IN THE SUPREME COURT OF FLORIDA

NORBERTO PIETRI,

Appellant,

vs. Case No. SC02-2314

STATE OF FLORIDA,

Appellee.
______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST JR.
ATTORNEY GENERAL

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO.0656879
1515 N. Flagler Dr..
SUITE 900
WEST PALM BEACH, FL. 33401
(561) 837-5000

ATTORNEY FOR APPELLEE

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IN THE SUPREME COURT OF FLORIDA

NORBERTO PIETRI,

Appellant,

vs. Case No. 02-2314

STATE OF FLORIDA,

Appellee.
______________________________/

PRELIMINARY STATEMENT

Appellant, NORBERTO PIETRI, was the defendant in the postconviction proceedings below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the record on direct appeal will be by the symbol "ROA," reference to the record in these proceedings will be by the symbol "PCR," and reference to the supplemental record will be by the symbol "SPCR" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case and facts but will include any additional relevant facts in the applicable argument section of this brief.

SUMMARY OF ARGUMENT

Issue I - The trial court properly denied relief as the evidence demonstrated that counsel adequately investigated a defense for second degree murder. Appellant failed to present any evidence at the evidentiary hearing that would have supported any other defense including that of voluntary intoxication.

Issue II - The trial court properly denied relief as the evidence demonstrated that counsel conducted a through investigation for the penalty phase. Appellant failed to present any additional credible information at the evidentiary hearing that had not already been uncovered, considered and/or presented.

Issue III - The trial court properly denied appellant's request for additional public records as the requested information was not a public record.

Issue IV - The trial court's order which incorporated by reference the state's response was not an abdication of the court's duty.

Issue V -Appellant's presentation of a legally insufficient claim alleging that he is insane to be executed in an attempt to preserve an issue for review at a later date is improper and summary denial was warranted.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY FOUND THAT BECAUSE THERE WAS NO EVIDENCE TO SUPPORT A GUILT PHASE DEFENSE OF VOLUNTARY INTOXICATION TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PURSUE THAT AFFIRMATIVE DEFENSE

Pietri claims that trial counsel, Peter Birch, made no meaningful attempt to investigate appellant's drug abuse history and his alleged intoxication at the time of the crime in violation of Strickland v. Washington, 466 U.S. 668 (1984). The focus of Pietri's criticism is that counsel failed to, "investigate Mr. Pierti's history of drug addiction and how that addiction and its natural consequences rendered Mr. Pietri unable to form the necessary element of intent to commit murder." **Initial brief at 64.** Appellant claims that trial counsel unreasonably failed to investigate and present any evidence, other than his own guilt phase testimony, to establish Pietri's affirmative defense of voluntary intoxication. The ramifications of counsel's failures were exacerbated by the fact that during opening statements, Mr. Birch allegedly told the jury that he intended to prove that appellant was intoxicated when he shot Officer Brain Chappell. And, although the jury received an instruction on voluntary intoxication, there was no

supporting evidence for that defense.[1] Pietri alleges that a proper and constitutionally mandated investigation should have included interviews with Randy Roberts and Luis Serrano, two people who were with Pietri for several days before the crime. Their testimony could have corroborated both a voluntary intoxication defense as well as Pietri's chronic history of drug abuse. Additionally, trial counsel should have obtained the services of an addictionologist or neuropharmacologist to evaluate Pietri. Allegedly, the information garnered from all these sources would have provided a basis for an intoxication defense.

Following an evidentiary hearing on this claim, the trial court denied relief. The trial court's conclusions are supported by both the original record on appeal and the postconviction record and therefore must be affirmed on appeal. See Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999)(recognizing deference given to trial court's assessment of credibility and findings of fact); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)(reasoning standard of review following Rule 3.850 evidentiary hearing is that if factual findings are supported by substantial evidence, appellate court will not

[1] Appellant claims that the state took full advantage of counsel's failure to corroborate his claim of intoxication by continually challenging his factual assertion that he suffered from drug addiction and was unable to form the specific intent to commit first degree murder. (ROA 2576, 3049).

substitute its judgment for trial judge’s on questions of fact, credibility, or weight). However, the trial court’s legal conclusion regarding Watson’s performance is subject to an independent *de novo* review. Stephen 748 So. 2d at 1034 (Fla. 1999).

In order to be entitled to relief on this claim, Pietri must demonstrate the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 466, 687 (1984). The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 784 So. 2d 380 (Fla. 2000)(precluding appellate court from viewing issue of trial counsel's performance with heightened perspective of hindsight). Clear precedent from this Court rejects the notion that the focus should be on what counsel "could have done." A defendant is not entitled to relief simply because current counsel "could" find new doctors who are able to offer a more favorable diagnosis. Pietri's claim that new mental health experts will now say that he was intoxicated at the time of the murder to the extent that he could not the specific intent to kill does not establish that counsel was ineffective at the guilt phase. Rose v. State, 675 So. 2d 567, 571 (Fla. 1996)(holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 477, 486 (Fla. 1998); Occhicone v. State, 768 So. 2d 1037 (Fla. 2000)(same).

The United States Supreme Court makes clear in Williams v. Taylor, 529 U.S. 362 (2000) that the focus is on what efforts were undertaken in the way of an investigation of the

defendant's background and <u>why</u> a specific course of strategy was ultimately chosen over a different course of action. The inquiry into a trial attorney's performance is not a analysis between what one attorney could have done in comparison with what was actually done. Any assertion to the contrary is completely inaccurate. The Eleventh Circuit Court of Appeals recounts the state of law regarding this issue as follows:

> I. The standard for counsel's performance is "reasonableness under prevailing professional norms." <u>Strickland v. Washington</u>, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); accord <u>Williams v. Taylor</u>, --- U.S. ----, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000) (most recent decision reaffirming that merits of ineffective assistance claim are squarely governed by <u>Strickland</u>). The purpose of ineffectiveness review is not to grade counsel's performance. <u>See</u> <u>Strickland,</u> 104 S.Ct. at 2065; see also <u>White v. Singletary</u>, 972 F.2d 1218, 1221 (11th Cir.1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." <u>Strickland</u>, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: <u>the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled</u>."[12] <u>Burger v. Kemp</u>, 483 U.S. 776, 107 S.Ct.

> 3114, 3126, 97 L.Ed.2d 638 (1987)(emphasis added).
>
> ___________________________
>
> [12] "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is ... whether what they did was within the 'wide range of reasonable professional assistance.' " Waters, 46 F.3d at 1518 (en banc) (citations omitted)(emphasis added).

Chandler v. United States, 218 F.3d 1305, 1313 n. 12 (11th Cir. 2000). It is always possible to suggest further avenues of defense especially in hindsight. Rather the focus is on what strategies were employed and was that course of action reasonable in light of what was known at the time. See also Henry v. State, Case No. 02-804 (Fla. October 9, 2003) slip op. at 13. With these principles in mind, it is clear that counsel Peter Birch and Donnie Murrell provided constitutionally adequate representation.[2]

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[2] At the evidentiary hearing, appellant presented the testimony of attorney, Robert Norgard, as a "Strickland expert." Norgard opines that trial counsel was ineffective for failing to pursue a voluntary intoxication defense. However Norgard did not outline what evidence was present to support his conclusion. Incredibly Norgard also admitted that he had not even read the record, including the state's evidence which supported a conviction for premeditated murder. (PCR 5951, 5971,, 5984-5989). His testimony was useless, and did not aid the trial court.

The trial court properly rejected Pietri's claim because he failed to offer any factual support for his assertion that a voluntary intoxication defense was viable. Appellant's trial attorneys clearly stated that no such evidence existed. The state asserts that the decision not to pursue a voluntary intoxication was constitutionally adequate.

At the evidentiary hearing, Peter Birch and Donnie Murrell detailed the efforts undertaken during the investigation and the reasoning behind the tactical decisions employed. As will be demonstrated below, trial counsel did conduct a through investigation, he detailed the efforts undertaken in preparation for the guilt phase, the information he uncovered, and the reasoning behind all his strategic decisions.

Birch stated that up until two months before the trial the defense was going to be that Pietri did not commit the crime. Birch explained that he was leaning towards a defense of holding the state to its burden of proof and hopefully creating reasonable doubt. Co-counsel Donnie Murrell traveled to New York to discuss the potential of this defense with a criminologist.[3] (PCR 6205-6206). However right before Christmas in 1989, Pietri for the first time told his attorneys that he did in fact shoot Officer Chappell. (5913-5920). Consequently the guilt phase

[3] Birch had the service of an investigator specifically for the guilt phase, Virginia Snyder. She was paid $ 2,585.69 for her services. R 72).

strategy was now going to focus on the degree of Pietri's culpability. Pietri's mental state at the time of the crime was now relevant to the guilt phase defense. (Id). Birch explained that he did not pursue a voluntary intoxication defense because there was no corroborating evidence that Pietri was in fact intoxicated at the time and therefore there was little chance of success. Birch testified as follows:

> For me to give that serious consideration, I would have felt he was under the influence of cocaine at the time of the shooting, which from everything I knew he was not, so based on my knowledge of cocaine, which I admit was not extensive and based on my understanding of intoxication as a defense, I would have felt he needed to be under the influence of cocaine, having ingested it earlier in the day for that to have a viable chance.

(PCR 6096). Because there was no evidentiary support for such a defense, Birch attempted to emphasize that this was a second degree murder because Pietri's <u>intent</u> at the time of the murder was to secure more drugs, not kill Officer Chappell. Indeed, Birch testified that Pietri himself told him attorney that he had not ingested cocaine for at least several hours and he was not under the influence of cocaine at the time of the shooting. (PCR 6095-6096, 6229). Birch sought to emphasize that the crime happened quickly, Chappell was walking up to Pietri, there was only one shot fired, and Pietri couldn't possibly have aimed so

“successfully” given that he was blind in his right eye. (PCR 6113, 6115-6116, 6165, 6169-6170.)

The second reason why Birch did not pursue a voluntary intoxication defense was because of his professional opinion that a jury would not be inclined to relieve Pietri of his responsibility for the killing a police officer.[4] Birch explained as follows:

> I, certainly, was aware of intoxication as a possible defense. In all candor back then and today I don’t think a jury would accept intoxication as a reason for killing a police officer. So, I don’t think it’s a very strong defense, I never have.

(PCR 6095).

The record on appeal supports trial counsel’s postconviction testimony. During opening statement, Birch told the jury that this case was all about Pietri’s addiction to cocaine. Pietri’s entire criminal life was centered on obtaining cocaine. Towards that end, he panicked when he was stopped by Officer Chappel. Pietri’s intent was never to kill the office but simply to get away. (ROA 1820-1824). In closing argument, Birch detailed all the evidence and argued to the jury that Pietri reacted in panic and fear and he never intended to kill Chappel, and unfortunately the one shot to the chest resulted in the

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[4] Cf. Grayson v. Thompson, 14 Fed. Law Weekly C1037, 1047 (11th Cir. 2001)(finding reasonable an attorney’s decision not to present voluntary intoxication defense as it is not necessarily favorable evidence before the jury); Tompkins v. Moore, 193 F.2d 1327, 1338 (11th Cir. 1999)(same)

officer’s death. That was the critical difference between a defense of voluntary intoxication and a defense that this was second degree murder. (PCR 6169-6170).

Co-counsel Donnie Murrell corroborated Birch’s testimony. Murrell had also concluded that this was a classic second degree murder case committed by a drug addict. (PCR 6197). Consistent with Birch’s testimony, Murrell testified that there was no evidence of voluntary intoxication and therefore that was never going to be the main defense:

> I think voluntary intoxication was a sub-theme of our entire defense. I don’t think it was ever the theory of defense that we, that we put our money on. It was, certainly, something that we put out there, certainly something that we hoped the jury might consider. But I don’t know. I would not describe that as our main defense.

(PCR 6202-6203). Murrell further explained that based on the facts and the opinions of the experts they had retained, voluntary intoxication was simply not viable:

> Their descriptions of the cocaine high and Iodice’s description and Caddy’s description all described a high that is extremely intense but extremely brief. And our client’s testimony was it had been several hours since he smoked cocaine at the time of the shooting.
>
> In my mind, that just made the voluntary intoxication defense something that was not going to carry the day for us.

(PCR 6229).

Because the theory of defense was going to be based on Pietri's chronic abuse and that his addiction is what controlled his life, the decision was made to put Pietri on the stand. Trial counsel believed that Pietri would be more effective/credible pleading for his life by telling the unvarnished truth at the guilt phase rather than by waiting until the penalty phase where he may viewed as someone simply trying to say anything to save his life. Additionally, by allowing Pietri to testify at the guilt phase, the jury would get an early opportunity to view and know Pietri as a person they can actually hear from directly. (PCR 6195-6197, 6262).

Leaving nothing to chance it was also decided that Murrell would do the direct examination of Pietri since Murrell could be more objective and actually tougher with Pietri during their preparation of his testimony. If Pietri could successfully withstand examination by Murrell in "warm ups" he would do well on the stand.(PCR 6196).

A review of Pietri's guilt phase testimony corroborates the description of trial counsels' strategy. Pietri told the jury of his pervasive and over powering addiction to cocaine. Piertri detailed how he turned to a life of burglaries to support his cocaine habit. (ROA 2267-2282). Upon his release from prison in 1986, Pietri was not able to stay drug free, he resumed his use of cocaine and returned to his life of crime to

support that habit. (ROA 2284-2290). When Pietri was eventually allowed work furloughs he violated the conditions of the furlough which ultimately lead to his escape. (ROA 2295-2312). Pietri was on a four day spree of abusing cocaine and committing burglaries when he committed the murder. (ROA 2339-2364). Pietri detailed the specifics of the burglaries the morning of the murder. (ROA 2372-2384). And consistent with Murrell's' testimony at the evidentiary hearing, the record reveals that Pietri candidly discussed the details of the encounter with Officer Chappell. The events happened so quickly, he sincerely told the jury that he had no intention of killing the police officer, and he did not aim the gun to kill him. (ROA 2511-2512, 2391-2392). Given Pietri's candid detailed account of his life on drugs, defense counsels' decision not to present any corroborating testimony was reasonable.

The record on appeal clearly demonstrates that trial counsel did not present a voluntary intoxication defense. At no time during his argument to the jury, did Birch ever say that Pietri was too high or too intoxicated to form the specific intent to kill. As detailed above, the theory of defense was that Pietri was consumed with his intent to escape. (ROA 2584, 2559, 2562, 2573, 2595). Consequently, appellant's contention that defense

counsel incompetently pursued a voluntary intoxication defense is not supported by the record.[5]

An obvious and necessary component of Pietri's claim is that there existed evidence of his intoxication which unreasonably went uncovered by trial counsel. However, Pietri could not and did not present any evidence at the evidentiary hearing that would have supported a voluntary intoxication defense. Consequently, Pietri's claim must fall. For instance, all of the lay people who testified at the hearing could not and did not provide any insight to Pietri's state of mind at the time of the shooting since not one of these people were actually with Pietri at that critical time. In fact they had not seen Pietri for approximately the previous four hours. Likewise, the mental health professionals could only offer insight into the debilitating and damaging effect Pietri's chronic use of drugs has had on his life in general. Although Pietri argues on appeal that such evidence was presented via the testimony of Drs. Krop and Lipman, a review of the record belies his contention.

---

[5] Also not supported by the record is Pietri's claim that the state challenged Pietri's assertion that he had a long standing cocaine habit. The state argued in both opening and closing argument at the guilt phase that regardless of his cocaine use, his actions clearly demonstrate an intent to kill the officer and not just an intent to escape. At no time did the state argue that Pietri did not ingest cocaine. (ROA 1803-1819, 2565-2572, 2576).

With respect to Pietri's state of mind at the time of the murder, the experts could only discuss the effects of withdrawal and the craving for more drugs had on Pietri's psyche at the time of the murder. At no time did anyone testify that Pietri could not form the specific intent to murder. For instance, Dr. Lipman testified at the evidentiary that he could speak about Pietri's state of mind with respect to his ability to form an intent to kill only in a neuropharmalogical terms. (PCR 5618). Pietri was delusional and paranoid, and at the time of the shooting, Pietri had very little cocaine in his system. (PCR 5618-5619). However the toxicity was still present, meaning that Pietri still craved the drug and was going through a withdrawal syndrome at the time of the shooting. (PCR 5621). Pietri was depressed, and was experiencing intense feelings of despair as well as a sever and pathological craving for cocaine. (PCR 5621-5623, 5626). Pietri was suffering from "metabolic intoxication" which means he had poor impulse control and that his brain chemistry was not normal. (PCR 5626, 5660. Pietri was described as someone who would act out of a need for self-preservation. (PCR 5626, 5659-5660). At most Lipman testified that the evidence was inconsistent with the conclusion that Pietri could form the specific intent to kill and was more consistent with an impulsive act.

Dr. Krop testified at the evidentiary hearing that he would be able to testify at the penalty phase that Pietri was "most likely" intoxicated "to some degree" at the time of the offense. (PCR 5506). The primary diagnosis would be that the chronic affects of long term abuse had rendered Pietri unable to control his impulses, he exhibits poor judgement and has a cognitive disorder not otherwise specified. (PCR 5509).

The state asserts that neither of these opinions amounts to a valid or specific diagnosis of voluntary intoxication. Indeed a majority of the experts did not even address the facts of the crime itself. The deficiency in Pietri's evidence completely eviscerates his argument that counsel was ineffective for not presenting this evidence at guilt phase. It is clear that the testimony of the mental health experts as presented would not have been admissible as a matter of law. Any testimony regarding his obsession with obtaining more drugs due to the powerful cravings for cocaine would have been irrelevant under Florida law. "[V]oluntary intoxication is an affirmative defense and . . . the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. . . . [E]vidence of alcohol consumption prior to the commission of a crime does not, by itself, mandate the giving of jury instructions with regard to

voluntary intoxication. . . . [W]here the evidence shows the use of intoxicants but does not show intoxication, the instruction is not required." Linehan v. State, 476 So.2d 1262, 1264 (Fla. 1985). The complete lack of evidence to support the notion that Pietri was too high to be able to form the specific intent to commit murder renders the mental health experts' testimony inadmissible at the guilt phase. Henry, supra(finding that counsel was not ineffective for failing to present defense for which there was no evidence (voluntary intoxication) or was inadmissible (diminished capacity)); Cf. Reaves v. State, 639 So. 2d 1, 4-5 (Fla. 1994)(upholding rule of law that "general mental impairment" is not admissible at guilt phase); Rivera v. State, 717 So. 2d 477, 485 n.2 (Fla. 1998)(*quoting* Lineham v. State, 476 So. 2d 1262, 1264 (Fla. 1985))(explaining that to successful assert the defense of voluntary intoxication there must be evidence that the defendant was unable to form the requisite intent).

Pietri also claims that trial counsel was ineffective for failing to present any lay witnesses at the guilt phase to corroborate Pietri's drug history and cocaine binge before the murder. Murrell explained that first of all, only Pietri could relay the details of the critical time period, i.e., the actual shooting. (PCR 6205). Although Brantley, Sorrano and Santana were with him during the several days before the murder, they

had not seen him for several hours before the shooting, consequently their testimony was at best only marginally beneficial.

Second, since it was well documented that Pietri's entire life of crime, i.e., twenty-eight felony convictions were motivated by the need for drug money and the fact that the state never contested the existence of Pietri's drug use/history, there was never a concern that the jury would not believe that Pietri suffered from cocaine addiction. In other words, there was no need to offer corroboration since no one was questioning the existence of Pietri's extensive drug abuse history. (PCR 6233, 6259). When shown the Department of Corrections records, corroborating Pietri's drug use in prison, Murrell discounted their importance since Pietri's drug abuse history was never contested. (PCR 6223). Third, the testimony of these witnesses would have been marginally helpful at best. As already stated, none of these people had been with Pietri sat the time of the crime. Additionally, their testimony would have opened the door to some very negative information about Pietri's violent tendencies when he was high on cocaine.[6] These

[6] Birch had conducted over ninety depositions. (PCR 590-1976, 2142-3217). Included in those depositions were interviews with two of the people, Mickey Brantley and Yori Santana, who were with Pietri during the cocaine binge days before the murder. (PCR 802-860, 2536-2620). Randy Roberts was not available at the time of trial, consequently his deposition was never taken. (PCR 6081). The state would note that appellant was unsuccessful in his attempts to secure the testimony of

individual provided additional evidence of Pietri's violent and anti-social nature at the evidentiary hearing. For instance; Pietri decided to get involved in violent gang activity in California; people familiar with Pietri's drug habits expressed fear about being around Pietri when he is on drugs due to his very short temper; Pietri would do whatever was necessary to obtain drugs; and he is responsible for introducing his own twelve year old brother to drugs. (PCR 6292-6294, 6317-6318, 6357-6358, 6380, 6403-6404). Clearly evidence of Pietri's violent propensities when under the influence of drugs is not the type of information you want a jury to hear when you are trying to convince them that the ultimate violent act of murder was an unintended and unforeseeable consequence. Given the very limited value of the testimony weighed against the potential negative impact a decision was made not to present any lay witnesses to corroborate Pietri's drug history.(PCR 6228-6230). That decision was reasonable and cannot form the basis of a claim of ineffective assistance of counsel. See White v. State, 559 So. 2d 1097 (Fla. 19900(finding counsel's performance not deficient for failing to present voluntary intoxication defense since no support existed for its presentation); Van Poyck v. State, 696 So. 2d 686, 697 (Fla. 1997)(affirming counsel's strategic decision not to pursue voluntary intoxication defense

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Randy Roberts at the evidentiary hearing as well.

since investigation of same proved futile); Johnson v. State, 583 So. 2d 657, 661 (Fla. 1991)(affirming denial of claim of ineffective assistance of counsel since new defense presented in collateral proceeding was contradicted by evidence as trial); Rivera v. State, 717 So. 2d 477, 486 (Fla. 1998)(upholding counsel's decision jot to pursue voluntary intoxication defense when there existed no evidence to support the claim that defendant was intoxicated at the time of th murder); Breedlove v.State, 595 So. 2d 8, 10 (Fla. 1992)(affirming summary denial of claim of ineffective assistance of counsel for failing to pursue voluntary intoxication defense as record demonstrates a total lack of available facts to establish defense);Arbeleaz v. State, 775 So. 2d 909 (Fla. 2000)(upholding summary denial of allegation that counsel was ineffective for failing to present evidence of epilepsy in order to negate specific intent where record shows that appellant testified to same and additional evidence did not demonstrate that he was having a seizure at the time of the murder); Cf. Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997)(finding counsel's decision to forego mental health testimony based on limited value weighed against other damaging evidence likely to be revealed); Van Poyck v. State, 694 So. 2d 686 (Fla. 1997)(same).

The evidence appellant now claims should have been presented at trial is virtually a restatement of the evidence that was

actually presented. As detailed above, the guilt phase defense was that this shooting was not an intentional murder but at best second degree murder as Pietri never intended to kill the officer. His only focus was on his ability to escape the area so he could obtain more drugs to satisfy his powerful addiction. That was also the theme of the evidence presented below. The focus was not voluntary intoxication, but on Pietri's withdrawal syndrom from cocaine and his pathological craving to continue his drug use. His actions were the result of this addiction and his need to preserve himself through his drug use. In conclusion, the evidence presented at the evidentiary hearing was either cumulative to the guilt phase presentation or/and it would have been admissible at trial. Pietri's claim that trial counsel was ineffective must be rejected.

ISSUE II

THE TRIAL COURT PROPERLY FOUND THAT TRIAL COUNSEL RENDERED ADEQUATE REPRESENTATION AT THE PENALTY PHASE AND COMPETENTLY UTILIZED THE SERVICES OF MENTAL HEALTH EXPERTS

Pietri attacks counsel's presentation and use of mental health witnesses at the penalty phase of his trial. He alleges that (1) Dr. Caddy and social worker Jody Iodice were not given sufficient background material, and an adequate amount of time to evaluate Pietri and prepare a presentation for the penalty phase, (2) the evaluations and assessments actually provided by both professionals were wholly inadequate, and (3) defense counsel failed to obtain the services of neuropsychologist.

The state asserts that Pietri has failed to establish his burden under either Strickland v. Washington, 466 U.S. 466, 687 (1984) or Ake v. Oklahoma, 470 U.S. 68 (1985). A review of the efforts undertaken by counsel demonstrate that after a through investigation was completed, defense counsel presented a penalty phase defense that was consistent with the guilt phase defense. Both lay and professional witnesses recounted Pietri's childhood and drug addiction. The focus was centered around the devastating effect that cocaine had on Pierti. Appellant's claim that new information not previously uncovered, should have been available to the penalty phases witnesses. Failure to do so was constitutionally deficient performance. However, the "new" information uncovered by current counsel was either not in

existence at the time of trial, or was simply non-compelling cumulative evidence of Pietri's chronic drug history. The diagnosis now offered by appellant's new doctors is virtually identical to what was presented at the penalty phase. Additionally, some of the opinions now being offered regarding statutory mitigation is less than credible. Simply because Pietri is able to present either more detailed information about Pietri's chronic substance abuse or a different diagnosis twelve years later does not entitle him to relief. The focus is not on what else could have been done, but rather on the reasonableness of what was actually done; Henry v. State, Case No. 02-804 (Fla. October 9, 2003; Chandler v. United States, 218 F.3d 1305, 1313 n. 12 (11th Cir. 2000).

In order to be entitled to relief on this claim, Pietri must demonstrate the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687 (1984). The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is

> all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 25 Fla. L. Weekly S749, 752 (September 28, 2000)(precluding appellate court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v. State, 675 So. 2d 567, 571 (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 482, 486 (Fla. 1998); Occhicone v. State, 25 Fla. L. Weekly S529 (June 29, 2000)(same).

As will be detailed below, the evidence adduced at the evidentiary hearing clearly demonstrates that Birch conducted a very through investigation. Simply because Pietri presents

additional family members or different mental health experts to further buttress his claim of sever drug addiction, and physical and sexual abuse does not entitle Pietri to relief. Pietri's good fortune in finding mental health professionals who will now offer a more favorable diagnosis than counsel was able to obtain at the time of trial does not prove that a competent investigation was not conducted at the time of trial. See Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains new diagnosis of organic brain damage); Provenzano v. Dugger, 561 So. 2d 546 (Fla.1991)(finding no basis for relief by mere fact that defendant has found expert who can offer more favorable testimony); Jones v. State, 732 So. 2d 313, 319 (Fla. 1999)(finding counsel's decision not to pursue further mental health investigation after receiving initial unfavorable report reasonable); Engle v. State, 576 So. 2d 696 (Fla. 1991)(same).

Following the guilt phase investigation, Birch decided to present a penalty phase defense that was consistent with the guilt phase evidence. Birch explained that in total he contacted five different mental health professionals to assist in developing the penalty phase mitigation. It turned out to be a very frustrating process. (PCR 6153-6154, 6156). One of those doctors was Dr. Kropp, a forensic psychologist with

training in neurpsychology. (PCR 5487, 5496). Kropp, who had come highly recommended, conducted a preliminary investigation into several areas including Pietri's competency, his sanity and any information related to penalty phase mitigation. (PCR 6071-6074, 6153-6154). Birch communicated very well with his client and never thought that Pietri's intelligence, competency or sanity were at issue however he wanted the areas explored nonetheless. (PCR 6071).

Kropp's initial evaluation proved fruitless. He found that Pietri was competent, there was no psychosis, no history of psychiatric problems, and no signs of organic brain damage. Kropp's assessment confirmed what Birch had already known, i.e., Pietri had a chronic drug abuse problem and potentially he suffered from physical and sexual abuse as a child. (PCR 6078). Although Kropp had requested further information, Birch made a conscience decision that he was not going to utilize Kropp's services and therefore he did follow up on Kropp's request. That decision was made based on the fact that Krop was not going to be helpful. Birch explained:

> Q: Now did you ever consider providing Dr. Krop with any background material of Norberto Pietri's drug problem in prison?
> A: No I can't say that I considered any of that, no. Again, after the initial meeting with Dr. Krop and his evaluation of Norberto, I was –I was of the thinking he was not going to be able to help us and I got the impression, however wrongfully it may have been, I got the impression that he

> did not feel that he would be able to help us.

(PCR 6117). Birch consistently characterized his discussion with Krop as "I can recall being extremely disappointed in the outcome of his evaluation;" "he [Krop] didn't speak highly of Norberto and it just, we just didn't click."(PCR 6079, 6156).

Birch continued to look for a mental health expert who could provide some assistance. (PCR 6120, 6157). He next spoke to Dr. Keith Haynes. The records indicate that Birch had two consultations with Haynes, who again unfortunately told Birch that this was a very tough case and that he could offer no assistance.[7] Based on his unsuccessful attempts to obtain the services of a mental health professional, Birch unsuccessfully sought a continuance. (PCR 6133-6134). Eventually, several days before the penalty phase was to start, Birch was able to secure the services of another highly recommended psychologist, Dr. Glenn Caddy. Birch was told that Caddy presented well to a jury and that you "could just let him go" (PCR 6160-6161). Records indicate that Caddy spoke to Birch on at least three occasions, and he conducted an extensive psychological evaluation/interview with Pietri. (PCR 6122-6123). Additionally, Birch had the assistance of an investigator from the public defender's office, Gail Martin, who was experienced

[7] The records indicate that Haynes was paid $675.00 for his services in this case. (PCR 6119-6121).

in capital litigation. Her responsibilities included doing the background check on Pietri, including a review of school records, and interviews with teachers and family members. (PCR 6157-6160).

Birch was asked to review five documents, all of which were generated from the Department of Corrections records from March of 1985 until August of 1988. All the documents related to Pietri's substance abuse problem in prison.[8] When asked if these documents would have been helpful to the guilt or penalty phase defense Birch responded as follows:

> Yeah it's hard to say. Everybody knew he had a cocaine problem. If you are asking me is this kind of like the smoking gun I don't see it that was. I may be missing something but I didn't see it that way.

(PCR 6128).

Murrell testified that part of the reasoning behind putting Pietri on the stand at the guilt phase was to "set up" the penalty phase defense since the penalty phase focus was centered around Pietri's drug use. (PCR 6202, 6253). Murrell explained that he and Birch were desperate to find a doctor who could offer helpful testimony for the penalty phase. He explained their retention of Caddy as an eleventh hour find since they had been seeking the assistance of such an expert since before the guilt phase. (PCR 6266, 6332-6333). Murrell confirmed the fact

[8] Also included in the documents was a psychological screening which included an IQ test score of 82. (PCR 6127).

that he and Birch attempted to obtain additional time by filing a motion for continuance which was unsuccessful. (PCR 6266).

In addition to Dr. Caddy, counsel also utilized the services of a social worker Joyce Iodice. Ms. Iodice came highly recommended by the public defender's office. Her testimony was very helpful in terms of describing the "model of addiction" as she validly described the impact of cocaine addiction. (PCR 6250-6251). The strategy behind her testimony was that it would and did provide a compelling history of cocaine addiction which tied into Pietri's testimony from the guilt phase. Birch intentionally did not have Iodice meet with the Pietri. The strategy was that she would be able to objectively explain how someone could be under the influence of cocaine and yet remember the events in question with clarity. Her focus was on drug addiction in general and not on Pietri. (PCR 6124-6125, 6213, 6219, 6332).

Birch also presented the testimony of a minister, Roger Paul. (ROA 2913-2925). Mr. Paul had personal knowledge of Pietri's sincere religious conversion. Ultimately the defense relied upon eleven non-statutory mitigators which centered on Pietri's drug abuse history. (PCR 6339).

A review of the testimony actually presented at the penalty phase mirrors both Birch and Murrell's testimony. The penalty phase commenced two weeks following the guilt phase. Pierti

presented the testimony of six lay witnesses and two professionals. The lay witnesses included four siblings, William, Marino, Ada, and Ramona; Yori Santana, one of the people who was with Pietri days leading up to the murder; and a minister, Roger Paul. The professional witnesses were Dr. Glen Caddy, and Jody Iodice.

The substance of the siblings' testimony centered around anecdotal accounts about Pietri's violent and alcoholic father. The children would witness the beating of their mother by their father on a daily basis. Eventually, the father abandoned the family. (ROA 2827-2834)). Pierti was a good brother when he was not involved with drugs but that drugs destroyed his life. Pietri had difficulty as a young child with his vision, and at the age of six he had surgery which left him blind in his right eye. (ROA 2849-71, 2888-2911).

Yoris Santana corroborated the family's testimony regarding Pietri's chronic drug use. She was also able to provide the jury detailed evidence of Pietri's drug use for the four days leading up to the murder. (ROA 2839-2846).

The substance of Paul's testimony was a description of Pietri's religious conversion which included his deep remorse for Officer Chappell's death. Indeed it was that conversation which precipitated Pietri's admission to his attorneys that he

was responsible for the shooting. (ROA 2916, 2921, PCR 6338). All the options were discussed with Pietri.

Jody Iodice, a social worker who works with recovering drug addicts and is one herself, testified about the general characteristics of a person who may be predisposed to drug abuse. She explained in layman's terms the powerful effect of cocaine, and the details of a cocaine high. (ROA 2932-2937). Iodice also explained that you may be under the influence of cocaine and still be able to make cognitive decisions, and remember events. (ROA 2937, 2944-2945).

Dr. Caddy, who met with Pietri for a total of three and half hours, discussed with him his childhood and family background, reaffirming what Pietri's siblings had recounted. (ROA 2955-2962, 2964-2967). Caddy was able to explain to the jury that Pietri's upbringing made him vulnerable to drug use, and in fact it set the stage for Pietri's drug abuse later on. (ROA 2967-2968, 3011). Pietri was of average intelligence, he was not psychotic, he knew the difference between right and wrong, and that it was wrong to kill. Caddy opined that Pietri was <u>perhaps</u> still under the effects of cocaine at the time of the murder and therefore his judgement was impaired. (ROA 2987-2995, 3010).

In addition to the presentation of these witnesses, the jury was told to consider eleven separate mitigators, including the two statutory mental health mitigators. (ROA 3081-3086). The

basis for both of those mitigators was Pietri's extensive cocaine use. (ROA 3081-3082). The jury was told to consider the fact that Pierti's life of crime never involved violent crimes, and he is not a cold blooded killer. (ROA 3082-3083). Additionally Birch pointed out to the jury that Pietri was to receive more than life in prison with the possibility of parole after twenty-five years. In other words there was no chance that he would ever be let out of prison for his crimes based on the number of other convictions he was facing. This was a person who was the product of an abusive home, including physical and sexual abuse and that beneath this problem, he was a good man and productive worker. Pietri is extremely remorseful for his actions. (ROA 303083). Pietri's life was ruled by cocaine and it ultimately destroyed his life. (ROA 3064-3087).

In rebuttal to the record on appeal and to Birch and Murrell's' explanation regarding their trial strategy, Pietri called several friends family members at the evidentiary hearing. The testimony of the lay witnesses contained much of the identical anecdotal evidence that was presented at the penalty phase regarding Pietri's chronic and long standing drug abuse history. (PCR 6334-6337, 6391-6398).

Additionally, Pietri also presented the testimony of several mental health experts. Dr. Harry Kropp, was the first to

testify. Kropp evaluated Pietri for potential penalty phase testimony in December of 1989. Kropp's conclusions from 1989 include a finding of substance abuse, no psychosis, no mental illness, no neurologocal disorder, or thought disorders. (PCR 5493-5494). Based on the additional information reviewed in the two set volume of materials, Kropp was able to explain in more detail Pietri's substance abuse problems. Ultimately he stated that the new information basically substantiates Pietri's problems with drugs. (PCR 5542). He would additionally opine that Pierti has a low average IQ; he has a cognitive disorder not otherwise specified; he is anti-social based on the number of crimes he has committed and that Pietri satisfies the criteria for both statutory mental health mitigators based on his substance abuse; cognitive disorder and psychological state. At the time of the murder Pietri was either actively intoxicated or he was in the state of withdrawal. (PCR 5331).

Dr. Sultan[9], a clinical psychologist, who did no formal testing of Pietri, was next to testify. (PCR 5786). She interviewed him on four separate occasions for approximately ten hours. (PCR 5781). She also reviewed the two set volume of materials as well as the conclusions of Drs. Goldberg and Lippman. (PCR 5786). Her conclusions were as follows: although Pietri is of average intelligence he is unsuccessful in

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[9] Dr. Sultan's disdain and strong personal views against the death penalty were well documented. (PCR 5826-5828, 5861).

processing information; he makes bad judgement calls; is unable to acquire new information and respond appropriately; and he has poor impulse control. Basically Pietri is a very serious addict who is driven by the need for drugs. (PCR 5795 5822). Pietri comes from a violent family life, poorly educated with no supervision as a child growing up. (PCR 5822). Pietri has characteristics of a borderline personality disorder; dependent personality; and anti-social traits. He does not meet the criteria for any single specific personality disorder, and he is not mentally retarded. (PCR 5822). He <u>may</u> suffer from organic brain damage. (PCR 5878).

Dr. Goldberg, is a non board certified neuropsychologist who specializes in scezcophrenia. He reviewed the background material, consulted with other mental health experts involved in this case, conducted diagnostic testing of Pierti and spent four hours with him. (PCR 6419). No malingering component was included in his testing. (PCR 6469-6474). Pietri did well on some tests and poorly on others. (PCR 6410-6411, 6432, 6446-6448). Goldberg opines that some of Pietri's impairments have improved over time because he has been away from drugs since his incarceration. (PCR 6485). He opined that Pietri suffers from cognitive impairments due to cerebral dysfunction in the brain, however, it is not possible to locate in which region of the brain the impairment exists. (PCR 6443). Dr. Goldberg's

conclusion is that Pietri satisfies the “catch all” non-statutory mitigator. (PCR 6444).

Dr. Lippman, a neuroparmacologist and psychopharmacologit, evaluated Pierti for the purpose of assessing the effects of drugs on mental disorders and on the brain in general. (PCR 5545-5546). Lipmann reviewed the background material provided to him by Pietri, he interviewed Pietri on two separate occasions, he reviewed Pietri’s trial testimony, and he interviewed family members. (PCR 5564-5573). Dr. Lipmman did not do any objective testing of the brain which could have conclusively confirmed or discounted brain damage, although he feels that is always the best course to take. He candidly admitted that such was not done in ths case since “CCR frowns on such testing.” (PCR 5659). Lipmman then opined the obvious, i.e., Pietri suffers from cocaine addiction. The cocaine affects the frontal lobe, which causes people to be less inhibited, and more persistent in their actions. Pietri was under extreme mental and emotional disturbance yet he could understand the criminality of his actions but he was unable to conform his behavior to the requirements of the law. (PCR 5617). Although Pierti had very little cocaine in his system at the time of crime he had a pathological need for the drug. His actions were impulsive and compulsive rather than intentional. Pietri suffers from impulse control based on his chronic drug

abuse. (PCR 5659-5690). Pietri did not want the police to prevent him from getting his drugs. (PCR 5679). Pietri's impulsive acts were done in a split second. (PCR 5682).

Pietri also presented the testimony of Dr. Caddy. Dr. Caddy explained that his role in 1990 was to evaluate Pietri's background, developmental history, his mental state and the existence of mitigating evidence. Caddy recalls , consistent with his testimony at the penalty phase, that he spent three and half hours with Pietri and spoke to his family. (PCR 5699-5703). Caddy reviewed the information contained in the two volume set of materials that has been previously detailed and provided to all of the mental health experts. He stated that the conclusions rendered in 1990 have not changed in any fundamental way today after reviewing the new information. The new information is simply more detailed than what he had available in 1990 but is does not change his conclusions at all, it merely corroborates it. He still stands by his testimony today. (PCR 5702-5703, 5732-5733, 5759). Dr. Caddy would not opine that Pietri's mental state during the murder of Officer Chappell would satisfy either mental health statutory mitigator. At most Caddy would only say that the overall stress experienced by Pietri at the time of the crime may have been related to the fact that he was caught or it may have been generated from the personality issues. He would tend to lean towards the fact that

it was related to his mental state but he would not directly make that assessment. (PCR 5743).[10] Caddy's ultimate conclusion is that the cocaine did not impair Pietri's perceptions but it made him more reactive to the situation at hand. (PCR 5765).

The state asserts that Pietri has failed to establish that trial counsel were deficient in their investigation and ultimate penalty phase presentation. Much if not all of the information presented today is virtually identical to what was presented years ago.[11] Indeed Caddy stated that his opinions remain the same. The central theme of the remaining doctors is that Pietri's chronic drug abuse has completely destroyed his life because all of his decisions are based on his need for cocaine. The record on appeal unequivocally establishes that the theme of the guilt and penalty phases at trial was exactly that. Consequently, Pietri cannot establish that former counsel did not provide adequate assistance.

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[10] The state would emphasize that two of Pietri's mental health experts, Caddy and Goldberg, would not opine that he meets the criteria for the statutory mental mitigators. Caddy clearly stated that his opinions today are no different than what he concluded in 1990. Therefore Caddy's opinion that Pietri does not meet the criteria for either statutory mitigator dissipates the "mystery" about why he was not asked by Birch on direct examination in 1990 if Pietri satisfied the statutory mitigators. Obviously Caddy would have said the he does not.

[11] The state wold also emphasize that the two volume set of materials provided to the new mental health experts consists of information that was either <u>not</u> in existence at the time of the trial, or is evidence which only corroborates Pietri's drug use in prison. (PCR 5501-5502).

Additionally, none of the new doctors offer any criticism or disagreement with Caddy's original assessment. At best the new doctors opine that Pietri may have organic brain damage; he has cognitive dysfunction, and he has anti-social personality traits. Simply because Pietri is able to find new doctors who may offer a more detailed account or provide a somewhat "different clinical spin" on his mental health status does not entitle Pietri to relief. See Johnson v. State, 769 S. 2d 990 (Fla. 2000)(refusing to find counsel's performance deficient simply because new doctors would take issue with failure of prior doctors to detect the existence of organic brain damage); Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains different diagnosis now); Provenzano v. Dugger, 561 So. 2d 546 (Fla.1991)(finding no basis for relief by mere fact that defendant has found expert who can offer more favorable testimony); Engle v. State, 576 So. 2d 696 Fla. (1991); Asay v. State, 769 So. 2d 974 (Fla. 2000)(finding that trial counsel's investigation was not deficient given that new opinions of mental health professionals were very similar to findings of original doctor but for a disagreement over the existence of organic brain damage); Rutherford v. State, 727 So. 2d 216, 224 (Fla. 1999)(affirming summary denial of ineffective assistance of counsel where additional evidence of appellant's

harsh childhood and Vietnam experience, although more detailed was cumulative); Provenzano, 561 So.2d at 546 (Fla. 1990) ("The additional testimony which Provenzano now suggests should have been given would have been largely cumulative."); Kennedy, 547 So. 2d at 913 (Fla. 1989) ("It was the trial judge's conclusion, and we agree, that Kennedy did not demonstrate how the failure to introduce any further information regarding his background other than that which was already before the jury prejudicially affected the outcome of his trial."); LeCroy v. State, 727 So. 2d 236 (Fla. 1998) (affirming summary denial of ineffectiveness claim that trial counsel failed to introduce additional evidence of defendant's family background where defendant failed to establish prejudice prong of Strickland); Roberts, 568 So. 2d at 1259(same) James v. State, 489 So. 2d 737, 738 (Fla. 1986)(denying claim that defendant received an inadequate mental health examination simply because newly acquired psychologist criticizes former mental health professional's failure to uncover organic brain damage).

Additionally Pietri cannot establish prejudice in counsel's "failure" to present the testimony of the metal health experts who testified during these proceedings. First of all any evidence concerning Pietri's substance abuse and violent childhood was cumulative at best. See Rutherford, 727 So. 2d at, 224 (Fla. 1999)(affirming summary denial of ineffective

assistance of counsel where additional evidence of appellant's harsh childhood and Vietnam experience, although more detailed was cumulative); Provenzano, 561 So.2d 541, 546 (Fla. 1990) ("The additional testimony which Provenzano now suggests should have been given would have been largely cumulative.") LeCroy, 727 So. 2d at 237 (affirming summary denial of ineffectiveness claim that trial counsel failed to introduce additional evidence of defendant's family background where defendant failed to establish prejudice prong of Strickland); Roberts, 568 So. 2d at 1259(same); Reaves v. State, 27 Fla. L. Weekly S601, 603 (Fla. June 29, 2002(same).

Second, the evidence presented was simply not compelling as it was never tied into Pietri's actions during the murder. See Asay v. State, 769 So. 2d 974 (Fla. 2000) (upholding trial court's rejection of expert opinion as speculative given that experts were unfamiliar with significant facts of the crime); Bryant v. State, 785 So. 2d 422 (Fla. 2001)(upholding trial court's rejection of mental health expert's opinion as defendant's own actions during the robbery/murder belie testimony of expert); Walls v. State, 641 So. 2d 381, 390-391 (Fla. 1994)(recognizing that credibility of expert testimony increases when supported by facts of case and diminishes when facts contradict same); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996)(same); Wournous v. State, 644 So. 2d 1000, 1010

(Fla. 1994)(upholding rejection of uncontroverted expert testimony when it cannot be reconciled with facts of crime).

Pierti has consistently maintained at trial and during these proceedings that this was a case of second degree murder. The additional opinions of the new doctors is no different than what was offered at trial. Indeed their findings were severely rebutted at the hearing. For instance, although all the experts say Pietri is "cognitively impaired' he scored well on those portions of the tests which are sensitive to such cognitive deficiencies, including organic brain damage. (PCR 5554-5556, 5591-5593). Furthermore, no testing was conducted by any of the doctors except for that done by Dr. Goldberg. All of the remaining doctors relied on the tests results obtained by Goldberg. Yet Goldberg's testing was very suspect. It was limited, incorrectly scored and did not include any malingering component. (PCR 6616-6617). Moreover, Pietri's own witness Dr. Lippman conceded that a malingering component in such testing is worthwhile yet Pietri's own counsel forbid its use. That restraint on Lipmann's evaluations speaks volumes about the accuracy of the results. Consequently, Birch's failure in presenting such questionable evidence does not establish the prejudice prong of Strickland. See Cherry v. State, 781 So. 2d 1040 (Fla. 2000) (upholding a finding that counsel's investigation was not deficient given that new findings of

organic brain damage were not based on physical testing and proposed mitigating evidence was controverted by evidence at trial); Miller v. State, 770 So.2d 1144 (Fla. 2000)(upholding trial court's rejection of proposed mitigator of abusive childhood since there was no corroborative evidence for the allegation); See also Asay, 769 So. 2d at 771 (finding counsel's performance not deficient where new evidence of organic brain damage was simply not compelling).

Pietri failed to present any explanation or attempt to counter his own statements at trial or Dr. Kropp's admission that Pietri's his motivation for the shooting was not get caught with all that stolen merchandise with him. The objective facts demonstrate that Pietri waited until the unsuspecting officer was within two feet of him, he pulled pout his gun and filed one shot into his heart. If Pietri did not nothing to escape he would have been caught in a stolen truck, with stolen merchandise, after escaping from jail. The motivation to get away from the unsuspecting officer was overwhelming. The jury was well within their authority to reject Pietri's claim that this was impulsive and unintentional and therefore at best only second degree murder. Nothing presented at the evidentiary hearing could call those findings into question. The trial court correctly denied relief as Pietri has not established either deficient performance of prejudice under Strickland.

ISSUE III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL PUBLIC RECORDS

Appellant claims that he properly filed a request for additional public records following the conclusion the evidentiary hearing in this case. Following a motion to compel production of additional records, and the state's response, the trial court denied the request. (PCR 6906). On appeal, appellant claims that was error, and requests that this Court order production of the requested material. Appellant's argument is without merit.

As accurately portrayed by appellant, the victim's father received a letter from a local attorney suggesting that Mr. Chappel resolve this case and agree to a sentence of life without the possibility of parole. However, counsel failed to also point out the following relevant information.

The letter was sent to Mr. Chappell, a private citizen by a private attorney who has absolutely no connection to this case.

Once the state became aware of the letter's existence, the matter was brought to the attention of the court. At that time, there was absolutely no suggestion by the state that counsel for appellant had anything to do with sending the letter or that counsel should in any way be admonished or held accountable for sending this letter. (PCR 6770). The state was merely pointing

out its concern regarding the possible inappropriate behavior of a private attorney. The state expressed concern to the court that a member of the Florida bar, took it upon herself to write an unsolicited letter to the victim's family, expressing her opposition to the death penalty, and trying to persuade them into a certain course of action. (PCR 6768-6770).

Appellant's cites to no authority for the proposition that this letter somehow falls under the dictates of Florida's public record laws. The state asserts that it clearly does not. Mr. Chappell's personal property/mail simply does not fall under Florida Statutes, Chapter 119. State v. Kokal, 562 So. 2d 324, 326-327 (Fla. 1990)(defining public records as documents prepared by or at the direction of a public agency with the intent to perpetuate, formalize, or communicate knowledge). Appellant's argument is frivolous. The trial court did not abuse its discretion in denying appellant's motion to compel public records See generally Glock v. Moore, 776 So. 2d 243, 254 (Fla. 2001)(applying abuse of discretion standard in determining appropriateness of trial court's ruling).

ISSUE IV

THE TRIAL COURT'S DECISION TO INCORPORATE BY REFERENCE THE STATE'S RESPONSE IN ITS ORDER WAS NOT IMPROPER

Appellant alleges that the trial court improperly abdicated to the state its responsibility for independently making findings of fact or conclusions of law and it failed to indicate what weight it was giving to conflicting testimony. This breach was committed when the court incorporated by reference the state's post hearing memorandum when it denied all relief. (PCR 6902). Allegedly appellate was prejudiced by the court's actions because the state's memo was facially deficient and erroneous in numerous areas. Appellant's argument is disingenuous and legally incorrect.

In support of his argument, counsel relies primarily on Mason v. State, 597 So. 2d 776 (Fla. 1990) and Patterson v. State, 513 So. 2d 1257 (Fla. 1987), however neither case supports appellant's proposition. First, these proceedings do not involve a penalty phase, and therefore the requirement of factual findings by the judge regarding the existence of aggravating and mitigating circumstances pursuant to Patterson is inapplicable.

Second, Mason simply stands for the proposition that trial courts, as fact finders, should determine the weight to be given conflicting evidence. The state does not disagree with that

proposition. However, there is no indication in this record that the trial judge did not make its own independent findings of fact. Simply because the court decided to incorporate the findings by one party does not mean that the court did not make its own implicit findings.

Following the completion of the evidentiary hearing, appellant advised the judge that both parties **agreed** to provide written closing arguments. (PCR 6761). At that point, the trial court then requested that both sides submit proposed orders. Not only did appellate counsel **not** object, appellate counsel stated, "we'll be happy to oblige." (PCR 6762). The court then explained its reasoning for the request:

> Let me just tell you, I think it helps me. It does. And I read the memo. I read 'em like I read every letter I get from every inmate, I mean I just—I do. And then I try to digest what I think is contained therein. And then the order tells me how the memos ties into that, it ties into the record. I mean, because that's what the order should do. And so if you don't mind doing that. Also I think, you know, without being so presumptuous as to tell the appellate courts, that it is probably helpful to them too. So if you'll do that, I'll thank you."
>
> And I think that it should definitely be a part of the record. And I'd just like the memo in there when it goes up, for whatever reason, Okay?
> APPELLANT'S COUNSEL: **I'll certainly oblige you.** (PCR 6762-6763).

The record clearly establishes that the trial court, acted with the consent of both parties, and did nothing improper. Any

substantive argument appellate wished to make regarding the content of the state's pleadings could have been made on rehearing. (PCR 6910-6916). Additionally appellant currently has the opportunity to make any argument deemed necessary on appeal.

In summation, there is nothing in the case law or pursuant to statute which precludes a trial court order from incorporating by reference those pleadings. Furthermore, appellate counsel **requested** the opportunity to provide written argument, and appellate counsel **willingly provided a proposed order** for the court's consideration. To then suggest that the court's actions in accepting those documents was improper is disingenuous.

And finally, on this record it is clear that the trial court made its own determination regarding the merits of this case as the court explained how it viewed the relevance of the written memos and propose orders.[12] Appellant's request to vacate the lower court's determinations must be denied.

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[12] The trial court's order incorporated by reference the state's memorandum and not any proposed order.

ISSUE V

PIETRI'S CLAIM THAT HE IS INSANE TO BE EXECUTED IS LEGALLY INSUFFICIENT

Pietri claims that he, "is insane to be executed." **See initial brief at 99.** Immediately thereafter, Pietri concedes that the claim is "not ripe for consideration". **Initial brief at 100,** Pietri raises this inadequate claim in an effort to "preserve" the claim for later review. The state asserts that summary denial was warranted. See LeCroy v. State, 727 So.2d 236,239 (Fla. 1998)(upholding summary denial of motion were there is no factual support for conclusory claim) ; Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations). See also Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) ("The second and third claims are devoid of adequate factual allegations and therefore are insufficient on their face."); Cf. Woods v. State, 531 So. 2d 79, 80 (Fla. 1988)(finding procedurally barred claim that executing defendant with diminished capacity is cruel and unusual punishment).

Finally in the future, if Pietri is able to demonstrate good cause as to why he should be entitled to file an amendment or

successive motion, that issue would be addressed at the appropriate time. See generally Florida R. Crim. Pro. 3.850 (f); See McConn v. State, 708 So. 2d 308 (2nd DCA 1998)(finding insufficient, defendant's request to amend postconviction motion based on allegation that it was "in the best interest of justice"). Summary denial is warranted.[13]

[13] Nor does filing an insufficient pleading preserve the claim for future consideration in federal court. Cf. Webster v. Moore, 199 F.3d 1256 (11th Cir. 2000)(ruling that tolling mechanism of federal habeas provision is not applicable unless state pleadings comply with state court limitations and requirements).

ISSUE VI

PIETRI CLAIMS THAT HIS TRIAL WAS FRAUGHT WITH HARMFUL CUMULATIVE ERROR IS LEGALLY INSUFFICIENT AND PROCEDURALLY BARRED, CONSEQUENTLY SUMMARY DENIAL IS WARRANTED

Pietri claims that due to the, "sheer number and types of errors involved in his trial," he is entitled to a new trial. **Initial brief at 100.** The state asserts that summary denial is warranted as this claim is procedurally barred as it was or could have been raised on direct appeal. See Zeigler v. State, 452 So.2d 537, 539 (Fla. 1984) ("In spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So.2d 419 (Fla. 1988); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994)(same); Rivera v. State, 717 So. 2d 477, 480 n.1 (Fla. 1998)(affirming summary denial of claim that cumulative error resulted in unreliable trial); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998)(finding all claims to be either without merit or procedurally barred and therefore there is no cumulative error effect to consider); Sireci v. State, 27 Fla. L. Weekly S183, S185 (Fla. February 28, 2002).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's denial of appellant's motion for postconviction relief.

Respectfully submitted,

CHARLES J. CRIST JR.
Attorney General

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CELIA A. TERENZIO
Assistant Attorney General
Fla. Bar No. 0656879
1515 N. Flagler Dr.
Suite 900
West Palm Beach, FL 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to William Hennis III, Assistant CCR-South, Office of the Capital Collateral Regional Counsel, 101 N.E. 3rd Ave. Suite 400, Fort Lauderdale, Fl. 33301, this 15th day of October, 2003.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

____

CELIA A. TERENZIO
Assistant Attorney General