sir. I mean to me a guy takes bottle of sleeping pills and wakes up a day and a half later, and a guy shoots himself, to me, you know, he's not exactly sane; you know, somewhere down the line the man hasn't been sane.

THE COURT: The, the question of what defense should be asserted or the best defense that should be asserted is one that's sometimes difficult in a case of this

magnitude, or a case that's this serious. This is so because sometimes perhaps the jury, if they refuse to accept a particular defense -- especially it involves alibi or insanity -- the fact that type of defense was presented to them may make them angry, may alienate them and maybe harm, if you will, in two ways, one, they may not accept that and find you guilty as charged; and they do that, that resentment may spill over into the way they do the penalty stage of the case and may cause them to react less favorably on the question of aggravating and mitigating factors.

The matter or the question of what defense should be presented in a case is a matter that requires skill and experience of one who's trained in the law and one who's tried cases.

Mr. DuRocher and Mr. Bronson have that skill and experience. And while they are required to consider raising defenses that you might suggest, as the lawyers in this case they're not bound to follow your suggestions or your desires or wishes.

This is what is referred to as trial strategy. And they have no interest at all in doing less than a competent, professional job on your behalf.

MR. PEEDE: Yes, sir. I'm not here trying to get, get out of, get out of being punished for what I've done. I just want to be punished in the right way.

THE COURT: This is something your lawyers are entrusted with speaking on your behalf.
Anything else you want, might want to bring up?

MR. PEEDE: No, sir, that's all.

MR. DuROCHER: One matter related to this, that is would want Mr. Peede to acknowledge, as he's instructed us, he has refused to allow us to negotiate on his behalf or seek anything other than a full jury trial of these issues.

And, Robert, would you acknowledge that you told us several times really the only choices you saw were not guilty by reason of insanity or death in the electric chair? Those are the two choices you see as an outcome of this case?

MR. PEEDE: What I've done, I really don't see but two choices, that's mental health or send me to the electric chair.

MR. DuROCHER: The reason I bring it up, Your Honor, it goes to the point of tactics and strategy. We have had to integrate that into our approach of the case. Would be fair to say -- not dramatized -- Mr. Bronson and I agonized just how to approach the defense on this case. And we're doing it the best way we think it should be done.

(Vol. II, TR. 212-216).

Following a one-week trial, which began on Monday February 13, 1984 and ended on Friday, February 17, 1984, the jury found Peede guilty of first degree murder and also found that he had used a weapon in the commission of the offenses (TR 912-914, 1234-1235). The sentencing phase of trial, with Peede present, was conducted on March 5, 1984. The state presented testimony of two witnesses detailing Peede's prior convictions and introduced into evidence certified copies of a judgment and sentence indicating that Peede was previously convicted of second degree murder and assault with a deadly weapon in California (TR 927-947). The defense presented the testimony of a psychiatrist, Dr. Kirkland, and also introduced into evidence thirteen letters from Peede's friends in North Carolina. (TR 948-958).

The jury was instructed as to three aggravating circumstances: (1) previous conviction of a felony; (2) murder committed while engaged in kidnapping; and (3) murder committed in a cold,

calculated and premeditated manner (TR 968-971). The jury was instructed upon the following mitigating circumstances: (1) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance, and (2) any other aspect of the defendant's character or record and any other circumstances of the offense (TR 970, 1248-1250). The jury recommended the imposition of death by a vote of eleven to one [11-1] (TR 974-976, 1247), and the trial court sentenced Peede to death (TR 978, 1251-1252).

The trial court entered written findings of fact to support the death sentence, specifically finding that Peede had been previously convicted of committing two felony crimes involving the use of force or threat to some other person, that the instant murder had been committed while Peede was committing a kidnapping, and that the murder had been committed in a cold, calculated and premeditated manner (TR 1263-1264). The trial court found as a mitigating circumstance that Peede was under the influence of extreme mental or emotional disturbance, but the trial court attributed little weight to this circumstance, stating that ". . . it is outweighed by the single aggravating circumstance, standing alone, of the defendant's prior crime of murder in the second degree and assault with a deadly weapon" (TR 1265).

Direct Appeal

This Court affirmed Peede's conviction and death sentence on August 15, 1985, rehearing denied September 4, 1985. Peede v. State, 474 So.2d 808 (Fla. 1985). Addressing the trial court's consideration of mitigating circumstances, this Court quoted from the trial court's order, which stated, in pertinent part:

> (a) ...Viewing the testimony of Dr. Robert Kirkland that the Defendant experienced a specific paranoia that the victim and his ex-wife, Geraldine Peede, were posing in nude magazines, the Court, giving the Defendant the benefit of the doubt, will consider it a mitigating circumstance. The Court also considered the rest of Dr. Kirkland's testimony and observed that this particular paranoia, had the facts been true, would not have called for or excused violent acts of the Defendant. Based on the totality of Dr. Kirkland's testimony, which included his opinion that the Defendant chose to act violently although capable of understanding the nature and consequences of his acts and to conform his conduct to the law, I find that although a marginal mitigating circumstance, it is outweighed by the single aggravating circumstance, standing alone, of the Defendant's prior crime of Murder in the Second Degree and Assault with a Deadly Weapon.
>
> (b) The Court reviewed and considered the letters presented by the defense. They were from people in North Carolina who had known the Defendant and his parents. I found no mitigating factors in the letters.
>
> (c) I found no other mitigating circumstance from anything presented in the sentencing hearing. (Emphasis added.)
>
> Peede, 474 So.2d at 817

Although this Court found that there was "no showing of the *heightened* premeditation, calculation, or planning", the death sentence was upheld because

Even absent this circumstance, however, we know that the result of the trial court's weighing process would not be different because it expressly held that the one marginal mitigating circumstance that it found was outweighed by the single aggravating circumstance standing alone of the defendant's previous convictions of two felony crimes involving the use or threat of violence to some other person. We hold that the death sentence was properly imposed by the trial court.

Peede, 474 So.2d at 817-818.

Peede's petition for writ of certiorari was denied on June 23, 1986. Peede v. Florida, 477 U.S. 909, 106 S.Ct. 86, 91 L.Ed.2d 575 (Fla. 1986).

Postconviction Proceedings

A death warrant was signed on May 6, 1988. Peede filed a Rule 3.850 motion for postconviction relief on June 6, 1988. The 112-page motion presented fifteen (15) claims for relief.[2] The State

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[2] I. Mr. Peede's Fifth, Sixth, Eighth And Fourteenth Amendment Rights Were Abrogated Because He Was Forced to Undergo Criminal Judicial Proceedings Although He Was Not Legally Competent.

II. Mr. Peede Was Deprived of His Rights to Due Process And Equal Protection Under The Fourteenth Amendment to The United States Constitution, as Well as His Rights Under The Fifth, Sixth, And Eighth Amendments, When The Sole Defense Psychiatrist Retained to Evaluate Him Before Trial Failed to Conduct a Professionally Appropriate Evaluation, Under Recognized Standards of Care, Resulting in a Trial at Which Mr. Peede Was Incompetent And Entitled to a Competency Hearing, And Resulting in The Lack of Fair And Reliable Capital Guilt-innocence And Sentencing Determinations.

III. Robert Peede Was Denied His Fourth, Fifth, Sixth, Eighth And Fourteenth Amendment Rights Because His Court-appointed Trial Attorneys Failed to Provide Him With Reasonably Effective Assistance.

IV. Trial Counsel Ineffectively Failed to Properly Present Even The Defense Which They Had Asserted, in Violation of The Sixth, Eighth And Fourteenth Amendments.

V. Material, Exculpatory Evidence Was Withheld From The Defense in Violation of Brady V. Maryland, 373 U.S. 83 (1967) And

filed a response, conceding an evidentiary hearing on those various

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The Fifth, Sixth, Eight, And Fourteenth Amendments.

VI. Throughout The Course of The Proceedings Resulting in Mr. Peede's Capital Conviction And Sentence of Death, The Jury Was Provided With Misinformation Which Served to Diminish Their Sense of Responsibility For The Awesome Capital Sentencing Task That The Law Would Call on Them to Perform, in Violation of Caldwell v. Mississippi, 105 S.C. 2633 (1985), And The Eighth And Fourteenth Amendments.

VII. The Failure to Instruct The Jury That Jurisdiction Is an Element of The Crime to Be Proven Beyond a Reasonable Doubt Was Fundamental Error Rendering Mr. Peede's Capital Conviction And Sentence of Death Constitutionally Void, And Trial Counsels' Failure to Properly Litigate This Issue Constituted Ineffective Assistance of Counsel.

VIII. The Trial Judge Repeatedly Informed Prospective Jurors That If Aggravating Circumstances Outweighed Mitigating Circumstances, The Jury Was Required to Recommend Death Sentence, in Violation of The Eighth And Fourteenth Amendments, And Counsel Was Ineffective For Failing to Object to This Error or to Properly Litigate This Important Constitutional Claim.

IX. Mr. Peede's Death Sentence Rests Upon an Unconstitutional Automatic Aggravating Circumstance.

X. The Instructions Failed to Adequately Explain That The Jury Must Unanimously Agree Upon Elements of The Crime, in Violation of The Sixth, Eighth And Fourteenth Amendments.

XI. The Trial Court's Instruction That a Verdict of Life Imprisonment Had to Be Rendered by a Majority of The Jury Materially Mislead The Jury as to Its Role at Sentencing And Created The Constitutionally Unacceptable Risk That Death May Have Been Imposed Despite Factors Calling For Life, in Violation of Mr. Peede's Rights Under The Eighth And Fourteenth Amendments.

XII. The Trial Court's Unconstitutional Shifting of The Burden of Proof in Its Instructions at Sentencing Deprived Mr. Peede of His Rights to Due Process And Equal Protection of Law, as Well as His Rights Under The Eighth And Fourteenth Amendments.

XIII. Mr. Peede's Sentence of Death Was Based Upon an Unconstitutionally Obtained Prior Conviction And Therefore Also on Misinformation of Constitutional Magnitude in Violation of The Eighth And Fourteenth Amendments, And Counsel Was Ineffective For Failing to Litigate This Claim.

XV. The State's Presentation of Detailed Testimony Regarding Mr. Peede' Prior Guilty Pleas at The Penalty Phase Deprived Mr. Peede of His Rights to a Fair And Reliable Capital Sentencing Proceeding Under The Eighth And Fourteenth Amendments, And Counsel Rendered Ineffective Assistance by Failing to Properly Litigate this Claim.

claims relating to alleged incompetency to stand trial, ineffective assistance of counsel, and Brady violation. On June 24, 1988, the trial court ordered a stay of execution and scheduled an evidentiary hearing to be held on November 28, 1988. (R 227; 229). On October 19, 1989, Peede filed a motion for continuance and the hearing was reset until April 17, 1989. (R.231-235; 236-237). On March 30, 1989, Peede filed a second motion for continuance, and the evidentiary hearing was reset until September 18, 1989. (R. 246-251). However, on September 15, 1989, the State's motion for continuance was granted and the hearing [on claims I through V of the defendant's motion] was continued until "a date subsequently to be determined. . ." (R. 246; 373). There was no further record activity in this case until 1995, when the trial court scheduled a status conference to be held on March 10, 1995.

On February 20, 1995, Peede filed a 166-page amended motion for postconviction relief, identifying a total of 21 claims for relief. (R.448-612). In this amended motion, filed seven years after the original, Peede asserted, for the first time, that leave to amend should be granted due to public records violations by specified and unspecified state agencies. The six additional claims raised in Peede's 1995 *amended* motion included: Claim X (unconstitutionality of Florida's capital sentencing statute); Claim XIV (Florida Supreme Court failed to conduct a meaningful

harmless error analysis); Claim XV (trial court failed to timely impose a written sentence of death); Claim XVI (admission of hearsay testimony at trial); Claim XIX (rules prohibiting Peede's lawyers from interviewing jurors violate equal protection); and Claim XXI (alleged lack of compliance with Chapter 119 public records requests). The State moved to strike the 1995 amended postconviction motion as an unauthorized amendment which was untimely filed. (R.613-620). On March 10, 1995 and April 6, 1995, the trial court held hearings on the State's motion to strike and Peede's request to amend his petition. (R.2-41). According to Peede's postconviction counsel, the newly asserted claims were "all mainly new law. . . most of them deal with jury instructions and the jury deliberations. . ." (R. 31-32).

On June 21, 1996, the trial court summarily denied Peede's motion for postconviction relief, addressing each of the 15 grounds asserted in the motion filed June 22, 1988. The trial court's order also referred to the allegations set forth in the amended motion (of February 20, 1995). (R. 632-649). In light of the renumbering of claims in the original and amended postconviction motion and in an effort to clearly identify the trial court's disposition of each, the State has set forth the pertinent portions of the trial court's written order in the argument section of the instant brief.

SUMMARY OF THE ARGUMENT

Issue I The trial court issued a comprehensive written order, attached specific portions of the trial record, and stated its rationale for denying postconviction relief based on the record. An evidentiary hearing was not warranted on the 3.850 motion filed in the instant case.

Issue II During the seven years which elapsed between the filing of Peede's original 3.850 motion and his amended motion, Peede did nothing to alert the trial court to any alleged non-compliance with Chapter 119. Peede failed to allege or demonstrate due diligence and timely public records requests. This claim is facially insufficient to merit further review.

Issue III The trial court did not err in summarily denying Peede's postconviction claim that he was incompetent to stand trial. This claim was procedurally barred and, alternatively, insufficiently pled and meritless.

Issue IV The trial court did not err in summarily denying Peede's postconviction claim of ineffective mental health assistance. This claim was procedurally barred and, alternatively, without merit.

Issue V The trial court did not err in summarily denying Peede's postconviction claim of ineffective assistance of trial counsel. Peede failed to establish any deficiency of trial counsel

and resulting prejudice under Strickland.

Issue VI The trial court did not err in summarily denying Peede's postconviction Brady claim. The allegedly withheld evidence was not material as a matter of law.

Issue VII Peede's postconviction challenge to the constitutionality of Florida's capital sentencing statute is procedurally barred.

Issue VIII The trial court did not err in summarily denying postconviction relief on Peede's procedurally barred jury instruction claim.

Issue IX Peede's allegation that the trial court improperly sentenced him to death without considering all nonstatutory mitigating evidence is procedurally barred. Alternatively, this claim is without merit.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING PEEDE'S RULE 3.850 MOTION FOR POSTCONVICTION RELIEF WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

The State does not dispute Peede's assertion that the law favors evidentiary hearings in death penalty postconviction cases; and, in this case, the prosecutor conceded an evidentiary hearing relating to the following categories of postconviction complaints: (1) alleged incompetence to stand trial, (2) ineffective assistance of trial counsel, and (3) alleged violation of Brady v. Maryland, 373 U.S. 87 (1963). (R. 207; 625-626). However, it is undeniable that it is the trial court, and not the prosecutor, who determines whether an evidentiary hearing is warranted. Swafford v. State, 636 So. 2d 1309, 1311 n.4 (Fla. 1994).

An evidentiary hearing is only warranted where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a legal basis for postconviction relief. See Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995) (no hearing warranted on an ineffective assistance of counsel claim where facts did not demonstrate a deficiency in performance that prejudiced the defendant); Jackson v. Dugger, 633 So.2d 1051, 1055 (Fla. 1993); Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993); Roberts v. State, 568 So.2d 1255, 1256-1260 (Fla. 1990); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

A. State's concession and scheduling of an evidentiary hearing

It is undisputed that the trial court initially scheduled an evidentiary hearing and Peede submitted a witness list containing the names of 79 witnesses who might be called at an evidentiary hearing in 1989. (R. 239-245). However, during the next six years, Peede filed nothing in the trial court to bring this case to disposition. Peede now argues that the trial court abrogated his right to due process by summarily denying his motion to vacate despite the state's concession and the court's initial scheduling of an evidentiary hearing. For the following reasons, this claim must fail.

In denying Peede's 3.850 motion, the trial court determined that summary denial was appropriate, even though the State conceded an evidentiary hearing on various postconviction claims. As the trial court explained,

> After reviewing the motion, the State's responses and the record of this case, the court concludes that summary denial of these claims is appropriate, even though the State conceded the need for an evidentiary hearing on certain ineffective assistance of counsel claims. Compare Swafford v. State, 636 So. 2d 1309, 1311 n.4 (Fla. 1994). **The record conclusively shows that, even if counsel were ineffective, that ineffectiveness did not prejudice the Defendant as explained below. The remaining claims are either procedurally barred or improperly pled.**
>
> In support of this denial, the court has attached voluminous copies from the record in compliance with the dictates of Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993). See Attachment "A" including Record pages 1-984, 1238-42, 1251-52, and 1264-65.
>
> (e.s., R. 632-633)

In Swafford v. State, 636 So.2d 1309 (Fla. 1994) the State suggested that an evidentiary hearing might be needed. This Court found that the State's concession was not dispositive of the actual need for an evidentiary hearing because that determination is to be made by the trial court. In the instant case, as in Swafford, the State's concession was not dispositive of the actual need for an evidentiary hearing on the defendant's postconviction claims.

In Alvord v. State, 694 So.2d 704 (Fla. 1997) the trial court entered an order granting an evidentiary hearing to allow the defendant to present nonstatutory mitigating evidence in response to a claim that error occurred under Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Before the scheduled evidentiary hearing was held on the Hitchcock claim, Alvord amended his postconviction motion to include an additional claim. Thereafter, the trial court reversed its original ruling by denying an evidentiary hearing and finding the Hitchcock claim to be procedurally barred. On appeal, Alvord contended that the trial judge erred in denying his Rule 3.850 motion without holding an evidentiary hearing. Finding the non-record, nonstatutory evidence Alvord outlined in his postconviction motion to be very similar to that which was previously considered and rejected in a prior habeas petition, this Court affirmed the summary denial of Alvord's motion for postconviction relief. In this case, Peede also alleges that he acted to his detriment in disclosing the names of 79 prospective

witnesses in 1989, however, Peede's speculative conclusion does not credibly provide him with any "entitlement" to an evidentiary hearing. As in Alvord, the trial court did not err in denying postconviction relief without conducting an evidentiary hearing.

B. Records Attachment

Rule 3.850(d) requires a circuit court to attach portions of the record conclusively establishing that a defendant is not entitled to relief. The original record on direct appeal in this case was in excess of 1400 pages, and it included eleven (11) volumes record, consisting of trial transcripts, pleadings, and exhibits. [Peede v. State, Fla.S.Ct. Case No. 62,115] According to Peede, the trial court erred in failing to attach specific portions of the record to the order summarily denying the postconviction motion. Contrary to Peede's claim, the trial court's order specifically identified and attached those portions of the record upon which it relied. As the trial court's order states, in part,

> In support of this denial, the court has attached voluminous copies from the record in compliance with the dictates of Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993). See Attachment "A" including Record pages 1-984, 1238-42, 1251-52, and 1264-65.
>
> (e.s., R. 632-633)

Moreover, because the trial court attached specific portions of the trial record and stated its rationale for denying postconviction relief based on the record, Peede is not entitled to

any relief under Hoffman v. State, 571 So. 2d 449 (Fla. 1990).

Peede also faults the trial court's ruling for not incorporating the six additional claims filed in the amended motion to vacate. The six additional claims raised in Peede's 1995 *amended* motion included: Claim X (unconstitutionality of Florida's capital sentencing statute); Claim XIV (Florida Supreme Court failed to conduct a meaningful harmless error analysis); Claim XV (trial court failed to timely impose a written sentence of death); Claim XVI (admission of hearsay testimony at trial); Claim XIX (rules prohibiting Peede's lawyers from interviewing jurors violate equal protection)[3]; and Claim XXI (alleged lack of compliance with Chapter 119 public records requests). Although the State moved to strike the 1995 amended postconviction motion as an unauthorized amendment which was untimely filed, the trial court stated that it had "reviewed and considered Defendant's *Amended* Motion to Vacate Judgment of Conviction and Sentence." (R. 613-620; 1688). With the exception of the belated public records complaint, all of the "new" claims presented in the amended motion to vacate involved issues which could or should have been raised on direct appeal. Therefore, they were procedurally barred on postconviction review. Cherry v. State, 659 So.2d 1069 (Fla. 1995); Van Poyck v. State,

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[3]Peede's complaint that he is precluded from interviewing jurors is likewise not appropriate for a motion to vacate under Rule 3.850, since it does not attack the validity of the defendant's convictions or sentences. Foster v. State, 400 So.2d 1 (Fla. 1981).

694 So.2d 686, 698-699 (Fla. 1997); Clark v. State, 690 So.2d 1280, 1282 (Fla. 1997). In Mills v. State, 684 So.2d 801 (Fla. 1996) this Court held that the trial court's specific finding that issues were procedurally barred was sufficient to support the trial court's summary dismissal of a defendant's postconviction motion. In Mills, this Court concluded that Roberts v. State, 678 So.2d 1232, 1236 (Fla. 1996), in which this Court found the failure to attach pertinent portions of the record to be reversible error, was distinguishable. In Roberts, the trial court not only failed to attach any portions of the record but also did not give any explanation for the basis of its ruling. However, in Mills, the trial court specifically found the issues raised by Mills "procedurally barred as representing matters which were or could have been raised previously for the reasons contained [in] the state's response." Therefore, this Court found no reversible error in the summary denial of postconviction relief. Mills, 684 So.2d at 804. In the instant case, the trial court issued a comprehensive written order *and* attached specific portions of the record supporting the summary denial of postconviction relief. Peede has not demonstrated any entitlement to relief based on the trial court's summary disposition of this case.

ISSUE II

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING PEEDE'S MOTION FOR POSTCONVICTION RELIEF BASED ON ALLEGED NON-COMPLIANCE WITH CHAPTER 119.

Peede alleges that the trial court erred in dismissing "many" of his claims without allowing him to amend his Rule 3.850 motion "after obtaining all public records." During the seven years which elapsed between the filing of his original postconviction motion and the amended motion, Peede did nothing to alert the trial court to any alleged non-compliance with purported Chapter 119 requests.

In 1995, Peede alleged, for the first time, that public records of various state agencies had not been received, or if received, were incomplete.[4] However, during the next year, Peede did not file any motion to compel or submit any evidence of due diligence and timely public records requests under Chapter 119.

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[4] Peede identified seven state agencies by name and asserted that complete files and records from unidentified "other agencies" had not been provided. (R. 609-610). Although he did not provide the trial court with any documentation of his purported public records requests or responses, Peede asserted that the following agencies had not complied with alleged public records requests: the Office of the Attorney General, the Florida Department of Corrections, Union Correctional Institution, Florida State Prison, Orange County Jail, the Sheriff of Orange County, Florida Department of Law Enforcement, and the Office of the State Attorney. (R. 609-610).

According to the prosecutor, Peede's public records request of Union Correctional Institution was submitted after Peede filed his amended motion to vacate. (R. 23-24). In addition, although additional public records had been made available, CCR had yet to pick up the requested materials. (R. 24). In response, Peede's postconviction counsel cited budgetary constraints which prohibited CCR from obtaining copies of the records which admittedly had been made available. (R. 26)

Absent some minimal identification of a credible claim of error, Peede has failed to establish any reason to prolong this matter by remanding for public records litigation on this bare bones complaint.

As with every capital litigant, the Public Records Act remained continuously available to Peede during the pendency of his postconviction proceedings. Peede's 1995 public records complaint arose long after the cut-off date for any timely-filed 3.850 motion. *See*, Zeigler v. State, 632 So.2d 48, 50 (Fla. 1993). A criminal defendant must alert the trial court about any lack of public records compliance and demonstrate due diligence in seeking public records. In the instant case, Peede's bare bones allegation, made for the first time in 1995, failed to evidence due diligence on his part and lack of compliance with Chapter 119. In Buenoano v. State, 708 So.2d 941 (Fla. 1998), this Court, denying relief on a capital defendant's eleventh-hour public records complaints, explained

> As the trial court recognized, this Court has extended the time period for filing a rule 3.850 motion so that capital postconviction defendants could amend initial rule 3.850 motions after all requested public records were furnished. See Ventura v. State, 673 So.2d 479 (Fla.1996); Walton v. Dugger, 634 So.2d 1059 (Fla.1993); Anderson v. State, 627 So.2d 1170 (Fla.1993); Muehleman v. Dugger, 623 So.2d 480 (Fla.1993); Provenzano v. Dugger, 561 So.2d 541 (Fla.1990). However, each of the cases in which the Court remanded to allow for an amended rule 3.850 motion involved an initial timely rule 3.850 motion. Here, we are presented with Buenoano's third motion for postconviction relief, clearly filed outside the time limitation of rule 3.850(b). As

> explained above, before Buenoano could be entitled to relief based on any claim she might raise as a result of her public records requests, in this otherwise procedurally barred motion, she must establish that the facts on which the claim is based were unknown to her or her attorney and could not have been ascertained by the use of due diligence. See Fla. R.Crim. Pro. 3.850(b)(1); Mills.
>
> The Public Records Act has been available to Buenoano since her conviction; but most of the records she alleges were not disclosed prior to the filing of her latest rule 3.850 motion were not requested until January 1998, or later. Some of the records were requested in January 1997, but Buenoano did not seek to compel compliance with those requests until February 1998. Buenoano has not alleged that through the exercise of due diligence she could not have made these requests within the time limits of rule 3.850. Accordingly, she is precluded from asserting that the trial court should have addressed her public records requests prior to denying her third rule 3.850 motion. Cf. Zeigler v. State, 632 So.2d 48 (Fla. 1993) (finding that rule 3.850 bars as untimely a motion based on information obtained as a result of a chapter 119 public records request made after the cut-off date for postconviction relief), cert. denied, 513 U.S. 830 (1994); Agan v. State, 560 So.2d 222 (Fla. 1990) (same); Demps v. State, 515 So.2d 196 (Fla. 1987) (same).

Peede has not demonstrated due diligence in seeking available public records nor any timely request to amend his original postconviction motion. Thus, Peede's 1995 allegations were procedurally barred. On the facts of this case, no violation of Chapter 119 or this Court's case law concerning capital defendants' rights to public records has been demonstrated. Alternatively, should this Court determine that Peede is nevertheless entitled to relief, this should affirm the trial court's denial of postconviction relief and permit a limited remand.

ISSUE III

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING PEEDE'S POSTCONVICTION CLAIM THAT HE WAS NOT COMPETENT TO STAND TRIAL.

The test for whether a defendant is competent to stand trial is whether "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Hunter v. State, 660 So.2d 244 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996), citing Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824, 825 (1960). Prior to trial, Peede was examined by a psychiatrist, Dr. Kirkland, who concluded that Peede was competent to stand trial despite the presence of a paranoid disorder. (TR. 1239, 1241-42).

Relying primarily upon Mason v. State, 489 So. 2d 734, 735-737 (Fla. 1986), and State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987), Peede claims an entitlement to an evidentiary hearing on his postconviction claim of incompetency to stand trial. In denying postconviction relief, the trial court found Peede's competency claim to be procedurally barred and, alternatively, without merit. The trial court also found that Peede was not entitled to an evidentiary hearing under either Mason or Sireci.

The trial court's order denying postconviction relief on Peede's competency claim found, in pertinent part:

CLAIM I -- INCOMPETENCE TO STAND TRIAL [INEFFECTIVE ASSISTANCE OF COUNSEL]

Insofar as this claim alleges that the Defendant was actually incompetent to stand trial it is procedurally barred. Smith v. Dugger, 565 So. 2d 1293, 1295 n.3 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541, 544 (Fla. 1990); see also Peede v. State, 474 So. 2d 808, 810-812, 815 (Fla. 1985)(finding that Defendant voluntarily absented himself from trial rather than from any illness affirmed on appeal), cert. denied, 477 U.S. 909, 106 S. Ct. 3286, 91 L. Ed. 2d 575 (1986).

However, the Defendant alleges counsel was ineffective for failing to raise the competency issue and, if the competency issue had been raised, the result at trial would have been different. Two recent cases have held that such a claim is procedurally barred. Cherry v. State, 659 So. 2d 1069, 1071 n.1, 1072 (Fla. 1995); Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988). However, in an abundance of caution, the court has addressed this claim directly and finds that the record conclusively refutes any ineffectiveness of counsel and also refutes any allegation of prejudice.

In order to find counsel was ineffective, two separate tests must be met:

> 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 showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Kelley v. State, 569 So. 2d 754, 758-59 (Fla. 1990)(quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 3385-86, 80 L. Ed. 2d 674, 693 (1984)).

> Here, the record affirmatively shows that counsel was not ineffective. Defendant was examined by a psychiatrist who indicated he was competent despite his paranoid disorder. (R. 1239, 1241-42). The failure to file a motion to determine competency is not ineffective assistance where there is no factual basis for it. Compare Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992)(counsel not ineffective for failing to file motions with no legal basis), cert. denied, ___ U.S. ___, 113 S. Ct. 3005,125 L. Ed. 2d 697 (1993).
>
> Moreover, the record also demonstrates lack of prejudice, because the trial court considered the Defendant's competency when determining that the Defendant voluntarily absented himself from trial and wished the trial to continue in his absence. (R. 669-676). The fact that Defendant suffered from a mental illness was known at the time of trial as was the fact that Defendant was not cooperating.
>
> (R. 633-635)

In denying relief on Peede's related postconviction claim of "ineffective psychiatric assistance," the trial court also distinguished Sireci and Mason and found that an evidentiary hearing was not required under Correll v. Dugger, 558 So. 2d 422, 426 (Fla. 1990) or Engle v. Dugger, 576 So. 2d 696, 702 (Fla. 1991). As the trial court explained,

> Only two cases have resulted in relief on this issue, Mason and Sireci v. State, 502 So. 2d 1221 (Fla. 1987). In both cases, the psychiatrists failed to discover evidence of extensive histories of permanent psychiatric problems such as mental retardation and an organic brain disorder. 489 So. 2d at 736-37; 502 So. 2d at 1223, 1224. Where there is no evidence that the original psychiatrists failed to notice such an obvious organic brain disorder or past medical history no evidentiary hearing has been required. Corell v. Dugger, 558 So. 2d 422, 426 (Fla. 1990); Engle v. Dugger, 576 So. 2d 696, 702 (Fla. 1991).

> Defendant has alleged that Dr. Kirkland considered only self-evaluation of the Defendant in reaching his diagnosis. Defendant believes his case would fall under the rubric of Mason and Sireci rather than under Corell and Engle solely because it is clear that Dr. Kirkland did not review any prior psychiatric reports or interview other who had dealt with the Defendant. Defendant argues that these reports or interviews may have led Dr. Kirkland to consider the possibility of organic brain damage or some other permanent mental deficiency.
>
> However, as in Corell and Engle the record shows that Dr. Kirkland did not overlook the possibility of organic or permanent brain damage. On the contrary, both of Dr. Kirkland's reports specifically considered Mr. Peede's extensive history of anti-social and explosive behavior, although that extensive history was self-reported. (R. 1239, 1241-42). Both of Dr. Kirkland's reports also reach a clinical diagnosis of mental disease, but find that Defendant was, in fact, competent to stand trial and was not insane. Id.
>
> Most significantly, during his testimony at the penalty phase of the trial, Dr. Kirkland made it clear that he had already considered the fact that organic brain damage could be one cause of Defendant's illness. (R. 957). This fact is important because, despite the knowledge that organic brain damage could be present, Dr. Kirkland still would have reached the professional conclusion that Defendant's mental illness did not affect Defendant's ability to tell right from wrong. (R. 952, 956). Because of that testimony, the jury also was able to hear that Mr. Peede's mental problems could have been caused by a permanent brain disorder. In short, even if Dr. Kirkland had examined additional records of Defendant's illness, Dr. Kirkland's opinion would have been the same and the essential evidence presented to the jury would have been the same.
>
> (R. 635-637).

The trial court did not err in finding Peede's competency claim to be procedurally barred and, alternatively, without merit. In support of his claim that he was incompetent to stand trial, Peede refers to allegedly "bizarre" behavior which was before the

trial court in 1984, and he directs this court's attention to an excerpt from the trial proceedings wherein Peede personally asked to be excused from trial. As the trial record shows, the trial judge questioned Peede extensively before finding that Peede's relinquishment of his right to be present during his trial was a knowing and voluntary one uninfluenced by illness or otherwise,

> THE COURT: Mr. Peede, we need to talk to you a little bit about the remainder of your trial.
>
> I've talked to your attorneys, in particular, Mr. DuRocher, indicated you are, don't want to participate anymore in the trial in the courtroom. I wanted to make sure this is a voluntary action on your part. And I want to make sure you understand or I understand that you, indeed, do not wish to participate further.
>
> MR. PEEDE: Yes, sir. You know, when I talked to you down in the courtroom I was trying to tell you then I wouldn't be back.
>
> THE COURT: Are you feeling ill? Or is it just a matter you'd rather not be in the trial?
>
> MR. PEEDE: At first I was feeling ill health wise, but, you know, after I had eaten and all, I feel okay health wise; just mentally I can't handle it, I, I just --
>
> THE COURT: Can't handle further participation in the trial you mean?
>
> MR. PEEDE: I don't mean any disrespect to my lawyers or to you or to anybody else.
>
> The whole, you know, the whole thing went against my wishes. And it's just mentally messing with me so bad that I rather not be any part of it. I rather be away from it.
>
> THE COURT: I want you to understand you are waiving your right to be present at all times during the Court proceedings?

MR. PEEDE: Yes, sir, that's fine. That's what I'd like.

THE COURT: You say you're not feeling ill at this time? This is just a decision you're making because it's your desire?

MR. PEEDE: Yes, sir.

THE COURT: Have you been taking any medication or anything else that would interfere with your ability to make clear and intelligent decisions?

MR. PEEDE: I was on medication until the day the trial started or the day that was, the jury was being picked. And then I was taken off of it.

THE COURT: What type of medication was it?

MR. PEEDE: I really didn't know what it was.

THE COURT: Sedative?

MR. PEEDE: At first it was something for depression, and then it was something to relax and sleep.

THE COURT: But you haven't had anything that would affect your ability to think clearly or make decisions?

MR. PEEDE: I don't think so.

THE COURT: Anyone threatened you in any way or offered anything to you to have you not participate any further in this trial?

MR. PEEDE: No, sir.

THE COURT: Has anyone consulted with you at all about this decision? Or is it simply a decision you're making on your own?

MR. PEEDE: It's my own decision.

THE COURT: Sum up by saying you'd rather be in your cell while this is going on?

MR. PEEDE: Yes, sir.

THE COURT: I'll respect your request in that regard.

MR. REIS: [prosecutor] Ask the Court to ask him one other question, whether or not he wishes for his attorneys to continue the proceedings on his behalf in view of his unhappiness with apparently the strategy that's --

MS. SEDGWICK: [prosecutor] I think a more proper way, if a short recess of a couple of hours --

THE COURT: Do you think if we adjourn court for a while and start back up again your thinking would be different about this?

MR. PEEDE: I had rather the trial continue on since the people are here from the other states, and, you know, going to be time consuming and the financial part and all on the State and all, I rather you go ahead and try the matter and get it over with.

THE COURT: Any indication you might be feeling different about this either tomorrow or the next day?

MR. PEEDE: No, sir, I rather you just go ahead and try it.

THE COURT: Mr. DuRocher and Mr. Bronson [defense attorneys] would be proceeding to --

MR. PEEDE: Yes, sir, I realize.

THE COURT: -- to defend you even though you're not there. Is that your desire? Do you want them to continue on?

MR. PEEDE: Yes, sir, I feel they've started the trial, they should finish it.

THE COURT: Anything further?

Thank you, Mr. Peede. You'll be taken back to your cell.

(TR. 669-673)

The trial judge made specific factual findings for the record, holding that Peede's decision not to be present for further trial proceedings was a free and voluntary one not prompted by any illness or outside factors (TR. 675). As found by the trial court and this Court on direct appeal, Peede made it abundantly clear that he fully understood the significance of his waiver and that his absence was voluntary. Peede v. State, 474 So.2d at 810-811. Moreover, the trial court's finding that Peede knowingly and voluntarily absented himself from the courtroom is supported by the record. Peede, 474 So.2d at 812.

In denying postconviction relief, the court below specifically found that the trial court considered Peede's competency when determining that he voluntarily absented himself from trial and wished the trial to continue in his absence. (R. 634-635, citing TR. 669-676). The fact that Peede suffered from a mental illness was known at the time of trial as was the fact that he was not cooperating.

As the trial court concluded in denying postconviction relief, to the extent that Peede is claiming the court should have conducted a competency hearing or requested further evaluations, this is a direct appeal issue. Johnston v. Dugger, 583 So.2d 657, 660 (Fla.), cert. denied, 115 S.Ct. 1262 (1995); see also, Kilgore v. State, 688 So.2d 895 (Fla.) (reviewing claim that trial court should have conducted competency hearing on direct appeal), cert.

denied, 118 S.Ct. 103 (1997). Although trial counsel is bound to seek further expert assistance if evidence exists which calls a defendant's sanity into question, Bush v. Wainwright, 505 So.2d 409, 410 (Fla.), cert. denied, 484 U.S. 873 (1987), in Bush, this Court held that Bush's postconviction claim of incompetency was properly summarily denied and the "numerous psychological problems now pointed out, such as learning disabilities, a dependent personality, and possible "diffuse organic brain damage" do not, when taken together, sufficiently raise a valid question as to Bush's competency to stand trial." 505 So.2d at 411.

Peede's allegation that he was tried while incompetent is refuted by the affirmative finding of competency at the time of trial. Peede does not even allege that a new mental health expert would testify that he was incompetent at trial, which is insufficient to raise a factual dispute. Bush, 505 So.2d at 412 (Barkett, J., concurring) (allegation that expert would now testify to *possibility* of incompetence falls short of adequately raising factual question of competency). There is no indication either in the trial or postconviction record that Peede did not rationally understand the proceedings against him at the time of trial. Accordingly, the trial court below properly summarily denied relief on this claim.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING POSTCONVICTION RELIEF ON PEEDE'S CLAIM THAT THE DEFENSE PSYCHIATRIST FAILED TO CONDUCT A PROFESSIONALLY APPROPRIATE EVALUATION.

Dr. Kirkland did not find Peede to be either insane or incompetent to stand trial, therefore, Peede alleges that his evaluation was professionally inadequate. Relying primarily on Ake v. Oklahoma, 470 U.S. 68 (1985) and Mason v. State, 489 So.2d 734 (Fla. 1986), Peede contends that he was denied a professionally adequate mental health evaluation. In denying postconviction relief, the trial court found Peede's "ineffective psychiatric assistance" claim to be procedurally barred and, alternatively, without merit. (R. 635-638). This Court has rejected similar postconviction claims as procedurally barred. Johnson v. State, 593 So.2d 206, 208 (Fla.), cert. denied, 506 U.S. 839 (1992); Medina v. State, 573 So.2d 293 at 295 (Fla. 1990).

Peede alleges that Dr. Kirkland's psychiatric evaluation was inadequate because he received no independent information concerning Peede's mental health history and conducted no psychological tests. As the trial court found in denying postconviction relief, both of Dr. Kirkland's reports specifically considered Peede's extensive history of anti-social and explosive behavior, although that extensive history was self-reported. (TR. 1239, 1241-42). Both of Dr. Kirkland's reports also reached a

clinical diagnosis of mental disease, but found that Peede was competent to stand trial and was not insane. Id. During his testimony at the penalty phase, Dr. Kirkland also explained that he had considered the fact that organic brain damage could be one cause of the Defendant's illness. (TR. 957). In denying postconviction relief, the trial court found this factor important because, "despite the knowledge that organic brain damage could be present, Dr. Kirkland still would have reached the professional conclusion that Defendant's mental illness did not affect Defendant's ability to tell right from wrong." (R. 637, citing TR. 952, 956). In denying postconviction relief on Peede's "ineffective psychiatric assistance" claim, the trial court stated,

> CLAIM II -- INEFFECTIVE PSYCHIATRIC ASSISTANCE
>
> Defendant claims his due process rights were violated because he received incompetent assistance from a psychiatric expert. He claims that his mental health expert, Dr. Robert G. Kirkland, failed to adequately or properly assess his competency to stand trial and this fact entitled him to post-conviction relief, citing Mason v. State, 489 So. 2d 734 (Fla. 1986). He alleges the existence of extensive prior mental problems and his behavior at trial as facts which Dr. Kirkland did not have or failed to consider.
>
> Once again, there is recent authority indicating this claim is procedurally barred. Cherry, 659 So. 2d at 1071 n.1, 1072; Doyle v. State, 526 So. 2d at 911. However, since the holding in Mason has never been specifically overruled, the court has considered the merits of the claim.
>
> Only two cases have resulted in relief on this issue, Mason and Sireci v. State, 502 So. 2d 1221 (Fla. 1987). In both cases, the psychiatrists failed to discover evidence of extensive histories of permanent

psychiatric problems such as mental retardation and an organic brain disorder. 489 So. 2d at 736-37; 502 So. 2d at 1223, 1224. Where there is no evidence that the original psychiatrists failed to notice such an obvious organic brain disorder or past medical history no evidentiary hearing has been required. Corell v. Dugger, 558 So. 2d 422, 426 (Fla. 1990); Engle v. Dugger, 576 So. 2d 696, 702 (Fla. 1991).

Defendant has alleged that Dr. Kirkland considered only self-evaluation of the Defendant in reaching his diagnosis. Defendant believes his case would fall under the rubric of Mason and Sireci rather than under Corell and Engle solely because it is clear that Dr. Kirkland did not review any prior psychiatric reports or interview other who had dealt with the Defendant. Defendant argues that these reports or interviews may have led Dr. Kirkland to consider the possibility of organic brain damage or some other permanent mental deficiency.

However, as in Corell and Engle the record shows that Dr. Kirkland did not overlook the possibility of organic or permanent brain damage. On the contrary, both of Dr. Kirkland's reports specifically considered Mr. Peede's extensive history of anti-social and explosive behavior, although that extensive history was self-reported. (R. 1239, 1241-42). Both of Dr. Kirkland's reports also reach a clinical diagnosis of mental disease, but find that Defendant was, in fact, competent to stand trial and was not insane. Id.

Most significantly, during his testimony at the penalty phase of the trial, Dr. Kirkland made it clear that he had already considered the fact that organic brain damage could be one cause of Defendant's illness. (R. 957). This fact is important because, despite the knowledge that organic brain damage could be present, Dr. Kirkland still would have reached the professional conclusion that Defendant's mental illness did not affect Defendant's ability to tell right from wrong. (R. 952, 956). Because of that testimony, the jury also was able to hear that Mr. Peede's mental problems could have been caused by a permanent brain disorder. In short, even if Dr. Kirkland had examined additional records of Defendant's illness, Dr. Kirkland's opinion would have been the same and the essential evidence presented to the jury would have been the same.

> Defendant also attempts to recast the same claims as ineffective assistance of counsel by asserting the counsel was ineffective for failing to locate and forward additional psychiatric records to Dr. Kirkland. However, as Dr. Kirkland's testimony indicates, additional documents would not have altered Dr. Kirkland's conclusions because he already knew the possible etiologies of Defendant's illness. Moreover, since the psychiatric evaluation is shown to have been adequate from the record, there could have been no prejudice in failing to provide these records. Compare Johnston v. Dugger, 583 So. 2d 657, 661 (Fla. 1991)(once psychiatric evaluation was determined to be adequate, claim of ineffective assistance for failing to forward records to psychiatrist failed second prong of the Strickland test).
>
> Defendant also seems to argue that the criteria which mental health experts must consider in reaching a professional medical opinion are now controlled by case law or by professional standards of which the court is to take judicial notice. While such considerations may affect the weight which is given a medical opinion, it does not make Dr. Kirkland's opinion so deficient that Defendant was deprived of due process in this case.
>
> (R 635-638)

As evidenced by the foregoing comprehensive analysis, this claim was properly subject to summary disposition. To the extent that Peede is asserting that trial counsel was ineffective for failing to ensure adequate mental health assistance, Peede's allegations are insufficient and are refuted by the trial record relied upon by the court below. (See also, Issue V). Finally, any claim that a new expert could have offered more favorable testimony would not constitute a sufficient basis for relief. Engle v. Dugger, 576 So. 2d 696 at 700 (Fla. 1991); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990); Correll v. State, 558 So.2d 422, 426 (Fla. 1990); Hill v. Dugger, 556 So.2d 1385, 1388 (Fla.), cert.

denied, 116 S.Ct. 196 (1995); Engle, 576 So.2d at 701 ("This is not a case like Mason v. State, 489 So.2d 734 (Fla. 1986), in which a history of mental retardation and psychiatric hospitalizations had been overlooked").

Psychiatric evaluations may be considered constitutionally inadequate so as to warrant a new sentencing hearing where the mental health expert ignored "clear indications" of mental retardation or organic brain damage. Rose v. State, 617 So.2d 291, 295 (Fla.), cert. denied, 510 U.S. 903 (1993); State v. Sireci, 502 So.2d 1221, 1224 (Fla. 1987). During the penalty phase, Dr. Kirkland testified about mental health mitigation. Even if Peede has now been able to find a mental health expert whom he believes could have offered more favorable testimony, this is not a sufficient basis for relief. Provenzano, 561 So.2d at 546. In order to obtain an evidentiary hearing, Peede must allege more than the conclusory argument presented in his postconviction motion. Peede failed to assert any credible basis to support his claim that his mental health assistance was constitutionally inadequate; therefore, this issue was properly summarily denied.

ISSUE V

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING PEEDE'S POSTCONVICTION CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Legal Standards

The test for judging claims of ineffective assistance of counsel was set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> 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 showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

To satisfy this test, the defendant must show both deficient performance *and* that the deficient performance prejudiced the defense. Strickland; Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). A claim of ineffective assistance fails if either prong is not proven. Kennedy v. State, 547 So.2d 912 (Fla. 1989). The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established *only* with a showing that the result of the

proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988).

Some of Peede's multiple allegations of ineffective assistance of trial counsel previously were addressed as subsidiary issues involving Peede's postconviction claims of (1) incompetence to stand trial and (2) inadequate psychiatric assistance. (Issues III and IV herein]. In denying postconviction relief on Peede's remaining claims of ineffective assistance of trial counsel, the trial court stated,

> CLAIM III -- COUNSEL INEFFECTIVE FOR FAILING TO DEVELOP INSANITY AND "MENTAL HEALTH" DEFENSES ET AL.
>
> A number of separate ineffective assistance of counsel claims are raised in Claim III. Most of these supplement Claims I and II and clearly are deficient for the same reasons. There was no viable insanity defense at trial and counsel did not act ineffectively in failing to present such a defense when the expert witness they had retained for the Defendant failed to find any indication that the insanity defense would have been viable.
>
> Moreover, there was extensive evidence of planning and premeditation which included not only evidence of defensive bruising on the victim (R. 567, 573) and that the victim continued to live for at least five minutes and perhaps longer after being stabbed (R. 570-71) but also the Defendant's own statement concerning the fact that he had to stop the car and jump into the back seat to commit the crime and he had a plan to sue the victim as a decoy to arrange the murder of his ex-wife, Geraldine Peede, and a man named Calvin Wagner. (R. 600, 710-11, 715-24, 829-35). Since both felony murder and premeditated murder were at issue, this evidence makes it highly improbable that any insanity defense would have actually affected the result of the trial. Defense counsel did in fact present mitigation evidence through

Dr. Kirkland at the sentencing phase.

Trial counsel is also alleged to have been ineffective for failing to present two other statutory mitigators; namely, inability to conform behavior to the law and duress. However, the tack taken by counsel was dictated by what the psychiatrist felt he could issue an opinion on. As with failing to present the insanity defense, counsel cannot be ineffective for failing to present a mitigator that the expert psychiatrist does not believe is present. See also Adams v. State, 456 So. 2d 888, 891 n.* (Fla. 1984)(Same claim procedurally barred).

Subsection B was not adequately pled. Defendant has failed to allege that a plea agreement was offered and that, but for counsel's dereliction, he would have pleaded otherwise. Compare Levens v. State, 598 So. 2d 120 (Fla. 1st DCA 1992), criticized on other grounds, Wilcox v. State, 638 527 (Fla. 5th DCA 1994).

Finally, trial counsel was allegedly ineffective for failing to take depositions of out-of-state witnesses and failing to call witnesses at trial. These claims are not well pled. Defendant must allege, at a bare minimum, the identity of the witness, the subject matter of their testimony and how that testimony would have affected the outcome of the trial. Gorham v. State, 521 So. 2d 1067, 1070 (Fla. 1988); Highsmith v. State, 617 So. 2d 825, 826 (Fla. 1st DCA 1993). Defendant also failed to allege that any given witness was available to testify. Puig v. State, 636 So. 2d 121 (Fla. 3d DCA 1994); Williamson v. State, 559 So. 2d 723, 724 (Fla. 1st DCA 1990).

* * *

CLAIM IV -- INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PRESENT INSANITY OR LACK OF PREMEDITATION DEFENSE

Defendant also asserts that his counsel was ineffective for failing to call Dr. Kirkland at the guilt phase of his trial to present an insanity defense, to, at least, to negate the element of premeditation. In order to properly allege that defense counsel was ineffective in failing to present a particular defense, Defendant must set forth facts that show the defense was viable. Panagiotakis v. State, 619 So. 2d 345 (Fla. 2d DCA 1993)(due process and objective entrapment defenses).

> Here, Dr. Kirkland's testimony would have been irrelevant to support an insanity defense or even a reduced ability to premeditate defense. Hall v. State, 568 So. 2d 882, 885 (Fla. 1990). Accordingly, defense counsel could not have been ineffective for failing to present that testimony.

Peede's claim of ineffective assistance of trial counsel was correctly decided without the necessity of an evidentiary hearing. Evidence which did not go toward proving or disproving Peede's ability to distinguish right from wrong at the time of the crime was irrelevant at Peede's 1984 trial, including evidence of irresistible impulsive behavior, diminished mental capacity, or psychological abnormality short of inability to distinguish right from wrong. Gurganus v. State, 451 So.2d 817, 820-821 (Fla. 1984). The failure to present expert mental health testimony by Dr. Kirkland during the guilt phase of trial presented no colorable claim of ineffectiveness. As this Court in Hall v. State, 568 So.2d 882, 885 (Fla. 1995) concluded,

> Expert testimony that a defendant suffered from a mental infirmity, disease, or defect without concluding that, as a result, the defense could not distinguish right from wrong is irrelevant (citations omitted).

As to Peede's challenge to trial counsel's alleged failure to conduct an adequate background investigation, the trial court properly found this allegation to be insufficiently pled. Absent some minimal identification of the witness, the subject matter of their testimony, and, most importantly, how that testimony would have affected the outcome of the trial, Peede's self-serving, bare

bones allegations were facially insufficient to warrant postconviction relief. Peede failed to allege and demonstrate any deficiency of counsel and resulting prejudice. See, Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988).

As to Peede's claim that his trial counsel "improperly acquiesced in Mr. Peede's rejection of the guilty plea," the trial court properly found this claim was not adequately pled because Peede did not "allege that a plea agreement was offered and that, but for counsel's dereliction, he would have pleaded otherwise." (R. 639); see also, Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Furthermore, during voir dire, trial counsel notified the trial court that Peede refused to allow his counsel to seek anything other than a jury trial in this case. As trial counsel explained,

> MR. DuROCHER [Defense counsel]: One matter related to this, that is would want Mr. Peede to acknowledge, as he's instructed us, he has refused to allow us to negotiate on his behalf or seek anything other than a full jury trial of these issues.
>
> And, Robert, would you acknowledge that you told us several times really the only choices you saw were not guilty by reason of insanity or death in the electric chair? Those are the two choices you see as an outcome of this case?
>
> MR. PEEDE: What I've done, I really don't see but two choices, that's mental health or send me to the electric chair.
>
> MR. DuROCHER: The reason I bring it up, Your Honor, it goes to the point of tactics and strategy. We have had to integrate that into our approach of the case.

> Would be fair to say -- not dramatized -- Mr. Bronson and I agonized just how to approach the defense on this case. And we're doing it the best way we think it should be done.
>
> (Vol. II, TR. 212-216).

As to Peede's postconviction complaints that trial counsel failed to "effectively litigate" the suppression of Peede's pretrial statements or litigate objections to the presentation of sentencing phase testimony, these claims involve issues cognizable on direct appeal, and there is no basis to review these procedurally barred issues under the guise of an ineffective assistance of counsel claim. Medina v. State, 573 So.2d 293 (Fla. 1990) (ineffective assistance of counsel can't be used to circumvent the rule against using 3.850 as a second appeal). Furthermore, even under the guise of ineffective assistance of trial counsel, Peede failed to show any deficiency of counsel and resulting prejudice under Strickland.

Peede's postconviction allegations fail to show that trial counsel's conduct fell outside the wide range of reasonable professional assistance. He has also failed to show that the result of the trial would have been different or that his trial was fundamentally unfair or unreliable. Peede's allegations fail to meet his heavy burden of demonstrating a colorable claim of ineffective assistance of counsel sufficient to warrant an evidentiary hearing. Peede's claim of "errors" are only identified by conclusory allegations that counsel failed to investigate and

failed to object to trial errors. Since no specific facts are offered in support of his allegations, no relief is warranted. See, Jackson, 633 So.2d at 1054 ("Conclusory allegations are not sufficient to require an evidentiary hearing"). "A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing." Kennedy, 547 So.2d at 913.

Peede likewise fails to satisfy the prejudice prong of Strickland. The overwhelming evidence of Peede's guilt clearly demonstrates the lack of any prejudice. Hildwin v. Dugger, 654 So.2d 107, 109 (Fla.), cert. denied, 116 S.Ct. 420 (1995). denied, 116 S.Ct. 591 (1995). Peede's claim was insufficiently pled and no evidentiary hearing was warranted. Engle v. Dugger, 576 So.2d 696, 699 (Fla. 1991). The trial court's summary denial of Peede's claim that he was denied his right to the effective assistance of counsel at trial was proper. Peede has not alleged specific facts which would warrant an evidentiary hearing on this issue. Therefore, he is not entitled to any relief.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING POSTCONVICTION RELIEF ON PEEDE'S CLAIM THAT ALLEGEDLY EXCULPATORY MATERIAL WAS WITHHELD FROM THE DEFENSE IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963).

Peede alleges that the State violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) in failing to disclose statements which were contained in the victim's diary and statements from his friends and relatives. For the following reasons, the trial court properly denied postconviction relief on this claim.

To substantiate a Brady claim, the defendant must prove: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. Hegwood v. State, 575 So.2d 170, 172 (Fla.1991) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir.1989)), Robinson v. State, 1998 WL 54134, (Fla. 1998).

In denying relief on Peede's postconviction Brady claim, the trial court found that the Brady violation, if any, could have had no effect on the outcome of the trial and, therefore, this evidence

was not material as a matter of law. (R. 641). The trial court's order states, in pertinent part:

> CLAIM V -- EXCULPATORY EVIDENCE WITHHELD; BRADY CLAIM
>
> The Brady claim is based on a hitherto undisclosed diary entry made by Mrs. Peede and statements from friends and relatives of Mr. Peede. The State's Brady violation, if any, could have had no effect on the outcome of the trial. Therefore, this evidence cannot be material evidence as a matter of law. United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, ___, 87 L. Ed. 2d 481, ___ (1985); White v. State, 664 So. 2d 242, 244 (Fla.), cert. denied ___ U.S. ___, 116 S. Ct. 591, 133 L. Ed. 2d 505 (1995).
>
> Evidence that Mr. Peede had injured others in explosive fits would have harmed him rather than helped him. Therefore, that evidence was not material to the guilt phase of his trial. Compare Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995)(no valid Brady claim where withheld photographs would not have supported case but might have inflamed jurors). Even in the penalty phase such testimony would have been inadmissible opinion evidence at best and merely cumulative of Dr. Kirkland's penalty phase testimony.
>
> Evidence from the victim's diary deserves special attention because it affects one of the theories of the State's case-in-chief, that the murder was committed in the course of a kidnapping. Since lack of consent is an element of the crime, the diary entry might appear to be relevant on its face.
>
> In fact, it could only have been admitted as "impeachment" of the victim's hearsay statements that were testified to by the victim's daughter at trial. See § 90.803(3)(a), Fla. Stat. (1983); Peede, 474 So. 2d at 816. Significantly, the diary is not the previous statement of the daughter but of the victim. Therefore, it is not technically impeachment evidence.
>
> Instead such evidence would have to satisfy the requirements of section 90.806, Florida Statutes (1983):
>
> (1) When a hearsay statement has been

> admitted in evidence credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.

§ 90.806(1), Fla. Stat. (1983)[5]. The statement to be refuted was that the victim was afraid of the Defendant at the time of the kidnapping and had left instructions with her daughter to call the police if she did not return. Peede, 474 So. 2d at 816. Those statements were admitted as exceptions to the hearsay rule because they reflected the then-present state of mind of the victim. Id.; § 90.803(3)(a), Fla. Stat. (1983).

Significantly, the diary entry is not relevant to the victim's present-sense state of mind on the day of the kidnapping. Nor does it reflect the victim's intention to go off with the Defendant to make it admissible under section 90.803(3)(a)2, Florida Statutes (1983). On the contrary, it reflects the victim's intention to go to Miami, the location from which she was kidnapped. Nor could the diary entry be admissible to show the Defendant's conduct, or the "loving nature" of his relationship with his wife. Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982).

The allegedly material diary entry was dated December 6, 1982. The murder occurred on March 31, 1983. The diary entry really only shows the declarant's state of mind on the day it was uttered, December 6, 1982. Even if an inference could be drawn that the state of mind recorded on December 6, 1982 carried over to an occasion four months later, its probative value would be very slight. In light of the daughter's testimony during trial, the diary entry could not have been material in a constitutional sense. The entry would not have "refuted" the prosecution's theory of the case, even if it had been admissible. See generally Duest v. Dugger, 555 So. 2d

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[5]The present statute has the more politically correct phrase "the declarant's" in place of "his".

849, 851 (Fla. 1990); Roberts v. State, 568 So. 2d 1255 (Fla. 1990); Swafford v. Dugger, 569 So. 2d 1264, 1267 (Fla. 1990).

(R 641-643)

Although the State initially acknowledged the appropriateness of an evidentiary hearing on this claim in 1988, as demonstrated in Herrera v. Collins, 113 S.Ct. 853 (1993), when newly-discovered evidence is alleged, a threshold colorable showing is required in order to warrant even the granting of an evidentiary hearing, much less the granting of post-conviction relief. This postconviction claim was properly subject to summary denial by the trial court pursuant to United States v. Bagley, 105 S.Ct. 3375 (1985). Everything contained in the State's file was made available to the defense. (See TR 1020 - State's response to demand for discovery - "Please contact the undersigned to arrange a mutually convenient time to inspect all items properly subject to disclosure, and to determine the existence or non-existence of confidential informer, electronic surveillance, search or seizure, exculpatory material and/or oral unrecorded statements by defendant, as provided by said rule; TR 1028; 1029; 1031; 1043; 1044; 1260 - stipulation of discovery - "Defense was also provided with copies of all police reports and witness statements written by these witnesses and others").

The diary containing romantic thoughts by the victim four months before the murder was hardly "material in the sense that its

suppression undermines confidence in the outcome of the trial" in any event. United States v. Bagley, 105 S.Ct. 3375, 3381 (1985). That Darla may have hoped that she and Peede might reconcile was evidenced by the fact that she later met him in Miami despite obvious misgivings. As to additional witness' statements of Peede's explosive rage, the trial court found that this evidence would have harmed Peede, rather than helped him. Moreover, the defense certainly could have learned of Peede's alleged emotional problems from Peede or other sources. See, United States v. Davis, 787 F.2d 1501, 1505 (11th Cir. 1986). In Cruse v. State, 588 So.2d 983 (Fla.1991), this Court reiterated, "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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." In the instant case, the trial court properly evaluated the evidence which was allegedly withheld in the context of the entire record and found that Peede failed to establish materiality under Brady. Peede has failed to show a "probability sufficient to undermine confidence in the outcome."

ISSUE VII

PEEDE'S CHALLENGE TO THE CONSTITUTIONALITY OF FLORIDA'S CAPITAL SENTENCING STATUTE IS PROCEDURALLY BARRED, THEREFORE, THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING POSTCONVICTION RELIEF

Peede sets forth a single sentence in support of this claim. (Initial Brief of Appellant at 20). According to Peede, this issue was previously raised on direct appeal but "new and significant case law has been decided by the United States Supreme Court." Peede does not identify the case law upon which he purportedly relies.

This issue is facially insufficient to warrant postconviction review. In Duest v. Dugger, 555 So. 2d 849 (Fla. 1990), cert. denied, 507 U.S. 1034 (1993), this Court stated:

> Duest also seeks to raise eleven other claims by simply referring to arguments presented in his motion for postconviction relief. The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues and these claims are deemed to have been waived.
>
> 555 So.2d at 851-52.

Peede has failed to identify any credible claim for postconviction relief. This issue is waived.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING POSTCONVICTION RELIEF ON PEEDE'S PROCEDURALLY BARRED JURY INSTRUCTION CLAIM

In denying postconviction relief on Peede's jury instruction complaint, the trial court found this issue procedurally barred and, alternatively, error, if any, was harmless. The trial court's order denying postconviction relief states,

> CLAIM XI -- IMPROPER JURY INSTRUCTION THAT MAJORITY NEEDED FOR LIFE RECOMMENDATION
>
> This claim fails for two reasons. First, it is procedurally barred. See, e.g., Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990). More importantly, in this case the jury was properly instructed twice at defense counsel's request that a six-to-six vote would be considered as a recommendation of life sentence. (R. 972, 973). Finally, the jury actually returned a verdict recommending death by an 11 to 1 margin. (R. 975). Thus, any error was certainly harmless because there is no indication anyone changed their vote to make a majority.
>
> (R. 646).

Challenges to the propriety of jury instructions must be presented at trial and on direct appeal. They are waived for collateral review. Buenoano, 559 So. 2d at 1118; Roberts, 568 So.2d at 1257-1258; Engle, 576 So.2d at 701. Any alleged impropriety as to instructions or comments directed to the jury would necessarily be reflected in the record on appeal, and therefore must have been raised on direct appeal. Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988). Because this issue was procedurally barred, it was properly subject to summary denial.

Furthermore, reviewing this issue in the context of ineffective assistance of counsel does not warrant any relief under Strickland. In the instant case, trial counsel explained that the death penalty is not appropriate in all cases of murder, but only where there is great evidence of aggravation or the case is more heinous or cruel (TR 212; 273; 252; 257; 258; 386; 405). He also ascertained whether the jurors would keep an open mind as to things that might persuade them to recommend life and whether they could follow the judge's instructions as to how to apply the law (TR 273; 368; 274). Counsel had no duty to challenge the judge's remarks since they were, in fact, not at all misleading. The jurors were also asked if they could make a recommendation of mercy or life imprisonment if the mitigating factors outweighed the aggravating factors and that mitigating factors would be things to consider that may make the offense less severe, or might lead or persuade one to feel that the death penalty would not be appropriate, but life in prison would. (TR 414).

Moreover, the jury was properly instructed in the penalty phase that it was their duty to render an advisory sentence "based upon you determination as to whether sufficient aggravating circumstances existed to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh aggravating circumstances that may be found to exist" (TR 969). It was further instructed that "if you find the aggravating

circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years. Should you find sufficient aggravating circumstances to exist, it will be your further duty to determine whether mitigating circumstances exist that may outweigh the aggravating circumstances. If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed." (TR 970-971). Such instructions at trial were correct. See, Arango v. State, 411 So.2d 172 (Fla. 1982). The jurors were instructed that each aggravating circumstance must be established beyond a reasonable doubt (TR 970), and that the advisory sentence should be life imprisonment if such aggravating factors alone do not warrant the death penalty (TR 970). The jury was further instructed to give the mitigating circumstances "such weight as you feel it should receive." (TR 971). And, the jury was instructed twice that a six-to-six vote would be considered as a recommendation of life sentence. (R. 972, 973). As the trial court also noted in denying postconviction relief, the jury actually returned a verdict recommending death by an 11 to 1 margin. (TR. 975). "Thus, any error was certainly harmless because there is no indication anyone changed their vote to make a

majority." (R. 646). In the instant case, the evidence in aggravation was extremely strong -- Peede had been previously convicted of committing two felony crimes involving the use of force or threat to some other person (second degree murder and assault with a deadly weapon -- TR 1265), and the instant murder had been committed during a kidnapping (TR 1263-1264). Balanced against the mitigating evidence of being under the influence of extreme emotional or mental disturbance, the trial court's imposition of the death penalty was affirmed on direct appeal. Peede's postconviction challenge to a purportedly flawed jury instruction is procedurally barred. This claim was properly subject to summary denial.

ISSUE IX

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING POSTCONVICTION RELIEF ON PEEDE'S CLAIM THAT THE TRIAL COURT ALLEGEDLY FAILED TO CONSIDER ALL NONSTATUTORY MITIGATING CIRCUMSTANCES.

Peede's final claim, that the trial court allegedly failed to consider all nonstatutory mitigating circumstances, is also procedurally barred. This is an issue which could have been presented in a direct appeal. In fact, Peede did challenge, on direct appeal, the trial court's alleged failure to consider mitigating circumstances. (Issue IX, Initial Brief of Appellant, Peede v. State, Fla. S. Ct. Case No. 65,318) Thus, this claim was properly subject to summary denial. Turner v. Dugger, 614 So.2d 1075, 1077 (Fla. 1992); Engle, 576 So.2d at 702; Agan v. State, 560 So.2d 222, 223 (Fla. 1990).

Assuming, arguendo, the merits of this claim are properly before this Court, Peede still has not demonstrated any entitlement to postconviction relief for the following reasons. In denying postconviction relief, the trial court found that the jury was not precluded from considering "any other aspect of the defendant's character," and the trial court did not limit its consideration of mitigating factors. The trial court's order denying postconviction relief on this claim provides,

CLAIM XIII -- TRIAL COURT FAILED TO CONSIDER NONSTATUTORY MITIGATORS

> The record of the case do not support this claim. The jury was instructed that they could consider "any other aspect of defendant's character or record, and other circumstance of the offense" in reaching a recommendation of life imprisonment. (R. 970). The written findings of fact also did not limit the evidence considered; this court specifically found that no other mitigating factors outweighed the aggravators to make a life sentence appropriate. (R. 1264-65).
>
> (R 647)

At the sentencing hearing, both the State and the defendant presented evidence as to aggravating and mitigating factors (TR. 927-959). The State's evidence was limited to proof of Peede's involvement in two prior felonies in the State of California to which he pled guilty and was convicted (TR. 927-936, 938-945). Those convictions were for second degree murder involving the use of a firearm and for assault with a deadly weapon (TR. 929).

Peede presented testimony in mitigation from Dr. Robert Kirkland regarding Peede's mental state at the time of the murder as well as unrebutted correspondence on Peede's behalf from a number of individuals in North Carolina. (TR. 948, 956-958). The sentencing judge, applying Dr. Kirkland's testimony with the "benefit of the doubt" in favor of Peede, determined that the murder was committed while Peede was under the influence of extreme mental or emotional disturbance; however, this "marginal mitigating circumstance" was sufficiently outweighed by the single aggravating circumstance of the defendant's prior convictions for second degree

murder and assault with a deadly weapon (TR. 1264-1265). The trial judge specifically stated that he had reviewed the evidence presented, which included the statutory mitigating circumstances as well as the additional non-statutory mitigating circumstances asserted (i.e., the letters presented by Peede on his behalf) (TR. 979-981, 1264-1265). After weighing the aggravating and mitigating circumstances, statutory and non-statutory, the trial court found the sentence of death was mandated based upon his finding that sufficient aggravating circumstances had been established to outweigh the single mitigating circumstance (TR. 1265).

While there was no procedural bar to the timely presentation of a claim based upon Lockett v. Ohio, 438 U.S. 586 (1978) and Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), with respect to the introduction and consideration of nonstatutory mitigating evidence during the capital sentencing hearing, Downs v. Dugger, 514 So.2d 1068 (Fla. 1987), at issue in this case is whether Peede demonstrated any credible claim under Hitchcock, or whether this issue actually involves a claim that could have been raised on direct appeal.

A sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Eddings v. Oklahoma, 455 U.S. 104 (1982). Hitchcock stands for the

proposition that when the judge and jury's consideration of mitigating circumstances is limited to statutory factors, the sentencing proceeding is constitutionally deficient and a new penalty phase proceeding before a jury is mandated. Hitchcock, Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Morgan v. State, 515 So.2d 975 (Fla. 1987). In this case, the jury's consideration of mitigating circumstances was not limited to statutory factors and the jury was specifically instructed that they may consider "any other aspect of the defendant's character or record, and any other circumstance of the offense." (TR 970). It is likewise clear from the findings of fact in support of the sentence of death that the trial court, as well, did not view its consideration as limited to nonstatutory mitigating factors and considered all matters proffered as mitigating (TR 1264-1265). Because this is truly not a Hitchcock claim, any error could have been, and should have been, argued on direct appeal. Counsel, in fact, did argue on direct appeal that other mental mitigating factors should have been found.

Peede's allegation that the trial court improperly sentenced him to death without considering all nonstatutory mitigating circumstances appearing in the record is procedurally barred, inasmuch as it could have been raised on direct appeal of Peede's conviction for first-degree murder and sentence of death. Peede v. State, 474 So.2d 808 (Fla. 1985).

Peede's confession revealed that Peede had become convinced that he had seen nude photographs of the victim and his ex-wife, Geraldine, in certain "Swinger" magazines and this concern led him to look through further magazines, later discovering what he decided was a picture of Darla, Geraldine, and Calvin Wagner together (TR. 721-722). Peede intended to utilize Darla as a lure to bring Geraldine and Calvin Wagner to a motel where he could kill them. Peede noted that Wagner and Geraldine Peede were afraid of him; therefore, it would be necessary to go to Miami and bring Darla back to set the trap to get close enough to the other two intended victims. (TR. 722-723, 1264). However, as noted by this Court on direct appeal, by prematurely murdering Darla at the time he did, Peede eliminated his bait. 474 So. 2d at 817. On direct appeal, Peede argued that the sentencing judge erred in finding only one mitigating circumstance to have been established, i.e., that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. Reciting the evidence that was adduced at the sentencing hearing, Peede asserted the applicability of only <u>one other</u> statutory mitigating circumstance, i.e., that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. § 921.141(6)(f), Fla. Stat. (1983). However, Dr. Kirkland, the psychiatrist called by the defense to testify at the sentencing

proceeding, stated that in his expert opinion Peede was, at the time of the murder, cognizant of his actions, aware of the consequences of the murder, and that he had sufficient mental capacity to conform his conduct to the requirements of law (TR. 955-956). The sentencing judge specifically noted this testimony in the sentencing order wherein he rejected all statutory and non-statutory mitigating factors other than the influence of extreme mental or emotional disturbance which he determined to have been marginally established giving the Defendant the "benefit of the doubt" (R. 1264-1265).

In this case, the sentencing order rendered by the trial judge revealed on its face that, after considering the evidence presented both at trial and at the sentencing proceeding - including certain letters presented on behalf of the Defendant - only a single statutory mitigating circumstance had been marginally established and that no non-statutory mitigating factor had been proven (TR. 1264-1265). The determinations by the trial judge were clearly supported by the record and made it readily apparent that the sentencing judge did consider all possible mitigating circumstances - statutory and non-statutory - in his evaluation of the evidence presented. Accordingly, no basis for postconviction relief has been demonstrated. The trial court's order summarily denying postconviction relief should be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order summarily denying Peede's Rule 3.850 motion to vacate should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Chris DeBock, Assistant CCRC-Middle, 405 North Reo Street, Suite 150, Tampa, Florida 33609-1004, this 29th day of June, 1998.

COUNSEL FOR STATE OF FLORIDA