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, FLORIDA

REPLY BRIEF OF APPELLANT

ROBERT IRA PEEDE
DC No. 093094 A1-P1114S
Union Correctional Institution
P.O. Box 221
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Pro se

PRELIMINARY STATEMENT

References to the trial and post-conviction records are as follows:

Trial: (R. ___).

Post-conviction: (PC-R. ___).

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STATEMENT OF THE CASE

Appellant Robert Peede is a mentally ill inmate under sentence of death. This is an appeal from the summary denial of an initial post-conviction relief motion filed pursuant to rule 3.850, Florida Rules of Criminal Procedure. The lower court initially agreed with both the state and the defense that an evidentiary hearing was warranted, stayed Mr. Peede's then-pending execution, and scheduled an evidentiary hearing. The court granted two continuances requested by the defense, and rescheduled the evidentiary hearing for September 18, 1989, well within a year of the initial hearing date. Three days before the evidentiary hearing was to take place, however, the state sought a continuance, which the court granted. Mr. Peede sought public records under Chapter 119, Florida Statutes. In 1995, the lower court scheduled a status conference. Mr. Peede filed an amended post-conviction relief motion supplementing his original claims, and included a claim seeking the lower court's assistance in his pursuit of public records. The lower court, after litigation over the state's motion to strike the amendment, then inexplicably rescinded its earlier order granting an evidentiary hearing and summarily denied all relief.

SUMMARY OF ARGUMENT

This case should be summarily reversed. The lower court failed to follow nearly every aspect of the rules and cases designed to ensure due process in capital post-conviction cases, and prevent the arbitrary and capricious infliction of the death penalty in Florida. Among the procedural violations requiring reversal in this case are the failure to hold a *Huff* hearing (per se reversible error, uncontested in the state's answer); the failure to attach those specific portions of the record that directly and conclusively refute each specific claim for relief (reversal required unless harmlessness is proven); the retraction of the evidentiary hearing after a determination that one was warranted under the Rule (reversal required unless harmlessness proven beyond a reasonable doubt); the failure not only to order the production of public records, but to address the issue at all (reversible error conceded by the state if Mr. Peede has a right to the public records he seeks); and the resolution of a key disputed factual issue without giving Mr. Peede an opportunity to present his evidence or argument (per se due process violation).

Should the Court find it necessary to consider the substantive rulings of the lower court, it will find, among other things, that Mr. Peede was unfairly and prejudicially held to a standard more burdensome than that mandated in the Rule; that the lower court applied the wrong substantive standards in evaluating the sufficiency of his pleadings; that the lower court based its denial of several claims on one erroneous factual determination unsupported by the record; and that Mr. Peede far exceeded the showing required to obtain an evidentiary hearing, not only in his motions, but in the two pleadings in which he listed scores of witnesses and how they supported his claims for relief.

ARGUMENT I

THE TRIAL COURT VIOLATED MR. PEEDE'S RIGHT TO DUE PROCESS AND/OR ERRED IN SUMMARILY DENYING MR. PEEDE'S RULE 3.850 MOTION, BY FAILING TO CONDUCT A *HUFF* HEARING, FAILING TO ATTACH THE SPECIFIC PARTS OF THE RECORD THAT CONCLUSIVELY AND DIRECTLY REFUTE EACH CLAIM, BY FAILING TO SERVE THE ATTACHMENT ON MR. PEEDE, FAILING TO APPLY THE PROPER LEGAL STANDARDS, AND FAILING TO PERMIT ACCESS TO PUBLIC RECORDS.

This case should not now be before this Court. The trial court failed to follow nearly every aspect of due process and the law governing capital post-conviction proceedings. No *Huff* hearing was held. *See Huff v. State*, 622 So.2d 982 (Fla. 1993)(hearing giving counsel an opportunity orally to present grounds for granting an evidentiary hearing is required in all capital post-conviction cases). No determination was made that Mr. Peede had received all of the public records to which he is entitled, making any ruling on the propriety of an evidentiary hearing premature. *See Anderson v. State*, 627 So. 2d 1170 (Fla. 1993); *Muehleman v. Dugger*, 623 So. 2d 480 (Fla. 1993); *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993); *State v. Kokal*, 562 So. 2d 324 (Fla. 1990); *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990). *See also Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992); *Ventura v. State*, 673 So.2d 479 (Fla.1996). Retracting its earlier grant of an evidentiary hearing (PC-R. 227, 229), the lower court applied a legal standard found nowhere in Florida law, and which was rejected by this Court only last year. *See Valle v. State*, 705 So.2d 1331 (Fla. 1997). Finally, the lower court engaged in a practice this Court has deemed "meaningless" when it allegedly attached 994 pages from the record on appeal rather than "those

specific parts that *directly refute* each claim raised." *Hoffman v. State*, 571 So.2d 449, 450 (Fla. 1990)(emphasis added). The lower court also violated Mr. Peede's due process rights by failing to serve on him the attachment to its Order. This plenary failure to follow the rules and precedent governing capital post-conviction proceedings violated Mr. Peede's right to due process.

A. REMAND IS REQUIRED BECAUSE THE TRIAL COURT FAILED TO CONDUCT A HEARING PURSUANT TO *HUFF V. STATE*, 622 So.2d 982 (FLA. 1993), A VIOLATION OF MR. PEEDE'S RIGHT TO DUE PROCESS.

One issue is dispositive in this case: Where a trial court in a capital case summarily denies an initial post-conviction relief motion without conducting a hearing pursuant to *Huff v. State*, 622 So.2d 982 (Fla. 1993), reversal is required. *Mordenti v. State*, 711 So.2d 30 (Fla. 1998). The requirement that the trial court conduct a *Huff* hearing applies to all initial capital post-conviction relief actions decided after 1993. *Mordenti*, 711 So.2d at 32; *Groover v. State*, 703 So.2d 1035 (Fla. 1997). The trial court entered its order denying Mr. Peede's amended motion (which was filed after *Huff* went into effect) in 1996, the same year the circuit court summarily denied the Rule 3.850 motion in *Mordenti*. *Id.* There can be no question that the trial court denied Mr. Peede's amended motion without first allowing his counsel an opportunity to present argument supporting the need for an evidentiary hearing. In failing to hear argument from Mr. Peede's counsel prior to ruling on the amended motion, the trial court violated Mr. Peede's right to due process of law. *Huff*, 622 So.2d at 983.

The state did not address this issue in its Answer Brief. By not raising the issue in its brief, the state has waived any argument in favor of affirmance on this issue. *See Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993)(state waived right to assert issue as grounds for remand).

"The law is well settled that failure to raise an available issue constitutes an admission that . . . error occurred." *Johnson v. State*, 660 So.2d 637, 645 (Fla. 1995)(defendant's failure to raise issue in appellate brief constituted an admission that no error occurred); *State v. Wells*, 539 So.2d 464, 468 n.4 (Fla. 1989)(by failing to raise issue on appeal state waived issue of defendant's privacy interest in borrowed car); *Thomas v. State*, 599 So.2d 158, 161 n.1 (Fla. 1st DCA 1992)(improper for state to assert waiver in motion for rehearing of appeal after failing to raise issue in its answer brief).

This case is controlled by the rulings in *Mordenti* and *Huff*. The failure to conduct a *Huff* hearing prior to summarily denying an initial post-conviction relief motion in a capital case is *per se* reversible error. *Mordenti, supra*. Excluding Mr. Peede from this procedural requirement in his challenge to his capital conviction and sentence would deny him due process and would result in the arbitrary and capricious infliction of the death penalty in this case. The state has not even attempted to dispute the point. Moreover, because the lower court also rescinded its earlier grant of an evidentiary hearing, the failure to allow counsel to present argument is compounded: Because the trial court violated Mr. Peede's right to have his counsel state on the record her arguments in support of an evidentiary hearing, there is no way for this Court to determine, based on this deficient record, whether Mr. Peede would be entitled to relief. *See Holland v. State*, 502 So.2d 1250, 1252 (Fla. 1987)(where presentation of evidence has been precluded, reviewing court does not know what that evidence would have been). This case must be reversed and remanded to the trial court.

B. REVERSAL IS REQUIRED BECAUSE THE LOWER COURT FAILED TO ATTACH "THOSE SPECIFIC PARTS OF THE RECORD THAT DIRECTLY REFUTE EACH CLAIM RAISED," AND FAILED TO SERVE THE ATTACHMENT ON MR. PEEDE.

In *Hoffman v. State*, 571 So.2d 449 (Fla. 1990), this Court held that Rule 3.850 itself requires reversal and remand where the trial court failed to attach "those specific parts of the record that directly refute each claim raised." *Id.*, at 550. *See also*, *Tillery v. State*, 639 So.2d 76 (Fla. 1st DCA 1994)(reversal and remand required where trial court denied ineffective assistance of counsel claim as legally insufficient and attached entire record to order). Here, the lower court appended 994 pages from the record on appeal as one huge attachment to its Order. The state argues that this attachment is "specific" within the meaning of *Hoffman* because the lower court attached only 994 pages of a record that exceeds 1400 pages. This suggestion is not persuasive. The trial court itself referred to the attachment as representing "voluminous copies from the record" that supported the general denial of relief, *not* pages specifically selected because they "directly refuted" any given claim. Order Denying Motion for Postconviction Relief at 1.

The state's argument is especially weak in light of the fact that the pages cited by the state as refuting Mr. Peede's *Brady* claim--pages 1020, 1028, 1029, 1031, 1043, 1044, and 1060--are from the relatively small portion of the record that the lower court did *not* attach to its order. Answer Brief at 48. The lower court neither cited these pages nor attached them, nor did it find Mr. Peede's *Brady* claim procedurally barred. It is ironic that the state would argue that the order and attachment are adequate, but find the need to supplement them with its own citations to the record. For these reasons, the cases relied upon by the state are inapposite. *Mills v. State*, 684 So.2d 801 (Fla. 1996), heavily relied upon by the state, is distinguishable on this point, especially

given that Mills' successor status was highly determinative of the outcome. *Id.*, 684 So.2d at 804. The same applies to the state's reliance on another successor case, *Roberts v. State*, 678 So.2d 1232 (Fla. 1996).

When this Court required a "greater degree of specificity" than attaching the entire record, *Hoffman*, 571 So.2d at 450, it did not mean that the trial court could indiscriminately select nearly a thousand pages of a 1400-page record. The requirement is that the trial court attach only "those specific parts of the record that *directly* refute each claim raised." *Hoffman*, 571 So.2d at 550 (emphasis added). The point of *Hoffman* was thus to require trial courts to apply Rule 3.850 in a meaningful way by tailoring their attachment to the specific refutation of each claim raised. *Id.* (state's argument that attaching the entire record should be upheld would render rule "meaningless"). Here, the lower court did not choose parts of the record that "directly [and conclusively] refute each claim." *Hoffman, supra.* Rather, the lower court lumped the bulk of the record into a single 994-page attachment which it said was "[i]n support of this denial" generally, not in direct relation to any specific claim. Order at 1. Under these circumstances, reversal is required. *Hoffman, supra.*

C. REVERSAL IS REQUIRED BECAUSE THE LOWER COURT'S RESCISSION OF ITS EARLIER GRANT OF AN EVIDENTIARY HEARING WAS ERROR, VIOLATED MR. PEEDE'S RIGHT TO DUE PROCESS, AND WAS NOT HARMLESS.

The lower court's order rescinding its grant of an evidentiary hearing and summarily denying relief cannot be affirmed unless the state proves the error was harmless beyond a reasonable doubt. *Holland v. State*, 503 So.2d 1250 (Fla. 1987). The state has not even attempted to argue harmlessness, and the standard could not be met in this case.

First, the lower court applied the wrong legal standards in assessing the sufficiency of Mr. Peede's motion. As this Court recently held

> [u]nder rule 3.850, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is entitled to no relief. *Harich v. State*, 484 So.2d 1239, 1240 (Fla. 1986).

Valle v. State, 705 So.2d 1331, 1333 (Fla. 1997). The lower court is required to "treat the allegations as true except to the extent they are conclusively rebutted by the record." *Id.*

More importantly in this case, the lower court may not require the movant to plead more than the "brief statement of the facts (and other conditions) relied on" as required by the Rule. *Valle*, 705 So.2d at 1334. Here the lower court ruled, and the state in its Answer Brief now argues, that in order to receive an evidentiary hearing, Mr. Peede "must allege, at a bare minimum, the identity of [witnesses], the subject matter of their testimony and how that testimony would have effected the outcome of the trial." Order at 9.[1] The application of this erroneous standard violated Mr. Peede's rights under the Rule, this Court's precedent, and, in conjunction with the numerous other failures, Mr. Peede's right to due process.

The state's argument on this point is remarkable only for its lack of candor. After conceding (1) that "the law favors evidentiary hearings in death penalty postconviction cases," (2) that the state "conceded an evidentiary hearing" was necessary on at least four claims, (3) that "the trial court initially scheduled an evidentiary hearing, and [(4) that] Peede submitted a witness list containing the names of 79 witnesses who might be called at an evidentiary hearing,"

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[1]The lower court cited *Gorham v. State*, 521 So.2d 1067, 1070 (Fla. 1988), as standing for this proposition. This citation, repeated by the state in its Answer Brief, is a flat wrong. Review of the cited page finds no support for the proposition.

the state asserts that no hearing was required in this case. The state argues that its concession of an evidentiary hearing is not dispositive, but avoids the fact that the trial court also thought a hearing was warranted. Not only did the trial court initially make what this Court can only assume was an independent judicial determination that an evidentiary hearing was warranted, it considered the hearing necessary enough to reschedule it three times, the last time at the state's request.[2] Finally, in deciding to stay Mr. Peede's execution, the lower court must necessarily have concluded that an evidentiary hearing was warranted. *See Johnson v. Singletary*, 647 So.2d 106, 111 (Fla. 1994); *State v. Henry*, 456 So.2d 466 (Fla. 1984)(assessing propriety of stay under same standard used for review of grant of evidentiary hearing). Thus, the state's attempt to avoid the holding of *Holland*, 503 So.2d at 1252-53, (once determination is made that defendant has a right to an evidentiary hearing, "denial of that right would constitute denial of all due process and could never be harmless"), is without merit.[3]

The trial court correctly stayed Mr. Peede's execution and granted an evidentiary hearing based on the pleadings that were before it. Since that initial filing, and the *state's* requested continuance in 1989, Mr. Peede has only increased the grounds for granting an evidentiary

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[2]On this point the state mistakenly asserts that Mr. Peede did nothing in pursuit of public records or resolution of this case after the state's continuance was granted. That is not true. Mr. Peede litigated access to records in the possession of several state agencies, litigation this Court resolved against him in *Asay v. Florida Parole Commission*, 649 So.2d 859 (Fla. 1994), and *Parole Commission v. Lockett*, 620 So.2d 153 (Fla. 1993). Furthermore, it was the *state* that last requested a continuance and then did nothing to show their ability to proceed.

[3]The cases relied upon by the state, *Swafford v. State*, 636 So.2d 1309 (Fla. 1994), and *Alvord v. State*, 694 So.2d 704 (Fla. 1997), concerned *successive* post-conviction relief motions, a second and third, respectively, which present different considerations. *See* Fla. R. Crim. Pro. 3.850(b)(1); *Buenoano v. State*, 708 So.2d 941 (Fla. 1998).

hearing, something the trial court would have known had it conducted the required *Huff* hearing. By failing to hold a *Huff* hearing the lower court compounded the due process and state law violations:

> the impact of the error in precluding the presentation of evidence can never be harmless for the self-evidence reason that a reviewing court does not know what that evidence would be.

Holland, 502 So.2d at 1252.

D. REVERSAL IS REQUIRED BECAUSE THE LOWER COURT FAILED TO HOLD A HEARING ON MR. PPEDE'S DEMANDS FOR PUBLIC RECORDS, AND DENIED DEFENDANT ACCESS TO PUBLIC RECORDS.

There can be no dispute that Mr. Peede is entitled to public records production. The state apparently concedes that remand is appropriate if Mr. Peede is entitled to the records he seeks. Answer Brief at 23. What the state argues is that Mr. Peede has failed to "submit any evidence of due diligence and timely public records requests under Chapter 119." As with the previous argument, this one is remarkable only for its failure to cite the governing case law and rules.

First, Chapter 119 contains neither a due diligence nor a timeliness requirement and the state cites to none. In the proceedings below Mr. Peede was neither given an opportunity nor a reason to have put evidence of his public records requests into the record. Deciding this issue on this record would violate due process. *See Holland, supra*. Second, if the state was interested in establishing *facts* regarding Mr. Peede's records requests, as it now improperly attempts to do through the prosecutor's statement about a public records request that was not even sent to her, Answer Brief at 21 n. 4, it should have opposed summary denial and urged the trial court to hold the evidentiary hearing on this issue to which Mr. Peede was entitled. *See Walton v. Dugger*, 621 So.2d 1357 (Fla. 1993). As previously stated, the claim that Mr. Peede has not been

pursuing public records is false. Mr. Peede litigated access to records in the possession of several state agencies, litigation this Court resolved against him in the consolidated cases of *Asay v. Florida Parole Commission*, 649 So.2d 859 (Fla. 1994), and *Parole Commission v. Lockett*, 620 So.2d 153 (Fla. 1993). The state's other factual allegations were not resolved by the trial court.

Third, as in the previous argument, the state relies on cases discussing *successive* post-conviction proceedings, without pointing out that this is Mr. Peede's initial Rule 3.850 motion. Most remarkable is the state's reliance on this Court's opinion in *Buenoano v. State*, 708 So.2d 941 (Fla. 1998). In the very portion of the opinion quoted by the state this Court specifically distinguished initial post-conviction proceedings such as this one from those to which its holding applied. The Court distinguished its holdings in cases involving an "initial timely rule 3.850 motion" like Mr. Peede's from "Buenoano's third motion for post-conviction relief, clearly filed outside the time limitation of rule 3.850(b)." *Id.* The due diligence requirement this Court applied in that case was nothing other than the requirement applying to all *successive* motions under the rule. Mr. Peede had never received an adjudication of his post-conviction claims before his amended initial motion was filed. In his amendment he sought the assistance of the trial court in obtaining the public records he had not yet obtained, just as other litigants have done with this Court's approval. *See, e.g., Walton v. Dugger*, 634 So.2d 1059, 1061 (Fla. 1996); *Anderson v. State*, 627 So.2d 1170 (Fla. 1993); *Provenzano v. Dugger*, 561 So.2d 541, 547 (Fla. 1990)(appropriate for defendant to raise public records claim in post-conviction relief motion).

As with the requirement of a *Huff* hearing, the requirement that only the specific portions of the record directly refuting claims be attached to the order of denial, and the standards for

granting then rescinding a grant of an evidentiary hearing, the lower court in this case completely disregarded Mr. Peede's right to public records. The only appropriate action is for this Court to reverse the summary denial and remand for an evidentiary hearing.

ARGUMENT II

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. PEEDE'S MENTAL HEALTH CLAIMS, I.E., THAT HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS TRIED WHILE INCOMPETENT, WHEN HE DID NOT RECEIVE COMPETENT PSYCHIATRIC ASSISTANCE, AND WHEN HIS TRIAL COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, PROVIDED INEFFECTIVE ASSISTANCE.

Mr. Peede is entitled to an evidentiary hearing on the claims discussed in Arguments III, IV, and V of his Initial Brief. In those arguments Mr. Peede shows that his rights were violated when--as a mentally ill person besieged by paranoid delusions and remorse over what those delusions wrought--he was tried while incompetent, without a proper hearing on his competency, and without the benefit of the counsel and mental health assistance that he was entitled to. The lower court purportedly "found" that if the psychiatrist who examined Mr. Peede at the time of his trial, relied solely on Mr. Peede's self-reporting, and rejected all collateral information from his conclusions, those conclusions would still be "professional," and trial counsel's decisions would rightly be constrained by them. In other words, the lower court prejudged a key factual question, that, *inter alia*, a mental health expert who rejects the following does *not* provide the competent and appropriate assistance due process requires: all other mental health professionals'

observations and conclusions, the results of tests for organic brain damage that were indicated but never performed, and even the possibility of an investigation that would reveal reports about Mr. Peede's social, educational, legal, correctional, medical, mental health, and personal history from people who were not delusional paranoids. The trial court's ruling on each of these claims rested on the wrong legal standards, and ignored or disputed the specific facts pled, facts which the trial court was required to assume were true. *Valle, supra.*

In considering whether Mr. Peede's rights were violated by the failings of the trial court, his attorneys, and Dr. Kirkland, the lower court found most "important" that, even with knowledge of Mr. Peede's organic brain damage, previous medical and psychiatric diagnoses, medications he had been taking, his family, social, and medical history

> 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. . . . 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.
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> . . . . Dr. Kirkland's [trial] testimony indicates[] additional documents would not have altered Dr. Kirkland's conclusions because he already knew the possible etiologies of Defendant's illness.

Order at 6 (emphasis added).

This ruling on what is a central factual dispute in this case, without an evidentiary hearing, violated Mr. Peede's right to due process. *See Scull v. State*, 569 So.2d 1251, (Fla. 1990)("Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties.").

The trial court found that Dr. Kirkland's alleged rejection[4] of all other psychologists' and psychiatrists' conclusions, and all evidence about Mr. Peede's medical, mental health, family, educational, correctional, and social history, constitutes a "professional conclusion." There is no evidence in the record–other than that proffered by Mr. Peede, which does not support the lower court–upon which the lower court could have based these findings as to (1) the standard of care; (2) whether the rejection an investigation of all available information was consistent with that standard (especially given that Dr. Kirkland, at the time he made that statement, did not know what that information would show); (3) whether the failure to conduct testing after finding indications of organic brain damage was consistent with the standard of care, *see Hoskins v. State*, 702 So.2d 202, 209 (Fla. 1997)(Dr. Kirkland's "failure . . . [when] warranted, to order additional testing regarding defendant's condition deprives the defendant of due process"), *citing State v. Sireci*, 536 So.2d 231 (Fla. 1988)(in which Dr. Kirkland's assistance did not meet due process standards); (4) whether ruling out a different diagnosis in the absence of the results of indicated testing and the available information, i.e., from a position of ignorance, is consistent with the standard of care; (5) and even whether Dr. Kirkland would in fact not change his opinion now.

Yet, from its unsupported supposition that Dr. Kirkland reached a "professional conclusion," and that his assistance was therefore "adequate," the lower court concluded that Mr.

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[4]This is only an allegation by the lower court because there is no evidence in the record that Dr. Kirkland would in fact reach the same conclusion today if he were presented with the relevant information. Even if he would, Mr. Peede contends that his opinion and the way he reached it are not "professional," competent, "adequate," or appropriate, and Mr. Peede is, as he has been, prepared to demonstrate that fact at an evidentiary hearing.

Peede could not show his attorneys were ineffective for failing to provide this lifetime worth of information to Dr. Kirkland. Order at 6, *citing Johnston v. Dugger*, 583 So.2d 657, 661 (Fla. 1991). The lower court concluded that trial counsels' performance could not have been deficient because, their "tack . . . was dictated by what the psychiatrist felt he could issue an opinion on." Order at 8. There is nothing in the record to support the trial court's conclusion that Dr. Kirkland's alleged refusal to consider any of the extensive evidence available regarding Mr. Peede's mental illness is "professional;" that what he "felt he could issue an opinion on" was all that a competent and appropriate forensic evaluation would have revealed. Indeed, this is the very fact that is in dispute in this case, and as such, the trial court was required to assume Mr. Peede's allegations were true, i.e., that Dr. Kirkland's testimony, far from conclusively refuting Mr. Peede's claims, is evidence that he did not perform a competent forensic diagnosis of the type appropriate to the issues in this case--at both phases of the trial--as due process required. *Valle*. Indeed, this testimony at trial that Dr. Kirkland "considered" that organic etiologies might be present, but failed to follow up on his supposition is startlingly similar to his error in another capital case where he considered that the defendant might have brain damage, but did no testing. *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987); *Hoskins*, *supra*.

Mr. Peede has pled that Dr. Kirkland's opinions and the way he reached them deprived Mr. Peede of what, "at a minimum," due process requires: the assistance of "a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 472 U.S. 68, 83 (1985). What is required, and what Mr. Peede was denied, is a mental health evaluation "appropriate . . . to [the] rebut[al of] factors in aggravation and to [the development of] factors in mitigation of the death penalty."

Hoskins, 702 So.2d at 209. In support of this claim Mr. Peede argued that the specific conduct of Dr. Kirkland fell bellow specifically identified professional standards of care for forensic mental health evaluations. He also pled the names of some **41** witnesses, including a board certified forensic psychiatrist, and the availability of records from several institutions that support his claims.

Specifically, and in addition to the facts and authorities cited in his rule 3.850 motion, Mr. Peede pled the following:

> Dr. Stephen Teich, a board certified in [sic] forensic psychiatrist, who has conducted an evaluation of Mr. Peede would testify regarding the extent of his mental illness. At an evidentiary hearing, Dr. Teich would say his evaluation of Mr. Peede, which has included examination of social, medical and physical records, reveals that Mr. Peede suffers from psychotic episodes, paranoia, delusions, and hallucinations traumatic stress disorder which affected his competency at the time of the offense, the time of trial, and persist at the present time and that Mr. Peede's mental illness resulted in his inability to differentiate between his second and third wives, and that Mr. Peede suffered from the delusion that he had killed his second wife, Geraldine, when it was Mr. Peede's first wife Darla who had been killed. Dr. Teich would testify that this delusion directly affected Mr. Peede's decision to absent himself from the courtroom during portions of his trial, and that this was particularly evident when Geraldine was testifying. He would testify that Mr. Peede suffered from and continues to suffer from delusions and regarding his wife's involvement in posing for pornographic magazines and that this delusion began when Mr. Peede was incarcerated in the California penal system, festered for a period, and culminated in Mr. Peede's psychotic episode, which led to Darla Peede's death. Dr. Teich would additionally have been able to testify regarding the existence of statutory and non-statutory mitigation.
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> 21. Dr. Teich would testify to the standards for conducting a professionally competent mental health evaluation and how the mental health evaluation conducted by Dr. Kirkland was inadequate and did not meet professional standards. Specifically,

> Dr. Teich would state that an examination based on self-reporting is not reliable or adequate and that a review of records and materials relating to the patient's past social and medical history is necessary. Dr. Teich also would testify that additional diagnostic testing is necessary to determine whether brain damage exists and that Dr. Kirkland's conclusions are in error because no additional diagnostic testing was conducted. Dr. Teich also would testify that Dr. Kirkland's conclusions that Mr. Peede exhibited anti-social behavior was invalid because no data was collected regarding the existence or non-existence of conduct disorder in Mr. Peede's adolescence.

Defendant's Motion for Rehearing at 8-9. The failure to conduct the professionally recommended testing called for in a given case violates *Ake*'s guarantee of competent mental health assistance, and where as here, that error resulted in the failure to identify statutory and non-statutory mitigation, the error cannot be considered harmless. *Hoskins v. State*, 702 So.2d 202 (Fla. 1997). Thus has Mr. Peede pled facts entitling him, at least, to an evidentiary hearing on his *Ake* claim.

At a minimum, and assuming *arguendo* that the lower court was right in speculating that Dr. Kirkland would testify today as he did at trial, there is a factual dispute between these two experts. Such a factual dispute between mental health experts can only be resolved through an evidentiary hearing. *See Medina v. State*, 690 So.2d 1241 (Fla. 1997)(reversing and remanding for evidentiary hearing based on experts' disagreement about whether defendant was competent for execution).

As stated *supra*, the lower court used its improper and unsupported finding that Dr. Kirkland provided adequate professional assistance further to conclude that Mr. Peede's trial counsel were not ineffective. Obviously, a valid conclusion cannot follow from an invalid premise. As Dr. Teich would testify at an evidentiary hearing, were Dr. Kirkland to conclude

that the information he should have had through testing and an adequate background investigation makes no difference in his opinions, that conclusion would be professionally inadequate. It would be as a legal matter as well, because the available information would have established statutory and non-statutory mitigation. When it comes to the discovery and evaluation of such evidence there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States v. Fessel*, 531 F.2d 1278, 1279 (5th Cir. 1979). Trial counsel has an obligation to conduct an investigation that will discover information relevant to the establishment of mental health mitigation, and the failure to provide information necessary to an accurate evaluation violates due process. *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), *cert. denied*, 474 U.S. 998 (1985); *see also*, *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir.), *cert. denied*, 116 S.Ct. 385 (1995); *Blanco v. Singletary*, 937 F.2d 1477 (11th Cir. 1991), *cert. denied*, 504 U.S. 946 (1992); *Cunningham v. Zant*, 928 F.2d 351 (11th Cir. 1991). This Court has held that the failure of trial counsel to investigate available evidence of statutory and non-statutory mental health mitigation is ineffective assistance. *See, e.g., Rose v. State*, 567, 572-73 (Fla. 1996).

Here, as in *Rose*, *supra*, Mr. Peede's trial counsel failed to discover and present, either to the jury or to a competent mental health expert, information available from numerous sources. Although the state has claimed that Mr. Peede failed to allege any witnesses who would testify to specific facts in support of his claims, the following things cited by Mr. Peede in his Motion for Rehearing conclusively refute that argument:

> 22. Hospital and other medical records would reveal that Mr. Peede suffered from a rare and debilitating skin disease as a child. This disease prevented him from engaging in all activities, and he

was unable to walk. This disease led to isolation from an early age and contributed to his mental illness. Hospital and other medical records would reveal that Mr. Peede suffered from severe scoliosis in his adolescence. These records reveal that Mr. Peede was in fact hospitalized for several months in a hospital for terminally ill children and was strapped to a board during this time. This further exacerbated his mental illness.

23. John Bell, Mr. Peede's childhood friend. Mr. Bell would state that because of Mr. Peede's skin condition, he was unable to walk and was forced to rely on neighborhood children (Mr. Peede was an only child) to carry him around or to cart him around in a wagon. Mr. Peede often was ridiculed by other children because of his condition, and his spinal condition and eventual hospitalization led to his further withdrawal from society. Additionally, Mr. Bell would testify about Mr. Peede's dysfunctional family life and specifically about Mr. Peede's relationship with his alcoholic and abusive mother, Tina Peede. Mr. Bell would testify about a phone call made to Mr. Peede from his mother when she was drunk. Mr. Peede rebuked his mother for calling him when she was drunk, and threatened not to take anymore calls. Soon after the phone call, Tina Peede took her own life by shooting herself. Mr. Bell would testify to the psychological trauma suffered by Mr. Peede, and that Mr. Peede never recovered from his mother's suicide, blaming himself for her death. Mr. Bell also would testify about Mr. Peede's deteriorating mental condition after the suicide, his increasing paranoia, and his difficulties in his relationship with his first wife, Kay.

* * * *

26. Eleanor Bell, who was acquainted with Mr. Peede during most of his life, would would testify about Mr. Peede's skin disease and scoliosis, and the effects those illnesses had on him. Ms. Bell also would testify about the friction between Mr. Peede and his mother, and regarding Tina Peede's illnesses. Ms. Bell also would testify about Mr. Peede's increasing paranoia and that Mr. Peede had purchased a gun for self protection because he believed people were out to get him.

27. Richard Bateman, an acquaintance of Mr. Peede's, who would testify about Mr. Peede's history of self-mutilation and mental illness. Mr. Bateman would say he once observed Mr. Peede beat himself in the face until he hurt himself because he had

missed a shot while playing pool. Mr. Bateman would testify that it was his opinion that Mr. Peede was mentally disturbed.

28. Records and testimony about Mr. Peede's attempted suicide after his break-up with his first wife, Kay. Mr. Peede attempted to kill himself by shooting himself in the stomach. This evidence would have been relevant to corroborate Mr. Peede's mental health claims.

29. James Parker, an acquaintance of Mr. Peede, would testify about Mr. Peede's family history and childhood to help establish Mr. Peede's mental health claims.

30. Pauline Parker, an acquaintance of Mr. Peede, would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims.

31. Victoria Parker, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims.

32. Hazel Parker, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims. Calvin Parker, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims.

33. Minnie Wagner, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims.

34. Pearl Morton, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peedes' mental health claims.

35. Thomas Womber, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims.

36. Lillian Legon, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims.

37. Clarise Webster, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims.

38. T.A. Taylor, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims.

39. Frances McCalister, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims.

40. Esther Wheely, an acquaintance of Mr. Peede, who would testify about Mr. Peede's family history and childhood for the purpose of establishing Mr. Peede's mental health claims.

41. Arthur C. McGraw, a police officer who spoke to Mr. Peede after his arrest, would have contradicted the State's theory of premeditation and would have demonstrated the lack of specific intent exhibited by Mr. Peede in Darla Peede's death.

42. Dan Nazarchuk, a police officer who spoke to Mr. Peede after his arrest, would have supported Mr. Peede's mental health claims. He would have contradicted the State's theory of premeditation and would have demonstrated the lack of specific intent exhibited by Mr. Peede in Darla Peede's death.

43. Records from the Orange County Jail where Mr. Peede was incarcerated before trial. These records document his bizarre behavior, delusional thinking and that he was prescribed and took Elavil during his incarceration there.

44. L. Burns, medical technician for the Orange County Jail, would testify about his observations of Mr. Peede's behavior while incarcerated at the jail prior to and during his trial.

45. Evidence and testimony from family members to describe the mental anguish caused by Mr. Peede's father, who cruelly forced Mr. Peede to watch him kill trapped animals when Mr. Peede was a child.

46. Rebecca Ann Keniston, Darla Peede's daughter, who would testify about Mr. Peede's bizarre behavior and delusional obsession

with the idea that Darla and Geraldine had posed for a pornographic magazine. This testimony would have corroborated Mr. Peede's mental health claims.

47. Tonya Bullis, Darla Peede's daughter, would testify about Mr. Peede's bizarre behavior and delusional obsession with the idea that Darla and Geraldine had posed for a pornographic magazine. This testimony would have corroborated Mr. Peede's mental health claims.

48. Geraldine Peede, Robert Peede's second wife, would testify about Mr. Peede's bizarre behavior and delusional obsession with the idea that Darla and Geraldine had posed for a pornographic magazine. This testimony would have corroborated Mr. Peede's mental health claims.

49. Calvin Wagoner, would testify about Mr. Peede's bizarre behavior and delusional obsession with the idea that Darla and Geraldine had posed for a pornographic magazine. This testimony would have corroborated Mr. Peede's mental health claims.

50. Paula Ranee Peede, would testify about Mr. Peede's bizarre behavior and delusional obsession with the idea that Darla and Geraldine had posed for a pornographic magazine. This testimony would have corroborated Mr. Peede's mental health claims.

51. Roy Gregory Peede, would testify about Mr. Peede's bizarre behavior and delusional obsession with the idea that Darla and Geraldine had posed for a pornographic magazine. This testimony would have corroborated Mr. Peede's mental health claims.

52. Kurt Boullis, would testify about Mr. Peede's bizarre behavior and delusional obsession with the idea that Darla and Geraldine had posed for a pornographic magazine. This testimony would have corroborated Mr. Peede's mental health claims.

53. A.B. Coleman, an attorney who represented Mr. Peede in his California second- degree murder case, would testify regarding Mr. Peede's mental illness and delusional behavior and would corroborate Mr. Peede's mental health claims.

54. Edward E. Parsons, an attorney who represented Mr. Peede

> in California on his charges of second degree murder and assault, would testify that Mr. Peede was not competent to stand trial or to accept a guilty plea, but the State offered such a good deal from the State that he encouraged and convinced Mr. Peede to plead guilty. Mr. Parson's testimony would serve to corroborate Mr. Peede's mental health claims.
>
> 55. Medical and other records from the California Prison and Parole system, would reveal Mr. Peede's history of mental illness, and corroborate Mr. Peede's mental health claims. E. Alan Campbell, probation officer in Eureka, California, would testify about Mr. Peede's mental illness and bizarre behavior and would corroborate Mr. Peede's mental health claims.
>
> 56. Ned Seely, probation officer in Eureka, California, would testify about Mr. Peede's mental illness and bizarre behavior and would corroborate Mr. Peede's mental health claims.
>
> 57. Jeff Roy Albright and Michael Lynwood Brown, Sr., would testify about their experiences and observation of Mr. Peede while he living in California after his incarceration. These witnesses would testify about Mr. Peede's obsession with the idea that his wives were posing for pornographic magazines. These men were in a position to observe other delusional and mentally ill behavior.

Defendant's Motion for Rehearing at 8-15. These witnesses and documents would establish a reasonable probability that but for counsel's deficient investigation, there is a reasonable probability that the outcome would have been different.[5]

The lower court also failed to consider, in any manner, Mr. Peede's allegation that the state withheld reports in its possession that were relevant to a mental health evaluation.

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[5]The state has claimed, however, that Mr. Peede must show the outcome in his case would have been different in order to obtain an evidentiary hearing. Not only is this a misstatement of the law regarding evidentiary hearings, *Valle*, 705 So.2d at 1333 (standard for granting evidentiary hearing lower than standard for granting relief), it is a misstatement of the law of ineffective assistance. *See State v. Michael*, 530 So.2d 929, 930 (Fla. 1988)(affirming finding of prejudice and grant of relief where "inability to gauge the effect of [counsel's] omission undermined the court's confidence in the outcome of the penalty proceeding").

Specifically (and this further refutes the state's argument that Mr. Peede made no specific factual allegations), the state withheld reports of interviews with members of Mr. Peede's family that would have made a difference in any competent forensic psychiatric evaluation. Police reports and statements which post-conviction counsel discovered in the State Attorney's files, reveal highly probative details about Mr. Peede's mental illnesses, their duration, possible origins, and influence over his behavior. Here, as in *Blake v. Kemp*, 758 F.2d 523, 527 (11th Cir. 1985), the state withheld from the mental health expert police reports revealing evidence of Mr. Peede's bizarre and even psychotic behavior, information that would be essential to any psychiatric assessment of the facts of this case. Here, as in *Blake*, the withholding of information contributed to the inadequate mental health assistance and resulted in a violation of Mr. Peede's due process rights and Sixth Amendment rights.

Mr. Peede also offered to present the testimony of his trial attorneys regarding what information was disclosed by the state:

> 24. Joseph DuRosher, Mr. Peede's trial attorney, would testify about his investigation and efforts to obtain necessary expert assistance, to provide his expert with the proper background materials to enable him to conduct an adequate mental health evaluation, and to seek additional diagnostic testing if necessary.
>
> 25. Theotis Bronson, Mr. Peede's trial attorney, would testify about his investigation and efforts to obtain necessary expert assistance, to provide his expert with the proper background materials to enable him to conduct an adequate mental health evaluation, and to seek additional diagnostic testing if necessary.

Def.'s Mot. For Reh'g at 10. This testimony about additional testing would be especially important in light of this Court's recent holding in *Hoskins*, *supra*, indicating the failure to perform tests needed for the identification of all available mitigating circumstances is harmful

error.

Assuming the allegations about the mental health assistance Mr. Peede received are true, as this Court must, *Valle*, *supra*, the argument advanced by the state and the court below, that "the affirmative finding of competency at the time of trial" refutes Mr. Peede's allegation that he was tried while incompetent, cannot be upheld. This "affirmative finding" is based on an inadequate mental health evaluation, inadequate investigation into Mr. Peede's chronic and longstanding illnesses, and conclusions that are not psychiatrically valid. Such a finding cannot conclusively refute anything.

Mr. Peede has been evaluated by a forensic psychiatrist who has concluded that he suffers from "psychotic episodes, paranoia, delusions, and hallucinations traumatic stress disorder which affected his competency at the time of the offense, the time of trial, and persist at the present time." This same expert has reviewed the findings made at the time of trial and the methodology employed in reaching them, and found them invalid and below the recognized standard of care, respectively. The records and other evidence discovered by post-conviction counsel and presented to the lower court, which were available to trial counsel as well, support mental health defenses and mitigation, standing alone and when properly considered by a mental health expert. Applying either the prejudice standard applicable to *Ake* violations, or the standard applicable to claims of ineffective assistance of counsel, Mr. Peede has pled facts and allegation sufficient to merit an evidentiary hearing. *Valle*, *supra*. Reversal is required.

ARGUMENT III

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. PEEDE'S CLAIMS THAT HIS TRIAL COUNSEL PROVIDED PREJUDICIALLY DEFICIENT ASSISTANCE TO THEIR PARANOID, INCOMPETENT CLIENT.

Under the governing legal standards, Mr. Peede is entitled to an evidentiary hearing on his claims of ineffective assistance of trial. At the time of this crime, at the time of trial, and today, Mr. Peede was and is mentally ill. At trial his paranoia, delusions, and the overpowering remorse he felt, rendered him incompetent. His legal counsel were all that stood between him and the electric chair. They had to meet the very highest professional standards, and the court and state were constitutionally prohibited from hindering their performance. But Mr. Peede did not receive the representation and fair adversary testing to which he was entitled under controlling legal standards.

The trial court did not apply these standards, however, and the state has misstated them before this Court. The state asserts that in order to receive an evidentiary hearing this Court requires movants to plead, "at a bare minimum, the identity of the witness, the subject matter of their testimony and how their testimony would have affected [sic] the outcome of the trial . . . to be facially []sufficient." This assertion is in direct conflict with this Court's holding last year that "a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is entitled to no relief." *Valle v. State*, 705 So.2d 1331, 1333 (Fla. 1997), *citing Harich v. State*, 484 So.2d 1239, 1240 (Fla. 1986). More importantly in this case, the lower court may not require the movant to plead more than the "brief statement of the facts (and

other conditions) relied on" as required by the Rule. *Valle*, 705 So.2d at 1334 (trial court committed reversible error by requiring movant to attach affidavits setting forth content of witnesses' testimony). Likewise, the trial court erred in holding that Mr. Peede's pleadings were legally insufficient because he did not plead names, and testimony.

The trial court and the state are also in error when they assert that Mr. Peede must "meet his heavy burden" of showing that "the result of the trial *would have been* different" in order to obtain an evidentiary hearing. Answer Brief at 43. Not only is this a patent and knowing misstatement of the legal standard for relief, which requires only a showing of a "reasonable probability" that the outcome would have been different, *Strickland v. Washington*, 466 U.S. 668 (1984), it is a gross overstatement of the legal standard for receiving an evidentiary hearing, which, as the state earlier conceded, is favored for initial post-conviction relief motions. *See Valle*, 705 So.2d at 1333 (pleadings not, as a matter of law, insufficient to warrant evidentiary hearing).

Mr. Peede pled facts which, if true, would entitle him to relief. The state's claim that Mr. Peede pled "no specific facts" and only "conclusory allegations that counsel failed to investigate and failed to object" is another misstatement of the record. Although no rule of Florida law required him to do so, Mr. Peede pled exactly what the trial court erroneously required him to plead: the names of witnesses and the subject matter of their testimony, and how it would bear on the state's case at trial. In addition to the witnesses identified *supra*, and the further testimony Mr. Peede offered to present from his trial attorneys, Mr. Peede identified the following:

Stephen Earl Kulp, would testify about an incident that

occurred at Pete's Cave, a bar he was tending in Eureka, California. This incident ended in the shooting death and assault of one of his co-workers. Mr. Peede was convicted of second-degree murder and assault in connection with this shooting, and the state used this as an aggravating circumstance in his death penalty case. The State established this aggravator through the testimony of Austin Backus, an observer who was riding his bike outside the bar, and John Anderson, a deputy sheriff who was involved in the arrest and prosecution of Mr. Peede. Mr. Kulp observed the aggressive and threatening behavior exhibited by his co-workers. This testimony would serve to neutralize the aggravator submitted by the State.

68. Ken Tracy, would testify about an incident which occurred at Pete's Cave, in Eureka, California. This incident ended in the shooting death and assault of one of two of his co-workers. Mr. Peede was convicted of second degree murder and assault in connection with this shooting, and the State used this as an aggravating circumstance in his death penalty case. The State established this aggravator through the testimony of Austin Backus, an observer who was riding his bike outside the bar, and through John Anderson, a deputy sheriff who was involved in the arrest and prosecution of Mr. Peede. Mr. Tracy was in a position to observe the aggressive and threatening behavior exhibited by these co-workers. His testimony would serve to neutralize this aggravator submitted by the State.

69. Deanna Reynolds, would testify about an incident which occurred at Pete's Cave, in Eureka, California. This incident ended in the shooting death and assault of one of two of his co-workers. Mr. Peede was convicted of second degree murder and assault in connection with this shooting, and the State used this as an aggravating circumstance in his death penalty case. The State established this aggravator through the testimony of Austin Backus, an observer who was riding his bike outside the bar, and John Anderson, a deputy sheriff who was involved in the arrest and prosecution of Mr. Peede. Ms. Reynolds was in a position to observe the aggressive and threatening behavior exhibited by his co-workers. Her testimony would serve to neutralize this aggravator submitted by the state.

70. Rebecca Kenniston and her husband, would testify that her mother, Darla, voluntarily went with Mr. Peede and had taken a bag of clothing with her when she went to the airport to pick up Mr. Peede. This testimony would have refuted the underlying felony of kidnapping, which the State used to assert a felony murder instruction, thus making

> premeditation an immaterial consideration. Had the felony-murder theory been disproven, the State would likely have been unable to obtain a first degree murder based on premeditation.
>
> 71. Arthur C. McGraw, a police officer who spoke to Mr. Peede after his arrest, would have contradicted the State's theory of premeditation and would have demonstrated the lack of premeditation by Mr. Peede. Mr. Peede made statements to Officer McGraw indicating that he had not intended to kill Darla and that it had just happened when he became angry.
>
> 72. Dan Nazarchuk, a police officer who spoke to Mr. Peede after his arrest, would testimony would have supported Mr. Peede's mental health claims, and would have contradicted the State's theory of premeditation This testimony would have demonstrated the lack of premeditation by Mr. Peede, as Mr. Peede made statements to Mr. Nazarchuk indicating that he had never intended to hurt Darla.
>
> 73. Testimony of law enforcement officials who took statements from Mr. Peede would testify about the voluntariness of Mr. Peede's incriminating statements while in custody.

Def.'s Mot. For Reh'g at 18-19. These witnesses would have helped establish that Mr. Peede's every act in this case, and his previous one, was the result of mental illness, facts that would have undermined confidence in the outcome at both phases of the trial. They would have undermined the element of intent, shown reasons why Mr. Peede's statements should have been supressed, established the existence of statutory and non-statutory mitigation, and refuted the existence of and, equally important in Florida's capital sentencing scheme, the weight given to specific aggrvating circumstances.

As to the lower court's conclusion that, in pleading that trial counsel unreasonably "acquiesc[ed] in Mr. Peede's rejection of the guilty plea," Mr. Peede failed to allege that there was a plea offer, this strained reading of the pleadings cannot be sustained. The lower court twisted Mr. Peede's allegation beyond reason. Obviously, in alleging "acquiscence [with respect

to] *the* guilty plea," Mr. Peede alleged that there was one.

The determination of whether Mr. Peede can establish prejudice, i.e., errors sufficient to undermine confidence in the outcome, must be mad cumulatively, based on all the evidence presented. *State v. Gunsby*, 670 So.2d 920 (Fla. 1996); *see also*, *Kyles v. Whitley*, 514 U.S. 419, 435-435, 437 (1995)(test for prejudice under *Strickland* and *Bagley* is to be made on cumulative basis). The trial court erred in considering each allegation of deficient performance in isolation, and without taking into account the allegations in Mr. Peede's *Brady* claim. In doing so, and in failing to follow the numerous procedural rules discussed *supra*, the lower court did not provide this Court with an order that could be affirmed. Mr. Peede can prove with the facts alleged that had counsel taken the actions identified here and in his other pleadings, especially with respect to the presentation of his mental health claims in support of the suppression motion, defenses, rebutting aggravation, and in support of mitigation, these actions "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict[s]." *Kyles*, 514 U.S. at 435.

ARGUMENT IV

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. PEEDE'S CLAIM THAT HE WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE STATE'S SUPPRESSION OF EVIDENCE, OBSTRUCTION OF HIS COUNSEL'S ABILITY TO MOUNT A DEFENSE, AND WITHHOLDING OF INFORMATION NECESSARY FOR HIS PSYCHIATRIST TO PROVIDE COMPETENT AND APPROPRIATE ASSISTANCE.

On this claim, as with the others, the trial court applied the wrong legal standards, and the

state has repeated them before this Court. The state violated *Brady v. Maryland*, 373 U.S. 83 (1963), Mr. Peede contends, when withheld information from Darla Peede's diary that would have created a materially different impression in the jury's mind about the relationship between Robert and Darla Peede. This information was relevant to the testimony of the state's key witness on kidnapping and the aggravating circumstance of murder during the commission of a violent felony, and would have undermined her credibility and the reliability of her account. *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Bagley*, 473 U.S. 667 (1985). By allowing a false impression to be placed before the jury, the state violated *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972). *See also Miller v. Pate*, 386 U.S. 1 (1967).

The state's legal argument on this point is inapposite, at best. The state cites *Herrera v.Collins*, 506 U.S. 390 (1993), as "demonstrat[ing]" that no evidentiary hearing is required on this "newly-discovered evidence" claim. First, it is difficult to see how *Herrera*, a case arising in Texas and decided on the basis of federal habeas corpus law, can demonstrate anything about the need for a hearing under Florida law. Second, this demonstration is especially unpersuasive given that the federal law applied was not even the law related to initial habeas corpus proceedings, as this is Mr. Peede's initial state post-conviction proceeding, but the law related to successive petitions. Third, and here the state makes its only honest point, *Herrera* concerned a newly-discovered evidence claim of innocence. The question was whether Herrera could obtain federal habeas corpus relief based on his innocence in the *absence* of a claimed constitutional violation. But the question here is whether Mr. Peede is entitled to an evidentiary hearing under state law, on his claim that a constitutional violation did in fact occur.

Mr. Peede also alleged the withholding of other evidence that was subject to disclosure.

There is no basis upon which to affirm the lower court's order with respect to the this claim because the only allegation addressed was the one related to Darla Peede's diary. Order at 10-12. This was error. A determination of materiality (the trial court did not rule on the withholding question) must be made on a cumulative basis. *Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Gunsby*, 670 So.2d 920 (Fla. 1996).

The lower court failed to consider the state's withholding of police reports of interviews with Mr. Peede's family members and others which contain evidence of his longstanding mental illnesses and severe psychological trauma. Significantly, the state does not claim in its answer that these records were disclosed to the defense. As in *Blake v. Kemp*, 758 F.2d 523, 526 (11th Cir. 1985), Mr. Peede's due process rights were violated when the state withheld reports, discovered by post-conviction counsel in the State Attorney's file, that reveal highly probative details about Mr. Peede's mental illnesses, their duration, possible origins, and influence over his behavior. Here, as in *Blake*, the state withheld from the mental health expert police reports revealing evidence of Mr. Peede's bizarre and even psychotic behavior, information that would be essential to any adequate psychiatric assessment of the facts of this case. Yet, the lower court failed to mention these allegations in its Order.

The lower court failed to consider whether this information, together with and as part of an adequate mental health evaluation, and in conjunction with all the other acts and information which Mr. Peede has alleged should have been part of the case at trial, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict[s]." *Kyles*, 514 U.S. at 435. On this there can be little doubt. Had this evidence been disclosed to a forensic psychiatrist conducting an adequate evaluation of Mr. Peede and this case, and had the

indicated testing for organic brain damage been performed, had trial counsel interviewed the scores of witnesses who would have testified about Mr. Peede's illnesses and especially his paranoid delusions, this case, which was already regarded as a product of mental illness, *see Peede v. State*, 474 So.2d 808 (Fla. 1985), might never have gone to trial.

CONCLUSION

The lower court failed to follow nearly every procedural and substantive rule governing capital post-conviction proceedings. In failing to conduct a *Huff* hearing, order the disclosure of public records, attach to its order those specific parts of the record directly and conclusively refuting each of Mr. Peede's claims, retracting its earlier grant of an evidentiary hearing, and failing to consider many of Mr. Peede's specific factual allegations, the lower court left this Court with nothing on which to base affirmance. Mr. Peede has made substantial showings that his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments were violated. He has pled scores of specific factual allegations and provided the names of even more witnesses whose testimony will establish them and his entitlement to relief. Affirming such a plenary failure to follow binding rules in this initial capital post-conviction action would render the imposition of Mr. Peede's death sentence arbitrary and capricious. This Court should reverse the lower court's summary denial, and remand for further proceedings.

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been sent by United States mail, first class postage prepaid, to all counsel of record on this 2nd day of September, 1998.

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