IN THE SUPREME COURT OF FLORIDA
CASE NO. SC11-2038

RICHARD ENGLAND.
Appellant,

v.

STATE OF FLORIDA
Appellee,

ON APPEAL FROM THE CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT FOR VOLUSIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. England lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. England accordingly requests that this Court permit oral argument.

CITATION KEY

The record on direct appeal of Mr. England's trial shall be cited (FSC ROA Vol. # p. #). The record of Mr. England's evidentiary hearing shall be cited as (PCR Vol. # p. #).

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

Richard England was indicted on charges of First Degree Murder and Armed Robbery with a Deadly Weapon, (FSC ROA Vol. I p.1-2). England filed a motion to suppress statements of inmates: inmate Diehl because he signed a contract with Mr. England not to divulge information, and inmates Seals and Garcia because they were allegedly working as state agents. (FSC ROA Vol. II p. 265-266).

Before the hearing, the Defense limited the motion to the testimony of Diehl

since the State did not intend to call Seals and Garcia as witnesses. (FSC ROA Vol. III p. 396, Vol. V, p. 960-61) The motion was denied. (FSC ROA Vol. III p. 396-397),

At the status conference on April 16, 2004, Mr. England, waived Speedy Trial, but the trial court rescinded the signed waiver over counsel's objection, after England changed his mind. (FSC ROA Vol. IV p. 657-681). The case was tried by jury from May 10 to May 24, 2004. The penalty phase jury returned a recommendation of 8 to 4 for death and Mr. England appealed. The judgments and sentences were affirmed in England v. State, 940 So.2d 389 (Fla. 2006). Mr. England's cert. Petition was denied on April 2, 2007. Mr. England filed his 3.851 Motion for PostConviction Relief on February 4, 2008. The State filed its Answer on March 14, 2008.

An evidentiary hearing was scheduled on September 15, 19-29, 2008. On September 6, 2011, the circuit entered an Order denying the 8, 9, 10, and 11 of the Defendant's 3.851 Motion for Postconviction Relief, along with an Interim Order denying claims 1-6, which addressed the merits of counsel's 3.851 motion filed on February 4, 2008.

On September 13, 2011, the State filed a Motion for Clarification and/or Correction. On October 20, 2011, the lower court entered an Order granting

Defendant's (sic) Motion for Clarification And/Or Correction And Denying Claims I, III, IV, VI, and VII of Defendant's Motion for Postconviction Relief. The State filed a State's Second Motion To Clarify And/Or Correct Trial Court's October 20, 2011 Order Granting Defendant's (sic) Motion For Clarification And/Or Correction And Denying Claims I, III, IV, VI, and VII of Defendant's Motion for Post-Conviction Relief, which was granted by the court on October 25, 2011. After disposing of various pro se motions filed by the Defendant, and reflected in the record on appeal, this Court entered a Briefing Schedule on December 14, 2012. This appeal follows.

RELEVANT EVIDENTIARY HEARING FACTS

TESTIMONY OF INEZ FYFFE: Inez Fyffe is the mother of Richard England. (PCR Vol. I p. 151). She is also the mother of Barry Allen England, who is deceased and Alison England. (PCR Vol. I p. 151). Richard England's natural father, who Richard never knew, was Richard Allen Williams. (PCR Vol. I p. 152). Richard was born in Panama. (PCR Vol. I p. 152). Mr. Williams left Inez before Richard was born. (PCR Vol. I p. 152). Inez later married Ronnie England, who was in the United States Army, and who adopted Richard when he was eight years old. (PCR Vol. I p. 152). Ronnie England served in the Vietnam War. (PCR Vol. I p. 152). Ronnie England was the biological father of Alison and Barry. (PCR

Vol. I p. 153). Inez and her family, including Richard England, lived together as a family for twelve years. (PCR. Vol. I p. 153). Ronnie England mistreated the children including Richard. (PCR Vol. I p. 153). For instance, when he drank and the children wouldn't do what he said, he would have them position themselves in this position called the cockroach with their arms and legs up. He would slam them against the walls. He would do a lot of bad things to them, things that were not good for the children. (PCR Vol. I p. 154). Richard was biting his fingernails and he was very nervous. (PCR Vol. I p. 154).

Inez decided to get separated from Ronnie England. (PCR Vol. I p. 154). Ronnie England had seven drinking and driving cases in Panama City and he also had cases in Kentucky and Florida. (PCR Vol. I p. 154). After Inez and Ronnie England separated, he took all the children from Inez, but he was caught drinking and driving and was put in jail. (PCR Vol. I p. 155). Ronnie England then called Inez to pick up two of the kids, Barry and Alison, but he kept the one that was not his kid, Richard England. (PCR Vol. I p. 155). Inez believed that Ronnie England was trying to hurt her by taking her son Richard away from her. (PCR Vol. I p. 155). Inez believed that Ronnie taking Richard from her was a vindictive act. (PCR Vol. I p. 156).

When Richard was taken from Inez by Ronnie England, Richard was

approximately 12 years old. (PCR Vol. I p. 156). After Richard was taken by Ronnie England, Richard never again lived in Inez's household. (PCR Vol. I p. 156). Inez believed that Ronnie brainwashed Richard. (PCR Vol. I p. 156). She believed that Ronnie had brainwashed Richard because when she would go visit Richard, he wouldn't treat her as a child would treat his mother that was visiting. (PCR Vol. I p. 157). Richard didn't appear to be happy when he came to visit his mother Inez. (PCR Vol. I p. 157). Richard was hyperactive as a child and he would react to things quickly. (PCR Vol. I p. 157).

Ronnie England told Inez that Richard was doing drugs and Inez asked Ronnie to give Richard back to her, but Ronnie refused to give him back. (PCR Vol. I p. 158). Ronnie England never intended to give Richard back to Inez even though it was in Richard's best interest. (PCR Vol. I p. 159). Inez saw Richard only once a month and sometimes three times a month when he lived with Ronnie England. (PCR.Vol. I p. 159).

About three years after Ronnie England left, Inez eventually married a man named David Cline. (PCR Vol. I p. 159). Inez lived with Cline, Alison and Barry. (PCR Vol. I p. 160). The marriage to David Cline was a big mistake. (PCR Vol. I p. 160). Inez felt that he wasn't a real person. (PCR Vol. I p. 160). Inez learned inadvertently that Cline liked both men and women - that he was a

bi-sexual. (PCR Vol. I p. 161). Inez also learned that Cline had a history of molesting a girl. (PCR Vol. I p. 161). Inez was told by a friend who would come to her house and leave her daughters with her children, Alison and Barry, that Cline had touched the little breast of the little girl. (PCR Vol. I p. 161). Inez's friend who told her this, Sorena, banished herself from the house and never came back again. (PCR Vol. I p. 161). Inez had further suspicions about Cline and she was having dreams and she couldn't sleep. (PCR Vol. I p. 161).

Alison was eight years old during the time Inez was married to Cline. (PCR Vol. I p. 161). Inez was married to Cline for only one and a half years. (PCR Vol. I p. 162). Inez once came home and found Alison nervous and crying in the bathroom. (PCR Vol. I p. 162). She found Cline naked in the bedroom and he had pictures of himself without any clothes on spread around the room. (PCR Vol. I p. 162). Cline also had ugly things spread around the bedroom such as vibrators, dildos, and something he used to put in from behind. (PCR Vol. I p. 162). Cline did not seem to care that these things were within sight of the children. (PCR Vol. I p. 162). Inez believed that Cline was abusing all of the children. (PCR Vol. I p. 162). Inez's belief was based upon changes she noticed in her children and how they were acting in a strange way. (PCR Vol. I p. 164).

Inez once noticed that Richard came home with new clothes after being

befriended by a black male soldier. (PCR Vol. I p. 164). At the time the family lived in Georgia and would see Richard with new things that she knew that Ronnie England did not and would not get for Richard. (PCR Vol. I p. 164). Inez was concerned about this because a person doesn't give things to a child for nothing in return. (PCR Vol. I p. 165). Inez believed that perhaps that man was taking advantage of Richard. (PCR Vol. I p. 165).

When Inez separated from Cline, he admitted to her that he played with Alison's mind and he also said something to the effect that "you will remember me through Richard." (PCR Vol. I p. 166). Inez was not sure what Cline meant by that statement. (PCR Vol. I p. 166).

Inez was available during trial to testify about the things that she testified to at the evidentiary hearing, but was never asked by the attorney's about these matters. (PCR Vol. I p. 166). The attorneys never asked questions like the questions she was asked at the evidentiary hearing. (PCR Vol. I p. 170). Inez did not testify at the penalty phase because she was told that the lawyers were going to use them, then afterwards the detective, or somebody, told them that they didn't need to put us up. (PCR Vol. I p. 169). No one ever asked Inez to testify at Richard's sentencing hearing. (PCR Vol. I p. 171).

TESTIMONY OF ALISON ENGLAND:

Alison Carmen England is Richard England's sister. (PCR. Vol. II p. 191). Alison's biological father was Ronnie England. (PCR Vol. II p. 192). Alison testified that she, Richard, and her other brother, Barry, lived together. (PCR Vol. II p. 192).

Alison described how Ronnie England treated the children by saying that he was pretty rough on them all. (PCR Vol. II p. 193). Alison described the military style punishment administered by Ronnie England as well as beatings to the boys with his fists. (PCR Vol. II p. 193). She also described Ronnie England forcing the children into the cockroach position. (PCR Vol. II p. 203). Alison recounted an incident when she and her brothers were caught eating cookies when they weren't supposed to. Ronnie England woke them up at 3:00 or 4:00 in the morning and he had staged a lot of junk food on the table. There was ice cream, cake, candy, and cookies. Ronnie England forced the children to eat until they got physically sick. Barry threw up in his bowl and was forced to eat the vomit. Richard England ate his brother's vomit to protect Barry from Ronnie England. (PCR Vol. II p. 204).

Alison described Ronnie England as an alcoholic. (PCR Vol. II p. 194). The military police would often bring Ronnie England home for drinking and driving and accidents. (PCR Vol. II p. 194). Often the violent punishment coincided with the alcoholism and intoxication but sometimes Ronnie England

would be violent even if he came home from work upset. (PCR Vol. II p. 195).

Alison recalled when Ronnie England left her mother, Inez, taking Richard with him and how she could not understand why it was happening. (PCR Vol. II p. 197). The children did not see each other as much after the separation and Barry was hurt by it a lot. (PCR Vol. II p. 198). After the separation, the family lived in a trailer park in Hinesville, Georgia. (PCR Vol. II p. 198). Shortly thereafter, David Cline came into the picture. (PCR Vol. II p. 198).

Alison remembered Cline living with her and the family for two or three years. (PCR Vol. II p. 199). Cline sexually abused Alison and raped her in a sense although as a child she did not understand what was going on. (PCR Vol. II p. 199). Cline raped Alison many times over a period of years when she was a young child. (PCR Vol. II p. 205). Cline told Alison that if she told about the abuse, he would hurt her mom. (PCR Vol. II p. 205).

Cline was real abusive to Alison and she believed he abused Barry also. (PCR Vol. II p. 199). There came a time when Alison suspected that Cline was abusing Barry. (PCR Vol. II p. 206). Right before Richard's trial, Barry died. (PCR Vol. II p. 206). Barry became involved in drugs and alcohol and he didn't care whether he lived or died. (PCR Vol. II p. 207). After he died, Alison went through his personal belongings and found pictures drawn into his bible. (PCR Vol. II p.

207). The pictures were stick figures of people being raped from behind and he wrote "ouch" on a few of the pictures. (PCR Vol. II p. 207). Alison believed that Barry was being sexually abused. (PCR Vol. II p. 208). She believed this because Barry would call her to the bathroom all the time and tell her to bring him a towel. (PCR Vol. II p. 207). When Alison would go to the bathroom Cline would be standing there naked and masturbating. (PCR Vol. II p. 208). Cline would tell Alison to come to the bathroom and he would do things to her and he would call Barry in the room, too. (PCR Vol. II p. 208). Now that she is older, it had to be for the same reason, but when she saw the stick figures in the Bible, Alison understood. (PCR Vol. II p. 208). When Richard England came to visit, Cline was there also. (PCR Vol. II p. 209).

Alison recalled attorneys Keating and Sanders but did not really recall investigator Jake Ross. (PCR Vol. II p. 209). The attorneys did not tell her what she would be testifying about and just said it was kind of to help Richard. (PCR. Vol. II p. 210). She was asked to come to Florida, and to testify, but she never did. (PCR Vol. II p. 210). Alison had one or two conversations with Mr. Keating on the phone and one or two in person when she was in Florida. (PCR Vol. II p. 210). Alison had no idea about her role or purpose in testifying at her brother's trial. (PCR Vol. II p. 210). Mr. Keating said to Alison that the jury needed to know he

had loved ones, that people who cared about him were there. (PCR Vol. II p. 211). Neither Mr. Keating nor Mr. Sanders ever explored the painful details of sexual abuse that Alison had suffered by the actions of Cline. (PCR Vol. II p. 211). Had she been asked by the trial attorneys, Alison would have come into the courtroom at Richard's trial and explained the things she testified to at the evidentiary hearing. (PCR Vol. II p. 211). Alison did not really remember Investigator Jake Ross too much. (PCR Vol. II p. 214).

TESTIMONY OF STEVEN DIEHL:

Steven Jason Diehl testified at the evidentiary hearing that he is now in prison in Jessamine County, Kentucky. (PCR Vol. II p. 224). He was once in the Volusia County jail on a violation of probation charge where he met Richard England. (PCR Vol. II p. 224). They were in the same block in the jail. (PCR Vol. II p. 225). Diehl and Richard England spoke several times daily for about a month. (PCR Vol. II p. 225). When Diehl spoke with Richard England, he knew that England was facing capital murder charges. (PCR Vol. II p. 225). Richard England told Diehl that he was innocent of killing Wetherell. (PCR Vol. II p. 225). Richard England also told Diehl that Michael Jackson was the killer of Wetherell.

While in the Volusia County jail, a jail deputy approached him about an offer to help himself. (PCR Vol. II p. 225). Diehl testified that the jail deputy was a taller

Hispanic male, kind of thinning receding hairline, brushed back, shaded glasses, that he didn't believe he had any facial hair. (PCR Vol. II p. 233). Diehl testified that the jail deputy told him that he knew that he was buddying up with Richard England and asked him if he would be interested in speaking with anyone about information that he heard from Richard England. (PCR Vol. II p. 233). Diehl told the jail deputy that he would be interested. (PCR Vol. II p. 233). Within a matter of days the detectives came out to see him. (PCR Vol. II p. 244). Diehl testified that as he testified previously, he did ask to speak with police, but he did not initiate the contact. (PCR Vol. II p. 234). The jail deputy did not specifically tell him what he was to do to help himself. (PCR Vol. II p. 234).

Diehl eventually came into contact with Detective Session and McGuire. (PCR Vol. II p. 234). Diehl was eventually asked by the detectives to speak with Richard England. (PCR. Vol. II p. 235).

TESTIMONY OF RICHARD ENGLAND:

Richard England testified at the evidentiary hearing and he maintained his innocence. (PCR Vol. II p. 260). England testified that he met Steven Diehl at the Volusia County Jail and since they both had the state of Kentucky in common, they began to talk. (PCR Vol. II p. 262). England said he did begin discussing his charges with Diehl. (PCR Vol. I p. 262). England did favors for Diehl such as

make phone calls for him. (PCR Vol. I p. 264). Diehl helped England obtain information related to England's discovery materials. (PCR Vol. I p. 266). They discussed things like getting a private attorney. (PCR Vol. I p. 268). England testified that Diehl said he believed him when England said he did not kill Wetherell. (PCR. Vol. I p. 269).

TESTIMONY OF DR. RICHARD CARPENTER:

Dr. Richard Carpenter testified at the evidentiary hearing. (PCR Vol. III p. 307). He is a licensed psychologist with a Bachelor's degree in psychology from the University of South Florida and a Doctoral degree in psychology from Utah State University. (PCR Vol. III p. 307). He worked as a Jimmy Ryce evaluator, did adolescent treatment for DCF, did forensic competency and sanity evaluations, and has worked on death penalty cases. (PCR Vol. III p. 307-36).

Dr. Carpenter evaluated Richard England and saw him three times. (PCR Vol. III p. 328). At first, England was reluctant to participate and Dr. Carpenter conducted a history and built a rapport. (PCR Vol. III p. 328). The second interview involved a psycho-social history. (PCR Vol. III p. 329). Near the end of the second interview Dr. Carpenter brought up the issue of homosexual or homophobic behavior or tendencies that were reported in the paper about the case. (PCR .Vol. III p. 330).

Dr. Carpenter completed an evaluation of Richard England and found him to be suffering from bipolar disorder. (PCR Vol. III p. 340). Bipolar disorder is a mood disorder of emotion and moods characterized by depression and what is called mania or as hyperactive or expansive elated moods. (PCR Vol. III p. 340). England had a very difficult time with hyperactive behavior in school and he very likely had attention deficit hyperactivity disorder or ADHD. (PCR Vol. III p. 340). Dr. Carpenter noted that England was retained in the fifth grade and he was impulsive. (PCR Vol. III p. 341). England described increasing tendency towards mood swings which vacillated between manic excitability and euphoric mood and depression. (PCR Vol. III p. 341). England reported hyperactive moods, high energy, manic moods, and decreased need for sleep without the need for stimulant drugs. (PCR Vol. III p. 341).

Alison England reported to Dr. Carpenter her brother as hyperactive and impulsive as a child. (PCR Vol. III p. 342). Alison reported the sexual abuse she suffered and the sexual abuse that Barry suffered. (PCR. Vol. III p. 343).

Richard England also reported that when he was around the age of 10 or 11 that he knew a boy from the Army base that had gotten some kind of expensive bike or moped or something. When asked where he got it, the boy told England that the coach gave it to him. (PCR Vol. III p. 343). When probed, the kid told England

that, "if you get involved in sexual activity with this guy, you'll get treats or gifts." (PCR Vol. III p. 343). England then did follow up on that conversation by getting involved with this guy and he stated that he was buying him things. (PCR Vol. III p. 343). When Dr. Carpenter asked England if the coach ever molested him he said he never let it get that far but admitted that one time the coach rubbed his stomach. (PCR Vol. III p. 343). Belly rubbing was the extent of it. (PCR Vol. III p. 343).

Dr. Carpenter spoke to Sarah Dullard, the ex-wife of England, who gave instances of England exhibiting bipolar behavior as an adult. (PCR. Vol. III p. 357). The diagnostic criteria for bipolar disorder in general terms includes racing thoughts, decreased need for sleep, elated moods, high levels of energy and related impulsivity and getting involved in activities that may be risk taking activities. (PCR Vol. III p. 358). It is also characterized by a distinct period of abnormally and persistent elevated expansive or irritable mood. (PCR Vol. III p. 360).

Dr. Carpenter testified as to a term called ego-dystonic. (PCR Vol III p. 367). The ego is considered to be the conscious mind and ego-dystonic means that something about one's self is unpleasant or negative in the eyes of one's ego. (PCR Vol. III p. 367). In other words, as you reflect upon yourself, things that are ego-dystonic are things you don't like about yourself. (PCR Vol. III p. 367). When you think about yourself or you think about your behavior, you don't like certain

traits or behaviors about yourself. (PCR Vol. III p. 368). The 1980 edition of the DSM-III had diagnostic criteria called ego-dystonic homosexuality. (PCR Vol. III p. 368). Homosexuality as a mental illness was dropped with the DSM-IV for social political reasons. (PCR Vol. III p. 369).

As a Jimmy Ryce evaluator Dr. Carpenter noted that clients are guarded about their sexuality or in outright denial of their sexuality. (PCR Vol. III p. 371). On all three visits, England denied to Dr. Carpenter that he is a homosexual. (PCR Vol. III p. 372). On the DVD interview, England said he was repulsed by homosexuality. (PCR Vol. III p. 374). England seemed very uneasy discussing issues of homosexuality. (PCR Vol. III p. 376). England had issues with the ego-dystonic aspect of homosexuality. (PCR.Vol. III p. 377). Regarding the incident of belly rubbing with the coach, it seemed to Dr. Carpenter that England was minimizing or withholding the whole story. (PCR Vol. III p. 378). Dr. Carpenter testified that it is common for children who have been sexually abused to become abusers themselves. (PCR Vol. III p. 382). Dr. Carpenter also testified that there was indication that England suffered an injury to the head and that such injury could cause brain damage. (PCR Vol. III p. 396).

Dr. Carpenter testified that according to Dr. Riebsame's assessment, England is impulsive. (PCR Vol. III p. 404). In Dr. Carpenter's opinion, England engaging in

sex for drugs or clothes was learning the modus operandi of homosexual hustling. (PCR Vol. III p. 412). England was learning to use his sexuality to manipulate people to get what he wanted. (PCR Vol. III p. 412). In summary, England was bipolar, homophobic, histrionic and he engaged in homophobic rage when he attacked Wetherell. (PCR Vol. IV p. 422).

Dr. Carpenter further explained that we know that homophobic violence is a reality. (PCR Vol. IV p. 424). People do attack homosexuals and frequently attack and kill homosexuals out of homophobic rage which is a conflict between two strong opposing psychological forces that a person is unable to resolve satisfactorily. (PCR Vol. IV p. 424). The defense mechanism is projective identification, which very simply means we hate in others the things we hate in ourselves. (PCR Vol. IV p. 424). There is also the fact that England was bipolar, which is also well known to be a risk factor for increased levels of aggression and violence and dysregulation of emotion or poorly controlled emotion and sudden surges of anger and rage, coupled with histrionic personality features, at a certain point this tension builds to a crescendo and then just like a nuclear bomb, it explodes in violence. (PCR Vol. IV p. 424-5). The brutal beating of Wetherell was a form of overkill which is inferential of strong internal rage being expressed. (PCR Vol. IV p. 425).

TESTIMONY GERALD KEATING:

Gerald Keating testified that he represented Richard England. (PCR Vol. V p. 542). Keating filed a notice of appearance on December 3, 2003. (PCR Vol. V p. 542). At some point in the defense Keating began a phase two penalty and/or mitigation investigation. (PCR Vol. V p. 543). On April 22, 2004, Keating filed a motion for appointment for co-counsel requesting that Mr. Sanders be appointed with him. (PCR Vol. V p. 543). Mr. Sanders was not death penalty qualified. (PCR Vol. V p. 543). Mr. Keating did not know of any death qualified attorneys who would be willing to step into a first degree murder death penalty case with three weeks to begin the case. (PCR Vol. V p. 544).

Upon their initial meeting, Keating learned that England believed that his speedy trial rights had been violated. (PCR Vol. V p. 544). Keating asked for dismissal on constitutional speedy trial grounds but the request was denied. (PCR Vol. V p. 545). Keating then explained to England that he had another case that was older and would have to be tried first, in the summer of 2004. (PCR Vol. V p. 545). Keating had to try the McDuffie case first. (PCR Vol. V p. 546).

Mr. Keating filed a motion to continue the trial for a waiver of speedy trial in March of 2004. (PCR Vol. V p. 549). Keating, at a standard docket call, believed that both orally and in writing he announced a motion to continue and waiver of speedy trial. (PCR Vol. V p. 550). When the waiver of speedy trial was granted,

Keating figured he had bought some time. (PCR Vol. V p. 550). Keating believed that the traditional time frame for bringing to trial a first degree murder case was about 12 to 18 months. (PCR Vol. V p. 551). That time frame would give an opportunity to do a full and complete investigation of phase one and phase two. (PCR Vol. V p. 551). Keating said that he would like to have done what he did in the McDuffie case - meet with his investigator, delegate tasks to co-counsel, go over mitigation checklists, plan a strategy, follow up on leads, do cross checks, and put together a comprehensive defense investigation. (PCR Vol. V p. 552). By comparison, Keating did not have the time to do such things in England's case. (PCR Vol. V p. 552). No extensive investigation was being conducted until March of 2004. (PCR Vol. V p. 552). Speedy trial was waived in March and Keating got a continuance and waiver of speedy trial in open court. (PCR Vol. V p. 553). Between March and April 16, 2004, Mr. Keating was at the jail talking to England and England said that either he didn't want to waive speedy trial or didn't waive speedy trial and Keating responded, "man, we were in open court. We did this. That was your signature." (PCR Vol. V p. 554).

Keating believed he wasn't communicating with England so he brought England back before the Court to figure it out. (PCR Vol. V p. 554). Keating called for a status conference on April 16th and England said, "no, I don't want to

waive speedy trial. And that previous motion, I kind of withdraw that kind of thing." (PCR Vol. V p. 554). Keating testified that as of April 2004 there was a waiver of speedy trial. (PCR Vol. V p. 563). As of April, Keating believed that with the waiver, if he got a continuance until late that year, he would have sufficient time to do preparation for the penalty phase and the rest of the case. (PCR Vol. V p. 564). Keating would have sought more time later in the year to try to get it onto more like a 12-month schedule. (PCR Vol. V p. 564). Keating tried to get out of the May 10th trial date to allow him enough time to prepare. (PCR. Vol. V p. 564). When he could not get a continuance, he sought to withdraw from representing England. (PCR Vol. V p. 564).

With the impending trial date, Keating did not believe he could render effective assistance of counsel. (PCR Vol. V p. 567-8). Keating was unable to do a psychiatric background investigation or obtain things like school records. (PCR Vol. V p. 569). Keating's preparation for the trial was characterized as a "three week war plan." (PCR Vol. V p. 570). He agreed that it was not the optimum scenario in preparation for a penalty phase before the jury. (PCR Vol. V p. 575). He did not have adequate time to present full and comprehensive mitigation presentation. (PCR Vol. V p. 575). Keating agreed that he could have retained a mental health expert in December of 2003. (PCR Vol. V p. 578). Keating retained

a mental health expert after the jury rendered a recommendation for death but before the Spencer hearing and he agreed that he would like to have an expert in earlier. (PCR Vol. V p. 580).

TESTIMONY OF ROBERT SANDERS:

Robert Sanders testified that he is a twelve year attorney specializing in criminal defense. (PCR Vol. V p. 617). The Richard England case was his first capital murder trial. (PCR Vol. V p. 617). Sanders was working on the McDuffie case with Keating and when Keating realized he was going to trial on the England case on short notice, he asked Sanders to second chair. (PCR Vol. V p. 618). Sanders had no experience in capital cases other then taking the classes and what he was doing on the McDuffie case. (PCR Vol. V p. 618).

Sanders described his work on the England case as "drop everything and just go." (PCR Vol. V p. 619). Sanders's role "was basically to be second attorney, basically pitch mitigation, not even investigate mitigation." (PCR Vol. V p. 619). To Sanders' knowledge, there was an initial waiver but he was not on the case at that point. (PCR Vol. V p. 619). When the case came back for another hearing and England indicated that he did not want to waive, that's when the case got scheduled on short notice. (PCR Vol. V p. 619).

Sanders' job was to pitch the penalty phase. (PCR Vol. V p. 619). If

England was convicted of murder, Sanders "was going to be the one that stood up there and handled the penalty phase, a fresh face, so to speak." (PCR Vol. V p. 620).

Regarding penalty phase preparation, Sanders believed he talked to a couple of the witnesses before they put them on the stand, but other than brief conversations, there wasn't much else. (PCR Vol. V p. 625). Sanders did not start any penalty phase preparation after being appointed to the case. (PCR Vol. V p. 626). He did not order any school or juvenile records. (PCR Vol. V p. 626). He didn't recall having a mental health expert involved at all during the trial. (PCR Vol. V p. 626). Sanders agreed that it would be prudent to retain a mental health expert appointed to evaluate England right after he was appointed to the case. (PCR Vol. V p. 627). Sanders was aware that England had a prior case involving the killing of a homosexual. (PCR Vol. V p. 627).

He did recall speaking with England's mother and sister and did ask and learn about sexual abuse. (PCR Vol. V p. 630). He didn't convey the information about sexual abuse to Mr. Keating. (PCR Vol. V p. 630). Sanders said that Mr. Keating was handling the majority of the case, the mitigation investigation was basically done, and he was basically there to be the attorney to present the information. (PCR Vol. V p. 631).

Investigator Jake Ross testified at the penalty phase for Inez and Alison.

(PCR. Vol. V p. 633). They could have testified telephonically at the penalty phase but didn't and no arrangements were made for them to testify. (PCR Vol. V p. 633-4). Sanders never moved for a post verdict motion to continue the remainder of the trial to prepare for penalty phase. (PCR Vol. V p. 634). Attorney Robert Sanders was in charge of handling Steven Diehl as a witness at trial. Most importantly he argued the motion to suppress Diehl's statements due to his working as an agent for the State of Florida. (PCR Vol. V p. 620-21).

TESTIMONY OF DR. JEFFREY DANZIGER:

Jeffrey Danziger testified that he is a psychiatrist. (PCR. Vol. VI p. 659). Danziger testified that bipolar disorder is a disorder of mood. (PCR Vol. VI p. 663). Danziger testified that he treated about 1,000 bipolar people. (PCR Vol. VI p. 666). Dr. Danziger never testified in a penalty phase about homophobic rage. (PCR Vol. VI p. 668). Homophobic rage is not in the DSM-IV. (PCR Vol. VI p. 670). Dr. Danziger testified that he met with Richard England for two and a half hours. (PCR. Vol. VI p. 674). He noted that England denied anything to do with the Wetherell murder. (PCR Vol. VI p. 676). Dr. Danziger did not conduct any intelligence testing or sophisticated neuropsychological testing. (PCR. Vol. VI p. 677). Dr. Danziger took a personal history from England and based on his meeting, Danziger did not find any major mental disorder. (PCR Vol. VI p. 679).

Dr. Danziger agreed that although homophobia was not in the DSM, that does not mean that homophobia does not exist. (PCR Vol. VI p. 696). Dr. Danziger did not interview family members of England. (PCR Vol. VI p. 697). In evaluating England, Dr. Danziger would have been interested in knowing that England may have had a homosexual affair with the co-defendant Jackson. (PCR Vol. VI p. 714). Dr. Danziger would have been interested in knowing that England attended a homosexual party a few days before the actual killing. (PCR. Vol. VI p. 714). Dr. Danziger admitted that discovery material which indicated that England may have been having anal sex with victim Wetherell at the time of the murder would be potentially valuable information as to why a decision was made to kill. (PCR Vol. VI p. 714-5).

TESTIMONY OF DR. WILLIAM RIEBSAME:

Dr. William Riebsame testified that he is board certified in forensic psychology. (PCR Vol. VI p. 722). Dr. Riebsame administered to England the Wide range Achievement Test, the Wechsler Abbreviated Scale of Intelligence,the Hare Psychopathy test, and the Minnesota Multiphasic Personality Inventory 2. (PCR Vol. VI p. 726).

TESTIMONY OF JAKE ROSS:

Jake Ross testified that he is employed with the Public Defender's Office as a

chief investigator supervising eight investigators throughout the Seventh Judicial Circuit. (PCR Vol. VII p. 821-22). He worked with Jerry Keating on capital cases and was appointed to work with Mr. Keating on Richard England's case. (PCR Vol. VII p. 822-23). His role was to follow up investigative leads, make efforts to locate alibi witnesses, conduct interviews, and do the mitigation investigation. (PCR Vol. VII p. 823). In his experience, the normal capital case takes about 15 to 24 months between arrest and trial. (PCR Vol. VII p. 824).

Mr. Ross obtained signed releases from Richard England on April 27, 2004. (PCR Vol. VII p. 835). At the time Mr. Ross was preparing for Richard England's trial, he was working two capital cases at the same time, and they had a situation where they had to find ways to continue Roy McDuffie's case and concentrate on Richard England's case, so it was a rush-type situation. (PCR Vol. VII p. 835). Mr. Ross was working two simultaneous cases at the same time and he was focusing on guilt phase issues trying to find alibi witnesses. (PCR. Vol. VII p. 836-7).

Mr. Ross testified at the penalty phase hearing in place of Alison England and Ines Fyffe. (PCR Vol. VII p. 831). Mr. Keating did not have these family members testify telephonically based on strategy. (PCR Vol. VII p. 832). Alison England and Ines Fyffe testified at the Spencer hearing and presented the same information. (PCR Vol. VII p. 832).

Jake Ross testified that he didn't independently recall if either Alison or Ines talked to him about sexual abuse, but he did remember them talking about physical abuse. (PCR Vol. VII p. 835-6). Jake Ross later recalled that David Cline, Ines' third husband, attempted sexual battery on Alison England and Ross said he gave the attorneys a copy of his report that reflected the attempted sexual battery. (PCR Vol. VII p. 838-9).

SUMMARY OF ARGUMENTS

Issue I: Trial counsel was ineffective during the guilt phase due to a failure to properly establish that witness, Stephen Diehl, acted as a state agent in obtaining damaging information from Mr. England prior to trial, in violation of Mr. England's rights under both the U.S. and Florida constitutions. Despite deposing Mr. Diehl, trial counsel failed to uncover the crucially important information that Mr. Diehl was solicited by a state employed correctional officer to serve as an agent to procure information form Mr. England. If not for the ineffective performance of counsel, Mr. England would have been acquitted. The lower court erred in denying this claim.

Issue II: Trial counsel was ineffective during the penalty phase of the trial by failing to adequately investigate and prepare for said phase, by failing to have Mr. England evaluated by a mental health professional in a timely manner. Furthermore, trial

counsel was ineffective for failing to uncover background information concerning sexual abuse with would have led to both statutory and non-statutory mitigation. The jury recommended death by a mere 8-4 vote, and had trial counsel been effective, Mr. England would have received a life sentence. The lower court erred in denying this claim.

STANDARD OF REVIEW

All of the issues discussed in the brief, should be reviewed under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), the claims are a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

ISSUE I

TRIAL COUNSEL FAILED TO UNCOVER EVIDENCE THAT THE STATE USED WITNESS STEVEN DIEHL AS AN AGENT OF THE STATE AGAINST MR. ENGLAND. THIS WAS A VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MOREOVER, THE STATE USED WITNESS STEVEN DIEHL AS AN AGENT OF THE STATE AGAINST MR. ENGLAND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

This claim was denied by the lower court. This was error. (PCR Vol. XX p. 3129-30). Steven Diehl testified that he was once in the Volusia County jail on a probation charge where he met Richard England while they lived in the same cell block. (PCR Vol. II p. 225). Mr. Diehl knew England was facing capital murder charges and the two spoke daily for about a month. (PCR Vol. II p. 225). Mr. Diehl's relationship with Mr. England and his case took an interesting turn, as described by the following testimony:

> BY MR. VIGGIANO
> Q. While you were in the Volusia County jail, did a jail deputy ever approach you about some kind of offer?
> A. Yes, he did.
> Q. And could you describe who this jail deputy was?
> A. He was a taller Hispanic male, kind of thinning receding hairline, brushed back, shaded glasses. I don't believe he had any facial hair. And I do not recall specifically what his what his name - - it seems to me that the name was like Martinez, or something to that effect. I would, however, like to elaborate on what I'm saying, if that's okay.
> Q. Yes. Well, what did the jail deputy say to you?
> A. He had asked me if I was - - well, he didn't ask me. He informed me that he knew I was kind of buddying up with Richard England and asked me if I would be interested in speaking with anyone about what was to - - you know information that I heard from Richard England. And a that point, you now, obviously I said I would be. So during the trial, if - - from what I'm hearing that was read back to me of testimony, did I request to - - did I request to speak to police? Yes, I did request to speak to

police, but I did not initiate the contact.
Q. Okay. Did anyone ask you back then, any of the attorneys representing Richard England, to your knowledge, ask you specifically these questions that I'm asking you today about how you got involved in the case?
A. No, not that I recall. I - - this has been, what, four years I believe?
Q. So you basically took that to mean that you could get involved in this case in some capacity?
A. Yes.
Q. So did the jail deputy specifically tell you what you were to do to help yourself?
A. Not specifically, no.
Q. And do you know what if the jail deputy ever saw or knew you were speaking with Richard England?
A. Yes. He made it clear to me that he was aware that I was in contact with Richard England.
Q. Did you eventually come into contact with a Detective Session and Maguire?
A. Yes. (PCR Vol. II p. 233-34).

Steven Diehl's testimony makes it abundantly clear that he was solicited by a state official to "work" for the State of Florida in this case as an agent. A state official, namely a jail guard, noticed that Steven Diehl had a seemingly friendly relationship with Mr. England, and decided to use that relationship to the State's advantage by approaching Steven Diehl.

Attorney Robert Sanders was in charge of handling Steven Diehl as a witness at trial. Most importantly he argued the motion to suppress Diehl's statements due to his working as an agent for the State of Florida. (PCR Vol. V p. 620-21). Attorney Sanders testified as follows:

BY MR. SHAKOOR
Q. Okay. So as you testified Mr. Diehl was the subject of the motion to suppress. And the deposition that you mentioned, that happened after the motion to suppress?
A. Yeah, I think it was within a couple of days where he just wanted to at least have a shot at him before the trial to do - - find out anything we could just to try to trick him up.
Q. So anything you learned at that deposition obviously couldn't have helped you in the motion to suppress?
A. Well, we could always renew it.
Q. Okay. If the motion transcript - - you mentioned you reviewed the motion to suppress transcript?
A. Yes.
Q. If the record of that transcript revealed you failed to ask questions indicating how the initial, the very initial meeting between Mr. Diehl and State authorities took place, would you refute the record?
A. No, sir (PCR Vol. V p. 624).

Trial counsel recognized the issue in regards to how Diehl was unlawfully used as a state agent against Mr. England, but trial counsel was woefully ineffective in fleshing the issue out and properly presenting it in the motion to suppress. A key problem is the fact that trial counsel neglected to discover how the initial meeting between Steven Diehl and a state official took place. Had trial counsel done this, he would have been able to discover that Mr. Diehl was blatantly solicited by a state actor to become a state agent against Mr. England. The following testimony concerning the motion to suppress hearing is very revealing:

Q. Okay. And I got a couple questions about the Diehl issue. Regarding the motion to suppress, was Mr. Diehl called to testify at the actual motion to suppress?

A. No, sir.
Q. Would you concede that the motion to suppress might have been more effective if Diehl actually testified at the hearing?
A. Possibly. (PCR Vol. V p. 635).

One obvious problem is that trial counsel filed and argued the motion to suppress BEFORE the deposition of Mr. Diehl took place. Had trial counsel scheduled the deposition of Mr. Diehl prior to filing and arguing the motion, and asked the proper questions, he could have properly gotten Mr. Diehl's testimony suppressed. Moreover, if Mr. Diehl had been deposed prior to the motion to suppress hearing and properly questioned, counsel would have been able to call Steven Diehl to actually testify at the hearing itself. A properly questioned Steven Diehl would have resulted in the motion to suppress being granted. Consequently, Mr. England would have been acquitted. Trial counsel was ineffective and Mr. England is entitled to relief.

During the evidentiary hearing, the State was unable to impeach Mr. Diehl's testimony regarding being approached by a jail deputy to act as a state agent. The State called Mr. William White, a man who worked as a lieutenant corrections officer during the time in question, and doesn't know Steven Diehl or Richard England. (PCR Vol. VII p. 803). Moreover, Mr. White testified that he might not know if any other correctional officer (CO) failed to follow the standard operating

procedures regarding CO handling of prospective jailhouse "snitches". (PCR Vol. VII p. 808).

The State also called a CO by the name of David Torres who was working during the time frame in question. David Torres doesn't know Steven Diehl either. (PCR Vol. VII p. 816). Officer Torres also testified that he is about 6'3", and that he doesn't think that there are any other Hispanic officers that are as tall as he. (PCR Vol. VII p. 815). The testimony of CO David Torres is completely irrelevant. He does not know Steven Diehl. His testimony was only presented as an attempt to rebut or challenge Mr. Diehl's description of the CO that approached him being a "Hispanic male, with thinning receding hairline, brushed back, shaded glasses". (PCR Vol. II p. 233). Mr. Diehl further described the CO as being named Martinez, or "something like that", being Hispanic or "Hispanic-appearing", six feet tall, 180-190 pounds and approximately 45 years old. (PCR Vol. II p. 244, 250). The evidentiary hearing testimony of David Torres and William White is completely irrelevant. Steven Diehl's evidentiary hearing testimony was not impeached or rebutted.

Prejudice

The ineffectiveness of trial counsel on this issue resulted in very clear prejudice. Mr. Diehl was used as a key witness against Mr. England at trial. Mr.

Diehl was unlawfully used as a state agent to gather information from Mr. England in preparation of his trial testimony and to help build the State's overall case. Regarding how he was used, Mr. Diehl testified as follows:

> BY MR. VIGGIANO
> Q. Were you asked by the detectives to speak with Richard England?
> A. I was asked eventually, yes. At first it was more of a asking me what I had heard, what I knew, and it was - - I guess it was more or less - - it was more or less said to me, you know, if there was anything else I knew or that would be helpful, that if I could let them know, that they'd be grateful for it. And, you know, I'm not going to say that they straight up came out, and said, "Hey, you know, you do this for us and we'll do this for you, " but they made it fairly clear that, you know, they could assist me in my - - in what I was going through, to get back home to my kids and my fiancee.
> Q. How did they make that clear to you?
> A. Just kinda the - - the exact statements, I don't recall, but through various statements that they made of just, you know, "If you help us, we'll see what we can do to, you know, maybe help you out."
> A. You know, like I said, there was never specifics stated to me, but I was fairly - - I was aware that they had power that I didn't have, that they could talk to some people that, you know, might be able to help me out in my situation.
> Q. Did you feel if you didn't help the detectives that your situation could get worse?
> A. No, I didn't feel it would necessarily get worse. I just - - I was sure that it wasn't going to get better.
> Q. Do you recall the meetings that you had with the detectives?
> A. Vaguely.
> Q. Did you ever reach out to the detectives?
> A. Yes.

Q. How did you do that?
A. Through the - - through the correspondence of the correctional officer.
Q. And do you recall testifying at Richard England's trial?
A. Yes.
Q. Did you testify that Richard England admitted to you that he committed the crime?
A. Yes. (PCR Vol. II p. 235).

The prejudice here is clear and obvious. Steven Diehl was recruited to be a state agent, told how he could help his own personal situation, told to speak to Richard England, and that information was later used against England when Diehl testified at trial. Mr. Diehl further testified on cross-examination as follows:

MS. CALHOUN:
Q. And during this meeting, did Mr. McGuire, Sergeant McGuire, Officer McGuire, tell you or caution you, in fact, that you could not go ask Mr. England questions about the murder of Howard Wetherall?
A. On the record, I believe he did. Off the record, no, he did not.
Q. So you are saying yes, he did tell you that - -
A. I'm saying that he did and did not, as well. I'm saying when there was a tape recorder running, certain things are said, and when the tape recording is not running, certain things are not said.
Q. So are you saying he contradicted the statement that you should not ask Mr. England questions once you were off the tape recorder?
A. No, I'm not saying that at all.
Q. Okay.
A. What I'm stating is that prior to being recorded, I was told to find out what I can. They didn't tell me specifically, "Do not ask questions, do not" – you know,

none of that was said. It was - - it was made clear to me to find out what I can however I need to go about doing so.
Q. Now, who's "they"?
A. The detectives.
Q. Give me names. Which ones?
A. Debbie Sessions and Shon McGuire. Those are the only two detectives that I speak with. (PCR Vol. II p. 245-46).
RECROSS-EXAMINATION:
Q. By Mr. England?
A. Yes, not always - - maybe not always willingly given. There were times when I did - - I guess "fish" would be the terminology I could use for it. There were times when I dug and I tried to find information out.
Q. Okay.
A. And I made lists of information and I turned those lists over to investigators. (PCR Vol. II p. 256).

The previous passages clearly speak for themself. Mr. Diehl was solicited to act as a state agent, and then guided to obtain information helpful for the state and against Mr. England. If trial counsel had timely deposed Mr. Diehl, asked the right questions, and called Mr. Diehl to testify at the motion to suppress, the motion would have been granted. Richard England would have been acquitted at trial. Trial counsel was ineffective in how the Steven Diehl issue was handled, prejudice resulted, and relief is proper.

Legal Argument

Steven Diehl was a government agent and deliberately elicited incriminating statements from Mr. England. The government violates an accused's Sixth

Amendment right to counsel when, after indictment, government agents secretly elicit incriminating statements in the absence of counsel. Massiah v. United States, 377 U.S. 201, 206 (1964). Statements obtained by an informant are the functional equivalent of interrogation, and violate the accused's rights if the informant acted beyond merely listening, deliberately eliciting incriminating remarks. Kuhlmann v. Wilson, 477 U.S. 436. 59 (1986). Consequently, a jailhouse informant violates an accused's Sixth Amendment right to counsel when he deliberately elicits statements while acting as a government agent. United States v. Li, 55 F.3d 325. 328 (7th Cir. 1995). Witness Diehl was acting by prearrangement with the State, and therefore violated Mr. England's Sixth Amendment rights. United States v. Henry, 447 U.S. 264, 273 (1980). The constitutional violation allowed the State to use what was otherwise inadmissible testimony to convict Mr. England of a murder. Trial counsel never cited to the above-mentioned cases in its two page, boilerplate motion to suppress. (See attached *Motion to Suppress Testimony of Steven Diehl and Documents and Seals and Garcia*).

In Strickland v. Washington, 466 U.S. 668 (1994), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial process." Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice.

Trial counsel was ineffective during the deposition of Steven Diehl when counsel failed to ask and elicit information about Diehl's initial contact with law enforcement. Counsel was ineffective for not scheduling the deposition prior to the motion to suppress, not asking the proper questions, and then not calling Diehl to testify at the hearing. Diehl was solicited by the jail deputy to speak to detectives about Mr. England's case. Had trial counsel scheduled things properly, and then asked the appropriate questions, specifically how Diehl came to meet with Detectives Session and McGuire, trial counsel would have uncovered that Diehl was acting as an agent of the State in violation of Massiah. Proper questioning and investigations would have also uncovered the same detailed information Diehl testified to during the evidentiary hearing regarding how he was used by the detectives. Counsel's performance was deficient under Strickland. Had counsel discovered the Massiah violation, Steven Diehl's testimony would not have come before Mr. England's jury, and Mr. England would have been acquitted. Relief is proper.

ISSUE II

MR. ENGLAND WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE THE PENALTY PHASE OF THE TRIAL. TRIAL COUNSEL FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE, COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT THE DEATH SENTENCE IS UNRELIABLE.

This claim was denied by the lower court. That was error. The trial jury recommend death by a close 8-4 vote. The penalty phase presentation of Mr. England's trial fall squarely on point both legally and factually with Larzelere v. State, 979 So.2d 195 (Fla. 2008). Regarding the investigation of the mitigation available to Mr. England but not presented, the Larzelere Court held:

> Like trial counsel in *Lewis*, Wilkins and Howes did not seek information regarding Larzelere's childhood and background. Wilkins could not remember any specific actions taken to investigate mitigation. He could only remember that he and Howes "were jointly pursuing whatever it was we were pursuing." Each of Larzelere's three sisters testified that Wilkins and Howes did not interview them on the topic of mitigation. Yet, all three of the sisters stated that had they been asked, they would

have testified during the penalty phase that Larzelere was sexually abused by her father "Pee Wee" Antley, Jason and Jessica Larzelere, two of Larzelere's children testified that counsel did not explain the concept of mitigation to them and that they would have testifed during the penalty phase about Larzelere being physically abused by a prior husband if asked. Jason testified that he tried to contact Wilkins after learning the role of mitigation in a first-degree murder case from his attorney William Lasley but that Wilkins would not take his call. Not only did Wilkins and Howes not interview family members about Larzelere's background, they discounted the portions of McDaniel's investigative report that documented Larzelere's father's alcoholism. Possible child abuse, and possible spousal abuse. Wilkins could not remember if he asked Larzelere about the abuse mentioned in McDaniel's report, and Howes could not remember if he asked Don Carpenter, the investigator who was hired to replace McDaniel, to "reinvestigate" potential mitigation. Id. at 204-05.

At the evidentiary hearing, Mr. Jake Ross, an investigator retained by trial counsel, was asked the following questions and gave the following answers:

BY MR. KILEY:

Q. But you did interview Ines and Alison, didn't you?
A. Yes, sir.
Q. Sir, I'd like you to take a look at this composite document (tenders). Okay? Now, sir, that's dated May 25th, 2004; correct sir?
A. Correct.
Q. That is right before the penalty phase began; correct, sir?
A. Yes, sir.
Q. In fact, that's the day that the verdict came out; correct, sir?

A. Yes, sir.
Q. Now, I'd like you to turn - one, two - we're on the third page. Ms. Ines Fyffe had three children. Do you see that part, sir?
A. Yes.
Q. What's the date above that?
A. 5/17/04.
Q. Okay. And then the next page, that would be page 2, you go into a history of earliest memories, birth through age 5. Do you see it, sir?
A. Yes.
Q. 5/17 - birth, dash, age 5.
A. Yes.
Q. Turn the page, please. And see if I'm - if I've got this wrong. I'm going to read it.

Little star, Point 1: Richard was 11 years old when he was separated from his mother. His mother was the backbone of the family, and when she left, Richard had no support. Do you see that, sir?
A. Yes.
Q. When Richard was 12 - next point: When Richard was 12 years old he was separated from his siblings. Ronnie gave Ines permission to keep Barry and Alison. Ronnie would not allow Richard to leave. He kept Richard. Do you see that, sir?
A. Yes. Yes.
Q. Next point: Ines married David Cline, third husband. Richard didn't know him that well. Cline was abusive to Barry and Alison. He attempted sexual battery on Alison.
A. That's correct.
Q. Did you tell the defense attorney, either Mr. Keating or Mr. Sanders, that Cline attempted sexual battery on Alison?
A. Yes. They received a copy of this report here.
MR. KILEY: No further questions, sir. (PCR Vol. VII p.837-39)

Mr. Keating was asked the following questions and gave the following answers at the evidentiary hearing:

> BY MR. VIGGIANO:
> Q. You could have possibly, correct, began your investigation early on upon appointment in December of '03, correct?
> A. Who, a shrink?
> Q. Yes.
> A. I could have, yes.
> Q. And you could have developed further information about Mr. England's background sufficient to provide a mental health professional about what he suffered growing up as a child? You could have developed background information, correct?
> A. I could have developed more family background information at that time, yes.
> Q. Now, if you had learned about the sexual dysfunction that Mr. England might have suffered as a child, you would have presented that to a mental health professional, correct?
> A. Yeah.
> Q. And if you had learned that Mr. England's siblings had been sexually abused as – by a stepfather as a child, you would have presented that to your mental health expert, correct?
> A. I think I would have. I'm not sue if – my understanding was that Mr. England himself was not sexually abused. I never heard of it before this 3.851, but it's my understanding from your pleadings that a stepfather may have molested other siblings in the family. But he wasn't living at home at the time, so I wasn't sure of the connection now that it's been raised
> Q. But if that were true, you's want to explore that, correct?
> A. Absolutely. I think you have to explore every possible mitigator *and that's something that could lead to*

something more important. (emphasis added).
Q. And you did know that there were sexual - homosexual overtones in this case, correct?
A. Yeah. (PCR Vol. V p. 577-79)

In Mr. England's case, a valuable lead was abandoned. In Wiggins v. Smith, 123 S.Ct. 2527 (2003) the Supreme Court of the United States ultimately held that "The performance of Wiggins' attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel." Id. at 2529. Justice O'Connor, in delivering the opinion of the Court, stated:

> We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.,* at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.,* at 688, 104 S.Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Ibid.*

The performance of trial counsel in Mr. England's case fell below prevailing professional norms. The deficiencies of counsel extended to the investigative and preparation aspect of the case. Mr. England is entitled to relief under Wiggins. In Wiggins, the investigation regarding mitigation was abandoned, leads were not

pursued. In Mr. England's case, trial counsel only did a cursory investigation. The Supreme Court of the United states further held in Wiggins:

> Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report. Their conduct similarly fell short of the American Bar Association's capital defense work standards. Moreover, in light of the facts counsel discovered in the DSS records concerning Wiggins' alcoholic mother and his problems in foster care, counsel's decision to cease investigation when they did was unreasonable. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of aggravating factors from Wiggins' background. Indeed, counsel discovered no evidence to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, thus distinguishing this case from precedents in which this Court has found limited investigations into mitigating evidence to be reasonable. Id. at 2530.

The mitigating evidence which counsel failed to discover and which was presented at the 3.851 was powerful. Had trial counsel retained a mental health professional upon appointment, all of the substantial mitigation presented at the evidentiary hearing should have been presented to the penalty phase jury. An 8 to 4

recommendation of death was returned by the penalty phase jury without hearing about Mr. England's childhood and his evolution from a child who was "belly rubbed" by a manipulative, perverted coach, to roaming the beach in the company of drunkards and drug addicts who gave young Richard England drugs and alcohol in exchange for *what?* Furthermore the evolution of Richard England from child to an untreated Bipolar, possibly brain damaged, ego-dystonic homophobe should have been investigated by trial counsel.

The Wiggins Court further held:

> When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing. Id. at 2538.

In assessing the reasonableness of an investigation and the "tactical decisions" resulting from that investigation, the Wiggins Court further held:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming Schiaich and Nethercott limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy. Id. at 2538.

In Mr. England's case, the "lead" that Alison England had been sexually abused by Cline merited further investigation. Trial counsel should have begun his investigation into mitigation upon appointment. Had he done so, a complete investigation could have began on December of 2003, the date of Mr. Keating's appointment to the case. However, jeopardy had attached upon swearing of the guilt phase jury. Upon reading of Jake Ross' report, effective counsel would have moved for a bifurcation of the proceedings to give the defense time to prepare a proper penalty phase. Trial counsel was ineffective in this regard and as a result, Mr. England was deprived of a reliable testing of the evidence. Mr. England is entitled to relief under Wiggins, but there is more. During the evidentiary hearing, Mr. Keating was asked and answered the following questions:

> Q. Okay. But – so you agree, though, that you didn't do any penalty phase preparation between the time you were appointed and the time of your motion to dismiss hearing on speedy trial in February?
> A. Yeah. "Any" is kind of a big word. I'm sure I went to the Statute 921.141, looked at my mitigators, looked at my aggravators, tried to get a feeling on that, found out about his family members generally. But I don't think I contacted his family until we were actually in the trial posture later that April.
> Q. And you didn't though, retain an expert witness or mental health professional to do an examination of Mr. England?
> A. Not at that time.
> Q. And you're aware of the ABA guidelines regarding

death penalty cases, that you want to - well, basically at every stage you have an obligation to conduct a thorough and independent investigation relating to issues of both guilt and penalty in the penalty phase?
A. Yes, sir.
Q. And you would want to do that if you could. If you had the time in an optimum situation, you would be able to do that kind of thing, correct?
A. Well, I'm going to do it in any situation, but in this situation, I was a little bit hampered in my investigation by Mr.England's - I'm going to call it a demand for speedy trial, but we had a too early trial and so it kind of cut short my opportunity to do a full and complete phase two investigation. (PCR Vol. V p.546-7).

Further on in his direct examination, Mr. Keating gave the following answers to the following questions:

Q. Did you feel especially uncomfortable with this penalty phase package that you were going before the jury?
A. I know that we didn't have adequate time to present what I consider a full and comprehensive mitigation presentation, but you got to dance with the girl that you brought there and we're going. Let's go. Whatever you got, let's put it on. Let's put on our best case. Let's convince these jurors that his life is worth keeping. Let's get six jurors on our side. Let's get a recommendation of life and let's go home. That's my goal.
Q. Would you agree or disagree that, under those circumstances, the presentation that you did would not be what you wanted to do according to, for example, the ABA guidelines?
A. I, frankly, don't want to answer the question compared to ABA guidelines. I'd like to answer the question without that, if possible.
Q. Okay. Go ahead, please.

A. I think your question was, was I satisfied with the phase two presentation.
Q. Did you think - did you feel comfortable or did you feel that your presentation in the penalty phase would meet the standards?
A. Yeah. Yeah, I did an excellent job in phase one and phase two. And once you bring in the ABA standards and compare me to a reasonable attorney, I did an outstanding job.
Q. Under the circumstances, would you say?
A. Yes.
Q. Okay. But given optimum circumstances, that you had 18 months to prepare, would you say that that penalty phase is something you'd want to present to that particular jury?
A. I don't understand your question. But once you take ABA out of it, I can answer it a different way. I met the ABA standards. I did a good job for the client.
THE COURT: I think the question is: Could you have done a better job had he waived speedy trial?
THE WITNESS: Absolutely, positively, that was my goal, that was my desire. I tried to talk my client into not having a speedy trial, to allow me to perform my job properly. And I think because he did not waive speedy trial, he impaired my ability to do a good job for him, to do the best job for him.
BY MR. VIGGIANO:
Q. You could have possibly, correct, began your investigation early on upon appointment in December of '03 correct?
A. Yes, sir.(PCR Vol. V p. 575-77).

In Collier v. Turpin, 177 F.3d 1184, 1202 (11th Cir. 1999) The Collier court held:

> Although Collier's attorneys concede that their performance was deficient, they blame the trial judge rather than themselves for their poor display. We find that the trial judge was not to blame for counsels'

> ineffectiveness; rather, they were. In sum, counsel did not perform as objectively reasonable attorneys would have; their performance fell below the standards of the profession and therefore their assistance at the sentencing phase of the trial was ineffective. Id. at 1202.

It is clear that trial counsel was reluctant to discuss the ABA standards. That is because he did not follow them. As in Larzelere, a mental health professional was retained *after* the jury had rendered its recommendation. The ABA standards are clear and unambiguous in that an investigation should begin upon appointment whether the client likes it or not. Clearly, trial counsel did not meet the standards in that a penalty phase investigation was begun at the eleventh hour rather than upon appointment. Counsel would have had from December of 03 until the date of trial, six months to prepare. Six months was plenty of time for a mental health professional to visit Mr. England and gain his trust (it took Dr. Carpenter three visits). Six months was enough time for a mental health professional to call Ines Fyffe and Alison England and obtain a *complete* factual history of the abuse Mr. England suffered as a child as was abducted at the evidentiary hearing. A reasonable attorney would have used every minute of the time constraints placed upon him to prepare a penalty phase case. Trial counsel's blaming Mr. England for not waiving speedy trial is an attempt to cover up the fact that his performance was deficient and not objectively reasonable. Mr. England was not to blame for the

deficient performance, trial counsel was. Mr. England is also entitled to relief under Collier.

Dr. Jeffrey Danziger, M.D.

The penalty phase presentation of Mr. England's trial falls squarely on point both legally and factually with Larzelere v. State, 979 So.2d 195 (Fla. 2008) in regards to the handling of Dr. Jeffrey Danziger, M.D. Regarding the investigation of the mitigation available to Mr. England but not presented, the defendant directs this court's attention to the Larzelere Court which held:

> Unlike the attorneys in Lewis who consulted a mental health expert before allowing Lewis to waive the presentation of mitigation evidence, Wilkins and Howes did not retain Dr. Krop to examine Larzelere until after the jury recommended death. Dr. Krop testified that he had done over 1500 first-degree murder evaluations in his career and that "this case was the only case that I've ever been involved in when I was asked to get involved **after the jury already come back with its recommendation**." (emphasis added). Donald West testified that there is "probably no worse timing" than to hire an expert after the jury recommendation because "at that point, all you can do is ask the court to override ... a jury's recommendation which, by law, the court is required to give great weight." Howes testified that he did not know why Dr. Krop was not retained early in the representation because he did not become Larzelere's counsel of record until around the time jury selection began. Wilkins first could not remember why he did not contact Dr. Krop before the recommendation but later explained the he did not contact Dr. Krop sooner because he did not suspect that Larzerlere had been abused, and he did not feel that it was worth

> looking for a needle in a haystack until after the death recommendation. Ordinarily counsel is not deficient where counsel has made a strategic decision. However, "strategic choices made after less than a complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation." Wiggins, 539 U.S. at 528, 123 S.Ct. 2527 (quoting Strickland. 466 U.S. at 690-91, 104 S.Ct. 2052.). Counsel would have seen a reason to consult a mental health expert regarding Larzelere had counsel interview her family members or otherwise pursued the investigator's report. As Dr. McClaren explained, "When you're talking to [Larzelere], boy she's easy to believe, but when you're out of the situation and start looking at all of those conflicting things ... there are many inconsistencies." The trial court correctly concluded that counsel was deficient for failing to obtain an informed mental health evaluation of Larzelere in advance of the penalty phase. Larzelere at 205-206.

Attorney Gerald Keating's ineffectiveness at the trial level is discussed above concerning his not following the leads obtained by investigator Jake Ross. Gerald Keating further demonstrates his ineffectiveness in handling the Jeffrey Danziger situation as follows:

> BY MR. VIGGIANO:
> Q. You could have possibly, correct, began your investigation early on upon appointment in December of '03, correct?
> A. Who, a shrink?
> Q. Yes.
> A. I could have, yes.
> Q. And you could have developed further information about Mr. England's background sufficient to provide a mental health professional about what he suffered

> growing up as a child? You could have developed background information, correct?
> A. I could have developed more family background information at that time, yes. (PCR Vol. V p. 577-8).

Mr. Keating further testified:

> Q. And none of that was presented to the penalty phase jury because it wasn't done, correct?
> A. Correct. Dr. Danziger from Winter Park.
> Q. Would you agree that's not the best scenario in preparation for a penalty phase, to hire the penalty phase expert after the jury's recommendation, but before the Spencer hearing?
> A. Yeah, in a perfect world I like to have them in earlier. (PCR Vol. V. p. 580).

Dr. Danziger's relationship to this case is eerily similar to the one Dr. Krop had in State v. Virginia Larzelere. In both cases, the expert was retained after the jury had reached it's verdict rendering any opinions they may have almost moot. Dr. Krop testified that he had done over 1500 first-degree murder evaluations in his career and that "this case was the only case that I've ever been involved in when I was asked to get involved **after the jury already came back with its recommendation**?" (emphasis added) Larzelere at 205. Dr. Danziger had a similar experience that he described in testimony:

> BY MR. VIGGIANO:
> Q. Doctor, you sent a statement to Gerald [sic] Keating on July 13th. And what day did you actually get asked to do an evaluation in this case by Mr. Keating?
> A. I believe there was an order after the jury had come

> back 8 to 4, asking me to go and see Mr. England. I believe that might have been the 5th or the 6th, and then the earliest I could get up was the 11th.
> Q. And you testified that you were involved in postconviction matters in the past, is that correct?
> A. Yes.
> Q. And did you ever testify before a jury in a penalty phase?
> A. Oh, yes.
> Q. Okay. And did you - how many cases did you do that in?
> A. Perhaps, a dozen, 15 over the years.
> Q. Have you ever been retained by an attorney in any of those cases after the penalty phase was completed to do an evaluation.
> A. Have I ever been first retained afterwards? No. There are times I've only spoken in the penalty phase, not in the guilt phase, but I will say that I've never done and evaluation after the jury reached their findings in a penalty phase. (PCR Vol. VI p. 691).

As mitigation expert Donald West testified in Larzelere, there is "probably no worse timing" than to hire an expert after the jury recommendation because "at that point, all you can do is ask the court to override ... a jury's recommendation which, by law, the court is required to give great weight." Larzelere at 205. The Larzelere opinion also makes mention of another way in which Dr. Krop was mishandled here:

> The record also supports the trial court's finding that counsel's performance did not improve up retaining Dr. Krop. Wilkins and Howes failed to provide to provide Dr. Krop with the investigator's report, Claude Murrah's trial testimony, or Harry Mathis's deposition, all of which would have alerted Dr. Krop to the possibility of sexual or physical abuse. According to Dr. Krop, Wilkins told

> him that no family members were available to assist in his evaluation. In State v. Coney, 845 So.2d 120, 129 (Fla. 2003), (quoting trial court's order), this Court held that trial counsel's "hurried preparation" for a mental health evaluation was ineffective assistance of counsel, where defense counsel "furnished little or no background information to the doctors, did not attend the evaluations, and did not believe it was his responsibility to explain to the doctors the meaning of statutory mitigation factors under law." In the instant case, counsel did not give Dr. Krop the investigator's report, Murrah's testimony, or Mathis's depostion, and neither Wilkins nor Howes attended when Dr. Krop was deposed by the State. Given this evidence, we find that the trial court did not err in concluding that Larzelere's waiver was not made knowingly and intelligently and that the trial counsel was deficient for failing to sufficiently investigate potential mitigation. Id. at 206.

Richard England's attorneys were similarly deficient. Dr. Danziger wasn't provided with any materials beyond state agency produced police reports. He wasn't given school records, or former PSI's, or any personal family history information.

> Q. And in the cases that you testified to, dozen or so cases that you were involved in penalty phases, isn't it true that the attorneys would provide you with oftentimes, records, voluminous records, school records, things like that.
> A. Some more than others. In some cases it has been voluminous, a banker box or more; in others, the data has been slimmer.
> Q. Yes. But there had been data, nonetheless; correct?
> A. Generally, yes.
> Q. And in your - your involvement in Mr. England's

case, were you provided materials from Mr. Keating?
A. Essentially, what you have seen in this exhibit here, this was my complete file.
Q. And that file was largely generated by you; correct?
A. Yes, although it did contain the homicide investigation that was provided to me. That was what I had. (PCR Vol. VI p. 692-3).

Similar to the Larzelere case, not only was an expert retained after the jury had reached its verdict, but once the expert was retained, he wasn't provided with the necessary background information. In this case, Dr. Danziger should have been provided with past school records and PSI reports. Interviews with family remembers should have been prepared for Dr. Danziger to review. Richard England's mother and sister should have been made available for Dr. Danziger to contact by telephone, if not in person. Dr. Danziger testified as follows:

Q. What if you had more than one person reporting these antecedents, if you had, say, two family members?
A. Well, childhood and adolescent antecedents are useful, but what would be critical to diagnose bipolar disorder is a clear history of at least four days in bipolar II, seven days in bipolar I, of an episode that met the criteria for mania as I described earlier in my direct testimony. And you can see the either from medical records, psychiatric records, prison records, county jail records, something. You would expect to see some signal that, as an adult, people manifested mood symptoms either in a depressed or a manic state. And that's really what we look for, rather than when they were nine years old they got in trouble because they couldn't sit still in their seat. That's valuable date, might be - I would think attention deficit hyperactivity disorder at the

top of my list, and then bipolar's possibility. But what you've told me is not enough to make a bipolar diagnosis. It's just not enough.

DR. DANZIGER further testified:

Q. But these reports are something you'd be interested in in doing your evaluation. Is that - - isn't that true?
A. Well, yes it would certainly be potentially valuable to have more information.
Q. And you would agree that you did have scant information in doing your evaluation of Mr. England; correct?
A. It's true that the collateral information I had was, indeed, limited, that's correct. (PCR Vol. VI p. 705-07).

The fact of the matter is that Dr. Danziger was called as a State friendly witness at the evidentiary hearing. He still felt obligated to admit to the fact that he was provided scant information in which to conduct his evaluation, and that additional information would have been valuable. Dr. Danziger provided further interesting information which demonstrated the ineffectiveness of trial counsel.

Q. And Mr. Keating didn't provide you with a full discovery file, did he.?
A. Mr. Keating provided me with what you have here. As I testified to, it was limited.
Q. If some of the discovery material that was provided to you included a conversation between Mr. England and another person, where they were discussing that Mr. Wetherall was having anal sex with Mr. England shortly before the murder occurred, would you not be interested in that?
MS DAVIS: Objection, calls for speculation.
THE COURT: Overruled.

DR. DANZIGER: That would be, potentially, valuable information, yes. It would imply a relationship between the two of them, and it could, potentially, change the dynamic of why the murder took place. It could represent some sort of, as you say, homophobic issue. It could also represent some disagreement between lovers. If there was some sort of previous sexual relationship between them, well, that opens up a number of other possibilities as to why the murder occurred.
MR. VIGGIANO: Would it be of interest to you if there were discovery materials with statements between people involved in this case which indicated that Richard England may have had a homosexual affair with the co-defendant in this case?
A. An again, that changes the dynamic, as well. In other words was there, as you suggest in your hypotheticals, is there some sort of love triangle? Are there jealousy issues involved here? It certainly opens up other possibilities as to why a decision was made to kill the victim, Mr. Wetherell, some of which might be helpful for the Defendant and some of which might not be.
Q. Would it be of interest to you that Mr. England was at a homosexual party, a party where all of the participants there were gay, a few days before this actual killing? Would that be of interest to you?
A. Yes, it would. (PCR Vol. VI p. 713-14).

Dr. Danziger further began to conclude his testimony by explaining how he understood the posture of the case, and that he was given limited resources.

Q. And then in the penalty phase, you may present a completely different story because - - you may present a completely different scenario of what happened because it's a different trial?
A. Yes, I understand that the strategic decisions lawyers

> make, yes, you have wide latitude and do whatever you think is best for your client.
> Q. And you didn't have the opportunity to review all the discovery materials and the multiple statements of the parties involved in this case, people who didn't testify and some people who did testify. You didn't have all that - - the benefit of all that material because Mr. Keating didn't provide it to you.
> A. I did not have that material, that is correct.
> Q. And had Mr. Keating provided you that material, you may have been able to do a thorough investigation into the mental health issues regarding Mr. England and explain to the jury why this case occurred. You don't know because you never got presented the materials, correct?
> MS. DAVIS: Objection, argumentative.
> THE COURT: Overruled.
> DR. DANZIGER: It's correct. It is possible, though I would say less likely than not, that I might have reached different conclusions, but it's possible, yes. (PCR Vol. VI p. 716-17)

As you can see from the last line, Dr. Danziger says that it is "possible" that he would have reached different conclusions had he received additional materials. What cannot be disputed, is that Dr. Danziger mentioned on multiple different occasions during questioning that the materials he received were scant, or lacking in some way. Moreover, when presented with specific, additional details that either were available to trial counsel, or should have been discovered by following leads, Dr. Danzinger testified that such information would be valuable or be of interest to him. (PCR Vol. VI p. 713-14). Trial counsel was ineffective in this case with the handling of Dr. Danziger, just as Ms. Larzelere's counsel was ineffective in the way

they handled Dr. Krop.

On July 16th, 2004, the Spencer hearing was concluded. (FSC ROA Vol. XIII 2168-2234). Dr. Danziger was not called by the defense to advise the trial court about his examination of Richard England. Dr. Danziger's report was placed under seal by the trial court so there is no indication that the trial court was aware of Danziger's findings or how those findings were formulated by Dr. Danziger. Dr Danziger based his evaluation of Richard England solely on the arrest reports and the self-reporting of Richard England.

Dr. Danziger did not interview Allison England; had he done so, (as did Dr. Carpenter) Dr. Danziger would have been aware of Richard England's level of maturity. (FSC ROA Vol. XIII p. 2105). Dr. Danziger, if provided with the information that Richard England had the maturity level of a 15 year old boy, would have asked what caused this arrest in emotional development.

Dr. Danziger did not interview Inez Fyffe. Had he done so, he would have discovered that Richard England was a hyperactive child, always on the go. Presumably, Dr. Danziger would have also explored these issues by reviewing school records and other documentation of Richard England's early years. However, trial counsel failed to provide Dr. Danziger with Richard England's school records. Had Dr. Danziger read the school records, he would have noticed that

Richard England was retained in 5th grade and also retained in 8th grade and then a subsequent expulsion from school. A trained clinician such as Dr. Danziger would have asked: Why? Was there some defect of the mind or disease of the mind which affected Richard England's performance at school? Due to trial counsel's ineffectiveness in seeking an evaluation after the jury had rendered its recommendation and Keating's providing Danziger with only the arrest reports on the instant offense; Dr. Danziger was "hamstrung" in his efforts to conduct a complete evaluation of Richard England. Pursuant to ABA Guidelines, trial counsel should have retained Dr. Danziger shortly after Keating's appointment on the case and trial counsel should have provided Dr. Danziger with the proper records to enable him to do a complete evaluation of Richard England. Mr. England was deprived of an individualized assessment of the propriety of the death sentence in his case and thus confidence in the outcome is undermined. The sentence of death is the prejudice.

Although readily available and discussed at trial, trial counsel failed to provide Dr. Danziger with the pre-sentence investigation regarding Richard England's conviction for second degree murder. Of particular interest is Richard England's juvenile criminal history as documented on page 3 and 3a of 6 of the PSI. Richard England began getting in trouble with the law at age 15. It begins with

Retail Theft, sale of cannabis, bicycle theft, Burglary of a Structure, Dealing in Stolen Property and Escape. A trained mental health professional would have asked: What was going on in this young boy's life to cause him to "act out" and abuse drugs?

The answer to the above posed question lies in the testimony of Allison England. Allison testified that at the time David Scotty Cline was sexually abusing her and her brother Barry, Richard England was a frequent visitor. (PCR. Vol. I p. 199-211). His inability to protect his sister and brother and possible sexual abuse of Richard England himself resulted in his homophobic condition and his character trait of placing himself in the role of protector. This powerful mitigation went undiscovered because a complete investigation into Richard England's past was never done, and therefore said information wasn't provided to Dr. Danziger.

Trial counsel's performance fell far below reasonable professional norms. The ABA Guidelines were not followed and as a result, Mr. England was deprived of a reliable adversarial testing of the evidence. Confidence in the outcome was undermined. But for trial counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different. Relief is proper.

In Wiggins v. Smith, 539 U.S. 510, 511 123 S.Ct. 2527, 2529 (2003), the United States Supreme Court addresses the reasonableness of the mitigation

investigation:

> In evaluating petitioner's claim, this Court's principal concern is not whether counsel should have presented a mitigation case, but whether the investigation supporting their decision no to introduce mitigating evidence of Wiggins' background was *itself reasonable.* The Court thus conducts an objective review of their performance, measured for reasonableness under prevailing professional norms, including a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time of that conduct. *Id.,* at 688, 689, 104 S.Ct. 2052. Pp. 2534-2536.
>
> Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report. Their conduct similarly fell short of the American Bar Association's capital defense work standards. Moreover, in light of the facts counsel discovered in the DSS records concerning Wiggins' alcoholic mother and his problems in foster care, counsel's decision to cease investigation when they did was unreasonable. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of aggravating factors from Wiggins's background. Indeed, counsel discovered no evidence to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, thus distinguishing this case from precedents in which this Court has found limited investigations into mitigating evidence to be reasonable. The record of the sentencing

> proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly stemmed from inattention not strategic judgment. Id. At 511-12 * 2530.

In Mr. England's case, clearly counsel's investigation was unreasonable. In light of the glaring fact that the second degree murder conviction of Mr. England at age 16 involved an elderly homosexual as did the instant case, competent counsel would have tried, through investigation, to explain to the penalty phase jury Richard England's antipathy to elderly homosexuals. The PSI and school records were never provided to Dr. Danziger. The PSI report indicated that England had *some sort of problem* before age 15 when his criminal activities began. The school records indicate some sort of learning disability which resulted in a retention of the 5th and 8th grades and poor grades in general. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice regarding the presentation of mitigation.

In Rompilla v. Beard, 125 S.Ct. 2456, 2458 (2005) the Supreme Court of the United States held:

> Even when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase. Id. At 2458.

The prior murder of Ryland was a focal point in the State's penalty phase presentation. (FSC ROA Vol. XII p. 1876-1916). Trial counsel was ineffective for failing to provide Dr. Danziger with documentation which would have explained Richard England's homophobic rage reaction. Trial counsel's attempts to portray Richard England as a good guy and someone whose life was worth saving, was based on a lack of investigation into his client's history. The evidence of Bi-polar disorder and homophobic rage reaction should have been developed by trial counsel *prior* to the penalty phase of the trial. The penalty phase jury had no idea of Richard England's mental state at the time of the offense; yet the penalty phase jury returned a recommendation of 8 to 4 for death. Had the jury heard this compelling mitigation, at least two jurors would have been swayed to return a verdict of life over death. The United States Supreme Court also addressed lack of investigation in Williams v. Taylor, 529 U.S. 362 (2000) stating that "the graphic description of Williams' childhood, filled with abuse and privation, or the realty that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability." In Williams, the Court recognized the influence that mitigation evidence could have on a jury. In Mr. England's case; if one substitutes "bi-polar disorder with ambivalent rage reaction" for "borderline mentally retarded," the penalty phase jury's appraisal of his moral culpability would have been influenced in

Mr. England's favor. The Florida Supreme Court in Orme v. State, 896 So.2d 725, 732 (Fla. 2005) held that:

> The trial court concluded in its order denying postconviction relief that Orme's defense counsel acted reasonably by not presenting bipolar disorder as a defense during the guilt phase and as a mitigator during the penalty phase, stating that there was some disagreement on how to diagnose Orme at the time of trial and at the postconviction proceeding, even with the additional information presented. The court noted that because the experts agreed that Orme was addicted to cocaine, and the drug addiction was a factor in his murder trial, it was reasonable for trial counsel to present only this evidence. We disagree and find that counsel's performance was deficient in both the investigation of Orme's mental health and the presentation of evidence of Orme's mental illness to the jury. Id. At 732.

The situation in Mr. England's case is far more egregious than that in Orme. The defendant in Orme had obtained a mental health evaluation; the mental health issues in Mr. England's case were never investigated in violation of the ABA Guidelines. Based on the holding in Orme, relief is proper.

Mr. England anticipates the State making the argument that there was no prejudice in this claim due to the fact that Dr. Danziger stated this on re-direct examination:

> MS. DAVIS: And have you seen anything that would change your mind as to what your original opinion was.
> DR. DANZIGER: No, I have not.

Of course, this statement was in response to the state attorney who took a part in the decision to "hire" Dr. Danziger to testify at the evidentiary hearing. Certainly, one would presume that Dr. Danziger would want to deflate the "damage" from his cross-examination testimony and remain in the good graces of the Office of the State Attorney. What cannot be disputed is that Dr. Danziger stated on multiple different occasions during cross-examination that he was given scant information, and that additional information would have been valuable or of interest to him. (PCR Vol. VI p. 705-717). Importantly, just like the unfortunate situation regarding Dr. Krop in Larzelere, Dr. Danziger testified that he had never, ever been retained to evaluate a defendant after the jury had recommended death. (PCR. Vol. VI p. 691). If Dr. Danziger had been retained shortly after trial counsel was appointed, and given the proper resources, he could have reached opinions which could have allowed him to testify at the penalty phase on Mr. England's behalf, aiding him in obtaining a life sentence. Moreover, if trial counsel found Dr. Danziger to be unhelpful for some reason, or another, they should have and could have found Dr. Richard Carpenter, or some other mental health professional who could have testified favorably on Mr. England's behalf. What we know is that trial counsel had duties toward Mr. England, and were woefully deficient and ineffective in carrying those duties out.

For extremely persuasive authority in its very own circuit, Mr. England would like to direct this court's attention to State v. Virginia Larzelere, No. 91-2561-CFAES (Fla. Cir. Ct. 7th Cir. Mar. 24, 2005). In that case, the court vacated Ms. Larzelere's sentence and granted her a new penalty phase due in large part to the trial counsel's handling of Dr. Harry Krop. (See attached Order). The trial court held in part:

> As such, the State's argument that since Dr. Krop asked her about abuse during the evaluation, she knew the importance of such mitigation is not persuasive, as it is counsel's obligation to investigate all avenues and then fully advise Defendant of the ramifications of such mitigation. Further, the State's argument that Defendant failed to divulge this information, which was in her control, to her attorneys is inapplicable to the instant case. The Florida Supreme Court has rejected similar arguments like the State's that Defendant, by not divulging the mitigating information, is the one who prevented counsel from investigating and presenting the mitigation evidence. Lewis, 838 So.2d at 1112-13 fn. 6 (citing Deaton v. Dugger, 635 So.2d 4 (Fla. 1993). Thus, the issue of failing to investigate and prepare for penalty phase shall be decided on the merits. (Order at 30).

The trial court also specifically brings up Dr. Krop here:

> In addition, Dr. Krop testified that he was not brought in to evaluate Defendant until after the jury's recommendation of death. See Evidentiary Hearing Transcripts, May 15, 2002-Vol. IV at 530-531. Dr. Krop stated he was provided with police reports, depositions, witnesses' interviews, and a packet of correspondence from Defendant to her attorneys. See id. at 534-35. Dr. Krop

> testified that he was not provided the initial investigator's report, which outlined the abuse and family history, prior to evaluating the Defendant. See id at 544. Dr. Krop stated he would have conducted the evaluation in a different manner had he had the report, and he would have followed up with family members listed in the report. See id. at 545-46; 564-55; 559; 602-03. Dr. Krop testified that Wilkins led him to believe there were no family members who the doctor could contact. See id. at 545-46; 560.
> (Order at 31).

Just like in the Larzelere case, Mr. England was denied effective assistance of counsel because Dr. Danziger was brought in after jury's recommendation of death. As discussed above, Dr.Danziger should have been brought in soon after appointment. Also, like Dr. Krop, Dr. Danziger was not provided with an investigator's report which outlined family information, or even contact information for the family. Dr. Danziger was only provided with arrest reports on the instant offense. Dr Danziger testified that more information would have been valuable, or of interest to him in conducting his evaluation. (PCR Vol. VI p. 705-17). Virginia Larzelere's trial court ultimately held:

> Based on a totality of evidence, this Court finds that counsel's performance was deficient because counsel did not spend sufficient time preparing for the penalty phase, never sought out Defendant's background, never sufficiently followed-up on the investigator's report outlining the abuse and family history, and never interviewed Defendant's family members. Counsel did not obtain informed mental health evaluations of

> Defendant sufficiently in advance of the penalty phase. Counsel presented no mitigation evidence to the jury, and only the testimony of two jail guards and limited information regarding former spousal abuse to the Court. Due to the lack of investigation, counsel was unable to advise Defendant as to the potential mitigation. Thus, Defendant's waivers of mitigation were not knowing and voluntarily made. See Lewis, 838 So.2d at 113-14; Deaton, 635 So.2d at 8-9; Coney, 845 So.2d at 130-31. Court finds that but for counsel's deficient performance, there is a reasonable, probability Defendant would have been sentenced to life in prison. See Coney, 845 So.2d at 131; see also Lewis, 838 So.2d at 1114 fn 10 and citations therein; Deaton, 635 So.2d at 8-9; Wiggins, 123 S.Ct. at 2543-44. In the instant case, the jury recommendation of death by the thinnest margin allowable, a 7-5 vote. Considering the evidence presented at the evidentiary hearing regarding sexual abuse and family history, including the family members and doctors' testimony, this Court cannot conclude that this evidence, either in the form of statutory or non-statutory mitigation, if heard by the jury would not have tilted the balance in favor of a recommendation of life. If only one of seven jurors voting for death had been persuaded to change his or her vote, the recommendation would have been a life sentence. See id. Further, considering the law regarding overriding the jury's recommendation, the Court would likely have followed the life sentence recommendation. See id. As such, Defendant's sentence of death shall be vacated, and Defendant is entitled to a new penalty phase. (Order at 32-33).

Mr. England is entitled to relief in the same way Virginia Larzelere was entitled to relief. Both came from incredibly abusive homes. While trial court counsel vaguely touched on the abuse through the testimony of Jake Ross, the jury

didn't hear about the sexual abuse that took place in the household, or the fact that the children were forced to eat vomit. (PCR Vol. I p. 204). Richard England's case is just like Virginia Larzelere's in the fact that the juries never heard crucial non-statutory mitigation based on significant childhood abuse. The jury also never heard about Richard England's various homosexual experiences and connections.

Trial counsel in the Virginia Larzelere case were ineffective in their handling of Dr. Krop. Rather than retaining him shortly after appointment, they waited until AFTER the jury had recommended death. In this case, a Dr. Danziger was retained AFTER the jury had recommended that Mr. England be sentenced to death. Dr. Danziger was also only provided with police reports to aid in his preparation. If counsel had properly followed ABA guidelines, he could have moved on to another expert like Dr. Carpenter if he discovered Dr. Danziger to be useless early in the process. However, Dr. Danziger did testify that additional information would have been valuable, or of interest to him in conducting his evaluation. (PCR Vol. VI p. 705-17). Just like the trial court and the Florida Supreme Court found counsel ineffective in how they used Dr. Krop in Larzelere, counsel was similarly just as deficiently ineffective in how Dr. Danziger was used in this case. The sentence of death is the prejudice with this extremely close 8-4 verdict. Pursuant to Larzelere, relief is proper.

Dr. William E. Riebsame

The clinical interview

Mr. England was evaluated by Dr. Riebsame on 7/3/08. The evaluation was preserved on DVD, played for the Court at the evidentiary hearing, and the relevant portions of the clinical interview was transcribed by the court reporter. (PCR Vol. I p. 97-108). At the outset of the clinical interview, Mr. England denied killing Howard Wetherell. (PCR Vol. I p.100). Mr. England admitted to Dr. Riebsame that he always has had trouble with his attention span. (PCR Vol. I p. 108). At the clinical interview the following questions were asked by Dr. Riebsame and answered by Richard England:

> DR. RIEBSAME: Okay. Did you ever have times where you're full of energy, before you came here, you're full of energy, have trouble sleeping, don't need to sleep, wide awake, might go a day or two without sleep, just running on energy, not really knowing why? Have you been able to do that?
> MR. ENGLAND: Yeah, I've had – yes, sir.
> DR. RIEBSAME: How – how – how come?
> MR. ENGLAND: If – if – like if I'm in a good mood.
> DR. RIEBSAME: Yeah.
> MR. ENGLAND: If I'm thinking of something, something that causes that –
> DR. RIEBSAME: Yeah.
> MR. ENGLAND: – and then it causes that reaction for me to feel that way.
> DR. RIEBSAME: Okay. Ever happen before you came to prison here?
> MR. ENGLAND: Did it happen before?

DR. RIEBSAME: Yeah.
MR. ENGLAND: Yes, sir, yeah.
DR. RIEBSAME: Okay. Not drug related, though. Not doing any kind of drugs or caffeine or anything like that?
MR. ENGLAND: No, no, just being at the house. (PCR Vol. I p. 110-11).

Post-conviction counsel respectfully contends that the above excerpt is prima facie evidence of an untreated Bipolar condition. Mr. England also admitted to Dr. Riebsame that although he has had energy, he has also felt depressed as well. (PCR Vol. I p. 112). At the interview, Mr. England denied being homosexual, bisexual and described himself as heterosexual. (PCR Vol. I p. 117-18).

However, when asked about homosexual experiences while growing up, the following exchange took place:

DR. RIEBSAME: No homosexual experiences growing up?
MR. ENGLAND: No, sir. Now, see - see, this is - this is what I'm getting at. These type of questions are kind of like invasive.
DR. RIEBSAME: Right. I'm going to back off a little bit. Let's look at Dr. Carpenter's eval. Let's challenge his evaluation, okay? He says part of it that there's some sort of hatefulness on your part towards homosexuals and that might explain how you got involved in this crime.
MR. ENGLAND: Right.
DR. RIEBSAME: So I mean, what do you think -
MR. ENGLAND: Well, my standpoint on that is -
DR. RIEBSAME: Yes.
MR. ENGLAND: - whether there is or isn't, whether I do have it or not or don't have it - what is it? Homophobia is what they call it?

DR. RIEBSAME: Yes.
MR. ENGLAND: It has - it has no relationship to the crime. (PCR Vol. I p. 118-19)

England's evasive response to Riebsame's questions regarding homosexual experiences as a child is typical of a victim of child sexual abuse in that England had repressed and is ashamed of being the victim of child sexual abuse. Mr. England stated later in the clinical interview that he may be homophobic although he steadfastly denied killing Mr. Wetherell. (PCR Vol. I p. 120).

Mr. England explained his homophobia to Dr. Riebsame in the following manner:

DR. RIEBSAME: Okay? I'm listening. And this report of Dr. Carpenter's is out there, and it talks about the possibility of this homophobic rage and how that might explain why you were involved in the crime. Okay. You're telling me that you weren't involved in the crime and you don't have this homophobic rage or you're not homosexual?
MR. ENGLAND: I may have, but it has nothing to do with the crime, is what I'm telling you.
DR. RIEBSAME: Okay. When you say you may have, what do you mean by that?
MR. ENGLAND: Well, I mean, do you know my history? I spent time in prison before.
DR. RIEBSAME: Yes.
MR. ENGLAND: And I've been around and I've seen that stuff that I didn't want - particularly want to see, you know, so maybe that might have -
DR. RIEBSAME: What are you describing?
MR. ENGLAND: Other men having sex.
DR. RIEBSAME: Okay. Okay.

> MR. ENGLAND: Or other men imposing themselves on other men that aren't of that - that aren't homosexual and just - just things that you would see in that type of an environment. (PCR Vol.I p.120-21).

Mr. England admitted that he had read Dr. Carpenter's report and could "respect his conclusions."in spite of the fact that he could not see how Carpenter's conclusions were connected to the crime. (PCR Vol. I p. 126).

Relevant evidentiary hearing testimony

Dr. Riebsame testified at the evidentiary hearing that the Defendant can have bipolar disorder as well as a personality disorder. (PCR Vol.VI p. 746). Regarding the WASI test, Riebsame gave England only two of the four subtests. (PCR Vol. VI p. 746-47). Dr. Riebsame testified that he learned from Mr. England that he had suffered a head injury. An injury such as this could result in brain injury. (PCR Vol. VI p. 747). The Trail Making Test administered by Dr. Riebsame, indicated "moderate impairment" (PCR Vol. VI p. 748). However, Riebsame claimed that the "moderate impairment" finding was not valid due to the fact that England was handcuffed at the time. Rather than unshackle England or give him another test to do while shackled, Riebsame chose to invalidate his own findings, Defense contends, in order to confirm his examination with the results obtained by Dr. Danziger. (PCR Vol. VI p. 750). Dr. Riebsame "deemed" that England met the criterial for being an impulsive individual based on the Hare test and some of the

information that Mr. England shared with him. (PCR Vol. VI p. 755). Dr. Riebsame did not dispute the fact that Mr. England had been hyperactive all his life along with depressive periods. Riebsame also did not dispute the fact that England "respected" Dr. Carpenter's findings but did not see how it was connected to the crime. (PCR Vol. VI p. 756-57).

Dr. Riebsame admitted that he did not talk to any family members in order to minimize the danger of self reporting. (PCR Vol. VI p. 762). Dr. Riebsame admitted that he did not talk to Karen Duggins and Sarah Dullard. Both women could and did provide information (to Dr. Carpenter) that Mr. England was both manic and depressive as an adult. Dr. Riebsame stated that he would "seriously consider" a finding of bipolar disorder. (PCR Vol. VI p. 763). Dr. Riebsame was also aware that attention deficit hyperactive disorder can be comorbid with bipolar disorder. So if someone is ADHD as a child, they can develop into a bipolar as an adult. (PCR Vol. VI p. 771). Regarding homophobia and homophobic rage, Dr. Riebsame's opinion was that Mr. England has been involved in homosexual and heterosexual activities prior to 27 years of age. (PCR Vol. VI p.773-4).

During the evidentiary hearing the following questions were asked and answered regarding Ego-dystonic homophobia:

BY MR. KILEY:
Q. What's ego-dystonic mean, sir?

A. Ego-dystonic is something different. Ego-dystonic - I'm with you.
Q. What is it?
A. Ego-dystonic is having some sense of something about yourself that is not consistent with how you want to experience or perceive yourself. So if someone has, say in a homosexual sense, an awareness that they are homosexual and they don't want to perceive themselves that way or don't want to have those types of experiences, it's dystonic, or contrary, or in conflict, to their ego. They are -
Q. So what do they do?
A. What do they do?
Q. Yeah.
A. It depends on the individual. Some people repress or deny the homosexual feelings and choose not to act out in a homosexual way. Others try to sort out the conflict and come to terms with the fact that they are homosexual, and it's no longer ego-dystonic.
Q. Some of them project their hatred onto others.
A. Their hatred of homosexuality.
Q. Yes.
A. Yes.
Q. Some of them commit suicide.
A. That's true.
Q. Some of them commit murder -
A. Yes. (PCR Vol. VI p. 776-7)

Furthermore, Dr. Riebsame opined that a bipolar condition could exacerbate someone who hated homosexuals, to "rage" against them. Regarding this issue, the following questions were asked and answered at the evidentiary hearing:

> Q. All right. Now, could someone who was bipolar, could that bipolar - could that bipolar condition exacerbate someone who hated homosexuals rage against them?

A. Yes.
Q. So, in other words, to put it in more precise psychiatric terms - psychological terms, the bipolar condition could exacerbate the ego-dystonic situation.
A. No.
Q. No? Would it make it worse?
A. What you'd expect would be the person's experiencing a manic episode that's been going on for several days, they're very agitated, they're notably irritable, grandiose, they're getting themselves in probably a variety of problematic situations across several days time, and they encounter a situation like aggressiveness, and the person becomes violent.
Q. The person becomes violent. Also, as you said before, with a homophobic person, they either get therapy and learn to deal with it; right?
A. Yes.
Q. They either come to grips with their sexuality.
A. Yes.
Q. They can commit suicide.
A. Yes.
Q. Or they can go into a rage and kill somebody; right?
A. Again you're kind of stretching it here in terms of whether we're talking about mania, homophobia, what the direction -
Q. Well, your last testimony, you just said ego-dystonic, a homophobe, can react in several ways; right?
A. Yes, but your questioning is misleading in terms of the information you're looking for.
Q. Okay, What am I looking for?
A. I think you want me to -
MS. DAVIS: Objection, argumentative.
THE WITNESS: - just link together, but you're not presenting the question in a way that I can answer it.
THE COURT: Overruled.
BY MR. KILEY:
Q. And you can't link it together?
A. If you could phrase the question a little bit better, I'll

do my best.
Q. Okay. You have an ego-dystonic person –
A. Yes, sir.
Q. – who hates in themselves a certain part of themselves –
A. Yes.
Q. – and, in a particular case, the fact that the patient is a homosexual and doesn't want to be a homosexual. Right so far?
A. You're repeating yourself, yes.
Q. Okay. Would being a bipolar help or hurt the ego-dystonic feelings?
A. It may have no effect. Again, we have a manic episode in a bipolar individual, and they have this ego-dystonic sensation about themselves in terms of homosexuality, you may actually see the person go on some sort of sexual spree, where they're involved in hypersexuality.
Q. Hypersexual homosexuality or heterosexuality?
A. It could be both simultaneous throughout a particular time period. That would be consistent with the manic episode, the bipolar disorder, manic episode of someone who is –possibly has some sort of ego-dystonic homosexuality you're describing.
Q. Well, would you say homophobic rage would be an extreme emotional disturbance? We know it's not a – we know it's not a mental disturbance because homosexuality is not a mental illness anymore, is it?
A. No. I don't think we would conceptualize homosexuality, even when it was a mental illness, as an extreme mental disturbance in terms of the mitigators.
Q. I know. However, homophobic – a rage would – a fit of anger, a fit of a heat of passion would be an extreme mental or emotional – would be an emotional disturbance, an extreme emotional disturbance; right?
A. It would certainly be an emotional disturbance. Whether it's extreme or not, you'd have to look at the circumstances of the event itself, (PCR Vol VI p.697-701)

Dr. Riebsame testified that he knew Dr. Danziger and had reviewed his report and listened to his testimony. (PCR Vol. VI p. 768).

Defendant respectfully contends that Riebsame's testimony was contaminated by confirmatory bias. A careful examination of his testimony and his clinical interview will reveal that Riebsame had suspected brain damage but only gave him part of the WASI test. Regarding the Trail Making test, England had scored "moderately impaired" yet Riebsame immediately discounted the finding by claiming the test was invalid due to England's handcuffs, and did not ask that they be removed or in the alternative, another test be given. Like Danziger, Riebsame relied on England's self reporting regarding his family history and childhood experiences. Again like Danziger, Riebsame relied on police reports about the crime rather than anecdotal evidence of bipolar behavior. Clearly, Riebsame was going to confirm his colleague's opinion in spite of what his testing revealed and without further investigation.

However, the post-conviction Court in Larzelere in its order on page 32-33, addressed the State's expert's testimony and how it related to the relief granted Larzelere and the subsequent affirmation of said relief by the Florida Supreme Court in this manner:

> The State also presented the testimony of a doctor, Dr.

McClaren, who received the same information regarding the family history and abuse and interviewed family members. See generally Evidentiary Transcripts, May 24, 2002 - Vol. VII at 760-872. Although Dr. McClaren did not agree that Defendant suffered from post-traumatic stress disorder, Dr. McClaren agreed that Defendant suffered from hysteroid personality disorder, narcissistic personality disorder, personality disorder not otherwise specified, and had features of borderline obsessive-compulsive disorder. See id. At 793-94;805-06. Dr. McClaren also found the sexual abuse of Defendant to be true. See id. At 791-92. Dr. McClaren found no statutory mitigators to exist. See id. At 801-03. Dr. McClaren also testified that there were many things that Dr. Mosman listed, such as good acts by Defendant, that were non-statutory mitigators. See id. At 827-28.

Based on the totality of this evidence, this Court finds that counsel's performance was deficient because counsel did not spend sufficient time preparing for the penalty phase, never sought out Defendant's background, never sufficiently followed-up on the investigator's report outlining the abuse and family history, and never interviewed Defendant's family members. Counsel did not obtain informed mental health evaluations of Defendant sufficiently in advance of the penalty phase. Counsel presented no mitigation evidence to the jury, and only the testimony of two jail guards and limited information regarding former spousal abuse to the Court. (See attached Order at p. 32-33)

In Larzelere v. State, 979 So.2d 195 (Fla. 2008), the Court held:

> As Dr. McClaren explained, "When you're talking to [Laraelere], boy she's easy to believe, but when you're out of the situation and start looking at all those other conflicting things.... there are many inconsistencies." The trial court correctly concluded that counsel was deficient

> for failing to obtain an informed mental health evaluation of Larzelere in advance of the penalty phase. Id. at 206

In Mr. England's case as in Larzelere, the issue is that trial counsel was deficient for failing to obtain an informed mental health evaluation of England in advance of the penalty phase. The jury never heard the testimony of the post-conviction penalty phase witnesses; yet they returned a recommendation of 8 to 4 for death. The compelling testimony of Alison England, Inez Fyffe, and Dr. Richard Carpenter would have swayed at least 2 jurors in favor of life. The facts and the law stated in Larzelere, are so similar to Mr.England's case that a new penalty phase should be ordered by this Court.

Legal Argument

In Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) the Court held that trial counsel's performance at sentencing was deficient and woefully inadequate where trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. Counsel presented limited testimony of lay witnesses. Hildwin at 110 fn. 7. In Hildwin, at the 3.850 hearing, experts testified that the defendant was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Hildwin's sentence was vacated. As in Hildwin, counsel for Richard England failed

to unearth a large amount of mitigating evidence which could have been presented at sentencing. As in Hildwin, counsel for Richard England presented limited mitigation testimony. It was inexcusable that trial counsel failed to investigate mental health mitigation, retain an expert in sufficient time to conduct a full evaluation, and present the evidence that Richard England was under the influence of extreme mental disturbance at the time of the offense where severe mental disturbance is a mitigating factor of the most weighty order. Hildwin at 110. Had mitigation evidence been presented, an expert could have testified that Richard England was under the influence of extreme mental or emotional disturbance at the time of the offense and Mr. England's sentence would have been life and not death.

In Ragsdale v. State, 798 So.2d 713 (Fla. 2001) the court held that trial counsel failed to conduct a reasonable investigation into the defendant's background for possible mitigating evidence where counsel failed to present evidence of a head injury after childhood accidents. After the accidents, Ragsdale went through behavioral changes in which he would violently "snap" over anything. Experts at the postconviction hearing testified that Ragsdale was under extreme mental and emotional disturbance and was unable to conform his conduct to the requirements of the law. Ragsdale's sentence was vacated and remanded for a new penalty phase. Trial counsel failed to discover or present this mitigating evidence at trial. Defense

counsel failed to take any steps to uncover mental health mitigating evidence that was readily available and his performance did not fall within the wide range of reasonable professional assistance. Baxter v. Thomas, 45 F.3d 1501, 1514 (C.A. 11(Ga.), 1995). Had trial counsel uncovered mental mitigation and retained an expert, the judge and jury would have known that England was under an extreme mental or emotional disturbance at the time of the offense.

In Rose v. State, 675 So.2d 567 (Fla. 1996) the defendant was denied effective assistance where counsel failed to investigate the defendant's background. Substantial lay testimony regarding mitigation was not investigated or presented by counsel during the penalty phase proceedings. As in Rose, Richard England's trial counsel failed to present to the jury similar mitigation evidence which was available.

Richard England's Family

England's trial counsel had available to them the testimony of his mother, Inez Fyffe and his sister, Alison England. Trial counsel could have presented these witnesses either live to the jury or they could have testified telephonically. Inez Fyffe could have given the jury background information about Richard England's upbringing. (PCR Vol. I p.151-171). She could have told the jury about how Richard never saw his natural father and was instead raised by the alcoholic stepfather, Ronnie England. Inez would have told the jury how Ronnie England

used military style punishment on Alison, Barry, and Richard. (PCR Vol. I p. 152-54). She also could have explained how, when Ronnie England separated from her, he took Richard, who was not his biological child, and left his natural children with Inez. (PCR Vol. I p. 156-7). Inez could have described the disruption and confusion to her family when Ronnie England committed this vindictive act. She could have explained to the jury how she believed that Ronnie England was brainwashing Richard and how Richard did not seem happy when Richard came to visit. (PCR Vol. I p. 157-59). Inez could have told the jury that she learned that Richard was doing drugs, and that she begged Ronnie England to give him back to her so she could help Richard, but he refused. (PCR Vol. I p. 158-59)..

Inez could have further described the sexual abuse suffered by Alison by Inez's next husband, David Cline. She would have told the jury that Cline was a bi-sexual and would have described his perversions. She could have explained how she later realized that Cline was abusing Alison. (PCR Vol. I p. 159-61).

Inez would have described a telling incident in Richard England's development. She would have told of when Richard came home with new clothes after being befriended by a black male soldier. (PCR Vol. I p. 164). She would have testified that she was concerned because she believed that perhaps that man was taking advantage of Richard. (PCR Vol. I p. 165).

Alison England would have been available to testify at the penalty phase either live or telephonically had she been asked by the trial attorneys. (PCR Vol. II p. 211-14). She could have testified about how her biological father, Ronnie England, a violent alcoholic, administered military style punishment to the children. (PCR Vol. II p. 193). She would have described the beatings that her brothers suffered at the hands of Ronnie. (PCR Vol. II p. 193-94, 203-04). Alison could have recounted an incident where the children were caught eating cookies when they were not supposed to be eating. Ronnie then forced the children to gorge themselves, to the point where they vomited. Ronnie then forced the children to eat their own vomit and Richard, to protect his brother Barry, ate Barry's vomit. (PCR Vol. II p. 204). Alison would have described the disillusionment the she and her family endured when Ronnie England left taking her brother Richard with him. (PCR Vol. II p. 197).

Alison would have described in riveting detail about how her step-father David Cline sexually abused her. (PCR Vol. II p. 199-206). She would describe how years later, after Barry's death, she went through his papers and bible and saw drawn stick figures when led her to believe Barry was also sexually abused by Cline. (PCR Vol. II p. 207). In retrospect, she pieced together her memory of events, and with the understanding of an adult, she realized that Barry, too, was being abused by

Cline. (PCR Vol. II p. 207-08). She also recounted times where Cline had opportunity to have abused Richard when he went to the house for visits. (PCR Vol. II p. 209).

Had the jury heard this testimony by Inez and Alison, the jury would have had an explanation for why the attack was committed on the older homosexual Wetherell. The jury would have heard the reasons and basis for the outburst of rage and the jury would have known why the attack happened. The jury would have been moved such that the mercy of a life sentence would have been the outcome. Trial counsels' failure to present the mitigation directly to the jury resulted in the death sentence and not a sentence for life.

Dr. Richard Carpenter

Dr. Richard Carpenter testified at the evidentiary hearing. (PCR Vol. III p. 307). Dr. Carpenter was tendered as an expert in the field of forensic psychology and allowed to give an opinion by this Court. (PCR Vol. III p. 325). Dr. Carpenter met with Mr. England three times, June 12th, August 1st and October 15th of 2007 at UCI. (PCR Vol. III p. 328). The first visit's purpose was to establish rapport with Mr. England and to obtain some simple background history. (PCR Vol. III p. 328-9). The second visit consisted of Carpenter doing a "psycho-social history, which was Mr. England's family background, which the Court heard through Alison

England and Inez Fyffe's testimony, educational, work history, relationship history, arrest history, drug and alcohol history, and psychiatric treatments. A mental status was done where Dr. Carpenter looked at symptomatology, and other things of that nature. (PCR Vol. III p. 329-30).

In the second interview, Dr. Carpenter told Mr. England that there was an issue of homosexual or homophobic behavior or tendencies that had been bandied about and had been reported in the newspapers at the time of Mr. England's trial in addition to the similarity between the first case in which he was found guilty of and the instant case. Dr. Carpenter told Mr. England that he would be back to focus on sexual activities such as homosexual activities and homophobia. Dr. Carpenter also testified that he was provided with material concerning Mr. England to aid him in his evaluation. (PCR Vol. III p. 330-31). First, Dr. Carpenter found that Mr. England was suffering from Bipolar disorder. In layman's terms, Bipolar disorder is a mood disorder; that is, it is a disorder of emotion and moods characterized by depression and what is called mania . There are hyperactive or expansive, elated moods. Dr. Carpenter considered Mr. England's self reporting that he had a very difficult time with hyperactive behavior in school because very likely Mr. England had attention deficit hyperactivity disorder (ADHD) that went undiagnosed. (PCR Vol. III p. 340). Dr. Carpenter also reviewed Mr. England's school records which

revealed that Mr. England was retained in the fifth grade.

In Rose v. State, 675 So.2d 567 (Fla. 1996), The Florida Supreme Court held:

> In contrast to the experience of guilt phase counsel, resentencing counsel had never handled a capital case before being appointed to represent Rose, and counsel was totally unfamiliar with the concept of aggravating and mitigating factors. He failed to investigate Rose's background and obtain the school, hospital , prison, and other records and materials that contained the information outlined above as to Rose's extensive mental problems, etc. Moreover, counsel testified that he felt restricted by the limited time (79 days) he had to prepare for sentencing, during a part of which counsel was married and went away on a ten-day honeymoon. Counsel also expressed concern with the trial judge's attitude that the case was a simple one requiring little preparation since there had already been one sentencing hearing. Id. At 572.

As in Rose, trial counsel never obtained the school records of Mr. England and did not provide same to Dr. Danziger. Although Danziger was retained too late to do a meaningful evaluation for presentation to the penalty phase jury, an examination by Danziger of the school records would have prompted Danziger to investigate any emotional problems or mental problems that caused England to be retained in 5th grade.

The Rose court further held:

> We find counsel's performance, when considered under the standards set out in *Hildwin* and *Baxter*, to be deficient. It is apparent that counsel's decision, unlike experienced trial counsel's informed choice of strategy

during the guilt phase, was neither informed nor strategic. Without ever investigating his options, counsel latched onto a strategy which even he believed to be ill-conceived. Here, there was no investigation of options or meaningful choice. *See* Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) ("[C]ase law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.."), *cert. Denied,* 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992). As noted above, it appears to have been a choice directly arising from counsel's incompetency and lack of experience. However, counsel, regardless of his inexperience, was not at liberty to abdicate his responsibility to Rose by substituting his won judgment with that of an appellate colleague.

FN6.

The State suggests that resentencing counsel did not investigate and present mitigation evidence because Rose insisted that counsel put on the "accidental death" theory at the penalty phase, rather than pursue mitigation. However, a careful reading of the record indicates otherwise. Resentencing counsel testified that the accidental death theory "changed everything that Mr. Rose ever stood for as far as his view of this case. He never admitted to me he did this crime. Never. Okay. So I mean this theory was a Mr. Carres [the appellate attorney] theory." We find no support in the record for the position that counsel's strategy was forced upon him by the defendant. Id. At 572-73.

There is no indication in the record that England forbade in any way, that the testimony of Inez Fyffe and Alison be presented to the penalty phase jury. Trial counsel did not spend enough time in preparing these witnesses for their testimony and was also ineffective in not having moved for a continuance to bring them back

or at least have them testify before the penalty phase jury by phone. It was only poor logistical planning on the part of trial counsel to have these witnesses sitting around for the guilt phase. It was also poor investigation and preparation that the riveting testimony that Alison England and Inez Fyffe produced at the evidentiary hearing; was not presented to the penalty phase jury. Defendant contends on this point, Mr. England is entitled to a new penalty phase under Rose.

Mr. England described himself as an impulsive child who frequently felt compelled to act without thinking. Carpenter considered that compulsion to act without thinking was a component of ADHD. (PCR Vol. III p. 341). Mr. England reported that he had these manic moods as well as depressive moods without the use of stimulant drugs . (PCR Vol. III p. 342). Dr. Carpenter also testified that he called Alison England to corroborate Mr. England's self report; Alison described her brother as hyperactive and impulsive as a child. (PCR Vol. III p. 342).

Alison England also detailed the sexual abuse that she and her brother Barry suffered at the hands of Cline and confirmed that Richard England was a frequent visitor to the home. (PCR Vol. III p. 342-43). As corroborated by the testimony of Inez Fyffe and Alison England, Mr. England disclosed to Dr. Carpenter what defense contends is Richard England's first experience with his sexuality. That is the incident with the coach when England was 10 or 11 years old. (PCR Vol. III p.

343-44).

Dr. Carpenter then testified that he read treatises and articles by medical doctors from psychiatric journals that would support his contention that ADHD is comorbid with bipolar condition. (PCR Vol. III p. 352). Dr. Carpenter also read some articles, learned treatises, and discussions about homophobia. (PCR Vol. III p. 354). Dr. Carpenter also interviewed Sarah Dullard, Mr. England's ex-wife, who informed Dr. Carpenter about England's behavior during their marriage. Dullard's answers to Carpenter's questions further bolstered his conclusion that Mr. England was indeed bipolar as an adult. (PCR Vol. III p. 357-59). Dr. Carpenter also talked to Karen Duggins, Mr. England's girlfriend, who also independently documented episodes of manic behavior or hypomanic behavior, as well as depressive episodes. (PCR Vol. III p. 359).

Dr. Carpenter also testified that in his three visits with Mr. England, he personally observed grandiosity and increased self esteem (a symptom of bipolar disorder). (PCR Vol. III p. 362).

Based on Dr. Carpenter's research into comorbitity between ADHD and Bipolar disorder, his interviews with Karen Duggins and Sarah Dullard, England's self reporting etc... Carpenter concluded that Mr. England was indeed suffering from untreated Bipolar disorder at the time of the crime and in his opinion; Mr. England

was under the influence of extreme mental or emotional disturbance at the time of the crime. (PCR Vol. III p. 365-67).

Regarding the homophobic aspect of the crime and England's personality, Dr. Carpenter began his testimony with a definition of ego-dystonic. (PCR Vol. III p. 367- 70). Dr. Carpenter then testified that as a Jimmy Rice evaluator, it is not uncommon in his experience, for a patient to deny his sexuality and that was why Dr. Carpenter tried to check up on the issue by using background material. (PCR Vol. III p. 370-72). Dr. Carpenter opined that based on his evaluation and his review of the interview with Dr. Riebsame, that Mr. England was, in fact, homophobic. Carpenter testified that Mr. England found homosexuality to be "repulsive."(PCR Vol. III p. 372-73). Dr. Carpenter also testified that Mr. England was reluctant to discuss any childhood instances of homosexual activities. (PCR Vol. III p. 376). The following questions were asked and answered regarding childhood homosexual experiences:

> Q. Okay. You never did get him to admit that he - well, I'm sorry. Doctor, did you ever get Mr. England to admit that he engaged in homosexual activity?
> A. No, I did not.
> Q. Why is that, sir? I was paying you good money to do that.
> A. Well, it seems to me that - and it's in the report in more detail, but, briefly, my sense is that he has engaged in this behavior, but is very conflicted about it and is - in plain English, is ashamed of it and finds it to be a repulsive

type of behavior that he has a lot of issues about having done in the past.
Q. It's what you explained before, the ego-dystonic aspect of this case.
A. Yes.
Q. Okay. You already testified that he told you about he was befriended by a coach. What did you – what did you deduce from this belly-rubbing incident? Was that an incident of homosexual behavior?
A. Yes, I would say it is.
Q. But he told you about it; did he not?
A. Right, right, yes, he did.
Q. Well, what did you deduce about this information?
A. Well, I think in the context of all the other things that are listed in the report, that it seemed to me that he was minimizing or withholding the whole story.
Q. Was withholding the whole story?
A. Yes.
Q. So something other than belly rubbing?
A. That is my suspicion, yes.
Q. At any rate, is it safe to assume, sir, that this may be his first homosexual experience –
A. Yes.
Q. – at age of 11?
A. Yes.
Q. And at age 11, did you observe that his grades dropped remarkably?
A. Yes. (PCR Vol. III p. 377-8).

Dr. Carpenter then went on to detail Mr. England's relationship with Michael Jackson in the following manner:

Q. Now, what conclusions do you draw – can you draw about the relationship between Richard England and Michael Jackson?
A. Well, Richard was significantly older. As best I can figure it out, he was about 11 years older than Michael.

Michael was 18. He was 29 or 30. Somewhere in through there. They had a friendship that included, you know – as we know from VanValkenburg's testimony, included being in a gay party. They met them in front of a gay bar or in a gay bar.

We know that Michael Jackson was engaged in trading sexual favors with Mr. Wetherell and getting favors in return, such as a place to live and other such remuneration. And whether or not the two of them had homosexual behavior is difficult to say definitively, but there is some suspicion that something was going on and –

Q. What did Sarah Dullard say about the relationship between Mr. England and Michael Jackson? She observed them, didn't she?

A. Yes.

Q. What did she say?

A. She thought it was odd and she couldn't quite figure out why in the world Richard wanted to hang around with Michael Jackson.

Q. A married heterosexual man –

A. Right.

Q. – wanting to hang around with someone roughly 12 years younger than he.

A. Right, who is living with a homosexual, some sort of Homosexual relationship with a 70-something-year- old man.

Q. Seventy-one.

A. Seventy-one.

Q. How about Karen Duggins, what did she say?

A. Same sort of thing, same characterization, that it was a, you know, scratch your head, what the heck are these two up to? They would disappear for days at a time. He would not really – he didn't really tell either one of them anything. He was evasive and wouldn't really tell them what was going on or why are you hanging around with him. (PCR Vol. III p. 380-81).

Defense contends that this evasiveness regarding the "coach" with Dr.

Carpenter and the same evasiveness regarding the relationship with Michael Jackson, is part of England's ego-dystonic, homophobic condition. He is ashamed of what happened when he was 11 and further ashamed of the feelings he had for Michael Jackson. Dr. Carpenter explained this as ambivalence in feelings, where one can experience both pleasure and pain. (PCR Vol. III p. 384-86).

Dr. Carpenter also opined that brain damage, if established, would enable Dr. Riebsame or any mental health professional to opine that Mr. England was under the influence of severe mental or emotional disturbance at the time of the offense. (PCR Vol. III p. 396). Mr. England's evolution from innocent 11year old child to homosexual hustler is detailed. (PCR Vol. III p. 412). His full evolution from hustler who could actively manipulate others into giving him drugs and then to use his body to actually take what he wants is illustrated by his first murder of victim Ryland when England was 16. (PCR Vol. III p. 414).

The nexus between Richard Engalnd's mental state and the murder of Howard Wetherell is detailed in the following manner:

> Q. All right. Now, Doctor, let me cut to the chase. You found this man is bipolar; Richard England is bipolar.
> A. Yes.
> Q. And homophobic?
> A. Yes.
> Q. Is there such a thing from the literature you've read of homophobic rage?
> A. Yes.

Q. What is homophobic rage?
A. Well, I think it's worth getting on the record that homosexual - excuse me, homophobic murders are not uncommon. They're - they occur with some regularity. And what takes place in these homophobic murders is that the perpetrator has a homophobic conflict between their homosexual either urges or behavior and that side of them that is repulsed or strongly disapproving, and in order to deal with that unresolved conflict, this is projected outward onto the victim. And in order to eliminate this conflict, they attack or kill the victim.
Q. Doctor, did you find anything else, histrionic, antisocial, any other?
A. Yes. We didn't go into the Axis II. Axis II is where personality disorders are noted and my Axis II diagnosis is histrionic - personality disorder no otherwise specified with histrionic and antisocial features.
Q. Was it also clear from both your clinical interview, the DVD interview of Mr. England and the clinical notes of Dr. Danziger, that Mr. England really was into many substances? He had tried many drugs.
A. Yes.
Q. Would you characterize that as an attempt to medicate himself, although he didn't know why?
A. Yes, that's very common.
Q. Okay, Doctor, again, you've determined he's bipolar. Correct, or not?
A. Yes.
Q. You determined he's homophobic. Correct or not?
A. Yes.
Q. You determined he was histrionic. Correct or not?
A. Yes. Yes.
Q. Got a personality disorder.

What does this man's mental state - in other words, I'm asking you: What's the nexus between this man's mental state and the brutal murder of a harmless elderly homosexual?
A. Well, as I said a minute or so ago, we know that

homophobic violence is a reality. People do attack homosexuals and frequently attack and kill homosexuals out of homophobic rage, which is a – as I said earlier, a conflict between two strong opposing psychological forces that the person is unable to resolve satisfactorily.

The defense mechanism is projective identification, which very simply means we hate in others the things we hate in ourselves. And you add that in with the fact that he had bipolar, which is also well known to be a risk factor for increased levels of aggression and violence and dysregulation of emotion or poorly controlled emotion and sudden surges of anger and rage. And when you put those two things together, coupled with the histrionic personality features, at a certain point this tension builds to a crescendo and then just like a nuclear bomb, it explodes in violence. And that is a well-accepted characterization of homophobic murder.

Q. Okay. Now, Doctor –

A. And I think that – I should just conclude by saying I think that is active in this particular case.

Q. Would that account for the brutal beating about the head of Mr. Wetherell?

A. Well, we know from the facts of the case that this was a form of overkill. Overkill is, in the literature, a reference to up close and personal, if you will, hand-to-hand type of attack. There was no gun used. There was a fire poker, which put him in close proximity to the victim, and the repeated strikes and blows that occurred are inferential of strong internal rage being expressed.

Q. Would you characterize – now, remember the murder of Mr. Ryland. Mr. England had pursued Mr. Ryland and hit him once and Mr. Ryland fell to the ground.

MS. DAVIS: Objection, leading and testifying.

THE COURT: Overruled.

A. Yes.

Q. All right. And did you consider it significant that Mr. England, although Mr. Ryland was already struck in

the head, already lying on the ground, that Mr. England continued to beat that man?
A. Yes.
Q. Why is it your opinion that he was already experiencing homosexual rage when he killed Mr. Ryland at the age of 16?
A. Well, I think, again, the facts of the case, the facts which are already in evidence about his childhood, the experiences that he had with receiving gifts and favors in exchange for homosexual activity, not to mention, of course, all the other nonstatutory mitigators - which I'm not going to repeat for everybody, but we already heard a full day's worth of that on Monday - all of those are also active features in what's going on. And the ADHD or bipolar that he was suffering at the time that he killed Mr. Ryland, I think that it's fair to say that this is - follows exactly the same pattern.

It's also interesting to note that given that they're both similar - I mean, these two cases are almost carbon copies of one another. It fits with the serial aspects insofar as you have the unresolved conflict, buildup of tension, because the conflict is unresolved, and then the person acts out again. And that's basically what I think happened the second time.

He tried - and, again, keep in mind this is all unconscious. I'm sure it's understood that all of these conflicts are outside of conscious awareness. But the point is that the - this kind of activity does not resolve the conflict that is underlying this activity. (PCR Vol. IV p. 422-27).

It is clear from the evidentiary hearing testimony that Mr. England is entitled to relief. Regarding the penalty phase, Larzelere applies. Trial counsel was ineffective in not following the ABA guidelines and beginning their penalty phase investigation upon appointment. The interviewing of Alison and Inez should have

been done by a mental health professional. Had they been interviewed by one, the subtle signs of mental illness, (ADHD, Bipolar disorder and homophobia) would have been presented to the penalty phase jury. A statutory mitigator would have been established. Postconviction counsel respectfully contends that portraying Richard England as a "good guy and someone whose life is worth saving" is ineffective assistance of counsel *per se* in that "good guys" don't get convicted of first degree murder.

The penalty phase jury rendered a recommendation of 8 to 4 in favor of death. However, there should have been an establishment of a statutory mitigator with the graphic, riveting testimony of Richard England's journey from innocent 11 year old child to sexual abuse victim (the belly-rubbing coach incident). This lead to being thrown out of his home by the drunken Ronnie England which forced him to seek the company of drunkards and drug addicts in exchange for god knows what demented acts, to a spurt of acting out minor crimes, which landed him in a juvenile home. What followed was his homophobic murder of Ryland and subsequent mentoring of Jackson which lead to the murder of Howard Wetherell. All of this evidence brought out at the evidentiary hearing would have explained England's actions. Trial counsel's penalty phase presentation ensured a death sentence because they never knew the explanation for the torment that England suffered resulting in the

rage which brought about the death of Howard Wetherell. Relief is both necessary and proper.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. England never received a fair adversarial testing of the evidence. Confidence in the outcome is undermined and the judgment of guilt and subsequent sentence of death is unreliable. Mr. England requests this Honorable Court to vacate the convictions, judgments and sentences including the sentence of death, and order a new trial.

CERTIFICATE SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by E-MAIL to [ken.nunnelly@myfloridalegal.com and CapApp@myfloridalegal.com] and U.S. Mail to Richard England DOC# 115574, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 11th day of March 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing **Initial Brief,** was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

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March 11, 2013

The Honorable Thomas D. Hall
Clerk, Supreme Court of Florida
ATTN: Tangy Williams
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1927

FILED
THOMAS D. HALL
2013 MAR 12 PM 2:10
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BY

Re: Richard England v. STATE OF FLORIDA
Case No. SC11-2038

Dear Mr. Hall:

Enclosed for immediate filing in the above-captioned case are:

1. Original and seven (7) copies of Initial Brief;

2. Original and seven (7) copies of Petition for Writ of Habeas Corpus

3. A copy of the first and last pages of the above-referenced documents for return to CCRC-M after stamping with the date of filing;

4. A pre-addressed, stamped envelope.

Please use the enclosed envelope to return the copies of the first (date-stamped) and signature pages of the documents to our office.

Copies have been provided to opposing counsel of record by first class mail. Thank you for your assistance in this matter.

Sincerely,

/s/
Ali A. Shakoor
Assistant CCRC

AAS/kdf

Enclosures

cc: Kenneth Nunnelley, Assistant Attorney General
David S. Frances, Appellant

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