IN THE SUPREME COURT OF FLORIDA;

CASE NO. 90,002

ROBERT IRA PEEDE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Peede's motion for postconviction relief. The motion was brought pursuant to Fla.R.Crim.P. 3.850. The court summarily denied Mr. Peede's motion in its entirety without an evidentiary hearing.

The following symbols will be used to designate references to the record in this instant cause:

"R" -- record on direct appeal to this Court;

"PC-R" -- record on 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Peede has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the gravity of the penalty. Mr. Peede, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

Mr. Peede was indicted by a grand jury for first-degree murder on March 31, 1983. After pleading not guilty, Mr. Peede was tried by a jury on February 13, 1984. Penalty phase was conducted March 5, 1984. Sentencing was conducted on March 5, 1984, (R. 920), but the court did not enter a written sentencing order until March 21, 1984 (R. 1263).

Mr. Peede unsuccessfully appealed his conviction and sentence, Peede v. State, 474 So.2d 808 (Fla. 1985). A death warrant was signed on May 6, 1988. Mr. Peede filed a Rule 3.850 motion on June 6, 1988. The State filed a response to Mr. Peede's motion, conceding the need for an evidentiary hearing on Claims I, II, III, VI, VIII and IX (R. 625). On June 24, 1988, the circuit court entered a stay of execution and thereafter scheduled four days for an evidentiary on Mr. Peede's motion (R. 227). On February 20, 1995, Mr. Peede filed an amended motion for postconviction relief. On June 21, 1996, the circuit court entered an order denying Mr. Peede's June 22, 1988 motion for postconviction relief in its entirety without ever holding an evidentiary hearing.[1] Mr. Peede now appeals that summary denial.

[1]No order was entered regarding Mr. Peede's February 20, 1995 amended motion. However, the circuit court's order referred to allegations raised in the amended motion.

SUMMARY OF ARGUMENT

The lower court erred in denying Mr. Peede's Motion. The files and records did not conclusively show that Mr. Peede was not entitled to an evidentiary hearing. As a matter of fact, the State in its pleading, had conceded to hold evidentiary hearing on several of the claims that was summarily denied by the lower court. Moreover, the law strongly favors evidentiary hearings in death penalty postconviction cases, especially where a claim is grounded in factual as opposed to legal matters. Gorham v. State, 521 So.2d 1076, 1069 (Fla. 1988). Furthermore, the lower court's ruling does not incorporate the six additional claims filed in the amended Motion to Vacate, and as a result six claims were not ruled on by the lower court.

ARGUMENT I

THE LOWER COURT ERRED BY DENYING MR. PEEDE'S RULE 3.850 MOTION WITHOUT GRANTING AN EVIDENTIARY HEARING AND WITHOUT ATTACHING RECORDS ESTABLISHING MR. PEEDE WAS NOT ENTITLED TO RELIEF, THUS DENYING MR. PEEDE OF THE RIGHT TO DUE PROCESS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The law strongly favors full evidentiary hearings in death penalty postconviction cases, especially where a claim is grounded in factual as opposed to legal matters. Gorham v. State, 521 So.2d 1076, 1069 (Fla. 1988); see also LeDuc v. State, 415 So.2d 721, 722 (Fla. 1982). In Mr. Peede's case, the State conceded the need for an evidentiary hearing and the lower court granted such a hearing. Subsequently, the lower court summarily denied Mr. Peede's Rule 3.850 motion without ever holding such a hearing and without attaching relevant portions of the record to the order. The lower court committed reversible error and this Court should remand Mr. Peede's case for an evidentiary hearing. Holland v. State, 503 So.2d 1250 (Fla. 1987); Hoffman v. State, 571 So.2d 449 (Fla. 1990).

A. THE CIRCUIT COURT ABROGATED MR. PEEDE'S RIGHT TO DUE PROCESS BY SUMMARILY DENYING HIS MOTION TO VACATE AFTER BOTH THE STATE AND THE COURT CONCEDED AN EVIDENTIARY WAS WARRANTED, A HEARING HAD BEEN SCHEDULED AND THE DEFENSE HAD TAKEN SUBSTANTIAL STEPS TOWARDS CONDUCTING THE EVIDENTIARY HEARING.

On June 6, 1988, while a death warrant was pending, Mr. Peede filed an emergency motion for postconviction relief with request for leave to amend, a request for stay of execution and a request for evidentiary hearing (R. 200). The State thereafter conceded that an evidentiary was required with respect to Claims I, II, III, VI, VIII and IX (R. 625). On June

24, 1988, the lower court granted a stay of execution and thereafter scheduled a four day evidentiary hearing (R. 227). In accordance with an order from the lower court, (R. 236), Mr. Peede filed a list with the names of over 79 potential witnesses to support his claims at the hearing (R. 239).

On February 20, 1995, Mr. Peede filed an amended motion for postconviction relief (R. 448). On March 10, 1996, the State filed a motion to strike Mr. Peede's February 20, 1995 amendment (R.625). On March 10, 1995, a hearing was held regarding Mr. Peede's request to amend and the State's motion to strike. Pursuant to the lower court's order, the State submitted a memorandum of law which conceded the need for an evidentiary hearing on Claims I, II, III, and V (R.625, 626).

On June 21, 1996, the lower court entered an order denying Mr. Peede's June 22, 1988 Motion for Postconviction Relief without holding an evidentiary hearing. No order was entered regarding Mr. Peede's February 20, 1995 amended motion.[2] However, the lower court's order mentions allegations raised in the amended motion.

In summarily denying Mr. Peede's Rule 3.850 motion, the lower court committed reversible error and this Court should remand Mr. Peede's case for an evidentiary hearing. In Mr. Peede's case, both the State and the Court conceded the need for an evidentiary hearing. "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of

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[2]The amended motion contained six additional claims in addition to amending the existing claims.

that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-53 (Fla. 1987). In addition, once the court conferred upon Mr. Peede the right to an evidentiary hearing, the denial of that opportunity abrogated his right to due process. Postconviction litigation is governed by principles of due process. Huff v. State, 622 So.2d 982 (Fla. 1993); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994); Holland v. State, 503 So.2d 1250 (Fla. 1987). Moreover, as there is no right to general discovery in postconviction litigation, Mr. Peede acted to his detriment when, pursuant to court order, a list of 79 potential witnesses to be called at the evidentiary hearing was disclosed to the state. Thus, remand for an evidentiary hearing is more than appropriate.

B. THE CIRCUIT COURT'S FAILURE TO ATTACH TO ITS ORDER THOSE PORTIONS OF THE RECORD WHICH CONCLUSIVELY DEMONSTRATE THAT MR. PEEDE IS ENTITLED TO NO RELIEF IS REVERSIBLE ERROR.

A trial court has only two options when presented with an initial Rule 3.850 motion: either grant an evidentiary hearing, or alternatively, attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted. Witherspoon v. State, 590 So.2d 1138 (4th DCA 1992); see also Roberts v. State, 678 So.2d 1232, 1236 (Fla. 1996); Brown v. State, 596 So.2d 1026, 1028 (Fla. 1992); Hoffman v. State, 571 So.2d 449, 450 (Fla. 1990); Fla. R. Crim. P. 3.850(d). In Mr. Peede's case, the trial court chose a course of action which does not constitute a permissible option under Rule 3.850. The court granted and scheduled an evidentiary hearing and then proceeded to summarily deny the motion without holding a hearing and without attaching specific portions to the order.

Upon summary denial of a Rule 3.850 motion, Rule 3.850(d) requires the circuit

court to attach portions of the record conclusively establishing that appellant is not entitled to relief. In Mr. Peede's case, the circuit court failed to attach portions of the record to its order which summarily denied the Rule 3.850 motion. Instead, the court, in effect, attached the entire record. The order issued by the lower court states that, pursuant to Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), "voluminous copies from the record" are attached as "Attachment A" (R. 632). However, Mr. Peede was not served with a copy of this attachment (R. 632). A review of the transcript page numbers referred to in "Attachment A" reveals that the lower court essentially attached the entire record. This Court has deemed this practice "meaningless and improper." Hoffman v. State, 571 So.2d 449 (Fla. 1990)(reversal and remand required where circuit court failed to attach portions of the record to its order summarily denying the defendant's Rule 3.850 motion); see also Lemon v. State, 498 So.2d 923 (Fla. 1986). Thus, because the circuit court ignored the procedures mandated by Rule 3.850 and failed to attach portions of the record conclusively showing summary denial to be appropriate, this Court cannot engage in an adequate review of the lower court's decision.

Mr. Peede pled substantial, serious allegations that go to the fundamental fairness of his death sentence. Specific facts were detailed in his motion. Mr. Peede was – and is – entitled in these proceedings to that which due process allows – a full and fair hearing by the court on his claims. Hoffman; Holland v. State. Mr. Peede's due process right to a full and fair hearing was abrogated by the lower court's summary denial, which did not afford proper evidentiary resolution.

The lower court here did not attach to its order the portion of the record that the

court found conclusively showed that Mr. Peede was not entitled to relief. The record does not conclusively establish that Mr. Peede is entitled to no relief. Accordingly, this Court should reverse and remand for a full and fair evidentiary hearing as required by Rule 3.850.

ARGUMENT II

FILES AND RECORDS PERTAINING TO MR. PEEDE'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119 AND 845, FLA. STAT., THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. PEEDE COULD NOT FULLY PREPARE AN ADEQUATE 3.850 MOTION.

Mr. Peede is entitled to Chapter 119 compliance and the trial court erred in dismissing many of Mr. Peede's claims without allowing him to amend his Rule 3.850 motion after obtaining all public records. The trial court erred in failing to grant Mr. Peede the opportunity to obtain the public records he has not received, to litigate his public records claims, and subsequently further amend his claims for postconviction relief after full disclosure of requested public records.

Mr. Peede has never received public records compliance pursuant to Chapter 1119 to which he is clearly entitled. See Ventura v. State, 673 So.2d 479 (Fla. 1996); Walton v. Dugger, 634 So.2d 1059 (Fla. 1993); Muehleman v. Dugger, 634 So.2d 480 (Fla. 1993); Anderson v. State, 627 So.2d 1170 (Fla. 1993); Mendyk v. State, 592 So.2d 1076 (Fla. 1992); State v. Kokal, 562 So.2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990). This Court has ruled that collateral counsel must obtain every public record in existence regarding a capital case or else a procedural default will be assessed against the defendant. Porter v. State, 653 So.2d 375 (Fla. 1995). However, a concomitant obligation

under relevant case law as well as Chapter 119 rests with the State to furnish the requested materials. Ventura v. State, 673 So.2d 479 (Fla. 1996). When the State's inaction in failing to disclose public records results in a capital postconviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the postconviction motion should be denied or dismissed. Id. Without full public records disclosure, Mr. Peede cannot file a complete Rule 3.850 motion. Id.; Anderson v. State, 627 So.2d 1170 (Fla. 1993). As such, Mr. Peede is denied effective legal representation. Spaziano v. State, 660 So.2d 1363 (Fla. 1995); Spalding v. Dugger, 526 So.2d 71 (Fla. 1988).

ARGUMENT III

MR. PEEDE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS AND HAS BEEN FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT.

A defendant must be competent at the time of his trial; otherwise, his conviction violates due process. Bishop v. United States, 350 U.S. 961 (1956); Dusky v. United States, 362 U.S. 402 (1960). If doubt exists as to a defendant's competency, the court must hold a hearing. Pate v. Robinson, 383 U.S. 375 (1966); James v. Singletary, 957 F.2d 1562 (11th Cir. 1992) Similarly, if a question arises during trial as to a defendant's competency, due process requires the court to conduct a hearing. Drope v. Missouri, 420 U.S. 162 (1975). Due process also requires that that hearing comport with constitutional standards. Pate James.

A claim that a defendant was incompetent at the time of the trial can be proven by the subsequent presentation of collateral evidence as to actual incompetency. Nathaniel v.

Estelle, 493 F.2d 794, 796-97 (5th Cir. 1974). It is insufficient that a defendant is aware of the ongoing legal proceedings at the time of trial; rather, he must also have a "rational understanding" of the proceedings. Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991) cert. denied, 112 S. Ct. 1942 (1992).

Where a Rule 3.850 litigant presents a claim contending that he was incompetent to stand trial and proffering extra-record information alleging with specificity the nature of the mental health evidence that went undiscovered, an evidentiary hearing is required. Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986) ("we must remand for a hearing on whether or not the examining psychiatrists would have reached the same conclusion as to competency had they been fully aware of Mason's history"). Additionally, where a litigant presents properly pled claims demonstrating that the mental health evaluations conducted at the time of trial was professionally inadequate, an evidentiary hearing and Rule 3.850 relief are appropriate. See State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); cf. Mason, 489 So. 2d at 735-37.

It was incumbent upon trial counsel to alert the lower court to the possibility that his client was not competent to be tried. Counsel's duty is continuing, so that if indicia of mental impairment arise during the representation, counsel must bring the matter to the court's attention and request a competency evaluation and a competency hearing. Counsel failed to do either in this case, despite evidence of Mr. Peede's mental impairments.

At the time of his 1984 trial, he was plagued by his longstanding mental disorders. He was plagued by delusions, paranoia, schizophrenia, severe depression, and diminished emotional functioning, and he was psychotic. There were indicia that Mr. Peede was

incompetent throughout the period leading up to his trial. Mr. Peede's inability to communicate and confer with counsel in any meaningful way should have put the court on notice that competency was an issue. Dusky v. United State, 362 U.S. 402 (1960); c.f. Fla.R.Crim.P. 3.211(a)(1) (1996). His behavior was at best, bizarre: Robert Peede stood trial in jail clothes and with a paper clip through one of his ears -- he refused to wear the suit his lawyers had provided, demanding instead to appear, shackled, in his jail clothes (R. 1207, 1209). On trial for his life, he walked out of court on a number of occasions, finally refusing to return. He attempted suicide by cutting himself with a razor after his arrest. His history is, in fact, one of severe self-mutilation. At trial, his attorneys described him as appearing ill, his face "pasty" and "chalky" (R. 665). They asked to have a doctor see him. Mr. Peede related to the court and counsel that "mentally [he could not] handle it [the trial]." (R. 670). The fact that Robert Peede was mentally ill and lacked the requisite competency to stand trial becomes crystal clear when his odd and bizarre courtroom behavior is reviewed alongside his Orange County Jail records.

Mr. Peede's bizarre and irrational behavior continued throughout the proceedings. He had expressed a desire from the outset to receive the death penalty. Almost immediately after his arrest, he executed and signed a written statement expressing the wish that he be sentenced to death, and that that sentence be carried out as soon as possible (See R. 860, 1064). He attempted suicide shortly thereafter (R. 700).

When his initial requests to simply walk out of his capital trial were denied by the court, Mr. Peede became more adamant, and informed the court that he wanted no part of the proceedings and could not participate in them:

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.

(R. 669-70). The court explained that the proceedings could be continued to allow him time to reconsider (R. 672). Mr. Peede's response to the court's offer is illustrative of the consistent irrationality of his behavior throughout the proceedings.

The remainder of the trial (the majority of the State's case) proceeded in Mr. Peede's absence. He did not reappear until the end of the sentencing proceeding, which he attended in his jail uniform, shackled, and wearing a paper clip in his earlobe. When the jury returned a verdict of death, Mr. Peede expressed his glee; laughing and giving everyone

in the courtroom the "thumbs up" sign, he thanked the jury for their verdict.

The record and non-record facts in Mr. Peede's case conclusively establish that a full and adequate evidentiary hearing on these issues, as in Mason v. State, 489 So. 2d 734 (Fla. 1986), is necessary in Mr. Peede's case. Thereafter, as in Hill v. State, supra, Mr. Peede can undeniably demonstrate his entitlement to Rule 3.850 relief. Reversal is therefore warranted.

ARGUMENT IV

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.

A defendant is entitled to expert psychiatric assistance when the State makes his mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright,

723 F.2d 799 (11th Cir. 1984). The mental health expert also must protect the client's rights, and violates those rights when he or she fails to provide professionally adequate assistance. Mason v. State. The expert also has the responsibility to properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37.

Mr. Peede did not receive a professionally adequate mental health evaluation in that the court-appointed mental health expert, Dr. Kirkland, did not have sufficient background information to make a reliable judgment. The mental health expert relied exclusively on self-reporting during a two hour and ten minute evaluation (R. 954), and he failed to obtain and assess information regarding social, medical and physical history available to him and relevant to Mr. Peede's mental health. Further, Dr. Kirkland failed to conduct the adequate diagnostic testing necessary to assess brain damage. As a result of Dr. Kirkland's failure to adequately evaluate Mr. Peede, critical issues regarding competency, statutory and nonstatutory mitigation were never presented to the judge and jury.

The psychiatric profession recognizes that psychological testing is indispensable to an adequate evaluation. Previous testing and the results thereof must be reviewed. Proper testing of the patient's mental state at the time of the evaluation should be conducted. Thereafter, the results of proper testing must be considered and reviewed alongside the information concerning the patient's mental health background and history. In short, psychological testing is critical to an adequate evaluation. See Kaplan and Sadock, pp. 528. None was conducted here.

The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment. Cognitive loss

is generally conceded to be the hallmark of organic disease, Kaplan and Sadock, and cognitive loss goes hand in hand with serious mental illness. Such loss can be characterized as (1) impairment of orientations; (2) impairment of memory; (3) impairment of all intellectual functions, such as comprehension, calculation, knowledge, and learning; and (4) impairment of judgment. Id. at 599. While the standard mental status examination (MSE) is generally used to detect and measure cognitive loss, the standard MSE -- standing alone and in isolation from other evaluative procedures --- has proved to be very unreliable in detecting cognitive loss associated with organic impairment or major mental illness. Kaplan and Sadock, in the fourth edition of their book, have explained why:

> When cognitive impairment is of such magnitude that it can be identified with certainty by a brief MSE, the competent psychiatrist should not have required the MSE for its detection. When cognitive loss is so mild or circumscribed that an exhaustive MSE is required for its recognition then it is likely that it could have been detected more effectively and efficiently by the psychiatrist's paying attention to other aspects of the psychiatric interview.
>
> In order to detect cognitive loss of small degree early in its course, the psychiatrist must learn to attend more to the style of the patient's communication than to its substance. . .
>
> The standard MSE is not, therefore, a very sensitive device for detecting incipient organic problems, and the psychiatrist must listen carefully for different cues.

Id. at 835. Accordingly, "[c]ognitive impairment[s]" should be considered in the context of the patient's overall clinical presentation – past history, present illness, lengthy psychiatric interview, and detailed observations of behavior. Id. at 836. It is only in such a context that a reasonable decision can be made concerning whether any cognitive impairment exists and, if so, regarding what the causes of such an impairment may be. Here, records reveal

that not even the standard MSE was conducted.

In fact, Dr. Kirkland's testimony reveals that he had meager information: he had no independent information and knew remarkably little about Mr. Peede's history, his pretrial incarceration, or what the records reflects, and he conducted absolutely no testing. Dr. Kirkland had nothing but self-report (see R. 950-51). (See supra). The State, of course, capitalized on the professional inadequacies during cross-examination.

Dr. Kirkland failed to meet the standard of care. He was called on to evaluate a defendant whose history demonstrated mental illness, yet he sought out no information and considered nothing regarding that illness. His reports fail to relate their basis or the standards applied to the ultimate, mostly erroneous conclusions drawn. (As reflected above, this was based on remarkably limited information.) He did not attempt to administer any of the needed psychological tests. In his evaluation of a mentally ill client, he relied solely on information gleaned from limited self-report interviews. Because of Mr. Peede's mental illness, and his resulting severe paranoia, delusions, distrust, etc., his ability to relate the facts relevant to his illness was in every sense limited. Cf. Mason, supra.

The professional inadequacies in Robert Peede's pretrial evaluation are clear. A review of available information would have demonstrated that Mr. Peede was, as a result of his mental illness, incapable of cooperating with his attorney, that he was incompetent, that he was not sane at the time of his crimes, that substantial diminished capacity defenses were available, that aggravating circumstances could have been challenged, and that a wealth of provable statutory and non-statutory mitigating circumstances existed in this case.

Had Mr. Peede received a professionally adequate evaluation, i.e., had the expert and

counsel taken minimal efforts to assure him that significant competency, insanity, diminished capacity, and mental health mitigation issues would have been presented for the consideration of the judge and jury. As a result, Mr. Peede's capital trial and sentencing were rendered fundamentally unreliable and unfair.In sum, Mr. Peede was denied his fifth, sixth, eighth, and fourteenth amendment rights.

Counsel's failure to ensure that Mr. Peede received such mental health assistance was deficient performance. Mr. Peede was prejudiced by such deficient performance in that he was forced to proceed to trial and sentencing when he was incompetent to do so; in that he waived important constitutional rights without having the capacity to knowingly, intelligently, and voluntarily do so, and in that the jury and judge never heard evidence of substantial statutory and nonstatutory mitigation relating to Mr. Peede's organic brain damage. This evidence was available, yet counsel unreasonably and without a strategic reason failed to investigate, prepare, and present it. Because the files and records do not conclusively demonstrate that Mr. Peede is not entitled to relief, an evidentiary hearing was and is required. Reversal is therefore warranted.

ARGUMENT V

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.

During his capital proceedings Robert Peede was represented by court-appointed attorneys who failed to fulfill the constitutional duties owed to a client. As is explained throughout this pleading, Robert Peede has chronically suffered from severe mental illnesses

and handicaps. He was neither competent nor sane. In no other single instance is it more important for an attorney to protect his client than when a client is mentally ill and unable to protect himself. Trial counsel failed in that duty. But even if Robert Peede was not ill, counsels' unreasonable acts and omissions violated the Sixth, Eight and Fourteenth Amendments and prejudiced Mr. Peede in the gravest of ways. The trial court erred in summarily denying this claim.

In denying Mr. Peede's IAC claims, the trial court stated, "the court concludes that summary denial of these claims is appropriate, even though the State concede the need for an evidentiary hearing on certain ineffective assistance of counsel claims." Order at p.1. In denying Mr. Peede's claims, the court failed to accept the allegations contained in the 3.850 motion as true. See Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989). Mr. Peede has alleged that his trial counsel failed to conduct an adequate investigation into Mr. Peede's background for the purpose of presenting statutory and nonstatutory mitigation in penalty phase and for the purpose of neutralizing aggravating factors presented by the State; inappropriately acquiesced in Mr. Peede's rejection of the guilty plea; failed to properly litigate or object to constitutionally inadmissible evidence, constitutionally vague jury instructions, and, an unconstitutionally obtained prior conviction; failed to properly challenge the State's case regarding premeditation and felony murder and the State's kidnapping theory; conducted no preparation for trial and relied almost exclusively on the state's investigation; failed to effectively litigate the suppression of Mr. Peede's pretrial statements; or, litigate objections to the presentation of sentencing phase testimony.

The trial court's order either fails to address or improperly denies Mr. Peede's claims

for relief based on facts in dispute. The trial court continued to draw the conclusions that Dr. Kirkland's mental health evaluation was adequate, thought it could not properly do so without an evidentiary hearing on the claim. Thus, all subsequent conclusions by the trial court regarding Dr. Kirkland's opinions are improper. In addition, the lower court improperly concluded that no plea offer was made to Mr. Peede. Order at p. 8. This is a factual allegation in dispute which, taken as true, must be resolved in an evidentiary hearing.

Moreover, the trial court improperly imposed a minimum standard for sufficient pleading of claims by requiring an allegation of a witness's identity, the subject matter of their testimony and how that testimony would have affected the outcome of trial. Order at p. 9. In Lewis v. State, this Court stated that there is no automatic right to pre-trial discovery in postconviction proceedings. The law does not require Mr. Peede to allege the availability of any witness to sufficiently plead his claims. Mr. Peede has clearly pled his claims sufficiently and is entitled to an evidentiary hearing where he will substantiate his claims for relief.

ARGUMENT VI

MR. PEEDE WAS DENIED A RELIABLE ADVERSARIAL TESTING OF HIS GUILT/INNOCENCE AND SENTENCING WHEN EXCULPATORY MATERIAL WAS WITHHELD FROM THE DEFENSE IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963) AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OR THE EVIDENCE WAS NOT PRESENTED TO THE JURY BY THE INEFFECTIVENESS OF COUNSEL.

The State withheld material and exculpatory evidence consisting of statements made by Darla regarding her relationship with Mr. Peede. Brady v. Maryland, 373 U.S. 83 (1963);

Augrs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 115 S. Ct. 1555 (1995). These statements painted a different picture of this relationship and did not fit in with the State's felony murder theory of the case. Furthermore, the State withheld statements by Mr. Peede's family that pointed to Mr. Peede's history of mental illness. This evidence would have been crucial to the development of mental health issues and to refuting the State's felony murder theory. It would have made a difference in the outcome of Mr. Peede's capital trial.

The trial court improperly denied Mr. Peede's Brady claim based on an improper analysis of their admissibility and conclusions drawn from matters that are in dispute and which, taken as true, require an evidentiary hearing. The trial court found the withheld statements of the victim to be hearsay and not admissible under any exception to the hearsay rule. However, the trial court overlooked the fact that exclusionary rules of evidence are inapplicable in the penalty phase of a capital trial. Garcia v. State, 622 So.2d 1325 (Fla. 1993); Fla. Stat. §921.141(1). Thus, the withheld statements would have been admissible during Mr. Peede's penalty phase and would have affected the jury's consideration of aggravating factors including, the CCP and during the course of a felony aggravating factors. Moreover, these statements could have been used during the guilt phase as evidence contradicting the State's kidnapping theory and to negate the inferences drawn from the victim's daughter's testimony. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

The State constructed and argued an elaborate felony murder theory based on an underlying kidnapping. The State's contention was that Mr. Peede forced the victim to

accompany him, against her will. The State supported this theory with the testimony of several witnesses to the effect that the victim was terrified of Mr. Peede and therefore would not have gone with him voluntarily. (See, e.g., R. 599-600, 623-626). The State devoted virtually its entire closing argument at the guilt-innocence phase to this kidnapping theory (see R. 874-88), and made it the feature of the penalty phase. The court then found as an aggravating circumstance that the murder was committed in the course of a kidnapping. (See R. 980, 1263).

The State knew prior to trial that the relationship between the victim and Mr. Peede was not as they had portrayed it. The State knew that the victim was very much in love with Mr. Peede, had hopes of effecting a reconciliation of their marriage, and in fact was looking forward to seeing him in Miami. The State knew this because they had the victim's diary, in which she had expressed her true feelings for her husband, Robert Peede. The defense, however, was unaware of this evidence (and consequently the judge and jury were unaware) because the State withheld it.

ARGUMENT VII

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

This issue has previously been raised by Mr. Peede on direct appeal to the Florida Supreme Court but new and significant case law has been decided by the United States Supreme Court.

ARGUMENT VIII

THE TRIAL JUDGE REPEATEDLY INFORMED PROSPECTIVE JURORS THAT IF AGGRAVATING CIRCUMSTANCES OUTWEIGHED MITIGATING CIRCUMSTANCES, THE JURY WAS REQUIRED TO RECOMMEND A 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.

Throughout the voir dire in Mr. Peede's case, the trial judge repeatedly informed prospective jurors that under Florida law, if aggravating circumstances outweighed mitigating circumstances, the jury was required to recommend the death penalty. These comments were made to groups of prospective jurors and to jurors who were questioned individually about their ability to serve in the penalty phase.

Specifically, the trial judge told jurors:

> If you found that the aggravating circumstances outweighed the mitigating circumstances . . . you would be under the law required to make a recommendation of the death penalty.

(R. 209) (emphasis supplied).

> Now, under the law of Florida, you'd be required to consider those factors. And if the aggravating circumstances outweighed the mitigating factors, then it would be your duty to make a recommendation of the death penalty.

(R. 270) (emphasis supplied). These remarks were made over and over again, as jurors were questioned individually and in groups. (R. 62, 83, 218, 250, 255, 276, 284, 299, 348, 364, 380, 389, 398, 409-410, 414).

Jurors understood the judge's explanation of the "law" and, at the prosecutor's urging, agreed they would abide by it:

[PROSECUTOR]: Do you think that you personally could recommend that a sentence of death be imposed in a first degree murder case under some set of circumstances?

[JUROR]: If it is the law that under these circumstances the death penalty is required, then I would have to, wouldn't I?

Is that–

[PROSECUTOR]: The law would say that it is your duty to return that.

[JUROR]: Then I guess I would have to.

[PROSECUTOR]: Do you think you could do that? Do you think you could follow the law?

[JUROR]: Yes, yeah.

(R. 400-01) (emphasis supplied).

The judge's comments to the jurors created a presumption mandating a death recommendation, telling the jurors that once aggravating circumstances outweighed mitigating circumstances, the jurors had no choice under the law regarding the penalty. See Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). The jury must be constitutionally instructed since it is co-sentencer. Glock v. Singletary, 36 F.3d 1014 (11th Cir. 1994); Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993) (Florida penalty phase jury is a co-sentencer and must therefore be constitutionally instructed).

ARGUMENT IX

MR. PEEDE WAS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE TRIAL COURT SENTENCED HIM TO DEATH WITHOUT CONSIDERING ALL NONSTATUTORY MITIGATING CIRCUMSTANCES APPEARING IN THE RECORD.

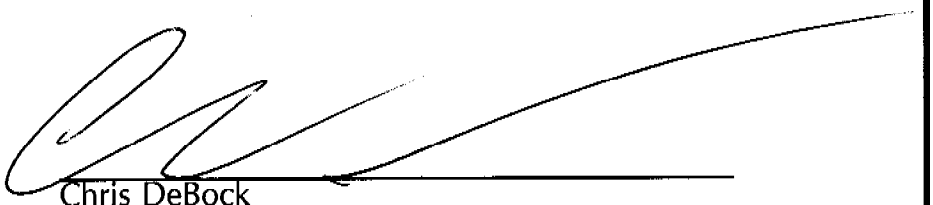
After the jury returned its advisory verdict of death in this case, the trial court followed the recommendation and sentenced Mr. Peede to death. Subsequently, on March 21, 1984, the sentencing judge entered an Order reflecting his findings in support of the death sentence. In this written order, the judge made his formal findings as to the presence of mitigating circumstances. The court the stated, "I find no other mitigating circumstance from anything presented in this sentencing hearing."

In Harvard v. State, 486 So. 2d 537 (Fla. 1986), it was held that "nonstatutory mitigating factors may arise not only from evidence presented in the penalty phase but also from evidence presented and observations made in the guilt phase of the proceeding." 486 So. 2d at 539.

The sentencing court in the present case apparently failed to consider nonstatutory mitigating circumstances which arose from evidence presented or observations made in other portions of Mr. Peede's trial. These nonstatutory mitigating factors included Mr. Peede's extreme remorse for his wife's death, his continuing mental illness which was made apparent to the court by Mr. Peede's conduct throughout the guilt phase, Mr. Peede's cooperation with and assistance to law enforcement personnel in ascertaining the events leading up to the victim's death, and his strong belief in a moral code which dictated that he should pay for his actions if he was blameworthy for them.

As a result, Mr. Peede was denied his rights under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Relevant nonstatutory mitigating circumstances were not considered by the trial judge. This error is especially significant in light of the Florida Supreme Court's determination that one of the aggravating circumstances given to the jury for its consideration and found by the judge to be present was, as a matter of law, not properly found. A new sentencing is therefore required in order to permit a reweighing of the aggravating and mitigating circumstances.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 25, 1998.



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