IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2314

NORBERTO PIETRI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

NEAL A. DUPREE
Capital Collateral Regional Counsel
Southern Region
Florida Bar No. 311545

WILLIAM M. HENNIS III
Assistant CCRC-SOUTH
Florida Bar No. 0066850

LAW OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
SOUTHERN REGION
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301

(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This appeal involves the denial of Mr. Pietri's Rule 3.850 motion following a limited evidentiary hearing. References in the Brief shall be as follows:

(R. __). -- Record on direct appeal;

(PCR. __). -- Record on postconviction appeal.

Other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE AND OF THE FACTS

The Circuit Court for the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, entered the judgement of conviction and sentence of death at issue in this case. The Palm Beach County, Florida grand jury indicted Mr. Pietri for one count of first degree premeditated murder in addition to fifteen other counts on September 13, 1988 (R. 3177). Mr. Pietri's jury trial took place before Judge Marvin U. Mounts. An initial attempt ended in a mistrial on January 23, 1990. The actual trial began on February 1, 1990 and lasted until February 7, 1990. The jury found Mr. Pietri guilty of one count of premeditated murder and all other counts as charged, except that he was acquitted of false imprisonment (R. 2673, 3603). The penalty phase began on February 22, 1990. After a one and a half day hearing, the jury voted in favor of death by a margin of eight (8) to four (4) (R. 3099-3102). On March 15, 1990, the court sentenced Mr. Pietri to die in the electric chair. (R. 3133). On direct appeal, the Florida Supreme Court affirmed the conviction and sentence but struck the aggravating circumstance of

cold, calculated and premeditated, holding the error to be harmless. Pietri v. State, 644 So.2d 1347 (Fla. 1994) *reh'g denied*, August 22, 1994. Mr. Pietri timely petitioned to the United States Supreme Court for certiorari was denied on June 19, 1995. Pietri v. Florida, 115 S. Ct. 2588 (1995). On March 14, 1997, Mr. Pietri, filed an incomplete Motion to Vacate in order to toll the time in which he is entitled to file a Petition for Writ of Habeas Corpus in federal court. See 28 U.S.C. §2244(d)(2) (1996). On January 27, 1999, Mr. Pietri filed a second incomplete Motion to Vacate at the direction of the trial court, prior to the trial court's subsequent determination that the public records process had been completed. A final consolidated Motion to Vacate was filed on March 3, 2000 at the direction of the trial court (PCR. 4547-4673). Following a Huff[1] hearing, the lower court entered an order granting a limited evidentiary hearing as to Claims VII, VIII (paragraphs 1-17 only), X and XI in Mr. Pietri's Rule 3.850 motion, and summarily denying the other claims (PCR. 4863). The evidentiary hearing was conducted over

[1]Huff v. State, 622 So. 2d 982 (Fla. 1993).

three sessions: October 23-24, 2001, February 5-7, 2002 and March 19-20, 2002. Post-hearing memoranda were filed simultaneously on July 5, 2002 (PCR. 6827-6882, 6786-6826). In a one-page order, the court denied all relief on August 27, 2002 (PCR. 6902). A motion for rehearing was filed on September 10, 2002, which was denied on September 13, 2002 (PCR. 6910-6916, 6917-6923). This appeal follows.

At the evidentiary hearing, the following evidence was adduced from the witnesses:

Donnie Murrell, one of the two lawyers who appeared for the defense at Mr. Pietri's trial, was the first witness at the October 23, 2001 session of the evidentiary hearing. He testified concerning an interview that the State had conducted with him the day before his testimony (PCR. 6007-6032). Murrell stated that Paul Zacks, the assistant state attorney, had spoken with him informally two or three times since the filing of Mr. Pietri's motion for post conviction relief. He also said that a formal meeting with the State had been arranged a week before the evidentiary hearing date and had taken place over a hour beginning

at 10:30 a.m. the preceding day (PCR. 6008). He said that he had called Mr. Pietri's postconviction counsel a few hours after his meeting with the State (PCR. 6008). The witness then reviewed a copy of Defendant's Motion to Disqualify the Office of the State Attorney, Defendant's Exhibit #1, which had been filed earlier in open court, and he confirmed that the account of his conversation with the state attorney the day before included in the motion was accurate (PCR. 6009). Mr. Murrell stated that his conversation with the state attorney had made him "extremely angry" and that in addition to calling post conviction counsel, he had called the Office of the Statewide Prosecutor to see if he could report a crime (PCR. 6010). He also testified that he had counseled with a lawyer although he was not represented in court by counsel. He stated that he had not decided how to proceed in the matter (PCR. 6010). He said that he had not advised postconviction about any actions that he should take, but agreed that Mr. Pietri's counsel had told him that he would probably file a motion to disqualify the Office of the State Attorney (PCR. 6011). Murrell offered his opinion that

the actions of the state attorney were in violation of the tampering with witnesses statute in Chapter 914 of the Florida Statutes (PCR. 6011).

Murrell then described the events in his one hour meeting with the state the day before which lead to his concerns. He stated that about halfway through the meeting, the state attorney began to ask him questions regarding trial counsel's performance at trial (PCR. 6012). Murrell said that he had "offered him my opinion that I thought in certain aspects, the penalty phase in particular, we had probably failed our client" (Id.). He said that the response of the state attorney was to tell him that his office "has a policy of reporting lawyers who admit ineffectiveness to the Florida Bar" (Id.). Murrell said that he then "questioned [the state attorney] as to why he needed to tell me that" (PCR. 6013). He said that the response he got was that "this is a no win situation here" and that if he had not been told "you will be angry at me later" (Id.). Murrell testified that he replied to the state attorney by saying "do what you got to do" (Id.). He said that the state attorney responded by telling him not to get

angry, and advising him that "you need to think about it before you throw yourself on the sword, we are just, we are just chatting" (Id.). He replied, saying, "if we are chatting then this chat is over," but that the state attorney continued with another 25 minutes of specific questions (Id.). Mr. Murrell detailed several areas where he told the state attorney he believed he had performed inadequately, which he said elicited another warning about Bar referral (PCR. 6014). Murrell said that before the meeting he had heard that Mr. Zacks had a policy of reporting attorneys to the Bar, but that he was not sure it was actually the policy of the Palm Beach County State Attorney's Office (PCR. 6016). Murrell said that he thought the state attorney was trying to intimidate him into not testifying as to his opinion of his own performance that he shared in the interview (PCR. 6017-6018). He testified that he was now considering reporting Mr. Zacks to the State Bar (Id.).

On cross-examination, Mr. Murrell stated that he was not aware of any ill-will on the part of Mr. Zacks in their prior relationship (PCR. 6021). He stated he was

aware that the Bar has a mandatory reporting obligation for lawyers who become aware of possible ethical violations (PCR. 6024). He also stated that he did not interpret the "Rat Rule" as "a threatening requirement" (Id.). He confirmed that he had his lawyer call Mr. Krischer, the Palm Beach State Attorney concerning this matter (PCR. 6025). He testified that Mr. Zacks' "warning" to him came about thirty minutes into their interview, only after "I talked about what I thought was ineffective I told you about those examples, that's when the warning came. I assume that warning was directed to the opinions" (PCR. 6029). Murrell also testified that Mr. Zacks had a reputation for reporting lawyers to the Bar (PCR. 6029-6030).

Peter Birch, who was lead counsel for Mr. Pietri at trial and also appellate counsel, first testified at the evidentiary hearing on October 23, 2001 (PCR. 6052-6174). He stated that he was appointed to represent Mr. Pietri on January 17, 1989 (PCR. 6054). Birch testified that co-counsel, his law partner Donnie Murrell, was appointed to Mr. Pietri's case in October 1989 after Birch filed a motion asking for co-counsel

"generally to help" (PCR. 6059). Later testimony established that Mr. Birch was in a position to get co-counsel as early as February 1989, but failed to do so (PCR. 6090-6092). He testified that it was his "guess" that Virginia Snyder, the only paid investigator who worked on the case, probably did no work on the penalty phase of the case (PCR. 6066). As of October 1989, Mr. Birch testified that he and Mr. Murrell had no specific plan for how to try the case or to divide up responsibilities (PCR. 6067-6068). Mr. Birch testified that he believed that Mr. Pietri was of normal intelligence (PCR. 6071). Mr. Birch reviewed documents from the court file and confirmed that a defense psychologist, Dr. Harry Krop, had been appointed on December 22, 1989, about a month before the case initially went to trial (PCR. 6074). He stated that he hired Dr. Krop primarily but not exclusively to assist counsel in the preparation of phase II (PCR. 6074-6075). He further testified that he recalled receiving a letter from Dr. Krop after Dr. Krop met with Mr. Pietri and that he was "extremely disappointed in the outcome of his evaluation" (PCR. 6077-6079). He

acknowledged that Dr. Krop had asked in his letter for additional background materials that he never provided to Dr. Krop. He testified that his recollection was that he believed at the time that "[Dr. Krop] would not be ideal for Phase II" (PCR. 6079).

Birch testified that he recalled that prior to the offense, Mr. Pietri was staying in a motel with a number of other people, including Yoris Santana who was called as a witness at the penalty phase, and Mickey Brantley Serrano, Luis Serrano, and Randy Roberts who were not called at trial (PCR. 6079-6081). He identified documents from the court file that indicated that the public defender moved to withdraw from Mr. Pietri's case because of a conflict concerning his representation of witnesses Randy Roberts and Luis Serrano (PCR. 6087-6089). Birch testified that he believed the only witness called at the guilt phase was the defendant himself (PCR. 6092). He stated that he "would hate to think" that preserving the sandwich was the sole factor for limiting the guilt phase witnesses to Mr. Pietri, "unless those [other potential] witnesses I think were borderline" (PCR. 6093). Mr. Birch testified that

although he was aware that intoxication was a potential defense for Mr. Pietri, he did not think a jury would accept intoxication as a reason for killing a police officer and he did not think it was a very strong defense (PCR. 6095). Therefore, he testified, "I never gave it serious consideration as presenting it that way to the jury" (Id.). He further testified that "[b]ased on my knowledge of cocaine, which I admit was not extensive and based on my understanding of cocaine intoxication as a defense, I would have felt that he needed to be under the influence of cocaine, having ingested it earlier in the day for that to have any viable chance" (PCR. 6096). He then testified that he had never used the intoxication defense during his legal career (PCR. 6097). He then stated that at the time of the trial he had a general understanding of the cocaine addiction withdrawal process as it related to intoxication and stated that his investigation had been deficient:

> My thinking back then, as best as I could recall, would be that the influence of drugs would had to have been directed at that time by direct -- I mean, he is suffering from the

> influence of cocaine that he ingested earlier that day or the night before. So it wasn't like he had to have had much cocaine in his body. To be honest, I don't think I ever knew how much cocaine he had in his body on August 22, 1988.

(Id.). Mr. Birch testified that he could not recall why he failed to call other witnesses at the guilt phase to support or bolster the testimony of Mr. Pietri (PCR. 6098). He testified that the depositions he took of Yoris Santana and Mickie Brantley [Serrano], two friends of Mr. Pietri who were staying with him in a hotel before the August 22, 1988 shooting of Officer Chappell, contained information about Mr. Pietri's substance abuse that would have been useful in supporting both a guilt phase intoxication defense and statutory and non-statutory mitigation (PCR. 6099-6107). Mr. Birch testified he was aware that Randy Roberts was another of the "circle of friends" who was with Norberto before the shooting (PCR. 6107). After he reviewed the police statements of Randy Roberts, he testified that the information contained in Mr. Roberts' statements about Mr. Pietri and his addiction to rock cocaine and constant use of cocaine in the days before the murder

would have been useful evidence to have presented before a jury in support of an intoxication defense and penalty phase mitigation. He testified that he had failed to depose or interview Mr. Roberts (PCR. 6107-6113).

He stated that he also had failed to depose or interview Mr. Pietri's brother, Luis Serrano, the fourth person present at the Airport Hotel and the Aqua Hotel with Mr. Pietri throughout the seven days after Mr. Pietri walked away from Lantana Correctional (PCR. 6110-6111). Mr. Birch testified that he could recall no reason for his failure to investigate these witnesses to Mr. Pietri's drug use around the time of the offense, stating that "[w]e, obviously, thought calling No[r]berto himself was the way to go" (PCR. 6112).

Birch testified that he did not recall if he had questioned potential jurors about their feelings about the intoxication defense (PCR. 6113). He stated that if the record reflected that an intoxication instruction was given and that he had acquiesced in it, he had no memory to the contrary (PCR. 6114). Mr. Birch testified that he did not recall intoxication "being a big focus in my closing argument" (Id.). He said that

he believed there was no premeditation and that the facts supported his position, therefore he did not view the case as one where his goal was to negate premeditation (PCR. 6115).

Birch testified that the experts that he eventually presented at the penalty phase, social worker Jody Iodice and psychologist Dr. Caddy, were unknown to him at the time he was preparing the guilt phase case (PCR. 6116). He also stated that he did not provide Dr. Krop with the either the depositions and police statements of Mickie Brantley, Randy Roberts or Yoris Santana or with any background materials about Mr. Pietri's drug problems in prison (PCR. 6116).

Mr. Birch reviewed his motion for payment of expert fees (PCR. 6121). He testified that it documented that the initial telephone consultation with Dr. Caddy was five days prior to the penalty phase, and that Dr. Caddy's evaluation of Mr. Pietri took place on the day before the two day Phase II hearing began (PCR. 6122). Mr. Birch testified that he was unable to say what if any psychological testing was performed by Dr. Caddy (R. 6124). He testified that he did not personally prep

either Dr. Caddy or Jody Iodice for their testimony (Id.). He stated that he did not have a paid investigator working on the penalty phase (PCR. 6125). He said that he was "pretty sure" that expert Jody Iodice never met with Mr. Pietri because "the focus of her testimony had to do with addiction in general and not specifically Norberto" (PCR. 6125). He testified that if he had examined the defense experts at the penalty phase, he would have attempted to elicit statutory mitigation from them (PCR. 6126).

He then testified that he did not believe that at the trial he had obtained four different Department of Corrections records that he agreed were evidence that Mr. Pietri had substance abuse problems while he was incarcerated, including the reported use of cocaine "a couple of days" before his final walkaway from Lantana Correctional (PCR. 6127-6132).[2] He testified that if he had had these DOC reports of drug use by Mr. Pietri, he would have provided them to Dr. Caddy (PCR. 6133).

[2]One of the records, a psychological screening report from Lantana Correctional dated March 14, 1985, indicated that Mr. Pietri's IQ score was 82. Mr. Birch testified he could not say whether this IQ score would be considered normal or not (PCR. 6127).

Mr. Birch testified that he recalled filing a pre-trial motion in December requesting a thirty day continuance between Phase I and Phase II, and renewing that request after the guilty verdict was returned (PCR. 6133). He stated that "we needed to find people to help us, we needed more time to find people to help us" (PCR. 6133-6134). Mr. Birch testified that after the proceedings, he received a letter from the County Attorney concerning Dr. Caddy's bill in excess of the authorized amount (PCR. 6138).

On cross-examination, Mr. Birch testified that Mr. Pietri's case was the first he had ever handled which involved the killing of a police officer (PCR. 6141). He stated that until the day before the trial commenced he had attempted to plead out Mr. Pietri's case, and that in fact a plea agreement had been reached with the State for a life sentence plus 130 years for the additional felonies for which Mr. Pietri was charged (PCR. 6142-6143). He further testified that Mr. Pietri had signed the plea agreement and was in full agreement to pleading guilty (PCR. 6144). According to Mr. Birch's testimony, the father of the victim scuttled the

plea to a life sentence:

> And the condition was that Tom Chappell approve the plea agreement along with the West Palm Beach Police Department. But Mr. Burton informed me that the West Palm Beach Police Department approved it provided Mr. Chappell and the rest of the family did. But it all boiled down as represented to me that one person Tom Chappell was the only one that did not approve the plea agreement, because of that they would not offer the plea agreement.

(PCR. 6143). Birch testified that by January 1990 he had a good relationship with Mr. Pietri (PCR. 6144). He stated that the defense of "some other guy did it" was cast aside relatively early in trial preparation (PCR. 6148). He testified that the preparation for Mr Pietri's testimony about his drug use at the guilt phase was Donnie Murrell's responsibility (PCR. 6150). He stated that his thinking regarding what witnesses to call involved both what a given witness had to offer along with "what is going to be disclosed that could hurt the case" (PCR. 6151). Trial counsel described the problems he had finding experts, stating: "I remember being frustrated because it did seem as though I wasn't having a whole lot of luck in finding someone

that could help us" (PCR. 6154). He testified that he believed that Dr. Krop was "less than enthusiastic about the case" and that he and Dr. Krop "just didn't click" (PCR. 6155). He stated that the five experts that he and Donnie Murrell considered all were to be directed at the penalty phase (PCR. 6156). Mr. Birch testified that Gail Martin, an investigator at the public defender's office, in the capital division, did some unpaid volunteer work helping him in the preparation of phase II (R. 6158). He explained that "I wasn't really giving her a whole lot of direction I was letting her do whatever she thought was necessary, that kind of thing" (PCR. 6158). He testified that Ms. Martin contacted some family members and may have obtained some records for him (PCR. 6159-6160). Trial counsel Birch testified he had unsuccessfully contacted at least five mental health experts before he found Dr. Caddy, who came "highly recommended" (PCR. 6160). He agreed that Dr. Caddy wanted more time (Id.). Birch testified that he had no recollection as to whether the experts he tried to contact were unable or unwilling to opine about cocaine use as mitigation (PCR. 6162). Mr. Birch

testified that he took many pre-trial depositions and filed many pretrial motions in the case (PCR. 6163-6164). He testified that his defense in Mr. Pietri's case was "that there was no premeditation, this was second degree murder" and that factually "that the conduct of Norberto Pietri was not that of someone who was engaged in a premeditated killing (PCR. 6164-6165). He testified that he prepared the witnesses he examined and he kept Mr. Pietri informed as to everything that was going on related to plea discussions, strategy, and discovery (PCR. 6166).

On redirect, Mr. Birch testified that Virginia Snyder's involvement as an investigator in the case was concerned with the defense that somebody else did it, and that apparently she was still involved in the case as late as December 1989 (PCR. 6167). He testified that he did not recall ever having a conversation with Mr. Pietri specifically involving a decision not to use the intoxication defense (PCR. 6168). He testified that his recollection of his intention in his closing argument was to say "that whole thing that man cared about was cocaine and that his whole function and

purpose for living was to get cocaine and that when he was stopped by Brian Chappell that is what he was thinking about. He wasn't thinking about shooting a police officer, he was thinking about getting cocaine" (PCR. 6170). He then testified that he did not see that argument as the same as an intoxication offense (PCR. 6170). He testified that he could not recall as to why he never interviewed or deposed Luis Serrano (R. 6170). He testified that in 1989-1990 he did not know the field of neuropharmacology existed (PCR. 6172).

Joriseli "Yoris" Santana testified at the evidentiary hearing on October 23, 2001 (PCR. 6174-6187). He testified that he knew Mr. Pietri as "Robert" or "Spider" (PCR. 6175). He stated that he went to school with two of Mr. Pietri's brothers (PCR. 6176). He was staying with Norberto Pietri and Luis Serrano, Mickie Brantley, and Randy Roberts at the Airport Inn and the Acqua Motel from August 18th until Wednesday August 24, 1988 (PCR. 6177). He was arrested at The Acqua on August 24, 1988, and Luis, Mickie and Robert/Norberto were arrested later that day (Id.). He testified that he was deposed in Mr. Pietri's case in

May 1989 and he identified a copy of his deposition (PCR. 6178). Mr. Santana described Mr. Pietri as an "uncontrollable" crack cocaine user during the week he spent with Mr. Pietri before and after Officer Chappell was killed (PCR. 6180-6183). He agreed with his prior deposition that Mickie Brantley and Luis Serrano were also doing cocaine all the time with Norberto (PCR. 6182). He described Norberto's behavior when he was smoking crack cocaine during the week at the two motels as "[l]ike somebody whose out of their mind" (PCR. 6184). He described Mr. Pietri as "nervous all the time, just everything bothered him, stayed quiet, whatever, just, just pretty much that. Somebody knocked on the door it was like, it was like he was going crazy or something. Turned off the lights, everything. Just, like, get in the shower, stay quiet, you know. Didn't -- to me it seems even more abnormal but I don't do any drugs, I never have, and, you know, just to watch, like somebody knock on the door big deal, so to him it was like --" (PCR. 6185). **Donnie Murrell** returned to testify on October 23-24, 2001 about his involvement in Mr. Pietri's case (PCR. 6188-6267, 6329-6351). Donnie

Murrell testified that the Pietri case was his first capital case and his first work on a penalty phase (PCR. 6190). He stated that Peter Birch was the "captain," so he basically did what Peter said. Murrell testified that although his assignment was not clearly broken down, generally he was working on the penalty phase of the case (PCR. 6193). He said that neither he nor Mr. Birch travelled to Mr. Pietri's homeland, Puerto Rico, that he had minimal contact with investigator Virginia Snyder, but he did travel to Atlanta to meet with expert Jody Iodice (PCR. 6194). Murrell testified that Mr. Birch had "a very strong, very close relationship" with Mr. Pietri, who "trusted him completely and understood Peter was devoted to his case" (R. 6195). He testified that his view of the guilt phase was that it was a "classic second degree murder" case, involving the "irrational actions of a dope addict" (PCR. 6197). He testified that his goal in his direct examination of Mr. Pietri was to negate premeditation (Id.). He described voluntary intoxication as "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" (PCR. 6202). Murrell testified that the elements of an intoxication defense are that "the Defendant voluntarily consumed or ingested a substance that made him so intoxicated at the time of the offense he was unable to tell right from wrong" (PCR. 6204). He testified that he had never used an intoxication defense as the sole defense in a case (PCR. 6204). He stated that there were witnesses he and Peter Birch could have called at the guilt phase who could have corroborated Mr. Pietri's substance abuse around the time of Officer Chappell's death (PCR. 6205). He testified that he did not know what sort of experts they could have retained to corroborate Mr. Pietri's substance abuse (PCR. 6205). He stated he never knew that Dr. Krop was retained to evaluate Mr. Pietri (PCR. 6206-6208). He did not recall ever talking to Dr. Krop or to Dr. Haynes in Mr. Pietri's case (PCR. 6209). He has had no experience using neuropharmacologists, and no knowledge as to their expertise, other than generally as substance abuse experts (PCR. 6210). He testified that at the time of Mr. Pietri's trial he knew very little about

psychological testing or IQ testing. (PCR. 6211). He was appointed to the case only about ninety days before they went to trial (PCR. 6213). Mr. Murrell testified that he did not recall ever discussing with Mr. Birch the possibility of using Jody Iodice as an expert about cocaine addiction at the guilt phase (PCR. 6214). Mr.Murrell testified that Ms. Iodice never met with Mr.Pietri or any of his family members (PCR. 6216). He examined her at Mr. Pietri's penalty phase, but he never asked her about the presence of statutory or non-statutory mitigation in Mr. Pietri's case (PCR. 6216-6217). He said that some of Ms. Iodice's penalty phase testimony about cocaine abuse was potentially relevant as to the issue of premeditation (PCR. 6220).

Mr. Murrell also identified the prison records concerning Mr. Pietri's Beta IQ score and prison drug use that Peter Birch had previously been asked about, and he agreed that he did not recall having them at the time of Mr. Pietri's trial (PCR. 6221-6223). He agreed that if he had been aware of the records, they would have been useful for experts and as evidence before the jury at both the guilt phase and at the penalty phase,

especially in light of the trial court's sentencing order finding no mitigation (PCR. 6224). The witness testified that he was "almost a hundred percent certain" that he was unaware at the time of trial that there was a DOC report of Mr. Pietri using cocaine days before the escape from Lantana Correctional (PCR. 6226). He also testified that Dr. Caddy did not do any psychological testing (PCR. 6227). Murrell testified that based on his contact with Norberto, he believed that he was of normal intelligence (PCR. 6227).

Mr. Murrell said that by the time he was appointed to the case as second chair, all the depositions had been completed. He stated that he probably reviewed all the depositions in preparation for the trial (PCR. 6227). Murrell testified that in their pre-trial depositions, Yoris Santana and Mickie Brantley both described Mr. Pietri as being on a crack cocaine binge during the four or five days prior to the killing (PCR. 6228). He and Birch decided not to call them at the guilt phase both because they had negative information about Mr. Pietri to impart and due to their concern that they could only corroborate that Mr. Pietri had smoked

cocaine several hours before the shooting (PCR. 6229). He testified that he could not explain why they chose to call Mr. Santana at the penalty phase despite these concerns (PCR. 6230-6231). He did not recall reviewing Randy Roberts' police statements at the time of the trial and could not say why Roberts was not deposed. He stated that he never spoke with either Randy Roberts or Luis Serrano (PCR. 6232). Mr. Murrell testified that presenting only Mr. Pietri's testimony to "preserve the sandwich" or the opportunity for rebuttal, was not a consideration because "I think we win cases by putting on evidence" (PCR. 6233). He stated that Dr. Caddy's evaluation of Mr. Pietri the day before he testified at the penalty phase was at "the 11th hour and 30 minutes" (PCR. 6236). He prepared and examined Dr. Caddy at the penalty because Mr. Birch "had a handful dealing with the family" (Id.). He testified that he recalled that Gail Martin volunteered to do some work on the penalty phase, but he could not say what role she had (PCR. 6237).

He testified that due to lack of preparation, his examination of Dr. Caddy brought out information

concerning Norberto as a 13 year old being involved in molesting a younger relative (PCR. 6238). He also stated that during his examination of Dr. Caddy, Caddy indicated no knowledge of Mr. Pietri's drug use in prison (PCR. 6239). Murrell testified that "Caddy was hand strung. He did not have the time to do what he needed to do correctly" (Id.). Mr. Murrell testified that it would have been useful to get Dr. Caddy's proffered opinion testimony at the penalty phase that Mr. Pietri did not have the specific intent to kill Officer Chappell, before the jury at the guilt phase (PCR. 6241). Based on his review of his billing statement, Murrell testified that neither he nor Peter Birch met Dr. Caddy face to face until the morning of the day he testified at Mr. Pietri's penalty phase (PCR. 6243). Murrell testified that if Dr. Caddy had been available at the guilt phase, he would have supplied him with the prison records that were noted previously and any other evidence that helped to establish that Mr. Pietri was suffering from cocaine withdrawal at the time of the offense (PCR. 6244).

Anything you can get to your

> evaluating physician or psychologist is helpful. The totality of their opinions and determination and diagnoses are only as strong as the time and effort that's put into the evaluation and the information that they have available to them to make those, to form those opinions from. Caddy didn't have any of the things that he needed. He had a three hour meeting with our client and that's it. He did no testing, he had nothing to corroborate what our client told him. He had no -- didn't read the depositions, no opportunity to read the police reports. He didn't have anything he needed to make an informed opinion. I think, I think it completely destroyed his credibility.

(Id.). Trial co-counsel Murrell said that Mr. Pietri's family members were not called at the guilt phase because he did not think their accounts of Mr. Pietri's drug binging "were sufficient to make a jury understand that the intent could not be formed" (PCR. 6245). He stated that presenting corroborative witnesses at the guilt phase would have done no harm (PCR. 6247). Murrell testified that he and Birch misused Jody Iodice by not having her meet and interview Mr. Pietri (PCR. 6250). His testimony summarized his view of their presentation of Dr. Caddy in the circumstances where he was unable to do "a complete psychological work-up: "The

State was able to just cut him down at the knees because he had nothing to corroborate what he sat there and talked about other than our client's statements to him and [an] interview with one sister" (PCR. 6251). Mr. Murrell testified that after reviewing his opening statement at the penalty phase, it "certainly looks like" his comments were focused on Mr. Pietri's use of cocaine (PCR. 6253). He testified that he believed that Mr. Pietri went through a genuine religious conversion during his incarceration prior to the trial (PCR. 6254). He further testified that he and Peter Birch talked about the conversion and they both were impressed by it (PCR. 6255).

On cross-examination, Murrell testified that he had been practicing for nine years prior to Mr. Pietri's trial, most of that time exclusively in the area of criminal defense (PCR. 6256). He testified that his role on the Pietri case was to assist Mr. Birch as a second chair (Id.). He testified that he would not be surprised if the record reflected that Mr. Birch took over ninety depositions and filed more than seventy pre-trial motions in the Pietri case (PCR. 6257). He

testified that he and Birch likely consulted pre-trial with local attorneys with prior capital experience, like assistant public defender Richard Greene (PCR. 6258). Murrell agreed that evidence that Mr. Pietri failed to take advantage of substance abuse programs in prison might not be helpful in front of a jury (PCR. 6260). He stated that he spent "a lot of time together" with Mr. Pietri preparing for him testimony at the guilt phase (PCR. 6261). He said that his view of Pietri's testimony was that "the jury was given a sense of his background and where he came from" (PCR. 6263). He opined that in cases of crimes of violence, he believed that a jury is unlikely to accept a voluntary intoxication defense because "it's something repugnant to lay people" (Id.). Murrell testified that as to the guilt phase and the penalty phase, they were unprepared because they did not have experts (PCR. 6265). His purpose in calling Judy Iodice at the penalty phase was to complement Mr. Pietri's guilt phase testimony by providing the jury with testimony from someone else with personal experience of cocaine addiction (PCR. 6330). He testified that they were attempting to educate the

jury "that the cravings from the addiction are certainly as powerful as the high and as compelling" (Id.). However, he stated that the problem was that her general testimony was not tied to Mr. Pietri (PCR. 6331). He testified that Mr. Pietri's detailed account of the day of the shooting and the days before while he was using cocaine "was not a problem, it was reality. . .and it gets back to I think sort of the misconception about a cocaine high" (Id.). Mr. Murrell testified that the decision to put on Dr. Caddy was made in a context where he and Birch had no alternative (PCR. 6333). He stated that he recalled that Peter Birch had contact with some of Mr. Pietri's family members "[b]ut I cannot tell you with who or how extensive it was" (PCR. 6335). He testified that putting on evidence at Phase II that Mr. Pietri had a brother in prison for murder might be something that would go "to the whole family context" (PCR. 6336). Mr. Murrell testified that he believed that his examination of Mr. Pietri brought out a "more unvarnished" history, including drug dealing, in an attempt to bolster his credibility (PCR. 6338). He stated that the witnesses called at the penalty phase

were part of a plan (Id).

On redirect, Mr. Murrell testified that Dr. Caddy's testimony at the penalty phase regarding Mr. Pietri allegedly telling him that he "aimed" the gun at the victim, was the result of lack of preparation time with Dr. Caddy (PCR. 6344). He described the testimony as "totally inconsistent with anything else we had presented, argued or ever heard. I think Caddy, frankly, made a mistake in what he thinks the client told him" (Id.). He further testified that "had I known Caddy was going to describe it that way, never would I have elicited that testimony. I think it undercut everything we presented earlier" (Id). On re-cross, Mr. Murrell said that he was uncertain if Dr. Caddy's subsequent testimony that Mr. Pietri's actions were "a psychotic reacted decision" undid the damage caused by his prior "picked up the gun and aimed it" testimony (PCR. 6347). In response to a question from the lower court, Mr. Murrell described the performance of himself and Mr. Birch at the penalty phase as "woefully inadequate" (PCR. 6351).

Virginia Morales testified at the evidentiary hearing on October 24, 2001 (PCR. 6281-6304). She testified that she is forty-nine years old and the third oldest of the 14 siblings that include Norberto Pietri (PCR. 6281-6282). She stated that she is about eleven years older than Norberto (Id). She described her father's heavy drinking as she was growing up in Puerto Rico and the beatings that her mother and the children suffered an his hands (PCR. 6282-6286). She testified that Norberto's parents never married and that his father was an alcoholic who spent all of the family's money on drink (PCR. 6283, 6311). She testified that the children did not have enough money for food in Puerto Rico (PCR. 6286-6287). She stated that they went to bed hungry and their mother could not defend them (PCR. 6294). She testified that Norberto's mother received no prenatal care until the eighth month of her pregnancy, nor did the children ever receive medical attention (PCR. 6285-6286). She testified that no one helped them (PCR. 6288). Virginia testified that Norberto seemed to be scared all of the time, he did not act like a normal child (PCR. 6289). She stated that it

seemed that something bothered him all of the time, and no one knew what it was (PCR. 6290). Virginia said that when Norberto, his mother and siblings moved to the United States, there was never enough room for all of the children (PCR.6291, 6293). She testified that she moved to the United States in 1968, with the rest of the family following afterwards. They all worked initially as migrant workers (PCR. 6289). At the age of 12 or 13, she testified that Mr. Pietri came to live with her in California, where she had a two bedroom house where ten people lived (PCR. 6292-6293). By 1979, she testified that Norberto was involved with gangs, so her brother Marino came to California and took Norberto back to Florida (PCR. 6294). She testified that she returned to Florida in February 1980, and recalled Norberto's battle with drugs in the early 1980s until he went to prison in 1984 (PCR. 6295-6296). Virginia testified that she saw Norberto when he first walked away from the work release program at Lantana Correctional Institution in 1988 (PCR. 6296). She described him as being excited about getting out of jail, telling her he only had two months left to serve

before his release date (Id.). She then testified that she next saw him a few days later, "about noontime" on the day that Officer Chappell was shot (PCR. 6298). She described Norberto as "mixed up" and not normal (PCR. 6297). She testified that she asked if he had escaped, but he denied it, "but he was like he didn't know what to do. He didn't know what to say" (Id.). Virginia testified that she also saw him on Wednesday, the day that he was arrested, and she described his behavior that day, handing her a flower, as abnormal (PCR. 6298-6299).

Edwin Serrano testified at the evidentiary hearing on October 24, 2001 (PCR. 6309-6328). Edwin Serrano testified that he has the same parents as Mr. Pietri but is five years older (PCR. 6310). He testified that he is serving a life sentence in the Tamaco Correctional Institution for murder (Id.). He stated that he moved to a West Virginia migrant camp from Puerto Rico at the age of ten (Id., 6314). He testified that the family was very poor and their father was an alcoholic and a "brutal wife-beater" who also whipped the children with whatever he could find (PCR. 6311, 6312). He testified

that Norberto's father brutally beat Norberto's mother, even while she was pregnant, and also beat the children (PCR. 6311-6313). He said that their father hit the children with belts, switches from trees, and electrical cords (PCR. 6311). He testified that during one particular beating, Norberto urinated in his pants (PCR. 6312). He stated that during the beatings, the children were not allowed to cry (PCR. 6312). He testified about Norberto first using drugs in California and then more extensively in Florida (PCR. 6318). He stated that Norberto became involved in violent gangs in California (PCR. 6317-6319). Edwin testified that when Norberto became involved with drugs he began inhaling spray paint, using marijuana, taking pills and doing THC (acid horse tranquilizers) (PCR. 6318, 6323). He described a escalating course of drug use and sales that resulted in him free basing cocaine with Norberto to the point where he described both himself and Norberto as addicts (PCR. 6321-6324). He testified that no one ever spoke with him about testifying in Mr. Pietri's case although at the time of Mr. Pietri's 1990 trial, he had been incarcerated since 1984 and was then in Baker

Correctional in Florida (Id.). He also named other family members with significant drug problems (PCR. 6328).

Freddie Serrano testified at the evidentiary hearing on October 24, 2001 (PCR. 6352-6364). Mr. Serrano testified that he is a younger brother, with the same mother and a different father [Freddie Torres], of Mr. Pietri, and that he is currently incarcerated in South Bay Correctional (PCR. 6352-6353). He testified that he was in Belle Glade Correctional serving time for grand theft auto in early 1990 at the time of Mr. Pietri's trial (PCR. 6354). He testified that he last lived with his brother Norberto between 1986-1987 in Greenacres, Florida when he was 15-17 years old (PCR. 6355). He stated that at that time Norberto was committing crimes, breaking in homes and cooking up cocaine (Id.). He testified although his brother did not introduce him to it, he was using crack or free base cocaine with Norberto while he lived with him (PCR. 6356). He stated that both he and Norberto were and are crack cocaine addicts to this day (PCR. 6357). He testified that during the time he lived with Norberto,

he smoked crack with Norberto and another brother, Luis Serrano,"every day, every night" (PCR. 6357). He stated that no attorney or investigator ever talked to him either about his life with Norberto or about testifying in Mr. Pietri's murder case (PCR. 6362). He stated that he would have talked to Norberto's attorneys back in 1990 (PCR. 6363). He described Norberto on crack as "always paranoid" (PCR. 6359). Freddie also testified that when Norberto was not on drugs he was "a loving person, very protective of his family" (PCR. 6361). Freddie testified that drugs changed the way his brother acted and behaved (PCR. 6362).

Luis Serrano testified at the evidentiary hearing on October 25, 2001 (PCR. 6377-6390). He stated that he is a brother of Norberto Pietri and that his twin sister is Ada Serrano (PCR. 6378). He testified that he is married to Mickie Serrano (Id.). Luis Serrano testified at the evidentiary hearing that he had been in trouble with the law and had been arrested for robbery at the end of the group crack cocaine binge when Norberto was arrested for murder in 1988 (R. 6383, 6387). He testified that although he has used illegal

drugs throughout his life, his brother Norberto was the source from which "I really learned about the stuff" (PCR. 6379). He testified that he first got cocaine from his brother at age thirteen, that he frequently smoked crack cocaine with Norberto and that he was a crack cocaine addict (PCR. 6380). He testified that he has now been "clean" for ten years (Id.). He described Norberto as a crack cocaine addict who "ran the show" (PCR. 6381). He testified that "[w]hatever [Norberto] said we did because all we wanted to do was smoke coke" and he was "the man of the coke" (Id.). Luis testified that he, Mickie Brantley, Randy Roberts and Yoris Santana were staying with Norberto at the Airport Inn and then at the Acqua Inn In August 1988 around the time of the shooting (PCR. 6381-6382). He testified that Norberto and the group, except for Yori Santana and Randy Roberts, were smoking crack "twenty-four seven" during the time they were at the Airport Inn and the Aqua (PCR. 6383-6384). He stated that "I believe that's the only thing got my brother in trouble right now, him being on that stuff. He needs help, he don't need no death row, just needs some help" (PCR. 6386).

He stated that he was in prison at the time of Mr. Pietri's 1990 trial, in either Gainesville or in Cross City (PCR. 6387). He stated that he was never questioned about Mr. Pietri's case (Id). He also testified that he never spoke to Norberto's attorneys or investigators, but that he would have testified in 1990 if he had been asked to do so (PCR. 6388). He further testified that he did talk to defense expert Dr. Jonathan Lipman in May 2001 about the use of drugs at the hotels in August 1988 (PCR. 6389).

Mickie Brantley Serrano testified at the evidentiary hearing on October 25, 2001 (PCR. 6390-6404). She stated that she was born on January 20, 1972 (PCR. 6390). She stated that she met Mr. Pietri through his younger brother Luis, who she first met when she was thirteen (Id.). She confirmed that she was one of the group of people with Mr. Pietri in August 1988 at the Airport Inn and the Acqua Motel (Id.). She reviewed her May 4, 1989 deposition on the witness stand, and she then testified that the testimony recorded therein was true (PCR. 6392). She stated that she would have been willing to testify for the defense in 1990 if she had

been asked (PCR. 6393-6394). She stated that Mr. Pietri was a crack cocaine addict in August 1988 and that she herself was "getting there" (PCR. 6394). She testified that during the period from Thursday when she first saw Mr. Pietri until the following Wednesday, "he was always high" (PCR. 6394). She confirmed her deposition testimony that Mr. Pietri had a real bad cocaine habit and was never off of cocaine (PCR. 6395). Ms. Serrano also reviewed on the witness stand a statement she made to the West Palm Beach Police on August 24, 1988 (PCR. 6396). She confirmed that when she saw Mr. Pietri in the woods on the Thursday afternoon that he walked away from Lantana Correctional, he was doing cocaine (PCR. 6396). She testified that she was never charged with any crimes as a result of the week around Mr. Pietri (PCR. 6397). She also testified that she spoke with Dr. Jonathan Lipman in 2001 (PCR. 6399). She testified that she probably would have spoken with a expert in 1990 before trial if Norberto's attorney had asked her to do so (Id.).

On cross-examination, Ms. Serrano testified that Mr. Pietri was facilitating her drug problems as a sixteen

year-old (PCR. 6402). She testified that she never witnessed Norberto hitting anyone, that he would just get "angry and hyper" (PCR. 6403).

Dr. Harry Krop testified as an expert psychologist for the defense at the evidentiary hearing (PCR. 5484-5544). Dr. Krop testified that he performed an initial evaluation of Mr. Pietri on December 12, 1989 at the request of Peter Birch (PCR. 5493). During that initial meeting, Dr. Krop said he took a basic history of Mr. Pietri's life and performed a mental status examination, which is typically what he does the first time he meets a defendant charged with first degree murder. (PCR. 5493). He defined his evaluation as being "preliminary" (PCR. 5494-5495). Dr. Krop testified that based on Mr. Pietri's self-report he could have testified in 1990 that he "most likely was intoxicated to some degree at the time of the incident in question" (PCR. 5506-5507). He also testified that if he had the background materials he reviewed when postconviction counsel contacted him about Mr. Pietri's case, he would have been able to testify in more detail relevant to the guilt phase intoxication issue (PCR. 5509):

> I would have testified as to the affects of cocaine, particularly the amount that Mr. Pietri was using and freebasing on a fairly continual basis, both in terms of his chronic use, as well as the few days prior to the incident in question, and how such an extensive use and continual use will cause individuals to become generally paranoid, hypervigilant and, again, have problems with their judgment and impulse control. So those would have been the areas that I would have testified.
>
> ***
>
> And, then, of course, the family interviews, which I had access to from the other experts, certainly would seem to have supported much of the family dysfunction and particularly supported the chronic substance abuse, as well as his behavior and his psychological status around the time in question, because of his extensive substance abuse.

(PCR. 5509-5510). Dr. Krop also noted during cross-examination that his impression when he interviewed Mr. Pietri in 1989 was that his intelligence was low average, an IQ of 80-90 (PCR. 5521). He testified that Dr. Terry Goldberg's WAIS-R short form testing was probably acceptable for determining an estimated IQ as part of an overall neuropsych battery (PCR. 5525).

Dr. Krop testified that he reported, in

correspondence dated December 26, 1989, to Mr. Birch concerning his preliminary conclusions: that Mr. Pietri was competent to proceed and there was no evidence to suggest that Mr. Pietri had been insane at the time of the offense (PCR. 5494). He testified that his report also indicated that Mr. Pietri's primary diagnosis was substance abuse, that he had family problems and he had a history of physical and sexual abuse, all factors that were potentially mitigating. He informed Mr. Birch that he would need additional information to proceed with a mitigation evaluation, specifically Department of Corrections records, medical records, school records, police reports, depositions of witnesses and past PSI reports. He also requested a meeting with Mr. Pietri's family members (PCR. 5494-5495, 5539). He testified that he needed independent data to corroborate Mr. Pietri's self-report. (PCR. 5496). Dr. Krop testified that he informed Mr. Birch of his preliminary findings, then waited for further instructions. He had no further involvement with trial counsel or with Mr. Pietri's case until he was contacted regarding post conviction proceedings (PCR. 5500-5501). Dr. Krop then testified

that if he had been contacted pre-trial by Mr. Birch, he would have been able to testify to his initial impressions of non-statutory mitigation, even though he stressed that those findings were limited and based solely on Mr. Pietri's self-report (PCR. 5506-5507). He stated that he would have testified that Mr. Pietri had 1) a history of substance abuse, 2) was most likely intoxicated to some degree at the time of the offense, 3) had a dysfunctional family situation, and 4) was a victim of sexual abuse (Id.). Dr. Krop testified that he would have recommended to trial counsel that Mr. Pietri undergo a full neuropsychological evaluation (PCR. 5539). Depending on the results, he stated that he would also have recommended a neurological examination as well (Id.). With the additional information and testing information that was provided to him by postconviction counsel, Dr. Krop stated that he could have testified at trial and supported his testimony about: Mr. Pietri's dysfunctional life, his father's abandonment of him, the considerable domestic violence in the home, his sexual abuse victimization, his feelings of being unprotected, that Mr. Pietri

suffers from a cognitive disorder, his limited intellectual ability, his problems with impulse control, disinhibition and reasoning, the affects of chronic substance abuse on him, the effects of cocaine, Mr. Pietri's cognitive disorder not otherwise specified, his poly-substance abuse chronic and his personality disorder not otherwise specified (PCR. 5507-5510). Had he had the information he requested from trial counsel Birch, Dr. Krop testified that would also have opined that Mr. Pietri had a serious emotional disturbance or disorder at the time the incident occurred and that Mr. Pietri's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired (PCR. 5512-5513).

Dr. Jonathan Lipman, a Chicago based board-certified neuropharmacologist, testified on February 5, 2002 at the evidentiary hearing (PCR. 5545-5695). After being qualified as an expert, he explained that his evaluation in Mr. Pietri's case:

> [F]ocused...on an understanding of Mr. Pietri's drug intoxication at the time of the offense from the point of view of his history and documentary evidence of his drug abuse and

> supplemented by such information as I could glean from witnesses to his behavior over the years and at the time of the offense. These are typically relied on when interviewing drugs abusers, because they're often not the best historians.
>
> ***
>
> [T]his particular question would be focused on the pharmacodynamics of the event, the effect of drugs on his brain. It is essential to have an understanding of the historic use of the drug -- of drugs, in order to determine how drugs have acted upon someone at a time.

(PCR. 5562). Dr. Lipman described neuropharmacology as "the study, the expertise dealing with the effects of drugs and chemicals on the mind, brain, and behavior" (PCR. 5551). Dr. Lipman stated that he relies on other experts in reaching his opinions, including psychologists, neuropsychologists, medical doctors, and sometimes social workers (PCR. 5559). He testified that since it was too late to order toxicology studies in Mr. Pietri's case, "I focused instead on an understanding of Mr. Pietri's drug intoxication at the time of the offense from the point of view of his history and documentary evidence of his drug abuse and supplemented by such information as I could glean from

witnesses to his behavior over the years and at the time of the offense" (PCR. 5562).

Dr. Lipman testified that he interviewed Mr. Pietri over two days in March 2000 (PCR. 5567). He also reviewed two packages of background material supplied by postconviction counsel (PCR. 5567-5568). In addition, he testified that he interviewed a number of persons other than Mr. Pietri and received supplemental records concerning Mr. Pietri (PCR. 5573). He testified that he also spoke to two of the other defense experts, Terry Goldberg and Faye Sultan (PCR. 5573-5574). Dr. Lipman then testified that all the materials he described were the kind of information that experts in his field rely on in forming opinions (PCR. 5574). He also testified that he created memoranda to his file incorporating his interviews with Mr. Pietri and the others he met with (PCR. 5575). Dr. Lipman testified about the components that went into forming his opinion and what was important about each one, including Mr. Pietri's trial testimony, the Department of Corrections disciplinary reports he had reviewed, his interviews with Mr. Pietri, and his family and friends personal interviews (PCR.

5578-5601).

The lower court inquired of Dr. Lipman during the examination about the scientific basis of his testimony that "[m]arijuana triggers cocaine need in a previously cocaine dependent person." (PCR. 5582). Dr. Lipman agreed to provide the lower court with the study (PCR. 5583)(PCR. 5017-5020). He then testified that the extensive history that he obtained from the interviews with Mr. Pietri's brothers Edward Serrano, Marino Pietri, William Pietri, and Luis Serrano; with his sisters Ramona, Juanita, Virginia, Ana and Ada; and his interview with Luis Serrano's wife, Mickie Brantley Serrano, all supported his opinion that Mr. Pietri's prior use of drugs "to the point of addiction and dependence and psychosis" "was important to my understanding of how drugs would affect him when he used them at the time of the offense." (PCR. 5601-5602). Specifically, he testified that the history he obtained supported a finding of "kindling" in reference to Mr. Pietri's drugs use, and he opined that Mr. Pietri was an individual of this type who was "super sensitive to the adverse affects of psychostimulants" (PCR. 5602). Dr.

Lipman testified that he also had the opportunity to review Dr. Faye Sultan's deposition (PCR. 5611). He also testified that the limited information he obtained from Dr. Goldberg indicates that Mr. Pietri has a frontal lobe brain function vulnerability that relates to intoxication (PCR. 5617). Dr. Lipman then testified that in his opinion, Mr. Pietri did not have the specific intent to kill Officer Chappell in August of 1988 (PCR. 5618-5629). He stated that "[t]he evidence I reviewed is not consistent with the conclusion that he had the specific intent to kill. It is consistent with an impulsive act, a separate impulsive act that was over before he even knew he had done it" (PCR. 5629). Dr. Lipman explained that metabolic intoxication is not determined by the cocaine level in the bloodstream and that low blood levels of cocaine do not mean that a chronic user is not under the influence of cocaine (PCR. 5620, 5626). He briefly explained one aspect of the chronic use of cocaine:

> Q So does the fact that his blood levels are very low if not nonexistent, that he's not under the influence of cocaine?

A Absolutely not.

Q Explain.

A Cocaine causes a release or it blocks the uptake side for the brain's dopamine neurotransmitter. The dopamine cannot be packed into press the sciatic nerve, therefore dopamine remains in the sciatic, exciting the perceptions.

Q And what is dopamine?

A Dopamine is a neurotransmitter for pain that is involved in regulation of sanity.

Q Would it be fair to call it a brain chemical?

A It is a brain chemical. It's related to adrenaline; epinephrine, as Americans call it. And the effects of cocaine far outlast the duration of the drug in the body. When the drug is used chronically, it causes toxic changes in the brain. They don't go away when the drug leaves.

(PCR. 5620-5621). Dr. Lipman testified that in his opinion Mr. Pietri was suffering from an organic mental disorder at the time of the offense due to an intoxication (PCR. 5628).

And yet we know from those of us who don't use cocaine, that being four days and nights without sleep is extremely dangerous on its own. So through, as part of the cocaine --

> chronic cocaine intoxication, added to which you have the increased anxiety, increased agitation, increased fear, and irrational style of thought that doesn't rise to the level, I think, of psychosis, in the full blown schizophrenic, in terms of the work, but does touch upon the psychotic spectrum in that the import that Mr. Pietri was getting from things that he saw was not, I think, rational.

(PCR. 5624). Dr. Lipman testified that Mr. Pietri was in a paranoid psychotic state at the time of the offense due to his metabolic intoxication from chronic use of cocaine (PCR. 5626)("Metabolic intoxication occurs when...the chemistry of the brain becomes so disrupted that even though the drug has left the system, the brain chemistry has not returned to normal. The person is intoxicated but the drug has gone"). Dr. Lipman also testified that both mental health statutory mitigating circumstances were present at the time of the offense. (PCR. 5617).

On cross-examination Dr. Lipman testified that he had evaluated clients for CCRC and testified on a number of occasions that were not included on a list he had provided the state attorney with at deposition (PCR. 5630-5641). He testified that the best way to determine

drug consumption would be drug analysis of blood, hair or physical evidence if they were available (PCR. 5644). He testified that during his interviews with Mr. Pietri's family members, he did not ask about early childhood experiences (PCR. 5655). Dr. Lipman testified that during his clinical interview of Mr. Pietri, he did not administer any objective measurement or instrument to detect malingering (PCR. 5659). Dr. Lipman testified that lack of impulse control "is a not uncommon feature of certain kinds of drug abuse that the frontal lobe of the brain is damaged by the drug abuse" (PCR. 5660). On re-direct, Dr. Lipman offered his opinion that Mr. Pietri was not malingering during his clinical interview (PCR. 5690).

Dr. Glenn Caddy testified at the evidentiary hearing on February 5-6, 2002 (PCR. 5696-5710, 5729-5677). Dr. Caddy testified that he was retained as a clinical and forensic psychologist prior to the Phase II hearing in 1990 (PCR. 5697). He examined Mr. Pietri for a total of three and a half hours the day before he testified at Mr. Pietri's penalty phase. (PCR. 5698). Dr. Caddy testified that his evaluation of Mr. Pietri was "the

best that he could do under the time available to [him]" and that it was "an effort to try to get as much material together as [he] reasonably could" (PCR. 5706). He stated that it was in no way a comprehensive mitigation evaluation (PCR. 5701). He simply conducted a mental status examination and a background investigation of Mr. Pietri's developmental history. (PCR. 5699). Dr. Caddy testified that he would normally do far more when asked to perform a penalty phase evaluation. In a case such as this, Caddy said he would want to become involved as early as possible and would want as much information counsel could provide (PCR. 5700-5701). He testified that he also would have liked to have conducted detailed psychological testing "or if there were any psychological testing done previously, to be able to examine that" (PCR. 5701). He had an opportunity to speak with a few family members on the morning that he testified at the penalty phase, but he stated that he failed to meet with them individually and did not have an opportunity to access their credibility (PCR. 5704-5705). He testified that he failed to obtain any corroboration of his interview with Mr. Pietri

because of lack of time (PCR. 5702), defining his evaluation as a ". . . frantic effort to do a consultation as prelude to the next phase of this trial, the sentencing phase" (PCR. 5702-5703). He had no further involvement in the case until he was contacted by postconviction counsel and was provided with two volumes of background materials and a number of depositions and statements of experts and witnesses (PCR. 5709-5710). Dr. Caddy testified that he did review background materials and various depositions of experts and witnesses that he had not previously reviewed in preparation for his testimony at the evidentiary hearing (PCR. 5729-5731). He stated that his review of these additional materials did not change his testimony from 1990, but rather he stated, "I have a much stronger frame of reference based on all that material" (PCR. 5733). He then testified that given his review of background materials and interviews it was likely that Mr. Pietri was "extremely impaired by his withdrawal state from drugs and from the entire array of underlying personality issues" at the time of the offense, and that "[i]t shouldn't be excluded as a

factor in his state of mind at the time he committed the murder" (PCR. 5741). Dr. Caddy further testified that his opinion in 1990 "moved somewhat in the direction" of supporting the proposition that Mr. Pietri was unable to appreciate the criminality of his conduct or to conform his conduct to the law (PCR. 5743). He stated that his opinion now "hasn't changed all that much, although it's simply perhaps a firmer position" because it is "most definitely better founded" (Id.).

On cross-examination Dr. Caddy testified that Mr. Pietri appeared to be open and communicative when he interviewed him in 1990 (PCR. 5746). He stated that Mr. Pietri reported a history of being sexually abused as a child to him during the 1990 interview (PCR. 5747-5754). He testified that his interview notes indicate that Mr. Pietri told him that at age five or six, a man named Freddie, who had impregnated Mr. Pietri's mother, had anal sex with him on a number of occasions (PCR. 5752). Dr. Caddy opined that he did not believe that Mr. Pietri is "gifted enough to have any appreciation of somehow setting up that whole scenario" concerning childhood sexual abuse "as a prelude to an examination

from me or any other person" (PCR. 5756). Dr. Caddy confirmed that his 1990 testimony included elements concerning Mr. Pietri's substance abuse, his exposure to domestic abuse, and his father's alcoholism (PCR. 5758-5759). In response to a question from the trial court, Dr. Caddy summarized his opinion regarding intoxication: "I can't rule out the possible significance of a cocaine intoxication state having relevance to. . . triggering him to do something that perhaps not being cocaine-involved may have caused him to perhaps flash and think about, but not do" (PCR. 5765). **Dr. Faye Sultan**, a clinical psychologist specializing in childhood sexual abuse, also testified on February 6, 2002 at the evidentiary hearing (PCR. 5767-5910). She testified that 20-25% of her practice involved forensic work, with the remaining portion being clinical work. She would have been available in 1990. She testified that she met with Mr. Pietri for a total of about ten hours over three days. (PCR. 5781). She testified that she reviewed two volumes of substantial background materials provided by postconviction counsel. (PCR. 5682). She stated that she had also reviewed the

depositions of Dr. Terry Goldberg, Dr. Jonathan Lipman, Dr. Goldberg's raw testing data, Dr. Lipman's family interview notes, his notes of his interview with Mr. Pietri, Dr. Lipman's notes about background materials that he had been provided with, Dr. Harry Krop's letter to trial counsel, Randy Roberts police interview, Mickie Brantley's deposition, and the trial testimony of Mr. Pietri's brothers William and Marino Pietri his sister Ada (PCR. 5783-5784). She testified that she did not perform any psychological testing, but instead she relied on Dr. Goldberg's testing in formulating her own opinions (PCR. 5786-5787). Dr. Sultan testified that Dr. Goldberg's testing indicated that Mr. Pietri "functions with a global estimated IQ of 76, on non-verbal tasks and non-verbal areas" (PCR. 5792). She stated that this finding was confirmed by Mr. Pietri's scale score of 57 on the Wechsler Memory Scale, Revised, which she described as "about three standard deviations below a normal score on that particular test" (PCR. 5792).

She then testified her opinion was that Mr. Pietri is "quite, quite impaired", based on Dr. Goldberg's

psychological testing, in several discrete areas: information processing, the ability to make good judgements, the ability to acquire new information from the environment and response to it appropriately, attention problems, and impulse control difficulties (PCR. 5793). Based on all the information available to her, including her interviews and review of materials, she testified:

> Mr. Pietri was a very serious addict, unable to control his behavior, very driven by the need to use more of the substance that he was addicted to. In addition, there's indication in the interviews of Dr. Lipman that Mr. Pietri exhibited some very, very bizarre behavior as his cocaine use increased. That he became quite paranoid, that he had hallucinations at times, that he acted out bizarre behavior. That indicated what Dr. Lipman refers to as a demented state, a state in which he's really not in contact with reality all the time. That was very significant to me, because it's a very extreme reaction to substance abuse, and that taught me something about the interaction with brain damage that Mr. Pietri probably has as a result of his child abuse, in interaction with the chemicals that he was putting into his body.

(PCR. 5794-5795). She then testified in some detail about the bases for her opinion that Mr. Pietri is a

sexual abuse survivor (PCR. 5797-5813). She stated that in the forensic setting the key to forming that opinion is whether the "presentation, the emotionality is consistent with what known survivors of sexual abuse have as their presentation" (PCR. 5809). Dr. Sultan testified that she found that presentation present in her interviews with Mr. Pietri (Id.). She also noted that the literature indicates that there is external corroboration in adult survivors of childhood sexual abuse in less than 5% of the cases (PCR. 5810).

Dr. Sultan testified that she had no disagreements with the impressions and findings of Drs. Goldberg and Lipman as presented in their depositions in Mr. Pietri's case (PCR. 5821). Dr. Sultan testified that Mr. Pietri also exhibits characteristics of a diagnosable personality disorder, which she described as "personality disorder, mixed" with "characteristics of borderline personality disorder, dependent personality disorder, narcissist personality disorder and antisocial personality disorder" (PCR. 5821-5822).

On cross-examination, Dr. Sultan testified that she

is opposed to the use of the death penalty (PCR. 5825). She stated that she has testified in about thirty-five capital cases, including six of seven in Florida for the Capital Collateral offices (PCR. 5827). She testified that she has never been asked to testify for the prosecution in a capital case and probably would decline to do so (PCR. 5828). She testified that she would describe herself as a specialist in mitigation issues (PCR. 5829). She stated that she does testify for prosecutors in non-capital cases (PCR. 5832). Dr. Sultan testified about a reprimand she received from her professional body in North Carolina in 1991 concerning employing a former client in her professional practice (PCR. 5836-5838). Dr. Sultan testified about her findings related to substance abuse, childhood sexual abuse, and brain damage in a number of cases that she had consulted on in Florida and North Carolina (PCR. 5842-5850, 5856-5862). Dr. Sultan then testified that she was aware that Dr. Goldberg had used four subtests of the Weschler Adult Intelligence Test, revised, not the entire test (PCR. 5850). She testified that Dr. Goldberg's testing did not conclude what Mr.

Pietri's IQ was, rather he derived a global IQ estimate of 76 (PCR. 5862). She testified that the four subtests used by Dr. Goldberg "give a very highly correlated IQ score relative to the entire battery" (PCR. 5863). She testified that neuropsychologists like Dr. Goldberg "will give a subset of the Weschler as part of a much larger battery that they're giving, because they're looking for a measure of overall functioning, and then they're also looking for many other specific areas of capability or capacity" (PCR. 5864). Dr. Sultan testified that she has administered the WAIS-R "many times" (PCR. 5866). She further testified that Mr. Pietri's performance on the achievement tests administered by Dr. Goldberg indicated a high school reading level in English even though his performance in other areas "was borderline mentally retarded" (PCR. 5867). Dr. Sultan opined that Mr. Pietri probably can be diagnosed as presenting attention deficit disorder (PCR. 5870). Dr. Sultan then discussed her findings concerning childhood sexual abuse and the basis for her opinion that Mr. Pietri was victimized (PCR. 5872-5878). She stated that she agreed with Drs. Goldberg

and Lipman that Mr. Pietri suffers from some brain damage in the frontal lobe area (PCR. 5878). Dr. Sultan testified that no brain scan had been performed on Mr. Pietri to her knowledge (PCR. 5879). Dr. Sultan confirmed that she had been quoted in a newspaper article as saying that juries don't understand the concept of mitigation (PCR. 5883).

On re-direct, Dr. Sultan testified that a newspaper interview with her about which the state attorney asked a number of questions had appeared in connection with an international book promotion tour arranged by her publisher, Doubleday, for Dr. Sultan to publicize her crime novels (PCR. 5884-5887). She testified that she is retained in capital cases as a psychologist, not as a mitigation specialist (PCR. 5888). She then stated that she is called to testify in less than half of the capital cases that she is retained as an expert in (PCR. 5889). Dr. Sultan testified that all but two of the capital clients whose cases she has consulted on were poor, that 70% of them were minorities, and 90% of them had substance abuse issues (R. 5893). She stated that in her experience it would be unusual to find a

capital case that did not involve issues of childhood trauma, childhood sexual abuse, poverty, race and substance abuse, area she opines about (PCR. 5893). Dr. Sultan testified that several of the tests administered by Dr. Goldberg had built-in measures to demonstrate if the clients was malingering (PCR. 5902-5903). She further testified that she was aware that Mr. Pietri's brother, Edwin, is in prison for killing someone (PCR. 5904).

Peter Birch, lead trial counsel, returned to testify further on February 6, 2002 (PCR. 5911-5931). He contacted postconviction counsel to ask to be recalled so he could clarify his previous testimony (PCR. 5912). He recalled that he had been asked on prior direct about why he had not presented the "Cholo defense" that somebody else had killed the officer (R. Id.). After thinking about it, he realized his prior testimony was misleading (Id.). He then testified that he would have presented that defense if he was able to make a good faith argument consistent with that defense and the client wanted him to do so (PCR. 5913). He testified

that the fact that such a defense was not the truth was a factor in not presenting it (PCR. 5915). Mr. Birch said that there was an intervening act that actually was the "true reason" that the Cholo defense was not used. He described this event as "a conversation with Norberto Pietri that changed the complexion of the case" in December 1989 "very close to Christmas" (PCR. 5914). He further testified that "on that day [Mr. Pietri] told me for the first time everything that had happened, and basically admitted to the crime, to the shooting. And that he wanted to -- he wanted to admit that to the jury and present whatever defense was consistent with that" (PCR. 5914). Mr. Birch testified that the context for this "moving" conversation with Mr. Pietri at the jail was that "[h]e had turned his life over to Christ" (PCR. 5915). He then testified that Mr. Pietri "was quite sincere about the whole thing" (PCR. 5916). On cross-examination, Mr. Birch testified that at the time he had the conversation with Mr. Pietri he wasn't really thinking about Phase II because he was 98% sure the case was a second degree murder case and would plead out (PCR. 5920). He stated that he continued to feel that

way after Mr. Pietri signed the plea agreement, until the night before the trial began when he received a call from the state attorney telling him there was not going to be a plea (PCR. 5921). At the end of the examination, Mr. Birch answered a question from the lower court as to what he believed his failures were at the 1990 trial (PCR. 5924-5931).

Robert Norgard testified at the evidentiary hearing on February 7, 2002 (PCR. 5936-5991). Mr. Norgard stated that he is an attorney in private criminal defense practice in Polk County, Florida (PCR. 5937). He stated that he has been involved in capital litigation for about twenty years. He testified that he is board certified in criminal trial practice and is serving his second term on the criminal law board certification committee (PCR. 5939). He testified that he publishes regularly on capital issues in the Florida Association of Criminal Defense Lawyers Defender Journal (PCR. 5941). He stated that he has tried fifty first-degree murder trials, in about half of which the State sought the death penalty (PCR. 5942). He testified that three to five of his capital cases involved use of

the intoxication defense at the guilt phase, and many of the others concerned intoxication issues as mitigation (PCR. 5942). He also stated that he has taught lawyers about the death penalty, served as a trial consultant on numerous cases, and testified as an Strickland expert in postconviction hearings (PCR. 5943-5947). He then testified about the standard of practice in 1989-1990 in Florida for investigation at the penalty phase (PCR. 5948-5957). Mr. Norgard also testified about the standard of practice in 1989-1990 in Florida for investigating and preparing an intoxication defense (PCR. 5957-5965). He testified that the genesis of death penalty training in 1990 for attorneys in Florida came out of the West Palm Beach area and the West Palm Beach Public Defender (PCR. 5968). Mr. Norgard testified that many of the things he learned were from Richard Greene, in that public defender office (Id.). Mr. Norgard testified that it was his opinion that Mr. Pietri's trial counsel did not meet the standard of reasonably effective assistance at the guilt phase because of their failure to use an intoxication defense at the 1990 trial (PCR. 5971-5973). He explained his

rationale, stating that "[t]he idea of [presenting an intoxication defense] without experts, even if it involves experts for both sides opining one way or another; corroborating evidence of the mental illness or this case cocaine use, you know, I mean there is effectively no defense present" (PCR. 5972). He also testified about what he described as trial counsel's deficient performance at the penalty phase (PCR. 5973-5977). He stated that "you need to develop your experts prior to trial, you need to provide 'em with the necessary information so that they can do the job you're asking them to do, and you need to select qualified experts, which wasn't done in this case" (PCR. 5975-5976). Mr. Norgard testified that in a capital case, even if you client denies that he did it, you still have to prepare the penalty phase (PCR. 5983).

On cross-examination, Mr. Norgard testified that his understanding prior to his testimony was that he would be limited to offering opinions about the community standard for capital representation in Florida in 1989-1990 (PCR. 5986-5987). He stated that he did not review the entire record of the Pietri case (PCR.

5988). He testified that he did not talk to either Mr. Birch or Mr. Murrell as part of his preparation (Id.).

Dr. Terry Goldberg, a neuropsychologist retained by postconviction counsel, testified at the evidentiary hearing on March 19, 2002, about a neuropsychological battery of tests he administered to Mr. Pietri in prison (PCR. 6417-6557). He testified that he works full-time as a neuropsychologist at the National Institute of Mental Health in the area of schizophrenia research, and that private forensic work constitutes only about 5% of his professional work (PCR. 6418-6420). Dr. Goldberg stated that he is a licensed psychologist in Virginia, the District of Columbia and in Maryland (PCR. 6421). He then testified about the results of a short form IQ WAIS-R test that he administered to Mr. Pietri which indicated a full scale IQ of 76, which he described as consistent with a prior prison Beta IQ score obtained by Mr. Pietri of 82. (PCR. 6433-6444). Dr. Goldberg noted that his short form WAIS only took fifteen to twenty minutes, while administering the full WAIS-R would have taken up to ninety minutes of the three hours testing time he spent with Mr. Pietri (R. 6430, 6439). Dr.

Goldberg's testified that he administered a battery of psychological tests over the time he spent with Mr. Pietri and he explained what the results of the testing told him about Mr. Pietri's mental functioning (PCR. 6444-6474). His ultimate opinion, based primarily on his objective testing, was that "[Mr. Pietri's cognitive impairments were due to cerebral dysfunction." (PCR. 6442). He explained that:

> The cognitive impairments that [Mr. Pietri] was experiencing, that was observable on these neuropsychological tests were due to dysfunction in his brain. That [the impairments] were not problems due to motivation, gross lack of comprehension, lack of cooperation, or; I'm sure as we'll get to; malingering.

(PCR. 6442-6443). He testified that it was his opinion that these cognitive impairments identified in his testing, on their own, rose to the level of non-statutory mitigation (PCR. 6444). Based on the background materials provided by postconviction counsel and his own testing and interview of Mr. Pietri, Dr. Goldberg determined that comparing Mr. Pietri's estimated full scale IQ score of 76 to his tested normal reading level indicated to him that "an

accumulation...of risk factors...eventually took a toll on his neurocognitive function; that includes his intellectual efficiency" (PCR. 6474). He then testified that these risk factors included Mr. Pietri's deprived background, head injuries, traumatic childhood trauma or abuse, the chaotic family situation with 14 siblings, frequent moves, and his history of poly-substance abuse. (PCR. 6474-6475). Dr. Goldberg testified that he understood his role as an expert in Mr. Pietri's case "to be to characterize the cognitive impairments that he had, and to discern if they were consistent with. . . organicity" (PCR. 6476). He stated that the neuropsychological battery of tests that he performed were the basis for his conclusions (PCR. 6477).

On cross-examination, Dr. Goldberg testified that he was not licensed to practice psychology in Florida and reiterated that 90% of his practice is research oriented (PCR. 6482). He testified that it is possible that Mr. Pietri's cognitive impairments may have improved over time since he has not been able to abuse substances on death row (PCR. 6486). He then stated that he had

spoken in the past with some of the other experts involved in Mr. Pietri's case (PCR. 6488). He also testified that he had reviewed two volumes of background materials and some supplemental information (PCR. 6489-6491). He stated that his conclusions were based primarily on his testing and clinical interview of Mr. Pietri (PCR. 6491). He then testified that he had administered fifteen to twenty different psychological tests and sub-tests to Mr. Pietri (PCR. 6492). Thereafter, Dr. Goldberg answered a long line of questions concerning the concept of malingering and whether his testing protocol allowed for the possibility that Mr. Pietri was not giving his full effort on the battery of tests (PCR. 6492-6504). Dr. Goldberg then testified about his rationale for using the WAIS-R subtests with Mr. Pietri and answered questions about his analysis of the results (PCR. 6504-6517). He then discussed some of his other test results, including the Trails A and B, the WRAT, and the Wisconsin Card Sort, (PCR. 6518-6525). Dr. Goldberg testified that he did not ask Mr. Pietri about the actual shooting of the officer (PCR. 6534-6435). He testified that his

testing was intended to look at risk factors for brain damage, not to try to understand Mr. Pietri's intent at the time of the crime (PCR. 6536). Dr. Goldberg stated that his finding of nonstatutory mitigation based on his testing indicates that Mr. Pietri was "a damaged human being that had a damaged brain" (Id.).

On redirect, Dr. Goldberg testified that he had an informal contact with his colleague, neurologist Dr. Thomas Hyde, who advised him that he had examined Mr. Pietri, who Dr. Hyde said exhibited several neurologic signs of frontal lobe dysfunction (PCR. 6543). Dr. Goldberg testified that he made the decision to use the four subtests of the WAIS-R without any input from Mr. Pietri's lawyers (PCR. 6545). Dr. Goldberg testified that 80-90% of the intelligence testing done in the United States is done using short forms of tests (PCR. 6548). He stated that using the short form test is his own personal practice in his research, civil work and criminal forensic work (PCR. 6548). Dr. Goldberg testified that he was never under the impression that he would be the only expert in Mr. Pietri's case. (PCR. 6550). **Dr. John Spencer**, a clinical

and forensic psychologist, testified at the evidentiary hearing on March 19-20, 2002 as a rebuttal witness for the State (PCR. 6559-6690). He stated that 85% of his practice is forensic (PCR. 6560). He conducted a three and a half hour clinical interview of Mr. Pietri at Union Correctional over two days, January 22-23, 2002 (PCR. 6565). He also reviewed the background material created by the defendant's counsel and numerous depositions and statements (PCR. 6565-6567). Although Dr. Spencer did no formal psychological testing of Mr. Pietri, he opined about the administration of the WAIS-R by Dr. Goldberg (PCR. 6567-6570). On voir dire, Dr. Spencer noted that the Clinical and Forensic Institute, of which he is President and Clinical Director, is a grant recipient of the Florida Department of Corrections (PCR. 6571). He estimated that the DOC grant constitutes up to two-thirds of the $500,000 gross annual income of the business (PCR. 6572-6573). He said that this was not a conflict of interest that prevented him from accepting forensic appointments in capital cases from the State (PCR. 6573). He confirmed that in his pre-trial deposition he testified that he

used no standard protocol for his forensic evaluations (PCR. 6575). Back on direct, he opined that based on his clinical interview, there was "No way in the world" that Mr. Pietri had an IQ of 76, but even if he did, "that's not that horrifying" (PCR. 6585). He said that at the time he went to the prison, he had numerous psychological tests and instruments with him, but since his purpose was to do a general assessment of Mr. Pietri "I went to go see what shook out" (PCR. 6590). Spencer contended that he didn't know when he went to the prison what he would be asked to rebut, or what question he was being asked to answer (PCR. 6590). He said that Mr. Pietri clearly described the shooting of the officer and he based his opinion about Mr. Pietri's intent on his own words (PCR. 6593-6595). He was not convinced that Mr. Pietri suffered childhood sexual abuse (PCR. 6596-6601).

On cross-examination, Dr. Spencer confirmed that he had provided his report to Mr. Pietri's counsel the day before (PCR. 6603). He testified that his employee, Ms. Butts, a clinical psychologist and an attorney who was allowed to sit at counsel table over defense

objection, was being provided by his office as a consultant to the state attorney's office free of charge (PCR. 6604-6607). He said that he did not think that the contents of his report differed from the representations in his deposition (PCR. 6607-6608). He testified that he had a WAIS III IQ test with him at the prison when he saw Mr. Pietri, "But I didn't need it" (PCR. 6609). He also said that he and the state attorney were 45 minutes late for both days of the evaluation of Mr. Pietri (Id.). He admitted that he had not studied the background materials concerning Mr. Pietri at the time of the evaluation (PCR. 6610). He also confirmed that he had never recommended that a full scale WAIS be administered to Mr. Pietri (PCR. 6612). He said that he had reviewed Dr. Goldberg's deposition and raw data, but his opinion was that Goldberg's testimony, which he sat through, "expanded quite a bit. . .on his opinion" (PCR. 6614). He agreed that the State never requested that he perform a full scale IQ test or tests for malingering (PCR. 6618). He agreed that his review of Dr. Goldberg's test results revealed no evidence of cognitive impairments (PCR. 6634). Dr.

Spencer's testimony affirmed Mr. Pietri's cocaine addiction and history of chronic substance abuse as was found by all the other experts (PCR. 6628, 6637). He testified that although the State made no request that he include in his report any opinions concerning statutory and non-statutory mitigation, he did so (PCR. 6631). Dr. Spencer testified that "without any question" Mr. Pietri suffered from chronic substance abuse including cocaine addiction (PCR. 6628). Dr. Spencer testified that he is not qualified to perform a neurological evaluation (PCR. 6666). He testified that he could not decipher Dr. Hyde's written report concerning a neurological evaluation of Mr. Pietri provided in surrebuttal (PCR. 6671). He suggested that Mr. Pietri might be genuinely remorseful about the offense (PCR. 6674). He also agreed that Mr. Pietri is a cocaine addict and was likely in a state of cocaine withdrawal at the time of the offense (PCR. 6676). Dr. Spencer said that he did not see the need for either a neuropsychological or neurological evaluation of Mr. Pietri (PCR. 6677).

Dr. Thomas Hyde, a behavioral neurologist, provided

an authenticating affidavit dated June 14, 2002, pursuant to the order of the lower court, in support of his written report of neurological evaluation of Norberto Pietri that was entered into evidence at the evidentiary hearing in surrebuttal (R. 6782-6783)(Defense Exhibit #56). Dr. Hyde's affidavit indicates that he reviewed the deposition and attachments of Drs. Goldberg, Lipman, Spencer and Sultan. The affidavit supports his unrebutted medical diagnoses of Mr. Pietri's neurological and psychiatric disorders noted in his written report that was admitted as surrebuttal evidence to Dr. Spencer's testimony, on the last day of the evidentiary hearing.

Gary Caldwell testified at the evidentiary hearing on March 20, 2002 (PCR. 6691-6718). He said that today and in the fall of 1989 and the spring of 1990 he was employed as an assistant public defender (PCR. 6691). He was mostly doing capital appeals in 1989-1990 (PCR. 6692). He testified that about six weeks ago, he spoke with Gail Martin, a former PD investigator now in private practice, who was visiting his colleague Richard Greene in an adjacent office (PCR. 6693). Ms. Martin

was searching for any documents connected to work done in 1990 on the Pietri case (PCR. 6694-6695). Mr. Caldwell located a document that he created in 1990 and he brought the document with him to the hearing (PCR. 6695). He described the document as "a draft affidavit; which was not formally executed, setting out more or less contemporaneously, different discussion that I and other people had in my presence with Donnie Murrell and Peter Birch, about the Phase II preparation in the case" (PCR. 6696). The draft affidavit was admitted into evidence, over State objection, as Defense Exhibit #60. The witness testified that he did not recall talking with either Donnie Murrell or Peter Birch after the events memorialized in his affidavit in the intervening years (PCR. 6709). The witness testified on cross-examination that he did not believe that he or Mr. Greene or Mr. Malone had an ethical duty to report trial counsel to the trial court or the bar if they believed Mr. Pietri was being incompetently represented by his lawyers in 1990 (PCR. 6713).

Richard Greene, another West Palm public defender, testified on March 20, 2002 at the evidentiary hearing

(PCR. 6719-6731). He said that he was briefly counsel of record for Mr. Pietri before he filed a conflict of interest motion (PCR. 6719-6720). He also provided an affidavit to trial counsel Peter Birch in support of a change of venue in the Pietri case (PCR. 6721-6722). He did meet in 1990 with Birch, Murrell, Caldwell and Steve Malone to discuss the penalty phase of Mr. Pietri's case (PCR. 6722). It appeared to him that they were basically unprepared for the penalty phase (PCR. 6723). He also said that he recalled that Mr. Birch had a vacation scheduled between the meeting and the scheduled penalty phase (Id.). He did recently review the draft affidavit prepared by Mr. Caldwell, but could not recall if he knew about it in 1990 (PCR. 6724). He has no recollection as to what involvement Gail Martin had in the Pietri case (PCR. 6725).

Steve Malone, a Palm Beach County public defender, was the final witness at the evidentiary hearing on March 20, 2002 (PCR. 6735-6747). He testified that after the guilt phase verdict in Mr. Pietri's case, Gary Caldwell asked him to go along to Donnie Murrell's

office with him:

> They really needed help in getting ready for the penalty phase. They did not have much at all in the way of any sort of non-family witnesses or records or documents at that time, so we sort of went through a short course in how to investigate a penalty phase with them. And I offered to do whatever I could to get the records they needed, records and develop witnesses.

(PCR. 6737). He identified the draft affidavit that was prepared by Mr. Caldwell (PCR. 6738). He said that he reviewed it back in 1990 and agreed at that time that it accurately reflected what had been talked about, with the exception of the last paragraph on page two (PCR. 6739). After reviewing the document again, he recalled some additional details. Specifically, that "they were very resistant to ideas. Both -- they would say it was either they couldn't get the money or they didn't have the time. So, I suggested getting a continuance for the penalty phase to give us more time" (PCR. 6740). He testified in response to a question from the lower court, "Peter's reputation is basically the detail man, and Donnie's always the dogged trial lawyer, is sort of the way I would frame it. But you know, I've done a lot

of these cases, and everybody makes mistakes, everyone can" (R. 6746).

SUMMARY OF THE ARGUMENTS

1. There was no reliable adversarial testing at the guilt phase of Mr. Pietri's trial due to the combined effects of trial counsels' prejudicially deficient performance. Trial counsel failed to conduct an investigation into intoxication at the time of the offense, despite ample evidence of Mr. Pietri's long standing substance abuse problems. Trial counsel also negligently failed to preserve a challenge for cause jury selection issues at trial to Mr. Pietri's prejudice. Trial counsel failed present evidence to negate specific intent in support of Mr. Pietri's innocence of first degree murder.

2. No adequate adversarial testing occurred at the penalty phase. Trial counsel failed to properly investigate a wealth of mitigation that was available. Substantial mitigation, both statutory and nonstatutory was available, yet was not investigated or presented due to counsel's prejudicially deficient performance. Trial counsel failed to retain experts until after the guilt

phase of Mr. Pietri's trial.

3. The lower court erred in denying Mr. Pietri's public records request and motion to compel directed to the State Attorney.

4. The lower court's order denying relief after the evidentiary hearing was not an exercise in independent weighing of the evidence or fact finding, but rather it was an abuse of discretion and an example of prejudicial bias.

5. Mr. Pietri is insane to be executed; he raises this issue for preservation purposes, as it is not yet an issue ripe for consideration.

ARGUMENT I -- LACK OF GUILT PHASE ADVERSARIAL TESTING

A. FAILURE TO INVESTIGATE, PREPARE AND PRESENT AN INTOXICATION DEFENSE

On cross-examination at the evidentiary hearing, the State solicited an explanation from trial counsel as to just what his defense was at the guilt phase. Mr. Birch testified that:

> Q The defense was that there was no premeditation, this was second degree murder. That's what I was trying to get the jury to accept, this

was a case of second degree murder.

A In which way, how were you trying to factually tell them through your client this was second degree murder not first?

A Through the action up to the shooting and the shooting, itself, that was pretty much it, to focus on it, that the conduct of Norberto Pietri was not that of someone who was engaged in a premeditated killing.

(PCR. 6164-6165). The record of the trial contradicts Mr. Birch's testimony at the evidentiary hearing. Birch argued to the jury that Mr. Pietri's active cocaine addiction was the linchpin of his case that Mr. Pietri did not premeditate the killing of Officer Chappell:

All of Norberto's crimes spell one thing, cocaine. Cocaine is gripping this world like nothing before. People who would never lie, lie for cocaine. People who would never cheat, cheat for cocaine. The cocaine was ripping him apart. So should Norberto Pietri be excused for his cocaine addiction? No, absolutely not. We are not asking that you excuse him. We are only giving you the whole picture and **asking you to consider the entire picture, the focus, and know Norberto Pietri's mind was on cocaine**. All of the burglaries, everything he did was focused and centered on one purpose, to get cocaine.

(R. 2550-51)(emphasis added). Mr. Birch testified that

he never had a direct conversation with Mr. Pietri in which an affirmative decision was taken to not use an intoxication defense at the guilt phase (PCR. 6168). He implied that his own personal prejudice against the use of the intoxication defense ("the belief on my part that a jury would not accept intoxication") was an important reason that such a conversation never took place (PCR. 6169). This failure to explore the defense with Mr. Pietri, in and of itself, was deficient performance. Presley v. State, 388 So. 2d 1385, 1386 (Fla. 2d DCA 1980). Given the specificity of his argument to the jury, quoted **supra**, the absolute necessity for additional evidentiary support at the guilt phase for an intoxication defense is even more apparent. During voir dire, the jury in Mr. Pietri's case was questioned about their views on intoxication and the fact that intoxication can, in some instances, negate the element of intent (R. 563-75, 1068-70, 1072-74, 1208, 1231, 1528-33, 1638-41). Also during voir dire, the prosecutor informed the jury that even though the judge instructs on voluntary intoxication, they were free to conclude that it didn't exist. (R. 1482). The

jury later received a jury instruction on this affirmative defense. (R. 2646-47).

Trial counsel explicitly promised the jury during opening argument that he would show there was no premeditation. (R. 1823). The only witness who testified for the defense during the guilt phase of the defendant's trial was the defendant himself. (R. 2266). Mr. Pietri's testimony mainly consisted of self-reported background information concerning his life and his subsequent involvement with drugs, specifically marijuana and cocaine. (R. 2273-75). He explained that he became addicted to cocaine and started committing robberies to support his habit. (R. 2277-81). He further testified about his arrests and incarcerations that occurred because of his desire for drugs and how he became re-addicted to drugs once he was released from prison. (R.2285, 2325). He also explained about the day of the crime and about how he reacted when he saw the police officer. Mr. Pietri testified that he was thinking "I'm Caught." (R. 2388).

Mr. Pietri testified that on the day of the crime, he pulled over as directed by the police officer and sat

there. He said that he felt frozen. (R. 2391). As the officer approached, Mr. Pietri grabbed the gun, which was next to him in the pouch and he shot the officer. He was in shock afterwards and did not realize what he had done. (R. 2391). Mr. Pietri testified that he had not thought about trying to kill the officer and did not intend to kill him when he shot the gun. (R.2391). No other testimony was offered by the defense concerning Mr. Pietri's drug use or the effects that the drugs he was using had on his mental state. Yet, Donnie Murrell testified at the evidentiary hearing that his goal in examining Mr. Pietri was to negate premeditation in the jury's eyes (PCR. 6197).

Trial counsel argued during closing arguments that Mr. Pietri was not guilty of first degree murder unless they (they jury) were convinced beyond all reasonable doubt that Mr. Pietri had a premeditated intent to kill the victim in this case. (R. 2538). Counsel went on to define premeditated intent as "... killing after consciously deciding to do so." (R. 2538). Counsel then argued that all of Mr. Pietri's crimes pointed to one thing: cocaine. (R. 2550). Counsel argued that while

the jury should not excuse Mr. Pietri for his cocaine addiction, they should focus on the whole picture and try to understand that his mind was on cocaine. (R. 2550-51). As evidenced by their verdict of guilty, the jury failed to find the affirmative defense of intoxication.

The jury failed to find intoxication as a defense since trial counsel failed to present any supporting evidence of such a defense. Initially, trial counsel failed to adequately investigate Mr. Pietri'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. Trial counsel failed to adequately interview Mr. Pietri's family and acquaintances concerning how Mr. Pietri's mental state was substantially altered because of his addiction. Trial counsel never bothered to interview two of the four people who were with his client almost continually for the week after he escaped from Lantana Correctional, his brother Luis Serrano and Randy Roberts. Perhaps this was due to the utter disarray into which trial counsel's initial defense that

"somebody else did it" was thrown into by two separate events. First, by the State obtaining confidential documents from his guilt phase investigator, and second, due to Mr. Pietri's religious conversion and confession to Mr. Birch that he had, in fact, shot Officer Chappell.

On December 27, 1989, trial counsel Birch filed a motion to dismiss the indictment or delay proceedings, based on the actions taken by the Delray Beach Police Department through Nancy Adams, who had stolen documents from the office of Virginia Snyder, the defense investigator retained when Mr. Pietri was contesting his guilt (R. 146, 3552-54). During a hearing on his motion on December 28, 1989, Birch requested a continuance until the State completed its investigation of Nancy Adams, who according to defense counsel had refused to give testimony and had indicated that she would invoke her Fifth Amendment right to not incriminate herself (R. 146). The trial court denied defense counsel's motion at the conclusion of the hearing (R. 200).

Mr. Birch stated on the record at the hearing on

December 28, 1989 that the entire defense of Mr. Pietri's case was in the purloined document. (R. 150). The infiltration of the defense team by Nancy Adams prejudiced Mr. Pietri's defense by throwing the defense team into disarray. On December 20 Birch had filed a motion for change of venue that was denied at the December 28th hearing, as was his December 27 motion for continuance of the penalty phase for 30 days after the guilt phase concluded (R. 3555). However, Judge Mounts denied defense counsel's motion to delay or dismiss proceedings. (R. 200).

Counsel was rendered ineffective by both his failure to properly investigate and litigate the issues concerning the purloined documents and by the State's action in obtaining them from his investigator. The failure by defense counsel to request alternative relief, beyond his motion to dismiss or delay proceedings, was negligent. At a minimum, trial counsel should have also moved to bar testimony at trial from any officers of the Delray Beach Police Department, to recuse the Palm Beach County State Attorney from the prosecution of the case, and to suppress any and all

statements made by Mr. Pietri. Failure to do so was an involuntary surrender by counsel of Mr. Pietri's Fifth Amendment rights.[3]

After the Cholo did it defense fell apart, it was critical for trial counsel to put together a workable defense for Mr. Pietri. More importantly, counsel should have recognized the necessity of retaining a qualified addictionologist or neuropharmacologist to evaluate Mr. Pietri. Birch was on notice when he got Dr. Krop's letter of December 26, 1989, with a primary finding of substance abuse (PCR. 5494-5495). He also was faced with Mr. Pietri's new version of events that had been communicated to Mr. Birch after his client's pre-Christmas religious conversion experience, an event that would require calling Mr. Pietri as a witness (PCR. 5914). The defense case now centered around Mr. Pietri's drug use and it's effects on his mental state at the time of the offense. Testimony from a qualified mental health professional with a specialty in substance

[3]A summary judgement was entered against Virginia Snyder's civil claims against the City of Delray Beach on June 23, 1998 in circuit court. On appeal, the DCA affirmed. Snyder v. City of Delray Beach, 736 So.2d 1243 (Fla. 4th DCA 1999), r'hg denied Aug. 16, 1999.

abuse would have provided the jury with an understanding of how certain drugs affect one's mind and how they could obstruct the formation of intent. Clearly counsel should have known by the end of December that it was critical for him to have an appropriate expert to meet with both Mr. Pietri and the persons who knew about his drug history. Therefore, it was unreasonable for counsel to fail to retain such an expert prior to the guilt phase of Mr. Pietri's trial, particularly considering that psychologist Glenn Caddy, who interviewed Mr. Pietri the day before his testimony, testified on proffer during the penalty phase that while Mr. Pietri **could** have formed the specific intent to kill in his cocaine withdrawal state, Caddy's opinion was that Mr. Pietri **did not** form that intent. (R. 3021). Caddy reiterated that testimony at the evidentiary hearing when he opined that Mr. Pietri was "extremely impaired" and that a "cocaine intoxication state" may have triggered the shooting (PCR. 5741, 5765). Trial counsel's failure to present any witnesses who could inform the jury of Mr. Pietri's mental state at and about the time of the offense was deficient performance.

According to Donnie Murrell's testimony, "the sub-theme of [Mr. Pietri's] defense" was that his use of and addiction to drugs on the day of the crime negated the formation of the intent to commit murder, yet counsel failed to investigate or present any supporting evidence of this defense (PCR. 6202). Due to his lack of investigation and preparation, counsel was completely ineffective in closing argument as he had no supporting evidence to convince the jury that Mr. Pietri's addiction, cocaine binging and withdrawal could and actually did inhibit the formation of the necessary element of intent in this case. What Dr. Lipman cogently described at the evidentiary hearing as "metabolic intoxication" was never placed before the jury (PCR. 5626). This was testimony that could have be obtained and presented in 1990. Counsel basically asked the jury to take Mr. Pietri's word, without any other evidence, that: 1) he was addicted to cocaine and other drugs at the time of the crime and 2) that this addiction inhibited the formation of the element of intent. It was unreasonable of counsel to place that burden on the defendant and the jury. Had the jury

received supporting evidence through the use of appropriate and properly prepared experts, the jury's decision on this issue would have been different. The state took full advantage of the deficient performance of trial counsel by arguing at the conclusion of the guilt phase that it did not matter whether Mr. Pietri was "on cocaine" or not. (R. 2576). In fact, the state is still doing so. During the penalty phase closing argument the state even questioned whether Mr. Pietri was a drug addict. (R. 3049). Now, even the state's rebuttal witness, Dr. Spencer, no longer disputes Mr. Pietri's cocaine addiction (PCR. 6676).

Because of counsel's actions, the jury and judge never heard important testimony proving lack of intent. In Strickland v. Washington, 466 U.S. 668 (1984), 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 testing process." 466 U.S. at 688 (citation omitted). Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2)

prejudice.

Trial counsel was **required** to investigate the voluntary intoxication defense and to present it directly with adequate support at the trial. Simply putting the defendant on as the only witness in support of the defense and then arguing it to the jury was deficient performance that operated to the substantial prejudice of Mr. Pietri.

The fact that the trial court instructed the jury on voluntary intoxication in no way relieves trial counsel of the responsibility to adequately present the defense. The standard governing a defendant's right to a jury instruction in this regard is also settled: any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support a defendant's request for an instruction on the issue. Gardner v. State, 480 So. 2d 91 (Fla. 1985); Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981). In terms of voluntary intoxication, Florida's courts have consistently acknowledged that such a defense **must** be pursued by competent counsel if there is evidence of intoxication, even under circumstances where

trial counsel explains that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985). The jury in Mr. Pietri's trial did receive a voluntary intoxication instruction (R. 2646-47). It should be noted that the prosecutor in this case shortened the voluntary intoxication instruction without objection from defense counsel. This was deficient performance (R. 2447-8).

Trial counsel's failure to obtain corroboration of Mr. Pietri's substance abuse and history of intoxication through witnesses or documentary evidence and his failure to provide them to experts at the guilt phase and penalty phase was also deficient performance.

At the evidentiary hearing Mr. Pietri presented evidence to show that due to voluntary intoxication he was not capable of forming and did not form the specific intent to kill Officer Chappell. Additional evidence was presented that supported a jury finding that Mr. Pietri's severe cocaine addiction supported an inference that he was intoxicated at the time of the offense.

Mr. Murrell's testimony concerning his lack of

knowledge about Dr. Krop, and the last minute acquisition and preparation of Dr. Caddy and Jody Iodice itself provides a cogent explanation of how the use of experts in Mr. Pietri's case fails to meet the standards established by Ake v. Oklahoma, 470 U.S. 68 (1985) (PCR. 6202-6220). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). Dr. Caddy, the only expert who testified in 1990 after evaluating Mr. Pietri, testified at the evidentiary hearing that his three and a half hour evaluation was a last minute job, and that a normal penalty phase evaluation would mean early involvement, psychological testing, and "far more" than he had time to do (PCR. 5700-5701). And it is important to recall that Dr. Caddy saw Mr. Pietri after the guilt phase was over, only the day before the penalty phase began. See Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66

Va. L. Rev. 727 (1980) (cited in Mason, 489 So. 2d at 737)("[I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject.").

Dr. Lipman's neuropharmalogical testimony at the hearing and the psychological opinions of Dr. Krop and Dr. Caddy all establish that an intoxication defense was appropriate and required in Mr. Pietri's case based on their findings that Mr. Pietri was "so intoxicated that he [was] unable to form an intent to kill" Harich v. Wainwright, 813 F. 2d 1082, 1090 (11th Cir. 1987)(citing Willey v. Wainwright, 793 F. 2d 1190, 1194 (11th Cir. 1986). (PCR. 5618-5629, 5620, 5626, 5506-5507, 5509-5510, 5741). Arguably, when taken in the context of the other experts opinions, even Dr. Spencer's opinion that Mr. Pietri was in cocaine withdrawal at the time of the offense is relevant and material to "metabolic intoxication" (PCR. 6676).

Mr. Pietri submits that evidence presented at the evidentiary hearing conclusively refutes the trial court's finding in the sentencing order:

> I reject as contrived and fabricated

> his self serving claim of cocaine intoxication. In fact, his lucid, coherent and logical testimony and the evidence of his conduct revealed in the trial show that, like so many others who use this central nervous system stimulant, he was sharpened, elevated, more alert and cunning than one would expect in the normal experience.

(R. 3709). Relief should issue in the form of an order for a new trial based on Strickland.

B. FAILURES DURING JURY SELECTION

This Court should re-visit trial counsel's failure to preserve challenge for cause jury selection issues noted in the evidentiary hearing testimony of Mr. Birch and Mr. Murrell in the context of ineffective assistance of trial counsel below. (PCR. 5927-5928). See Pietri v. State, 644 So. 2d 1347 (Fla. 1994). Unreasonable and ineffective trial performance has been found and prejudice has been presumed when trial counsel failed to challenge jurors who expressed a bias or prejudice in favor of the death penalty; who indicated that they felt all indicted people were guilty and; who indicated that the defendant's failure to testify would be held against him.

Mr. Pietri's trial counsel was ineffective in that

he failed to effectively challenge for cause Juror Carrol after Juror Carrol unequivocally answered that he would automatically vote for the death penalty if there was a first degree murder of a police officer. (R.1259). This issue was found on direct appeal not to have been preserved for review, and that failure was deficient performance by trial counsel, who was also appellate counsel, that operated to the significant prejudice of Mr. Pietri.

C. INNOCENT OF FIRST DEGREE MURDER

The state in this case proceeded only under the theory that this crime was premeditated first-degree murder. As explained elsewhere, Mr. Pietri's addiction to drugs, particularly cocaine, prohibited the formation of the necessary element of intent for the crime of premeditated murder. As such, it was impossible for him to be convicted of first degree murder in this case.

Mr. Pietri's history of drug addiction and how that addiction rendered Mr. Pietri unable to form the necessary element of intent to commit murder. Testimony from a qualified mental health professional with a specialty in substance abuse would have provided the

jury with an understanding of how certain drugs affect one's mind and how they could obstruct the formation of intent.

ARGUMENT II -- LACK OF PENALTY PHASE ADVERSARIAL TESTING

A. FAILURE TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION

Trial counsel was ineffective for failing to prepare for the penalty phase until after the jury verdict of guilt was rendered. (R. 2602). The law requires that an attorney charged with the responsibility of conducting a capital trial begin investigating for the penalty phase before the guilt phase of the trial and not wait until the guilt phase is over. Blanco v. Singletary, 943 F. 2d 1477, 1501-02 (11th Cir. 1991).

Counsel was ineffective for failing to retain a neuropsychologist to evaluate Mr. Pietri and conduct both standard psychological testing and neuropsychological testing. Trial counsel was ineffective for failing to provide Dr. Caddy with background material or adequate time to conduct a proper evaluation of Mr. Pietri. Because of counsel's actions

the jury and judge never heard important testimony proving statutory and non-statutory mitigation.

Counsel was also ineffective for failing to have Mr. Pietri evaluated by a qualified addictionologist or neuropharmacologist. The defense case centered around Mr. Pietri's drug use and the impact of long term and short term substance abuse on his mental state at the time of the offense. Testimony from a qualified professional with a specialty in the effects of drugs on the human brain would have provided the jury with a wealth of mitigation evidence. Dr. Lipman opined that both statutory mental health mitigators were present in Mr. Pietri's case (PCR. 5617). It is clear counsel should have retained an addictionologist or neuropharmacologist. That professional should have been provided with detailed background information, then met with and evaluated Mr. Pietri. And then the professional, like Dr. Lipman, should have done follow-up interviews with family members and friends of Mr. Pietri including contacts with persons who used drugs with Mr. Pietri.

Trial counsel failed to adequately investigate Mr.

Pietri's history of drug addiction and how that addiction rendered Mr. Pietri unable to substantially conform his conduct to the law. Trial counsel failed to adequately interview Mr. Pietri's family and friends concerning how Mr. Pietri's mental state was substantially altered because of his addiction.

Trial expert Caddy had only the briefest of exposure to any family members before he testified. Social worker Iodice never spoke with anyone. Because of counsel's failures, the jury knew next to nothing about the man whose fate was in their hands. There was a wealth of mitigating evidence that the defense should have presented, which would have given two additional jurors the basis for also recommending life, which would have resulted in a six to six jury vote.

The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases,

the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995).

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991). It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed below had been presented to the sentencer. Strickland, 466 U.S. at 694. Ineffective assistance of counsel claims are governed by the two-step analysis set forth in

Strickland; to establish a Sixth Amendment violation, a defendant must establish (1) deficient performance, and (2) prejudice. Id. at 687. The United States Supreme Court in Williams v. Taylor, 120 S.Ct. 1495 (2000), reemphasized the continuing vitality of the Strickland test and reiterated what the standards are with respect to capital cases and how they are to be properly applied. The Supreme Court made it clear that Mr. Pietri "had a right--indeed a constitutionally protected right--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer" Williams, 120 S.Ct. at 1513. Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Id. at 1524.

In addition to deficient performance, Mr. Pietri must also establish prejudice, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. If "the entire

postconviction record, viewed as a whole and cumulative of []evidence presented originally, raise[s] 'a reasonable probability that the result of the [] proceeding would have been different' if competent counsel" had represented the defendant, then prejudice is demonstrated under Strickland. Williams. Mr. Pietri need not establish his claim by a preponderance of the evidence; rather the standard is less than a preponderance. Williams, 120 S.Ct. at 1519 ("[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be `diametrically different,' `opposite in character or nature,' and `mutually opposed' to our clearly established precedent ..."). A proper analysis of prejudice also entails an evaluation of the totality of available mitigation--both that adduced at trial and the evidence presented at the evidentiary hearing. Id. at 1515. Finally, the law does not require that Mr. Pietri establish the existence of mitigating circumstances

beyond a reasonable doubt. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1991) ("when a reasonable quantum of uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved")

1. Deficient Performance

Both Mr. Birch and Mr. Murrell testified at the evidentiary hearing regarding their performance at trial. Their testimony is the best evidence for the problems that resulted for Mr. Pietri. Trial counsel Birch testified at the evidentiary hearing that he had unsuccessfully contacted at least five mental health experts before he found Dr. Caddy at the eleventh hour (PCR. 6160). He testified that he had no recollection as to whether the experts he tried to contact were unable or unwilling to opine about cocaine use as mitigation (PCR. 6162). He explained that Dr. Caddy came "highly recommended" but "he wanted more time" (PCR. 6160-6161). The trial record indicates that Dr. Caddy did not conduct any psychological testing (R. 3003). His only background information came from Mr. Pietri's self report, a meeting with some of Mr.

Pietri's family members, and the probable cause affidavit provided by counsel (R. 3003). His penalty phase testimony focused on Mr. Pietri's life history, and his opinions that arguably provide nonstatutory mitigation (R. 2958-2967). He also opined about Mr. Pietri's propensity towards drug usage and his drug abuse (R. 2958-69, 2978-2985). He failed, other than on proffer at the penalty phase, to opine about Mr. Pietri's mental state at the time of the offense.

Trial counsel failed to give defense clinical psychologist Glenn Ross Caddy and social worker Judy Iodice adequate background material on Mr. Pietri and the offenses he was standing trial for. A wealth of documentary, physical and testimonial evidence was available to counsel. Inexplicably, counsel failed to investigate and provide necessary material to the defense experts. (R. 2929, 2941, 3003).

The state took advantage of this error at trial. The prosecutor effectively utilized the experts lack of knowledge of Mr. Pietri's background and the facts relating to the present charges to impeach the experts. (R. 3001, 3003, 3005). The prosecutor also relied on

counsels' failure to provide the experts with background material in closing argument to challenge the experts opinions. (R. 3047, 3049, 3051, 3056, 3057, 3058).

Glenn Ross Caddy, a clinical psychologist, was retained by the defense on or about February 15, 1990, eight days **after** the jury returned a guilty verdict. Mr. Pietri had been the only defense witness during the guilt phase of his trial. Caddy testified only at the penalty phase of Mr. Pietri's trial. (R. 2952-3022).[4]

The first contact with psychologist Caddy that is memorialized in defense counsel's files was on February 15, 1990, the same day Judge Mounts denied trial counsel's motion for a thirty day continuance of the penalty phase, then scheduled to begin on February 22. (R. 2708). The motion was filed that same day and included a representation that counsel was unable to prepare for the Phase II proceedings by February 22. (R. 3652). The record of the hearing reflects that although trial counsel admitted that he had agreed to the February 22 date after the verdict he was simply

[4]During a proffer outside the presence of the jury, Caddy did opine during the penalty phase that Norberto Pietri did not form the specific intent to kill in his cocaine withdrawal state. (R. 3021).

unprepared to go forward:

> At that time also we thought we would make a good faith effort to be prepared by February 22nd. If I may say so, I feel we have made a good faith effort. We have worked on nothing but this case day and night since the conviction. We have contacted the offices or the people of five mental health experts. We have yet to find one who can assist us in this case, **not necessarily for psychological testing** but more for the question of cocaine use which clearly goes to the mitigating factors. We don't even have one yet despite our efforts of contacting five of them. We also have two in the process of being contacted. Mr. Murrell is flying to Atlanta to speak with one of them. We are diligently seeking just the use of an expert. Once we find one, that person, that gives us all of five days, six days if you will, to be prepared for that particular person's testimony.

(R. 2704-05)(emphasis added). Glenn Caddy did only a "mental status examination" of Mr. Pietri to determine if there was a question of sanity. (R. 2957). He never did any psychological testing on Norberto Pietri. (R. 3003). The person in Atlanta referred during the February 15 hearing was apparently Jody Iodice, a Georgia licensed clinical social worker, who did eventually testify during the penalty phase for the defense about the general effects of freebasing cocaine

(PCR. 6194). She was neither a physician nor a psychologist. According to the defense files she was contacted as early as February 13. However, although she was retained at some later point by the defense, she never reviewed any records in the case or met Norberto Pietri, his family members, or other who were around him when he was using drugs. (R. 2926-52).

Psychologist Caddy met only once with Mr. Pietri, at Palm Beach County Jail, for three and a half hours on February 21, 1990, the day before he testified. (R. 2955). Prior to meeting with Mr. Pietri, Caddy billed the defense for a single fifteen minute telephone conference on February 17. According to his testimony and billing records, after his contact with Pietri on February 21, Caddy participated on the same day in a one hour telephone conversation, in lieu of a deposition, with the state attorney and had two half hour telephone consultations with defense counsel. Defense counsel stated in a hearing the same day that he was unprepared to go forward, that he needed more time to acquire records and that he had not had the time or money to get his client examined by an expert. (R. 2783-84). Other

than his actual court appearance, for which he billed $2,200, the only other contact with defense counsel or the defendant that Caddy billed for was for a hour consult with defense counsel on February 22, the day of his testimony.

The **only** background materials supplied to Caddy by trial counsel were the Probable Cause affidavit and some police statements, a total of only eight or nine pages! (R. 2956, 3003-04). Caddy did not talk to any of Norberto Pietri's many family members until the morning before he testified. (PCR. 5704). The defense simply failed to provide Dr. Caddy with any background material: no police reports, no depositions, no medical records, no Department of Corrections records, no jail records, no school records, nothing concerning the client he was hired to evaluate in this case. (R. 3004).

During his examination of the defense experts, trial co-counsel Murrell deficiently failed to solicit any opinion from either expert as to the presence of **any** of the statutory mitigating circumstances. However, during the closing argument, trial co-counsel Birch argued for

eleven mitigating circumstances based on the evidence, including the factors that Mr. Pietri committed the crimes while under the influence of mental and emotional distress and that Mr. Pietri's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. (R. 3081). Yet defense counsel explicitly requested that the court not read any of the statutory factors in his jury instructions. (R. 2746). Four jurors of the twelve did not recommend death. (R. 3100). The failure by trial counsel to investigate the client's background, to then locate and prepare competent expert witnesses, and to then examine the experts about their findings regarding the existence of statutory and non-statutory mitigation was deficient performance. The prejudice to Mr. Pietri is self-evident where the jury recommendation was only 8 to 4 for death.

Certainly four jurors found that some mitigation existed and that it was at least equal in weight to the aggravating factors. Proper background investigation and selection, preparation and examination of experts would have resulted in two more votes for life. In this

case, two lawyers were appointed for Mr. Pietri, the law partners Birch and Murrell. (R. 3489). The deficient performance by defense counsel is magnified where, as here, there were two defense counsel available to work on the case.

The prejudice to Mr. Pietri created by counsel's deficient performance was underlined by the absence of any findings of mitigation in the trial court's sentencing order, which ridiculed the possibility of intoxication as "contrived and fabricated" and "self serving" (R. 3709).

Trial counsel Birch had contacted a psychologist, Harry Krop, as early as December 5, 1989, for the purpose of arranging a psychological evaluation of Mr. Pietri (R. 3543). This was months prior to the February 15, 1990 hearing noted herein, and weeks prior to the Christmas time "conversion" conversation that trial counsel reported marked the abandonment of the "somebody else did it" defense (PCR. 5914). Birch then filed a motion on December 6 to authorize payment of up to $1500 to appoint Dr. Krop as a defense expert based on representations that he had "worked with undersigned

counsel previously on court-appointed cases, is a recognized expert in his field, and could provide substantial assistance to counsel in the preparation of the defense ...primarily, but not exclusively, for Phase II preparation." (R. 3543). Judge Mounts signed an order appointing Dr. Krop on December 22, 1989 and an order allowing Dr. Krop admission to Palm Beach County Jail on December 21, 1989. (R. 3545, 3542).

Dr. Krop did evaluate Mr. Pietri on either December 12 or 22 and provided a written report. In that December 26, 1989 report addressed to defense counsel Birch, Krop advised as follows:

> Should the State seek the Death Penalty, it will be necessary for me to review depositions and other relevant documents. It would also be helpful for me to interview his mother and to review his educational records, any past PSI reports and other prison records. From my initial evaluation, it appears that this Defendant's history of physical and sexual abuse as well as his chronic drug abuse can be developed as possible mitigating factors as well as his intoxicated state at the time of the incident.

An order for payment to Dr. Krop in the amount of $822.00 was entered on January 11, 1990. The materials

requested by Dr. Krop and the suggestions that he made about preparation for the case in mitigation were precisely the areas where counsel dropped the ball with experts Caddy and Iodice **seven weeks later**. Counsel was on notice as to what was necessary for proper care and feeding of their experts long before they went into panic mode after their motion for continuance of the penalty phase, filed at the insistence of the West Palm public defenders who were advising them, was denied on February 15, 1990 (PCR. 6740). Based on his testimony at the evidentiary hearing, it is unclear why psychologist Krop was not used as a guilt phase or penalty phase witness. Peter Birch's explanation that he and Dr. Krop "just didn't click" is not an excuse for the profound negligence by trial counsel that resulted in Dr. Caddy examining Mr. Pietri the day before he testified at the penalty phase (PCR. 6155). Defense counsel's failure to ensure that Mr. Pietri received the assistance of a competent qualified mental health expert to develop evidence to assist in establishing mitigating circumstances and rebutting aggravating circumstances denied Mr. Pietri the adversarial testing to which he

was entitled and constituted deficient performance. Strategy requires a plan, careful thought as to the kind of mental health or other experts that should be retained, provision of background materials to the experts, consideration to the types of testing (Neuropsychological, neuropharmacological, neurological, etc.), background investigation, interviews with family members and friends, client involvement, and adequate preparation time for witnesses. There was no strategic plan in this case. Trial counsel's "strategic decision" to wait until Mr. Pietri had been found guilty of first degree murder to begin preparing for the penalty phase is deficient performance. An attorney cannot make a strategic decision not to present a potentially viable issue absent a diligent investigation. "[M]erely invoking the word strategy to explain errors [is] insufficient since `particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.'" Horton v. Zant, 941 F.2d 1449, 1461 (11th Cir. 1991) (quoting Strickland v. Washington, 466 U.S. at 691) (footnote omitted). "[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." Horton, 941 F.2d at 1462.

2. Prejudice

Mr. Pietri was prejudiced by the failure of trial counsel to obtain a proper mental health evaluation. While trial counsel called two experts to testify on Mr. Pietri's behalf, Jody Iodice (R. 2926-2952) and psychologist Dr. Glen Caddy (R. 2953-3023), counsel failed to give either expert adequate time to evaluate Mr. Pietri,[5] and failed to provide any background information or corroborating information that they needed to sustain their opinions. Since both witnesses' testimony was unsupported, the jury returned with a death recommendation. In effect, counsel did not call Iodice and Caddy to present valid mitigation at the penalty phase. To do so would have required that they actually prepare them. Counsel called Iodice and Caddy to mask their lack of preparation and their ineffectiveness.

[5] Jody Iodice never met or examined Mr. Pietri before she testified at the penalty phase (R. 2941).

Jody Iodice failed to provide any meaningful testimony at Mr. Pietri's trial. She was not retained as an expert for the purposes of a penalty phase evaluation. She was not asked to evaluate Mr. Pietri's state of mind at the time of the offense, nor was she asked to opine about his background or life history. She was not asked to provide any specific information regarding Mr. Pietri at all. At the time of trial, Jody Iodice was a licensed clinical social worker in Georgia working with recovering alcoholics and drug addicts (R. 2926). She was qualified as an expert in the field of alcohol and drug abuse (R. 2929-2931). She testified about her experiences with people addicted to drugs (R. 2931-2940), and did so only in its broadest sense. She failed to relate drug abuse to Mr. Pietri in anything other than the hypothetical sense.

The rushed nature of the examination and lack of corroborating information affected Dr. Caddy's ability to articulate and support his opinions. The lack of support made Dr. Caddy an easy target on cross-examination. In his own words, the lack of time and information "compromised the quality" of his testimony

(PCR. 5706). There is no reasonable explanation as to why counsel waited until after the guilt phase to retain Dr. Caddy and Jody Iodice. What makes counsels' failure to prepare a mental health evaluation in this case even more unreasonable is that they had retained a well qualified expert in early December 1989, Dr. Harry Krop. However, counsel failed to provide Dr. Krop with any of the information he requested after his initial screening interview of Mr. Pietri.

At the hearing, Mr. Birch asserted that he did not follow-up with Dr. Krop because he believed at the time that "[Dr. Krop] would not be ideal for Phase II (PCR. 6155). This self-serving speculation, however, is not evidence of anything. Dr. Krop testified at the evidentiary hearing that he would testified about his initial impressions of non-statutory mitigation, even though he stressed that those findings **were limited and based solely on Mr. Pietri's self-report** (PCR. 5507). Even without any information, based on his own contemporaneous notes, Dr. Krop stated at the evidentiary hearing that he would have been able to testify that Mr. Pietri had 1) a history of substance

abuse, 2) was most likely intoxicated to some degree at the time of the offense, 3) had a dysfunctional family situation, and 4) was a victim of sexual abuse (Id.). Had Mr. Birch investigated this case and discovered the available records, and provided such records to his expert (as he had a constitutional duty to do),[6] Dr. Krop testified that not only would he have corroborated his initial opinions regarding non-statutory mitigation, he also would have opined regarding Mr. Pietri's state of mind at the time of the offense, and would have given testimony in support of statutory mitigation. Such additional information was provided to Dr. Krop by postconviction counsel in preparation for the evidentiary hearing. Dr. Krop testified that he would have conducted a neuropsychological evaluation or strongly recommended that one be performed (PCR. 5539). He also testified that he had reviewed Dr. Goldberg's data and it was his opinion that Dr. Goldberg had used a comprehensive battery of neuropsychological tests (PCR.

---

[6]See, e.g. Wallace v. Stewart, 184 F.3d 1112, 1116 (9th Cir. 1999) ("Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes").

5541-5543). It was information that was available at the time of penalty phase or the type of information which would have been available had counsel properly obtained an expert evaluation (PCR. 5539-5540). Specifically, had counsel contacted Dr. Krop and followed his recommendations, Dr. Krop would not only have had the records he requested, he also would have had access to neuropsychological test results and neurological data. (PCR. 5539). Had counsel simply followed-up on Dr. Krop's requests, the substantial mitigation listed above would not only have been presented to the jury, there is a reasonably probability that it would have been accepted.[7]

As presented through lay and expert testimony at the evidentiary hearing, there is uncontroverted evidence of statutory and nonstatutory mitigation which was never presented to the jury. Although the State called Dr. John Spencer to rebut the testimony of Mr. Pietri's experts, he was neither qualified to render such opinions nor did he have enough information to do so.

[7] Unlike Dr. Caddy's **unsupported** opinions, which were destroyed on cross examination and rejected by the eight members of the jury and the trial court (R. 3001-3010).

His criticism of Dr. Goldberg's WAIS-R IQ testing and the State's charge of alleged negligence by Goldberg in failing to perform formal malingering tests are both completely undermined by Dr. Spencer's total failure to do **any** psychological testing or malingering testing over the two days he had court-ordered access to Mr. Pietri over the objection of postconviction counsel (PCR. 6618-6619). This was in spite of the fact that he had the relevant testing materials with him. Although Mr. Pietri asserts that Dr. Spencer's opinion concerning the absence of mitigation lacks any credible evidentiary support and flies in the face of his deposition and hearing testimony about the presence of remorse and addiction, counsel notes that Dr. Spencer's testimony does affirm Mr. Pietri's cocaine addiction and history of chronic substance abuse as was found by all the other experts (PCR. 6628, 6637, 5358-5470).

Trial counsel failed not only to present a full picture of Mr. Pietri's mental status at the time of the offense, he also failed to give the jury an adequate picture of the man they were about to sentence to death. Had the jury known the extent of Mr. Pietri's horrible

background, the difficulties of his childhood, the full extent of his addiction history, and the presence of objectively testable cognitive and neurological disorders, there is more than a reasonable probability that two additional jurors would have voted for a life sentence.

To counter the essentially unrebutted factual scenario presented at the guilt phase, the jury at the penalty phase was presented with testimony that served the interest of concealing counsels' ineffective preparation more than actually giving the jury a true picture of Mr. Pietri's life. Counsel called eight (8) witnesses during the penalty phase. They called four (4) of Mr. Pietri's fourteen (14) brothers and sisters. They also called Yoris Santana, a friend of Mr. Pietri's, who was present with Mr. Pietri the weekend proceeding the killing of Officer Chappell (R. 2838-2847). Counsel also called a "minister" who visited at the Dade County Jail and the last minute experts, Jody Iodice and Dr. Glen Caddy.

Counsel for Mr. Pietri also submits that the testimony of Strickland expert Robert Norgard supports a

finding of deficient performance and prejudice as to the acquisition, preparation and use of experts by trial counsel at the guilt phase and the penalty phase of Mr. Pietri's trial. (PCR. 5936-5991). Furthermore, the draft affidavit prepared by public defender Gary Caldwell and identified by Mr. Caldwell at the evidentiary hearing, further establishes deficient performance at the penalty phase by trial counsel (PCR. 6691-6718)(Defense Exhibit #60). The very public defender office identified by Mr. Norgard as the most important source for capital defense expertise circa 1990 created a contemporaneous damning document eviscerating the preparation and performance of Mr. Birch and Mr. Murrell prior to the penalty phase. Assistant public defender Richard Greene indicated in his testimony that Peter Birch was concerned about preparation for the penalty phase interfering with a vacation he had planned (PCR. 6273).

Based on the evidence presented at the evidentiary hearing, the legal arguments contained herein and in Mr. Pietri's prior submissions, and the cumulative effect of all errors asserted by Mr. Pietri, Mr. Pietri submits

that he is entitled to relief. As noted above, Mr. Pietri needs to establish by less than a preponderance of the evidence that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In Mr. Pietri's case, the prejudice is apparent. Mr. Pietri's sentencing jury was entitled to know the reality of Mr. Pietri's background, as it "might well have influenced the jury's appraisal of his moral culpability." Williams, 120 S.Ct. at 1515. "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) (citing Lockett v. Ohio, 438 U.S. 586 (1978)).

The State has also argued that the outcome of Mr. Pietri's case is governed by the divided holding in Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000). Unlike in Mr. Pietri's case, the use of mental

health experts and evidence was not at issue in Chandler. Chandler's argument in federal court was that additional mitigation in the form of character evidence should have been presented. Mr. Birch and Mr. Murrell's performance was unreasonable performance under the circumstances. See Williams v. Taylor, 120 S.Ct. 1495 (2000).

A court reviewing an ineffective assistance of counsel claim must determine whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). Had counsel fully investigated the case for life, as outlined herein, the jury would have recommended life and the Court would have been bound to follow that recommendation.

This is especially so in a case such as Mr. Pietri's, a case involving a wealth of mitigation which was available for presentation at the time of trial and which was never investigated or developed by defense counsel. There was no tactic here. There was no strategy here. This is plainly a case of ineffective

assistance. Here, "counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). Here, counsel made no meaningful preparation for the penalty phase, had no reason for failing to prepare, and had no strategy at all. Trial counsel advised the trial court that this was the case more than a week after the conclusion of the guilt phase during a hearing in which a renewed defense motion for a thirty day continuance was denied days before the penalty phase was to commence (R. 2706, 3652).

Counsel violated his primary duty -- the duty to investigate and prepare. As stated above, the failure of trial counsel to conduct a marginally adequate investigation of Mr. Pietri's case is beyond question and the resulting prejudice to Mr. Pietri, where the jury vote for death was eight (8) to four (4), is unavoidable.

ARGUMENT III -- PUBLIC RECORDS

Counsel for Mr. Pietri properly filed an affidavit for additional public records pursuant to Fla. R. Crim.

P. 3.852 (i) on July 17, 2002, requesting additional public records from the Office of the State Attorney, 15th Judicial Circuit (PCR. 6683-6895). A portion of the record of the evidentiary hearing, attached to the affidavit, reflected that the State was in constructive possession of a letter addressed to the victim's family and that the letter had been tendered by the State for potential inspection by the Court on March 20, 2002. After being advised by the Court that the disposition of the letter was up to the lawyers, counsel for Mr. Pietri advised the Court that he did not want to make a "snap judgment" about whether the letter should be part of the record. (PCR. 6768-6770).

In a letter dated May 16, 2002, undersigned counsel requested a copy of the letter and any other "associated materials" in the possession of the State Attorney, so that the materials could be examined before the due date of Mr. Pietri's post-hearing memorandum (PCR. 6889). The State Attorney never responded to this request, either by entering an objection, claim of privilege or in any other manner. Therefore, on August 21, 2002, counsel for Mr. Pietri filed a Motion to Compel directed

at the Office of the State Attorney, 15th Judicial Circuit. (PCR. 6896-6901). No hearing was ever held, and the lower court entered an order denying Mr. Pietri postconviction relief on August 27, 2002 (PCR. 6902). The following day, August 28, 2002, the Assistant Attorney General filed a response to Mr. Pietri's motion to compel (PCR. 6903-6905). This response simply restated the proposition that had been voiced by the State at the evidentiary hearing when the State brought up the Chappell letter, namely that life without parole would be an illegal sentence in Mr. Pietri's case. On September 5, 2002, the lower court entered an order denying the motion to compel (PCR. 6906-6909). This issue has never been adjudicated before this Court. "When the State's inaction in failing to disclose public records results in a capital postconviction litigant's inability fully to plead claims for relief, the State is estopped from claiming that the postconviction motion should be denied or dismissed. Ventura v. State, 673 So. 2d 479 (Fla. 1996). ("The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an

asserted procedural default that was caused by the State's failure to act")." As noted supra, Rule 3.852 also anticipates that the Court will resolve public records issues through a hearing before entering an order denying postconviction relief. Yet there was never a hearing and the State utterly failed to respond to the request for the Chappell letter and any associated records. This Court should order this and any related correspondence to be produced to Mr. Pietri.

ARGUMENT IV -- ERROR IN THE LOWER COURT'S POST-HEARING ORDER

The lower court failed in its duty to play an independent role in the process. The court directed the parties to prepare post evidentiary hearing memoranda and proposed orders (PCR. 6761-6763). Mr. Pietri filed a one page proposed order granting relief along with his post-hearing memorandum (PCR. 6827-6882).[8] The State failed to provide a proposed order, although they timely filed a post-hearing memorandum (PCR. 6786-6826). The

[8]It does not appear that the proposed order is in the record on appeal. Undersigned counsel is filing a contemporaneous motion to supplement the record with the cover letter and a copy of the proposed order.

lower court abdicated any responsibility for independently making findings of fact or conclusions of law by thereafter entering a post-evidentiary hearing order denying relief that "incorporated by reference and made a part of the record" the State's post-evidentiary hearing memorandum, not a proposed order, to the court's one sentence order denying relief (PCR. 6902, 6786-6826). Even the State's memorandum cautioned the lower court that "it is imperative that this Court provide detailed factual findings as to each claim so that all reviewing courts must apply a presumption of correctness to those findings" (PCR. 6788). Judge Mounts' order does not indicate that he "determined what weight should be given to conflicting testimony" pursuant to Mason v. State, 597 So.2d 776, 780 (Fla. 1992). It seems particularly negligent on the part of the court to fail to do so in circumstances where the defense offered nineteen witnesses and the State offered only one in rebuttal.[9]

---

[9]This Court's review over ineffective assistance of counsel claims is *de novo*. Stephens v. State, 748 So. 2d 1028 (Fla. 1999). If the lower court had made any findings of fact after the evidentiary hearing, those facts would be due deference on appeal if they were supported by competent and substantial evidence. Id. The

Absent a fair tribunal there is no full and fair hearing. Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988) dictates that even the appearance of bias is sufficient to warrant reversal. At Mr. Pietri's 1990 trial Judge Mounts simply adopted the State's memorandum of law and attached same to the sentencing order. No mitigation of any kind was found, as the state had argued. This violated Patterson v. State, 513 So. 2d 1257 (Fla. 1987). This 3.850 claim was found to be procedurally barred as raised and rejected on direct appeal. Trial counsel's failure to object was deficient performance which prejudiced Mr. Pietri. The State's post-hearing memorandum is facially deficient and clearly erroneous in area after area, and the lower court's reliance on it was an abuse of discretion. A few examples are called for. The State contends that "defense counsel testified that there was absolutely no evidence" to support a voluntary intoxication defense (PCR. 6794). "Pietri did not present any evidence that would have supported a voluntary intoxication defense" (PCR. 6794) "At no time did anyone testify that Pietri

---

instant order is unsupported and insufficient.

could not form the specific intent to murder" (PCR. 6795). The State also claims that trial counsel deposed three of the four people with Mr. Pietri during his cocaine binge days before the murder (PCR. 6796.). Testimony and evidence presented at the hearing clearly showed that not only did trial counsel fail to depose Randy Roberts or Luis Serrano, even though they were the basis for the public defender conflicting off the case, they never even bothered to find them and talk to them. Only Mickie Brantley and Yoris Santana were deposed. The State's entire formulation as to what needs to be present for an intoxication defense is flawed, thus their analysis of the quality of the evidence presented is also flawed, there was not a "complete absence of any evidence to support a claim of voluntary intoxication" (PCR. 6802). It is also untrue that Dr. Krop was not asked about specific intent (R. 6803); that Dr. Lipman's finding of "metabolic intoxication" is irrelevant (PCR. 6804); or that Dr.Caddy was not asked about specific intent to kill (R. 6804). Additionally, Dr. Hyde's report concerning his medical opinion of Mr. Pietri's neurological abnormalities was introduced in

surrebuttal to Dr. Spencer findings that Mr. Pietri suffered from no cognitive or neurological difficulties, not to support or refute voluntary intoxication (PCR. 6806-6807).

The State's reliance on Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985) is unclear since Mr. Pietri was charged with premeditated murder and a voluntary intoxication instruction was given at trial in 1990. Mr. Pietri was not required to show that he was "too high" to be able to form the specific intent to kill as the State's memorandum implies (PCR. 6807). No strategic decision has been made when trial counsel's position is, like Mr. Birch's, that he never uses the voluntary intoxication defense. Trial counsel's personal beliefs about the intoxication defense preceded the abolition of the defense in law in Florida by some years. Mr. Pietri lost the potential benefit of the defense because of trial counsel's personal prejudices and not for strategic reasons. The Ninth Circuit recently analyzed a case where trial counsel was not absolved of deficient performance at the guilt phase for failing to investigate mental health defenses even when

his client claimed he was innocent, as did Mr. Pietri until late December 1989. See Douglas v. Woodford, 316 F. 3d 1079, 1086 (9th Cir. 2003).

The State's memorandum takes liberties concerning the penalty phase issues aired at the evidentiary hearing. The State repeats the misinformation that Mr. Birch contacted Dr. Krop after Mr. Pietri admitted to Birch that he had killed Officer Chappell (PCR. 6811). This is factually incorrect based on the record. Krop was contacted by Mr. Birch in early December. Krop testified in great detail at the evidentiary hearing about what he needed from Mr. Birch to be a useful guilt phase or penalty phase witness. He had written Birch with a detailed list in late December 1989. The State's characterization of Dr. Caddy's contact with Mr. Pietri as "an extensive psychological evaluation" is inaccurate, particularly in the context of the testimony of Dr. Caddy, Donnie Murrell and Peter Birch. (R. 6812). The record contains no evidence that Gail Martin of the Palm Beach public defender office did anything other than pro bono last minute damage control work on the Pietri case because that office was deeply

concerned about the negligent preparation by Birch and Murrell at the penalty phase, as was well documented by Gary Caldwell's affidavit and his testimony along with that of Richard Greene and Steve Malone. (PCR. 6812). The State's memo simply fails to mention the disagreements in the testimony of Mr. Birch and Mr. Murrell. For example, Murrell disagreed with Birch's characterization of Jody Iodice's testimony and said that she was a wasted opportunity. (R. 6813). The State's description of Dr. Caddy's testimony to the effect that he did not find that Mr. Pietri met either statutory mental health mitigator does not comport with the record (R. 6820). That is simply not what Dr. Caddy said. The lower court's "incorporation by reference" of the state's memorandum is an abuse of discretion.

ARGUMENT IV - MR. PIETRI IS INSANE TO BE EXECUTED

Mr. Pietri is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane.

Mr. Pietri acknowledges that this claim is not ripe for consideration. However, it must be raised to preserve the claim for review in future proceedings and in federal court should that be necessary. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Accordingly Mr. Pietri must raise this issue in the instant pleading.

ARGUMENT V - CUMULATIVE ERROR

It is Mr. Pietri's contention that the process itself failed him because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). This Court must consider the cumulative effect of all the evidence not presented to the jury whether due to trial counsel's ineffectiveness, the State's misconduct, or because the evidence is newly discovered. Kyles v. Whitley, 514 U.S. 419 (1995).

CONCLUSION

Mr. Pietri submits that relief is warranted in the form of a new trial and/or a resentencing proceeding. To the extent that the lower court erred in granting an

evidentiary hearing, reversal is warranted as well on that basis.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Celia A. Terenzio, Office of the Attorney General, 1515 N. Flagler Dr., 9th Floor, West Palm Beach, FL 33401-3432, on June 10, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

WILLIAM M. HENNIS, III
Florida Bar No. 0066850
Assistant CCRC
101 N.E. 3rd Ave.
Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Appellant