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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENTS IN REPLY

ARGUMENT I

The State takes the position that this Court should give deference to the trial court's alleged findings of fact and assessments of witness credibility relied on in denying guilt phase relief. The State contends these findings were supported by both the original record on appeal and the postconviction record and therefore must be affirmed on appeal pursuant to Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). The State fails to answer Mr. Pietri's argument that the trial court abused its discretion by failing to make any independent findings when it adopted the State's posthearing memorandum as an attachment to a one page order denying relief. This was a mechanical act, not independent thought.

Given that the State has "accept[ed] appellant's statement of the case and facts," as laid out in Mr.

Pietri's Initial Brief, it is an ironic counterpoint to that acceptance that the State has repeated the same themes of misstatement and misinformation that were contained in its post-hearing memo to flesh out the balance of its brief. This Court's independent *de novo* review of the trial court's legal basis for denying guilt phase and penalty phase relief to Mr. Pietri should begin with a careful comparison between the record and the representations made by the State in the post-hearing memorandum adopted by the lower court.

The State's arguments that "[t]he trial court properly rejected Pietri's claim because he failed to offer any factual support for his assertion that a voluntary intoxication defense was viable" and that "[a]ppellant's trial attorneys clearly stated that no such evidence existed" are both factually incorrect and not borne out by the record. In Henry v. State, Case No. 02-804 (Fla. October 9, 2003), relied upon by the State, this Court found that Henry had failed to present any evidence in postconviction that he was actually intoxicated at the

time of the offense.[1] Mr. Pietri's case is completely different.

Neuropharmacologist Dr. Jonathan Lipman's detailed testimony at the evidentiary hearing concerning Mr. Pietri's metabolic intoxication at the time of the offense conforms with the requirements for an expert's testimony about specific intent that this Court recently articulated in Henry[2] (PCR. 5618-5630). Dr. Lipman testified about his detailed interviews with Mr. Pietri's family members.[3] (PCR. 5562). Two of the group, Luis and Mickey Serrano were living with Mr. Pietri in the hotels after he walked away from Lantana Correctional and embarked on the cocaine binge that culminated in the shooting. Dr. Lipman

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[1]"Henry did not present any evidence that the mental health experts retrial counsel contacted - or anyone else - would have testified that Henry was intoxicated at the time of the offense with or without regard to any underlying mental condition." Id at 8.

[2]"As we said in State v. Bias, Gurganus stands for the principle that "it is proper for an expert to testify 'as to the effect of a given quantity of intoxicant' on the mind of the accused when there is sufficient evidence in the record to show or support an inference of the consumption of intoxicants." 653 So. 2d at 383. Thus an expert "**may need to explain why a certain quantity of intoxicants causes intoxication in the defendant whereas it would not in other individuals**." Id. Henry at 7. (emphasis added).

[3]Dr. Lipman conducted in person interviews with Mr. Pietri's siblings Edwin Serrano, Ramone Pietri, Marino Pietri, William Pietri, Juanita Pietri, Virginia Pietri, Ana Pietri, Ada Serrano, Luis Serrano and his sister-in-law Mickey Brantley Serrano. His interview notes were attached to his deposition and were also introduced at the evidentiary hearing (PCR. 5168-94).

explained in his testimony that these interviews were an important part of developing his opinion about Mr. Pietri's drug history and drug use at the time of the offense (PCR. 5562).[4] The Court should also recall that psychologist Dr. Glenn Caddy testified at the evidentiary hearing about Mr. Pietri's "extremely impaired" cocaine intoxicated state (PCR. 5741, 5765).[5] Dr. Harry Krop, who was retained by trial counsel but never called to testify, stated during the evidentiary hearing that he would have been prepared, based on his initial interview of Mr. Pietri, to testify at trial that the defendant "most likely was intoxicated to some degree" at the time of the offense. (PCR. 5506-5507).

There were acts and omissions by trial counsel that added up to deficient performance at the guilt phase. There was evidence available for trial counsel to discover that would have supported a voluntary intoxication

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[4]Dr. Lipman also conducted an extensive interview with Mr. Pietri over two days. His notes of that interview are also part of the record. (PCR. 5168-93).

[5]Dr. Caddy had testified on proffer at the penalty phase that it was his opinion that Mr. Pietri did not form the specific intent to kill at the time of the offense (R. 3021). Mr. Murrell testified that Dr. Caddy was unknown to trial counsel at the time of the guilt phase (PCR. 6242-43).

defense. Mr. Pietri's prison records, which were reviewed by all the postconviction experts, revealed a history of drug abuse in prison including cocaine use on August 15, 1988 only a week before the murder as well as a Beta IQ score of 82. (Defense Exhibits 31-35). Testimony at the hearing by trial counsel established that this material would have been a red flag if they had only obtained it. Murrell testified that he was 100% sure he never knew about the 8/15/88 Lantana Correctional Disciplinary Report about cocaine use by Mr. Pietri after he walked away from the lock-up (PCR. 6226). Both trial counsel indicated that evidence of drug use in prison would have been very important evidence to provide to an expert at the guilt phase (PCR. 6127-32, 6221-23, 6244). Other than their contact with Yoris Santana, Mickey Brantley and sister Ada, trial counsel apparently failed to interview the family members who told Dr. Lipman about Mr. Pietri's substance abuse history in detail.[6] Trial counsel failed

[6]As is established elsewhere, Peter Birch deposed Santana and Brantley before the trial. Santana was presented only at the penalty phase. The record does not reveal when Ana was contacted by counsel. She also testified at the penalty phase. Birch and Murrell both testified that they did not know why they failed to interview or depose Luis Serrano or Ricky Roberts who were with Mr. Pietri in the days before and after the murder along with Brantley and Santana.

to obtain a detailed social history/substance abuse history on Mr. Pietri. Murrell testified in some detail about his misuse of social worker Iodice who was hired because of her knowledge about drugs (PCR. 6214, 6250, 6270, 6331). The record reveals that trial counsels' investigation regarding guilt phase issues ended after Dr. Krop's evaluation in December 1989. Both Birch and Murrell admitted to a very limited understanding of the issues related to cocaine withdrawal and cocaine intoxication (PCR. 6097-98, 6115, 6204, 6210, 6244, 6333). According to Birch's testimony, when Mr. Pietri told Birch he had not ingested cocaine for several hours before the offense, Birch believed that an intoxication defense was inapplicable (PCR. 6096-97).

Donnie Murrell's testimony at the evidentiary hearing indicated that he did not understand the subtle differences between a voluntary intoxication defense and an insanity defense. He described the elements of the voluntary intoxication defense as being that "the Defendant voluntarily consumed or ingested a substances that made him so intoxicated at the time of the offense he was unable to tell right from wrong." (PCR. 6204). This

is precisely the kind of misperception that this Court identified as a problem in a lower court's summary denial order concerning voluntary intoxication in Reaves v. State, 826 So. 2d 932, 938-39 (Fla. 2002). Given Murrell's testimony, it is fair to suggest that his understanding of the voluntary intoxication defense undermined his ability to develop and present it. The State's brief emphasizes Peter Birch's testimony that it was his opinion that the voluntary intoxication defense would not work in front of a jury. The State relies on Grayson v. Thompson, 257 F. 3d 1194 (11th Cir 2001) and Tompkins v. Moore, 193 F.2d 1327, 1338 (11th Cir. 1999) to support its position that it was therefore reasonable for Peter Birch and Donnie Murrell to fail to present an intoxication defense because such a defense is not necessarily favorable evidence before the jury.

However, Grayson and Tompkins are distinguishable from Mr. Pietri's case. Grayson's trial counsel did present an intoxication case, but his federal habeas claim of ineffective assistance was based on arguments that: (1) trial counsel failed to develop and present additional evidence at trial regarding his chronic alcoholism and

intoxication at the time of the offense; (2) trial counsel failed to introduce hospital records supporting the intoxication defense; and (3) trial counsel failed "to gather and present a defense expert regarding intoxication and alcoholism and their effects on an individuals ability to appreciate and understand the consequences of his actions." Grayson at 1219-21. At the trial, Grayson himself testified in great detail in support of his own voluntary intoxication.[7] Trial counsel also called the defendant's mother, his sister and the local Sheriff to confirm portions of Grayson's testimony concerning loss of memory related to alcohol intoxication. Id. at 1220. In closing argument to the jury, trial counsel in Grayson argued lack of specific intent and "made references to Grayson's intoxicated state at the time of the crime,"

[7]"At trial, defense counsel's theory was that Grayson lacked the specific intent to be guilty of capital murder. Grayson testified as to the large quantity of alcohol he and Kennedy had consumed on the night of the killing. Counsel emphasized Grayson's repeated trips to buy alcohol and his consumption of large amounts of wine right out of the bottle for several hours immediately preceding the crime. Consistent with his intoxication, Grayson repeatedly testified on direct regarding his inability to recall the specifics of the crime. Indeed, Grayson testified that he completely forgot committing the crime the next morning until his mother told him of Mrs. Orr's killing...Grayson again emphasized that he was extremely intoxicated at the time of the crime and his problem with alcohol. He insisted that he would not have committed the crime at all if he had not been so drunk." Grayson at 1218-19.

although counsel argued that "We are not saying voluntary intoxication completely absolves him of his fault." Id. at 1223. (emphasis added). The State argued that intoxication was not an available defense because Grayson had been "sober enough to walk, talk, rape, pillage the house for valuables, and walk home of his own accord." Id. at 1205. In short, there can be no doubt that a voluntary intoxication defense was presented and rebutted at Grayson's trial.

Grayson's trial counsel's performance regarding presentation of the intoxication defense was found by the Eleventh Circuit not to be "below the standard of reasonable professional performance" because "[c]ounsel highlighted the intent issue and Grayson's consumption of excessive alcohol on the night in question. In addition counsel focused the jury on the physical and forensic evidence suggesting Grayson's lack of intent to kill Mrs. Orr. This approach was not unreasonable." Id. at 1220. The Court held that Grayson's trial counsel's failure to obtain and present an expert regarding intoxication and alcoholism was reasonable due to the "limited resources

available"[8] to counsel in Alabama and the fact that while expert testimony might have been "helpful", "the effects of excess alcohol consumption are not necessarily outside the ken of the average juror." Id. at 1221.

There was no such restriction on expenditure for experts in Mr. Pietri's case. After Dr. Krop informed Mr. Birch that as a result of his December 12, 1989 evaluation his opinion was that Mr. Pietri was in an "intoxicated state" at the time of the offense, he ultimately billed for only $822 of the $1,500 that had been authorized for his services .[9] Nor can it be inferred that the average juror in 1990 had a similar common-sense understanding of the dynamics of chronic crack cocaine addiction and binging such as was present in Mr. Pietri's case. Trial counsel for Mr. Pietri acknowledged their lack of understanding of his substance abuse and acknowledged that their failure to present any testimony, by Jody Iodice for example, other than that of Mr. Pietri

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[8]The opinion notes that Alabama then had a statutory limit of $500 for expert funds. Id. at 1201.

[9]Dr. Krop's billing, the motion for payment, along with his December 26, 1989 report and Mr. Birch's motion for appointment were all introduced as exhibits at the evidentiary hearing.

at the guilt phase in support of voluntary intoxication was not a strategy. (PCR. 6097, 6116, 6214, 6220).

Some corroboration of Mr. Pietri's testimony at the guilt phase was required to support a voluntary intoxication defense, even if voluntary intoxication was presented as a background "sub-theme of our entire defense" as Donnie Murrell testified (PCR. 6202). Clearly that much would be necessary for a finding that counsel's performance in that regard was reasonable according to the standard articulated in Grayson. This Court should also take note of Mr. Birch's argument at the penalty phase that Mr. Pietri's cocaine use was sufficient support for the two statutory mental health mitigators (R. 3081). In the context of that argument Birch explained to the jury that their consideration of Mr. Pietri's cocaine use in the penalty phase context was different than what they had considered at the guilt phase: "We are not talking when we were discussing the difference between first and second-degree murder and you had an intoxication instruction, this has nothing to do with that. We are talking about **any degree of impairment** as being considered by use as a mitigating circumstance.

Norberto was not a cold, calculated murderer that the Prosecutor portrays. He was strung out on cocaine. He used it for four days, days and nights constantly, without hardly any sleep. He was not a cold, calculating murderer." (R. 3081-82)(emphasis added). Birch's argument at the penalty phase was a direct acknowledgement to the jury of the failure at the guilt phase of the defense argument that Mr. Pietri's cocaine use met the standard required in the voluntary intoxication instruction .

The Grayson Court noted that trial counsel in Mr. Grayson's case did not testify that he made a strategic decision to downplay the intoxication defense, but rather had testified that "he would have wanted expert testimony regarding alcohol consumption" at the trial if he could have obtained it. Id. at 1222. Critically for comparison to Mr. Pietri's case, Grayson did actually present the testimonial evidence of voluntary alcohol intoxication that was available to him under the circumstances. "Because counsel's presentation of evidence regarding the issue of intent and Grayson's intoxication were reasonable under the circumstances facing counsel at the time,

counsel's failure to do something more does not rise to the level of ineffective assistance of counsel." Id. at 1222.

Mr. Pietri's counsel failed to do the single most important thing at trial that is necessary when presenting a voluntary intoxication defense -- communicating to the finders of fact the fact of intoxication itself:

> It is conceivable that undue emphasis on a defendant's intoxication - beyond communication of the fact of intoxication itself - could potentially alienate the jury as an attempt to excuse truly horrendous conduct. In this case, undue emphasis on Grayson's intoxication could have undermined defense counsel's attempt to show Grayson's acceptance of responsibility for what he had done.

Id. Intoxication must be specifically articulated, not implied, for an intoxication defense to be properly presented.[10] Under this analysis some explication as to the processes of cocaine intoxication, withdrawal, and brain chemistry has to be included in the defense. The

[10]Mr. Pietri testified as the defense's only guilt phase witness at his 1990 trial. He testified that he smoked the last of his crack cocaine at about 8:00 a.m. on the morning of August 22, 1988 (R. 2371). Testimony by a police officer at the trial established that a radio transmission from Officer Chappell reported that he was shot at 10:56 a.m. that same morning (R. 2064).

State's contention of a "complete lack of evidence to support the notion that Pietri was **too high** to be able to form the specific intent to commit murder" actually begs the question. The issue is not the amount of cocaine in Mr. Pietri's bloodstream at the time of the offense, but rather whether the presence or absence of cocaine impacted on his brain chemistry such that he was unable to form the intent to kill. It was precisely at that nexus that the expert testimony at the evidentiary hearing was focussed. Chronic crack cocaine addiction with the binging behavior that accompanies it results in metabolic intoxication that is bound up with the withdrawal syndrome and the pathological craving that the State's brief refers to. Far from being cumulative, the expert testimony at the evidentiary hearing established the processes of addiction and explained the dynamic forces at work. The State's "too high" formulation is based on an alcohol consumption model of "too drunk" to form intent or the alcoholic blackout syndrome model, both of which are predicated on high levels of alcohol present in the bloodstream at the time of an offense.

Pharmacologist Dr. Lipman explained in some detail how

Mr. Pietri's damaged brain was more vulnerable to intoxication than a "normal" person's brain because he was a long-term cocaine addict, something the State now takes pains not to dispute, with frontal lobe problems that had been identified by the testing of Dr. Goldberg and Dr. Hyde. The critical factor for Dr. Lipman's analysis is that metabolic intoxication continues and accelerates even after a high concentration of cocaine has left the system. "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." (PCR. 5626). The processes of cocaine intoxication and withdrawal are simply not something that a juror in 1990 would have had an ordinary lay understanding of. Experts are called for precisely when matters at issue are "necessarily outside the ken of the average juror." Even trial counsel Birch admitted that he did not know what a neuropharmacologist was in 1989-1990 (PCR. 6172).

Tompkins is the other case that the State relies on in its brief for the proposition that it is reasonable for an attorney not to investigate and pursue an intoxication

defense, as such evidence is not necessarily favorable evidence before a jury. The section of the Tompkins opinion that the State cites to concerns not a guilt phase intoxication defense, but rather the use of evidence of self-reported alcohol and drug abuse at the penalty phase. Tompkins at 1337-38. The evidence of drug abuse in Tompkins consisted "almost entirely of his own statements...to the psychologist who testified as his expert witness on mental state issues in the Rule 3.850 proceeding." Id. at 1337. Neither the affidavits of nine family members and close friends of Mr. Tompkins, nor the evidentiary hearing testimony of five of the same nine, indicated that he had a serious substance abuse or alcohol problem. Id. The opinion acknowledges that even when a factual basis exists for the presentation of a mitigation case based on alcohol and drug use, the decision to go forward "can harm a capital defendant as easily as it can help him at sentencing." Id. at 1338. That cautionary note is predicated by two screening standards for approaching the question of what reasonably constitutes a "factual basis" in such circumstances:

> The opinion of a medical expert that a

> defendant was intoxicated with alcohol or drugs at the time of the capital offense is unreliable and of little use as mitigating circumstances evidence when it is predicated solely upon the defendant's own self-serving statements, especially when other evidence is inconsistent with those statements.[11] (citation omitted).
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> * * *
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> A psychological defense strategy at sentencing is unlikely to succeed where it is inconsistent with the defendant's own behavior and conduct. (citation omitted).

Id. at 1337-38. Assuming that the "two-edged sword" analysis by Judge Carnes applies to the guilt phase as well as to the penalty phase, it follows that Mr. Pietri's intoxication defense would be unlikely to succeed unless it was consistent with his behavior and conduct. Likewise, unless Mr. Pietri's self report to any expert, such as Dr. Krop, was corroborated by other consistent evidence supporting voluntary intoxication at the time of the offense, it would be of "little use" in support of voluntary intoxication. This equation thus requires that trial counsel make a good faith effort to investigate Mr.

[11]The opinion points out in footnote 8 which appears after the phrase "self serving statements" that Tompkins continued to maintain his innocence of the murder and to deny that he was under the influence of drugs or alcohol at the time of the offense.

Pietri's behavior and conduct in the community and in the prison system. It also requires an investigation of all available corroboration for his substance abuse history and possible intoxication at the time of the offense. Counsel submits that an intoxication defense in Mr. Pietri's case was certainly "consistent with his behavior and conduct" and should have been "corroborated by other consistent evidence supporting voluntary intoxication at the time of the offense" if counsel had done their jobs. Instead they chose to present only Mr. Pietri's own testimony. The conduct of trial counsel in Mr. Pietri's case was unreasonable based on the very standards promoted in the cases cited by the State's brief.

The State contends that Mr. Pietri's "violent and anti-social nature" would have been revealed if trial counsel had called corroboration witnesses at the guilt phase of his trial, therefore they made a strategic decision not to present any lay witnesses. However, little damaging information of any real consequence is contained in the material cited by the State. Notwithstanding an extensive criminal record consisting of burglaries and drug offenses, Mr. Pietri did not have any

prior violent felony convictions and the prior violent felony aggravating factor was not presented at the penalty phase. The citation in the State's brief to Donnie Murrell's testimony for the proposition that "[g]iven the very limited value of the testimony weighed against the potential negative impact a decision was made not to present the lay witnesses to corroborate Pietri's drug history," misstates what Murrell said. Murrell actually 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 testified that he and Birch decided not to call them at the guilt phase 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)(emphasis added). This testimony further shows trial counsel's misunderstanding of the crack cocaine dynamic and how it fit in with a potential intoxication defense. He then testified that he could not explain why they chose to call Mr. Santana to testify about Mr. Pietri's cocaine use at

the penalty phase despite these same concerns (PCR. 6230-6231). He did not recall reading Randy Roberts' police statements about Mr. Pietri's cocaine use at the time of the trial and could not say why Roberts was never deposed. He stated that he never contacted Randy Roberts or Luis Serrano, both of whom were with Mr. Pietri during the time period that Yoris Santana and Mickey Brantley were deposed about (PCR. 6232).

The State also contends that no one questioned the existence of Mr. Pietri's extensive drug history during the 1990 trial. This is simply not true. During closing argument at the penalty phase, State Attorney Burton specifically asked the jury to consider why, if Mr. Pietri was such a drug addict, he did not have many convictions for drug possession (R. 3049).

Recent United States Supreme Court case law has made even clearer the responsibility of trial counsel to properly investigate their cases. While an attorney is not required to investigate every conceivable avenue the Court has emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum

> of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further

(Wiggins v. Smith 123 S.Ct. 2527, 2538 (2003)).

Furthermore:

> Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation.

Id at 2539, citing Strickland, 466 U.S. at 690-691. Given the lessons of Wiggins. Mr. Pietri submits that trial counsels' actions in investigating and presenting a voluntary intoxication defense were deficient performance that operated to the severe prejudice of Mr. Pietri.

ARGUMENT II

a. Introduction

In a 2003 case the United States Supreme Court has reaffirmed the right of a capital defendant to the effective assistance of counsel. In the case of Wiggins v. Smith 123 S. Ct. 2257 (2003), the Court emphasized the principles set forth in Strickland v. Washington, 466 U.S. 558 (1984), when it restated:

> We established the legal principles

> that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) citations omitted). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688.

(Wiggins v. Smith, 123 S. Ct. 2527, 2535). The Supreme Court further held that counsel has:

> [A] duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Strickland, 466 U.S. at 668 (citation omitted). Mr. Pietri has proven both deficient performance and prejudice at the evidentiary hearing, undermining the adversarial testing process at trial.

Mr. Pietri's claim of ineffective assistance of trial counsel rests on the failure to investigate and present mitigation that was available. Florida 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"). The order below, simply adopting the State's post-hearing memorandum without making any independent findings of fact, simply ignored this basic rule of law. Mr. Pietri is entitled to relief in the form of a new penalty phase.

b. Deficient Performance

Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Williams v. Taylor, 120 S. Ct. 1495, 1524 (2000).[12] See also Id. at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for

[12] The Supreme Court granted relief to Mr. Williams, the first time the Court has granted relief on the basis of ineffective assistance of counsel as to the penalty phase of a capital case. As demonstrated at the hearing and in this memorandum, Mr. Watson's case is even stronger than Mr. Williams' and his entitlement to relief is clearly established under the Williams decision.

possible mitigating evidence"). "It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital trial." Id.

Both the record of Mr. Pietri's penalty phase and the evidence presented at his evidentiary hearing reveal trial counsels Birch and Murrell made a "less than complete investigation" and that their omissions were the result of either no strategic decision at all, or by a "strategic decision" that was itself unreasonable, being based on inadequate investigation. As a result, counsel's performance was deficient, with regard to both mental health evidence and other mitigation evidence.

As Wiggins makes clear, trial counsel's 11th hour act after the guilt phase of retaining Dr. Caddy as a mental health expert is insufficient to constitute the requisite "reasonable investigation" and does not substitute for a full investigation of the defendant's social history. See Wiggins at 2536 in which the retained psychologist "[C]onducted a number of tests on petitioner...conclud[ing] that petitioner had an IQ of 79,

had difficulty coping with demanding situations and exhibited features of a personality disorder" but "revealed nothing of his life history" Id. at 2536.[13]

Trial counsel testified that they did not employ an investigator for purposes of preparing a penalty phase case. (PCR. 6066, 6158, 6237). Donnie Murrell, who testified that he was nominally in charge of preparing the penalty phase case, testified that the Pietri case was his first capital penalty phase and that he was not prepared (PCR. 6190, 6238, 6243, 6265, 6344, 6351). He specifically identified his failure to use Jody Iodice as a resource in working up Mr. Pietri's drug addiction history as a mistake (PCR. 6250).

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[13] The situation in the instant cause, however is even more egregious than in Wiggins because in Wiggins, the psychologist did conduct psychological testing, whereas in Mr. Pietri's case, Dr. Caddy did not. Dr. Krop's testimony revealed that trial counsel was on notice as of Krop's December 26, 1989 report, less than a month before jury selection began on January 23, 1990, of the broad outline of the potential mitigation that Dr. Krop had identified in Mr. Pietri's case. Dr. Krop also advised in some detail what he (or any psychologist) would require to develop credible sentencing phase testimony. ("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.")(Defense Exhibit 19). Counsel chose not to use Dr. Krop and to ignore his cogent advice until after Mr. Pietri was convicted of first degree murder on February 7, 1990.

Wiggins specifically addresses the failure by trial counsel to investigate a capital defendant's social history for the purpose of developing potential mitigation. It clarifies the fact that applicable professional standards require such investigation. Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice:

> Counsel's conduct . . .fell short of the standards for capital defense work articulated by the American Bar Association (ABA) --standards to which we have long referred as guides to determining what is reasonable" Strickland, supra at 688; Williams v. Taylor, supra at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.41 (C) p. 93 (1989) (emphasis added).

(Wiggins v. Smith, 123 S. Ct at 2536-2537).[14] As the

[14] It is noteworthy that the State filed a motion objecting to any testimony on this matter (R. 4936-37). The testimony was allowed over the State's objection, and the State's brief now complains that the testimony of Robert Norgard was not credible because he failed to review the complete record of Mr. Pietri's case. "Norgard did not outline what evidence was present to support his conclusion...Incredibly Norgard also admitted that he had not even read the record, including the state's evidence which supported a conviction for premeditated murder." State's Brief at 9, ft. 2.

Wiggins Court further explained, the applicable ABA standards state that:

> [A]mong the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.

Id quoting 1 ABA Standards for Criminal Justice 4-4.1. (emphasis in original). Had trial counsel timely investigated Mr. Pietri's social history, he would have discovered a wealth of information that would have both been compelling in its own right and have bolstered the testimony and credibility of his mental health expert Dr. Caddy.

At the penalty phase, trial counsel called two of Mr.

Norgard's testimony was never intended to be a specific critique of trial counsel's performance in the instant case, in fact both postconviction counsel and Norgard were under the impression that the trial court would limit and not allow such testimony. Norgard made this point in his testimony (PCR. 5986-87). The record of the examination reveals that his testimony was about the standard of practice in 1989-1990 (PCR. 5948-68). Establishing what the community standards required of Florida capital litigators in 1989-1990 was the very reason that postconviction counsel sought to present the testimony of Norgard as a Strickland expert. The Wiggins opinion refers specifically to ABA standards that were in place at the time of Mr. Wiggins' capital trial which took place in 1989, the year before Mr. Pietri's capital trial. The fact that Birch and Murrell were unprepared to adequately investigate Mr. Pietri's capital defendant's social history does not vitiate the fact that the relevant professional standards were in place and stated the need to do so.

Pietri's brothers, William and Marino Pietri, two of his sisters, Ramona Rivera and Ada Liddell, Yoris Santana who had been with him on the cocaine binge before the murder, and a jail minister named Roger Paul (R. 2827-2924). Of the family members, only his sister Ada had much to say about Mr. Pietri's drug use (R. 2905-09). The rest of the family members' testimony concerned family history and trauma. Paul basically testified about Mr. Pietri's Christian conversion experience in jail around Christmas 1989 (R. 2913-24). After the testimony of the lay witnesses, the defense's experts Jody Iodice and Glenn Caddy testified.

At the evidentiary hearing, with the exception of Yoris Santana who was called to testify again, counsel called members of Mr. Pietri's family who had not been approached to testify at the penalty phase or the judge sentencing, even though they would have been available and willing to do so. They included sister Virginia Morales, brothers Edwin Serrano and Freddie Serrano who are both incarcerated, Luis Serrano, another brother who was present with Mr. Pietri during the group crack cocaine binge before and after the murder, and his wife Mickey

Brantley Serrano who was also present for same. (PCR. 6281-6404). As noted elsewhere, all of these family members, with the exception of Freddie, were interviewed by Dr. Lipman and aided in the formation of his opinions.[15] The testimony of the three brothers and that of Mickey Serrano provided a cogent, detailed and graphic corroboration of Mr. Pietri's descent into drug addiction that was not present in the 1990 penalty phase testimony. The testimony of Yoris Santana, Luis Serrano, and Mickey Serrano provided a mutually consistent account of the period in August 1988 after Mr. Pietri walked away from Lantana Correctional and lived with them and Randy Roberts in the Airport Inn and Acqua Inn and smoked cocaine

[15]The State claims that "Dr. Lipman did not do any objective testing of the brain, which could have conclusively confirmed or discounted brain damage...He candidly admitted that such was not done in this case since "CCR frowns on such testing." (PCR 5659). The State's quotation is out of context. Dr. Lipman's testimony concerned his failure to score a screening test he used called the Magical Ideation Scale. He then was asked some questions by the State about malingering instruments, and why he failed to use one instrument called the CAQ. It was only in response to the State's question about whether using the CAQ "would have been helpful to you to try to make an objective assessment as to whether or not information you were receiving ...was accurate" that Dr. Lipman testified that he did not use the instrument because "Mr. Hennis told me that his office frowned on such things." The exchange had nothing to do with objective testing concerning brain damage, but rather concerned the administration of personality testing. The questioning of Dr. Lipman by the State at deposition on this same topic casts more light on this issue (PCR. 5138-41). The neurological testing performed by Dr. Thomas Hyde, a medical doctor, did provide objective medical evidence of brain damage, which the State's brief ignores.

"twenty-four-seven" (PCR. 6180-83, 6383, 6394). The other family members testimony at the evidentiary hearing regarding the poverty, abuse and neglect of Mr. Pietri's early life was compelling and graphic, easily available, but for no strategic reason, trial counsel did not investigate what these witnesses had to say and failed to have an investigator appointed to assist in working up the penalty phase.

There was testimony at the evidentiary hearing from members of the appellate staff at the Palm Beach Public Defender supporting deficient performance by trial counsel (PCR. 6691-6747). Gary Caldwell identified a draft affidavit that he created in 1990 at the end of the Pietri trial that described "discussion that I and other people had in my presence with Donnie Murrell and Peter Birch about the Phase II preparation in the [Pietri] case" (PCR. 6696).[16] A few excerpts from the text follow:

> On Valentine's Day, 1990, during the afternoon, I saw Donnie Murrell at the entrance to the Comeau Building in West Palm Beach. We briefly discussed the Norberto Pietri case and his preparation for the sentencing phase. He told me that he and his partner, Peter Birch,

[16]Admitted as Defense Exhibit #60.

> were not prepared, were depressed, and needed help. He complained that he did not have the resources to hire experts . . . Donnie and Peter were quite unfamiliar with the life history of Mr. Pietri . . . They had never had this client examined by a psychiatrist or psychologist, and had not obtained any expert to assist in the preparation of mitigation. They complained that the investigator they had retained was ineffective, but expressed no inclination to hire another one, or to conduct investigations themselves.

At the March 15, 1990 judge sentencing, no other witnesses or evidence was presented by the defense (R. 3111-33). At the penalty phase on February 23, 1990, Peter Birch had argued eleven mitigating circumstances (R. 3081-87). The potential mitigation listed by Mr. Birch did not include the non-statutory mitigator of poverty in this case. See Foster v. State, 654 So. 2d 112, FN5 (Fla. 1995) (trial court found as non-statutory mitigation, among others, the defendant's poverty). Another nonstatutory mitigator the jury should have considered but that was not listed by Mr. Birch is childhood trauma. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988)(childhood trauma has been recognized as a mitigating factor). The testimony of psychologist Dr.

Faye Sultan about childhood trauma and sexual abuse was not credibly rebutted by the state expert, forensic psychologist Dr. John Spencer.[17] Dr. Sultan also testified that she relied on the neuropsychological testing and findings of Dr. Terry Goldberg in reaching her opinions. (PCR. 5786-87). Her testimony also supported Dr. Goldberg's testing protocol (PCR. 5864). She also testified that several of the tests that she reviewed that had been administered by Dr. Goldberg, do in fact have malingering measures (PCR. 5902-03).[18] Dr. Spencer impeached himself by his unprofessional techniques of evaluation, his failure to perform any psychological

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[17]Dr. Sultan's personal views "against the death penalty" notwithstanding, her testimony established that a professional organization that she belongs to, the American Psychological Association, has taken a formal position in support of a moratorium on the use of the death penalty, as has the American Bar Association. Dr. Sultan stated that she agreed with the APA position. Concern about the fairness of the American death penalty system is not impeachment (PCR. 5774).

[18]The State's allegations that Dr. Goldberg somehow mis-scored his tests, used the wrong battery, should not have used the short-form WAIS-R, or misinterpreted Mr. Pietri's performance are based solely on Dr. Spencer's testimony (PCR. 6568). Dr. Spencer acknowledged during his testimony that the divergence between the results obtained by Dr. Goldberg on Mr. Pietri's WAIS-R short form, an IQ of 76, and the results on Wide Range Achievement Test (WRAT), a standard score of 103, might indicate "a detriment in other areas of functioning." (PCR. 6615, 5431-34). In fact, during his deposition he admitted that it could indicate malingering or "specific neurological types of deficits.' (PCR. 5434). Yet Dr. Spencer chose to do no testing.

testing[19], his cozy relationship providing free services to the State Attorney, his lucrative contract concerning sex offenders with the Florida Department of Corrections, and his flip-flop in diagnostic impressions from his deposition until his testimony (PCR. 6574-75, 6567, 6604-07, 6572-73, 6607-09).[20] The United States Supreme Court has recognized that abuse and particularly sexual abuse is "powerful" Wiggins at 2542. The failure by counsel to investigate these instances of abuse does not amount to "a reasonable investigation". Trial counsel's 11th hour retainer of Dr. Caddy provided a very limited mental health mitigation presentation and did not constitute "a reasonable investigation". With regard to the sentencing

[19]The irony of this omission is that at the evidentiary hearing the State harshly criticized Dr. Terry Goldberg's short-form WAIS-R IQ testing of Mr. Pietri and Dr. Goldberg's alleged failure to specifically test for malingering during the neuropsychological battery. The late arriving Dr. Spencer, who was accompanied by State Attorney Zacks on both his visits with Mr. Pietri at Union Correctional in Raiford, admitted during his evidentiary hearing testimony that even though he took an IQ test with him to Raiford, he failed to do any type of psychological or malingering testing during his evaluation (PCR. 5374, 6567-70, 6590, 6618-19).

[20]In a deposition on January 30, 2002, Dr. Spencer testified that his impression was that Mr. Pietri had a chronic cocaine abuse problem, cocaine addiction, and he also opined that Mr. Pietri's history supported a diagnosis on anti-social personality disorder (PCR. 5379). During his testimony at the evidentiary hearing on the day after he submitted his final report, he made no mention of anti-social personality disorder, but for the first time opined that he found no mitigation, statutory or non-statutory (PCR. 6626-31).

strategy adopted by trial counsel, as in Wiggins, the two sentencing strategies -- mental health mitigation and social history -- are not necessarily mutually exclusive.

However, as Wiggins makes plain, to hire an expert witness does not exonerate the need for trial counsel to conduct an investigation into the individual's social history, particularly when the psychologist, as in this case, fails to perform any independent investigation. Here, as in Wiggins, the decision by trial counsel to hire a psychologist shed no light on the extent of their investigation into Mr. Pietri's background.

One important aspect of Mr. Pietri's social history that would have been useful for the expert to consider is his substance abuse history. As outlined in the guilt phase claim, trial counsel failed to investigate Mr. Pietri's extensive drug history. However, as Wiggins makes plain, the duty to investigate is separate and distinct from the decision as to what mitigation to present to the jury. Here, an investigation of Mr. Pietri's pervasive drug abuse would have given counsel additional reasons to investigate Mr. Pietri's mental

health conditions including the existence of cognitive impairments and their etiology, as described in the evidentiary hearing testimony of neuropsychologist Dr. Goldberg and the report of neurologist Dr. Hyde that was admitted into evidence.[21]

The testimony of Palm Beach County Assistant Public Defenders Gary Caldwell, Richard Greene and Steve Malone, along with Robert Norgard's community standards testimony, strongly supports the proposition that even in the areas that trial counsel purported to rely on, counsel's investigation was not the "requisite diligent" investigation mandated by Williams and Wiggins. Dr. Caddy's "drive-by" evaluation of Mr. Pietri and Jody Iodice's non-specific testimony about drug abuse did not equal an adequate investigation. Given the State's comments in its brief that Dr. Caddy conducted "an extensive psychological evaluation" during the three and a half hour meeting he had with Mr. Pietri the day before the penalty phase in 1990, its reliance on Dr. John

[21]Dr. Goldberg's opinion that his neuropsychological testing of Mr. Pietri showed cognitive impairments that were caused by cerebral dysfunction is supported by Dr. Hyde's report and affidavit (Defense Exhibit #56; PCR. 6782-83).

Spencer's postconviction "evaluation" and testimony in rebuttal at the evidentiary hearing becomes more comprehensible. The State model fails to meet the requirements of Ake or Wiggins.

As to the assistance provided by Gail Martin, the Palm Beach Co. Public Defender investigator, Mr. Birch and Mr. Murrell made it clear that she was volunteering to help out (PCR. 6157-60, 6237). Murrell, who was in charge of the penalty phase, could not even say what role she had. Id. Counsel avers that what is most likely is that Ms. Martin got involved, to whatever degree, at the specific behest of the appellate staff of the Public Defender who were aghast at the level of negligence regarding preparation for the penalty phase that they found out about after Mr. Pietri was found guilty on February 7, 1990 (PCR. 6737). The penalty phase began on February 21, 1990.

Trial counsels' failure to do a social history investigation itself limited the scope of Dr. Caddy's evaluation of Mr. Pietri because, as he testified, he was not given documentary records about Mr. Pietri (PCR. 5702). He also testified that his limited access to

family members took place on the morning of his testimony at the penalty phase (PCR. 5704-05). To the extent that any social history was presented to the jury, it was entirely through Mr. Pietri's self reporting to Dr. Caddy. The very circumstances of Dr. Caddy's penalty phase evaluation make it suspect. Psychiatric and neurological expert evaluations at trial that are inadequate and incomplete can and should be supplemented by additional investigation and expert evaluations and presented to the lower court in postconviction as part of the process of proving ineffective assistance and Ake violations, and prejudice can be found even when the State presents rebuttal. See State v. Coney, 845 So. 2d 120 (2003).

Donnie Murrell testified that he never obtained or provided to Dr. Caddy the prison records that were introduced at the evidentiary hearing that confirmed Mr. Pietri's cocaine addiction even while incarcerated at Lantana Correctional days before the murder. (PCR. 6239). Dr. Caddy did not review any depositions, such as the depositions of Yoris Santana and Mickey Brantley, people who were in Mr. Pietri's company hours before the offense (PCR. 5702). He never knew anything about Dr. Krop's

evaluation and never had an opportunity to confer with Dr. Krop, or for that matter, with Jody Iodice (PCR. 5701). He never performed any psychological testing, in part because he just didn't have time to do so (PCR. 5701).

Given that there is evidence of cerebral dysfunction demonstrated in the findings of neuropsychologist Goldberg and neurologist Hyde, counsel submits that psychological testing was required for the completion of an adequate psychological evaluation of Mr. Pietri. Dr. Krop testified at the evidentiary hearing that he would have recommended neuropsychological and neurological testing if Mr. Birch had responded to his December 26, 1989 letter. (PCR. 5539).

Trial counsel Birch testified that he was not enthusiastic about Dr. Krop and that he and Dr. Krop "just didn't click" (PCR. 6155). The State's brief describes Dr. Krop's initial evaluation as "fruitless." This is a complete misrepresentation. As argued in the guilt phase section of this brief, Dr. Krop specifically noted the possibility of using an intoxication defense. And no matter what trial counsel Birch personally thought of Dr.

Krop, trial counsel cannot be excused for ignoring what Dr. Krop's report pointed out in plain language: the necessity of preparing a penalty phase by gathering the information that Dr. Krop advised, including the need for neuropsychological testing. Although the State's brief states that Mr. Pietri was evaluated by Dr. Krop for competency at the request of defense counsel, it ignores the very specific penalty phase recommendations noted supra in Dr. Krop's post-evaluation letter.[22] Trial counsel's failure to follow up until after the guilt phase is precisely the kind of omission addressed by Wiggins. The Supreme Court emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

(Wiggins v. Smith 123 S.Ct. 2527, 2538 (2003)).

[22]The Defense Motion to Authorize Appointment of Expert requesting Dr. Krop's appointment was filed on December 6, 1989. It was admitted as Defense Exhibit 19 at the hearing below. It requests $1,500 and indicates in paragraph 4 that Dr. Krop "has 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 in the above-styled cause primarily, but not exclusively, for Phase II preparation."

Here, Dr. Krop, the first mental health expert retained by counsel thought that further testing should be done and would have recommended it to counsel if counsel had only followed up with him. Dr. Caddy admitted at the evidentiary hearing that he needed more time to do an adequate evaluation of Mr. Pietri. (PCR. 5700-01). Yet, for no strategic reason, no psychological testing of any kind was ever done. Under Wiggins and Williams, trial counsel's investigation amounted to deficient performance.

At the evidentiary hearing Mr. Pietri presented evidence from five experts: three psychologists, a neuropharmacologist, and a neurologist. All had evaluated him. All the mental health and non mental health mitigation was available had trial counsel chosen to investigate it. There was no strategic or tactical motive for failing to investigate this mitigation and any decision not to do so was not itself based on reasonable investigation. The first prong of the Strickland test has been conclusively established.

c. Prejudice

In order to demonstrate prejudice, Mr. Pietri must

show that "[T]here 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. See Williams v. Taylor, 120 S. Ct. 1495 (2000), in which the Supreme Court granted relief based on ineffective assistance of counsel because " . . . the graphic description of [Mr. Pietri's] childhood, filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability." Williams v. Taylor, 120 S. Ct. 1495 at 1515.

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. "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)). Moreover, "[m]itigating evidence . . . may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S. Ct. at 1516.

First of all, the only evidence presented to Mr. Pietri's penalty phase jury was the testimony of Dr. Glenn Caddy, social worker Jody Iodice, who never met the client or anyone else apart from trial counsel Murrell, and the family members noted supra. No other evidence of Mr. Pietri's substance abuse history and social history was offered. However, the evidence of Mr. Pietri's background, as presented at the evidentiary hearing, filled as it was with detailed descriptions of drug addiction, poverty, sexual and physical abuse and neglect demonstrates:

> [T]he kind of troubled history [the United States Supreme Court] ha[s] declared relevant to assessing a defendant's moral culpability, Penry v. Lynaugh, 429 U.S. 302, 319106 L. Ed 2d 256, 109 S.Ct. 2034 (1989). (Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background. . .may be less culpable than defendants who have no such excuse).

Wiggins, 123 S.Ct at 2542.

Here, as in Wiggins, the nature and extent of Mr. Pietri's privations are such that they should have been presented to the jury. Additionally, as in Wiggins, while it may have been strategically defensible to focus on the mental health issues, "the two sentencing strategies are not mutually exclusive" Id at 2542.

Furthermore, as noted supra, the thorough investigation of a social history would have helped to support the testimony of Dr. Caddy at trial. At the penalty phase closing arguments, the State made much of the fact that Dr. Caddy did a last minute evaluation and saw Mr. Pietri one time for only three and a half hours (R. 3051). The State also argued that Dr. Caddy had not reviewed jail records or anything else in formulating his opinions (R. 3056). Finally, the State also noted during closing argument that Ms. Iodice had presented only a general overview "like you could get on Donahue" and argued that her testimony had no application to Mr. Pietri's case (R. 3057).

The credibility of Dr. Caddy was completely undermined, in part because he had such limited collateral

information made available to him. Had trial counsel properly investigated Mr. Pietri's social history and made the relevant information available to Dr. Caddy, the prosecutor would not have been able to make this extremely prejudicial argument before the jury. The same argument is also relevant to counsel's failure to request psychological testing, for intelligence or brain dysfunction.

The jury was thus left with a correct but extremely prejudicial impression that Dr. Caddy's work was less than complete, and thus not credible. Again trial counsel's omission tainted the testimony of his mental health expert, to Mr. Pietri's substantial prejudice. Had testimony of the type rendered by Dr. Lipman, Dr. Krop, Dr. Goldberg, Dr. Sultan and Dr. Hyde been presented to the jury, there is a reasonable probability that the outcome would have been different.

As Mr. Pietri has now demonstrated, a plethora of statutory and nonstatutory mitigation was available had trial counsel only investigated it in anything other than

the most superficial manner.[23] Mr. Pietri has shown compelling and credible evidence that he has neuropsychological deficits and that these factors support the statutory mental health mitigating factors. He has shown that he suffered a lifetime of poverty, emotional physical and sexual abuse and neglect as well as pervasive substance abuse. Counsel's failure to investigate and present this evidence, both to the jury and to his expert as well as his failure to follow up Dr. Krop's December 12, 1989 screening with a full workup of mental health mitigation, was the direct cause of Mr. Pietri's jury recommendation of death.

At the evidentiary hearing, Mr. Pietri presented evidence of both statutory and nonstatutory mental health mitigating factors. This evidence was not presented at the penalty phase. Neither the trial court nor the jury would have been free to ignore the evidence of mitigation presented by Mr. Pietri at the evidentiary hearing, had it been presented at trial. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1991) ("when a reasonable quantum of

[23]Despite the State's representations to the contrary, the record reveals that Dr. Caddy did testify in support of statutory mitigation at the evidentiary hearing (PCR. 5739-44).

uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved"). In no way has the state controverted Mr. Pietri's evidence of cognitive and brain dysfunction and the plethora of mitigating factors evident from Mr. Pietri's social history. Dr. Spencer's so-called evaluation of Mr. Pietri was a sham. Dr. Spencer failed to undertake any psychological testing of Mr. Pietri, failed to arrive on time for the evaluations, submitted his report to opposing counsel at 5:00 p.m. on the day before he testified, flip-flopped his diagnostic impressions between the time of his deposition and the time of his report and testimony, and admitted during his testimony that he uses no scientifically normed or peer reviewed standard protocol during his evaluations (PCR. 6567-70, 6609, 6603, 6575, 6631, 6607-08).

Even without the evidence presented at the evidentiary hearing, the jury did not return a unanimous verdict in favor of death (R. 3099-3102).[24] Had all the available mitigation been properly investigated and presented, Mr.

[24]The jury recommended death by a vote of eight (8) to four (4).

Pietri would have received a life sentence.[25]

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 failing to grant an evidentiary hearing on a claim, reversal is warranted as well on that basis.

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[25]("[H]ere as in Wiggins, and even presuming that the pretrial evaluations revealed some mitigation evidence, it is clear that during his investigation trial counsel did not discover mitigation of the same quantity or quality of that which actually existed and was later introduced at the postconviction evidentiary hearing. Hence, it would be difficult to conclude that counsel's knowledge of the available mitigation was sufficient to make an informed strategic choice on these matters. Without having uncovered the information regarding [Pietri's] troubled background, any 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitation on investigation.'" Wiggins, 123 S.Ct. at 2541 (quoting Strickland, 466 U.S. at 690-91). In fact, any attempt to distinguish the difference between the limited mitigation presented at [Pietri's] penalty phase and that presented at the evidentiary hearing is strikingly similar to the type of post-hoc rationalization that the Supreme Court rejected in Wiggins. Id. at 2358"). See Armstrong v. State, SC01-1874 (Fla. October 30, 2003) slip op. at 37-38, Anstead, C.J. concurring.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply 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 December 19, 2003.

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.

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