IN THE SUPREME COURT OF FLORIDA

ROBERT IRA PEEDE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Case No. SC04-2094
Lower Tribunal No. CR83-1682

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Trial Facts

Peede was convicted of the first degree murder of Darla Peede and sentenced to death in 1984. On appeal, this Court provided the following summary of facts:

> Intent on getting Darla to come back to North Carolina with him to act as a decoy to lure his former wife Geraldine and her boyfriend Calvin Wagner to a motel where he could kill them, Peede, on March 30, 1983, traveled from Hillsboro, North Carolina, to Jacksonville, Florida, on his motorcycle. He sold his motorcycle near Ormond Beach, took a cab to the airport, and flew to Miami. He attempted to call Darla at her daughter's residence several times, each time speaking with Darla's daughter Tanya because Darla was not at home. At 5:15 p.m., he called back and spoke with Darla who agreed to pick him up at the airport. Prior to leaving for the airport, however, Darla left very strict instructions with Tanya to call the police if she was not back by midnight and to give them the license plate number of her car because she may have been forced into the car. She was afraid of being taken back to North Carolina and being put with the other people he had threatened to kill. She gave Tanya the telephone numbers of Geraldine and the police in Hillsboro, North Carolina. She left her residence with only her purse and took no other belongings that would evidence her intention not to return home that evening. Although she would normally call Tanya if she were going somewhere and not coming back for the evening, Tanya received no such call.
>
> According to Peede, when Darla picked him up at the airport, she informed him that she planned to go back to her apartment and then to the beach the next day. He then directed her to drive north on Interstate 95, but, after gassing up Darla's car, they mistakenly got on the turnpike heading for Orlando. As they left the Miami area and the song "Swinging" came on the radio, Peede took his lock-blade knife and inflicted a superficial cut in Darla's side. In his confession,

Peede described his belief that Darla and Geraldine had mutually advertised for sexual partners in a nationally publicized, pictorial "Swinger" magazine which he had seen while imprisoned in California.

Peede said that on the way to Orlando they stopped and picked up a hitchhiker who drove the car while they had intercourse in the back seat. The hitchhiker was dropped off in Orlando and Peede drove east on I-4 toward Daytona Beach. As they drove, the conversation again returned to the subject of Peede's belief that Geraldine and Darla had advertised in "Swinger" magazine. Approximately five to six miles outside of Orlando, Peede stopped the car on the shoulder of the road, jumped into the back seat, and, with his lock-blade hunting knife, stabbed Darla in the throat which resulted in her bleeding to death within five to fifteen minutes. Still determined to get back to North Carolina to kill Geraldine and Calvin, he proceeded up I-95. He left Darla's body in a wooded area in Camden, Georgia, and he threw the murder weapon out of the car window on his way to North Carolina. When he returned to his home in Hillsboro, North Carolina, he decided that he would kill Geraldine and Calvin while they were on their way to work. He loaded his shotgun and placed it beside the door. Before he could carry out his plan, the police arrived, and he was arrested. Darla's heavily bloodstained car was parked at his residence. In addition to his lengthier confession to the authorities, Peede wrote out and had witnessed the following short confession:

> My name is Robert Peede, on March 31, 1983, I killed my wife Darla, by stabbing her in the neck with a Puma folding knife. This occurred on Hwy. 4 (interstate) about six miles east of Orlando Fla., in the back seat of Darla's 71 Buick.
>
> I ask for the death penalty in this crime, to be carried out as soon as possible.
>
> Robert Peede
>
> D.O.B. 6-30-44

> Darla's body was found in the woods. She had a stab wound in the throat area which continued into the chest and into the superior vena cavae, a second stab wound nine inches below her shoulder in her side, and bruising on various parts of her legs and arms which the medical examiner characterized as defensive bruising. The contusions on her wrists evidenced a struggle.
>
> Peede was convicted of first-degree murder. The jury recommended that the death penalty be imposed, and the trial court sentenced him to death.

Peede v. State, 474 So. 2d 808, 809-810 (Fla. 1985).

Previous Post-Conviction Proceedings

The trial court summarily denied a motion for post-conviction relief and that decision was appealed to this Court. This Court reversed the trial court's summary denial and remanded for an evidentiary hearing on four issues. The issues this Court stated required factual development during an evidentiary hearing were as follows: 1) a Brady claim regarding whether the State had possession of the victim's diary and whether Peede's counsel had access to it; 2) whether the State improperly withheld evidence establishing Peede's longstanding mental illness; 3) whether counsel was ineffective for failing to present issues surrounding Peede's competency and; 4) whether Peede received an inadequate mental health evaluation and whether counsel was ineffective in failing to argue additional statutory mitigation and present witnesses to document Peede's

alleged history of abuse, bizarre behavior, and manifestations of mental illness. Peede v. State, 748 So. 2d 253, 257-259 (Fla. 1999).

Post-Conviction Competency Litigation

On remand to the circuit court, Peede's evidentiary hearing was delayed by questions of representation and change of counsel due to conflict. And, the hearing was delayed due to the issue of Peede's competence. On March 24, 2000, counsel for CCRC requested a competency examination of Mr. Peede. Thereafter, the circuit court appointed mental health experts to examine Peede. On May 24, 2000, the court conducted a competency hearing, and heard testimony from two experts retained by the defense and two experts appointed by the court. The two experts retained by the defense[1] testified that Peede was not competent to proceed based upon his apparent inability to discuss the details surrounding the murder of his ex-wife, Darla.

Peede allowed himself to be interviewed by Dr. Fisher, an expert retained by his counsel. Dr. Fisher found Peede to be of average intelligence and "he was in general cooperative." (V-25, 1447). He found nothing remarkable; Peede was not schizophrenic or overtly impaired or retarded. (V-25, 1448).

[1]Dr. Fisher was retained by CCRC to examine Mr. Peede and admitted that almost all of his work in criminal cases has been for the defense. (V-25, 1444-45).

Nonetheless, Dr. Fisher found Peede was not competent because he would not discuss the details surrounding the murder with him. (V-25, 1449). When Dr. Fisher attempted to discuss the facts with Peede he would become emotional to the point that Dr. Fisher felt if he pursued it further he was risking termination of the interview. Id. Peede would not talk about the "inner workings of that himself at the time of the crime for which he is incarcerated." Id. at 1449-50. Dr. Fisher had no explanation for Peede's refusal to talk about the event: "I didn't have a good explanation for that inability; that I perceived he's got the brain power, the, probably has the memory but he couldn't do it." (V-25, 1450).

Dr. Fisher testified that Peede could not talk about what happened with Darla in the car, but did have a competent understanding of other issues in the case, and, for example was able to express his displeasure with counsel for CCRC for failing to cancel the transport order when a scheduled hearing was cancelled. (V-25, 1450-51). Dr. Fisher concluded that Peede was incompetent in that he did not have the ability to "speak to his attorneys about the particulars of the case, meaning what happened in the car with Darla, nor has he talked to Dr. Teich or myself in the effort to get information about that same area." (V-25, 1452). However, in the other areas,

Peede did "understand what these proceedings are, what the proceedings are against him. He knows what he's accused of, he knows when it happened, he knows what the sanctions are. So he does know those things." Id.

Dr. Fisher found that Peede suffered from major memory disturbance and "he has depression." Dr. Fisher acknowledged that the DOC records reveal repeated instances of Peede failing to cooperate with authorities in the medical context. (V-25, 1453) So, as part of his personality, he will refuse to cooperate. Id. At other times, however, Peede will cooperate for medical procedures as he did in receiving an operation for hemorrhoids. (V-25, 1453-54). Dr. Fisher had difficulty reconciling the fact that during the Nelson inquiry Peede apparently had the ability to discuss events on the day of Darla's murder, specifically, regarding his allegation that he and Darla picked up a hitchhiker. (V-25, 1455). Dr. Fisher acknowledged that the objective testing he conducted did not reveal any problem or defect that would explain why Peede would not talk about what happened in the car with Darla. (Id. at 1457-58). Dr. Fisher was aware that the court appointed two other experts to examine Mr. Peede and that he refused to see them. (V-25, 1458). That was a factor which might indicate Peede is malingering on this issue. (Id. at 1458-59).

Peede would not agree to be interviewed by the two court appointed doctors and they could not render an opinion on competency for that reason. However, one court appointed doctor, Dr. Berns, subsequently reviewed a videotaped interview conducted by a defense doctor, and, from his review of the records and that video, concluded that Peede was indeed, competent to proceed. (V-25, 1550). On June 22, 2000, the trial court found Peede competent to proceed.

At a status conference, Peede's new counsel, Kenneth Malnik, Assistant CCRC, South, questioned Peede's competency. On November 29, 2000, the Honorable Judge Lawrence Kirkwood reaffirmed his prior competency ruling and granted the State's motion for Peede to submit to an examination by a mental health expert selected by the State. On December 6, 2001, Peede's counsel filed a written motion to determine competency based upon Peede's emotional display during a meeting with counsel at the jail.[2] Peede evidently became very emotional when the discussion turned to his ex-wife Darla. Moreover, Peede indicated that he would not trust any doctor selected by the State and therefore would not cooperate in the court ordered

[2]Previous counsel was allowed to withdraw based upon personal conflict with Peede.

examination.[3] The State filed a written objection to another round of competency examinations, noting that the issue of Peede's competency had been fully litigated. (RA-A). The State argued the instant motion did not differ significantly from the conduct cited in the previous motion to determine competency. (RA-A).

On February 8, 2002, the Honorable Lawrence Kirkwood granted the defense motion and appointed Dr. Berns to examine Peede and submit a report. (V-25, 1537). On March 13, 2002, Dr. Berns filed a report documenting his review of records and conclusions regarding Mr. Peede. (V-25, 1549-57). As part of his evaluation, Dr. Berns met with Peede at prison to conduct an interview. However, Dr. Berns found Peede uncooperative and the interview was terminated after only ten minutes. (V-25, 1554). Dr. Berns therefore was not able to render an opinion on Peede's competency. Id. at 1556. Dr. Berns recommended that Peede be transferred to the psychiatric unit of the Florida State prison where he could be monitored and the staff could report on his mental condition. Id. at 1555. On June 13, 2002, the State filed a notice of concurrence with the court appointed expert's recommendation that Peede be transferred to the forensic unit of

[3]On January 4, 2002, Dr. Merin traveled to Union Correctional to meet with Mr. Peede but Peede refused to be examined.

a state hospital, such as the North Florida Evaluation and Treatment Center where he could be observed on a 24 hour basis by trained mental health professionals.

On September 17, 2002, the Honorable Lawrence Kirkwood issued an order for Peede to be transferred to a state mental health facility for a period of evaluation and to file a report with the court. (V-25, 1563). On December 12, 2002, Dr. David Frank, a contract psychiatrist with Union Correctional Institution, submitted a report to the court. Dr. Frank's report noted the following:

> Following admission to the UNCI TCU, Inmate Peede was evaluated with a full initial psychiatric evaluation, weekly follow-up psychiatric interviews, around the clock nursing and security observations, and periodic observations by a recreational therapist. Inmate Peede chose to refuse most services and opportunities for evaluation, which necessitated a longer than expected evaluation period. During these seven weeks of observation/evaluation, he has not exhibited any signs or symptoms of psychosis, thought disorder, depression, mania, or any other major mental disorder. In fact, during the evaluation period, the multi-disciplinary services team has been unable to identify any disorder that would indicate the need for inpatient treatment... (V-25, 1569).

Dr. Frank concluded that Peede did not require any inpatient mental health treatment, and that he suffered from a personality disorder with Antisocial and Borderline Features. (V-25, 1570).

Dr. Gloria Calderon, Senior Physician for Union Correctional Institution submitted a report to the court on May 23, 2003. (V-25, 1584). Dr. Calderon observed that Peede refused scheduled appointments with psychiatry. Dr. Calderon observed Peede in his cell and noted that he was pleasant, cooperative, and willingly signed the refusal slips. Id. Peede was not on any psychotropic medication and recommended lowering his psychiatric classification so that he would no longer be seen by psychiatry on a regular basis. Id.

On July 18, 2003, the Honorable Alan Lawson conducted a hearing to determine Peede's competency. Defense counsel presented one witness at the hearing, Dr. Frank. Dr. Frank observed Peede in "TCU" for at least 12 days during the six weeks that Peede was in the facility. (V-18, 554). There was nothing in his observations of Peede during that period that would lead him to conclude Peede was incompetent. Id. Peede would not discuss the issue of his wife's murder because it hurt "too much," the same reason he gave the trial court. Id. His unwillingness to discuss the facts was not due to mental illness. (V-18, 554-55).

Although he was not directly asked to examine Peede for post-conviction competency, Dr. Frank observed that the criteria for competency are "fairly simple." (V-18, 555). The only

question regarding Peede's competency was whether he was able to give information to his attorney. "And again, he has the ability, and that's what it actually asks in there. Does he have the ability. It doesn't say will he. Actually, does he understand that he is expected to discuss the events surrounding his crime with his attorney. But then later on I think it says that, you know, also that he is able to. So those two issues." (V-18, 555-56). Dr. Frank believed that his observation of Peede and his review of background material provided a sufficient basis to conclude that Peede was competent to proceed. (V-18, 555).

At the hearing, counsel Malnik reiterated the previous difficulty counsel had with Peede, that he would not discuss the facts surrounding the murder with him. (V-18, 551-52). The court then inquired of Mr. Peede as to why he would not discuss the facts with counsel. Peede told the court: "Truth is, it hurts too much. So I'm thinking about it, and I don't want to talk about it." (V-18, 552-53). Upon further inquiry, Peede pointedly reiterated his stance: "Sir, I just told you. I don't think about it. I don't talk about it. That's the end of it. If you want to kill me, kill me. That's it. I'm through with it." (V-18, 553).

On July 24, 2003, the Honorable Alan Lawson found Peede competent to proceed. The court noted, in part:

> "Having evaluated the experts' reports, viewed Mr. Peede's in-court behavior, and carefully considered the testimony of Dr. Frank and this Court's discussion with Defendant, the Court finds Defendant to be competent. Simply put, Mr. Peede *could* assist his attorneys, if he wanted to, but is instead *choosing* not to discuss the facts of this case. It is clear to this Court that Mr. Peede is not incompetent, simply uncooperative." (V-25, 1607).

Peede pursued a Petition for Extraordinary Relief in this Court challenging the trial court's competency finding. This Court dismissed the Petition on January 28, 2004, Peede v. State, 868 So. 2d 524 (Fla. 2004).

Post-Conviction Evidentiary Hearing

(i) Trial Defense Attorneys

William DuRocher, was the elected Public Defender for Orange County from 1980 until 2000. (V-15, 378-79). The Peede case was assigned to the senior lawyer in the felony division, Theotis Bronson. (V-15, 380). It was the killing of a spouse and they had pretty good success in pleading such cases, so initially, a second lawyer was not assigned as was the usual practice in capital cases. (V-15, 380-81). DuRocher thought that Bronson was a competent lawyer who had been doing average work. DuRocher was aware of difficulty Bronson was having communicating with Peede as a client. He came to believe the

conflict was because Peede did not want a Black lawyer representing him. (V-15, 382). He was not sure of the source of that knowledge, but, he had a clear memory of Peede not wanting an African-American attorney. (V-15, 383). Peede rejected a plea offer of life, with a minimum mandatory twenty five years, an offer which he and Bronson thought Peede would be wise to accept. (V-15, 384-85).

DuRocher had no recollection of seeing a handwritten journal from Darla Peede at the time of trial. (V-15, 388). He would have wanted to view the diary at the time of trial. (V-15, 390). DuRocher testified that the state agreed that Darla voluntarily picked Peede up at the airport but that a slight stab wound and other marks of violence supported the idea that it later became a kidnapping. (V-15, 423). The diary apparently had some useful information, but, also, perhaps some detrimental information in that it might humanize the victim in the eyes of the jury. (V-15, 448).

Mr. Peede was a difficult client, and, when DuRocher attempted to humanize Peede by patting him on the shoulder to show the jury that he was not afraid of Peede and that they were together on this, Peede said, “to keep his – keep my goddam hands off him, and I agreed I would do that.” (V-15, 427).

DuRocher helped develop mitigation and had Peede examined by Dr. Kirkland in order to develop mitigation regarding his mental state. (V-15, 393). They had an investigator developing contacts in North Carolina and they had information that Peede came from a "decent, stable family home. I believe his parents had a business there, a small business." (V-15, 393). There was "mitigation evidence to be developed, and I think we did what we could with it. There wasn't a whole lot, but..." (V-15, 393).

Mr. Peede did not cooperate with counsel, but, DuRocher testified that he did not consider Peede incompetent. "My understanding would be that - - that the issue of competency would go to the ability to assist Counsel, not the refusal to assist Counsel. And I took Mr. Peede to be refusing to assist me and Mr. Bronson." (V-15, 399). Peede understood their roles and he came to view Peede as "manipulative" and guided by reason that "I didn't understand." (V-15, 400). Moreover, they had Dr. Kirkland's report, finding Peede competent to assist counsel and understand the proceedings. (V-15, 400). Peede would never agree to a continuance. (V-15, 429). However, if DuRocher felt he needed one, he would have asked for it. (V-15, 429).

Dr. Kirkland examined Peede twice, once prior to trial and again after he had been convicted. DuRocher did not think that

he provided background material for Dr. Kirkland, but was "sure I discussed some of the background with him." (V-15, 402). If Dr. Kirkland had asked for any additional information, they would have supplied it. (V-15, 434). Dr. Kirkland, "in the later 70's and into the '80's, was recognized by the Courts of this circuit was one of the preeminent forensic psychiatrists in the area, and was frequently called by both the State and Defense to do these kinds of evaluations and make these kind of reports." (V-15, 403). Dr. Kirkland's opinion carried a great deal of weight with the courts and his testimony was a big plus during the penalty phase. (V-15, 403). In 1983 and 1984 it was not as common to provide background information for a psychiatrist as it is today. At that time, few attorneys had experience in capital cases, the idea that information extended beyond the statutory mitigators was still new. (V-15, 434).

DuRocher did have a list of witnesses the State planned to call to establish the prior murder aggravator. However, he testified he did not have a list of who "all they talked to in California." (V-15, 407). They knew of the California homicide and had a conversation with the lead investigator there." (V-15, 408). He did not recall seeing a statement by Eleanor Bell or Mr. Bateman and did not know how it might fit within "the Peede murder trial." (V-15, 409). The public defender file

contained a witness statement to the California murder from Austin Backus. He would have reviewed this statement at the time of trial. (V-15, 415).

DuRocher testified that the public defender's office generally had good relations with the prosecutors and there was a cooperative atmosphere in which discovery was informally discussed or turned over. (V-15, 417). They were in the same building and it was very common to exchange information informally. (V-15, 417). Another attorney in his office, his chief assistant, Lou Lorinz, evidently worked on the case. DuRocher thought he had contact with the California authorities and that he may have spoken to the attorney who represented Peede in the late 70's. (V-15, 419). The correspondence to the California attorney reveals that attempts were made early on in the case to develop information which might be helpful in the penalty phase. (V-15, 420).

The defense developed information for the penalty phase though investigators Bill McNeely, lead investigator, and his assistant, Doug DePrizio. They were assigned to develop mitigation in Hillsborough, North Carolina. (V-15, 409). He thought that they made a good faith effort to develop mitigation and find witnesses who would be willing to testify. (V-15,

410). However, they could not come up with much mitigation, DuRocher explained:

> ...Peede had a fairly normal upbringing; was, you know, an average student, I think, went through the schools there. His family was generally well-like in the community. But, again, we were not able to – out of that scenario, we were not able to draw out specific, factual, good information to use for Mr. Peede.
>
> At some point he had left, you know, this – this nice, kind of idyllic North Carolina small town and gone to California and shot two people, one of them died, So we were trying to overcome – overcome that and the aggravating circumstances that the State had presented, but we just couldn't come up with much." (V-15, 410).

Notes from the defense file reflect calls to the North Carolina area and contact being made with an Aunt and Uncle of Peede's. (V-15, 431-32). DuRocher identified a number of letters that he submitted on behalf of Peede at sentencing from friends and family. (V-15, 435). [Exhibit 7]. Peede's friends and family seemed to say good things about him and thought the defense would portray Peede as a polite, pleasant, good person. (V-15, 437). He thought that most of the letter writers were of advanced age, and declined to come to Florida to testify. (V-15, 445).

DuRocher did not see any reason to pursue an insanity defense. He had Dr. Kirkland's opinion and while at times Peede appeared agitated, and, worried during trial, he thought that

Peede made willful choices. (V-15, 436). Even though Peede chose to absent himself from the trial, the attorneys had regular contact with him and were monitoring his condition. (V-15, 437). If DuRocher observed any reason to question Peede's competency during trial, he would have informed the court. (V-15, 437).

Theotis Bronson testified that he was presently a Ninth Judicial Circuit Court judge in the Civil Division. (V15, 450). At the time he represented Peede he had not represented a defendant in a capital case. (V-15, 451). Judge Bronson did recall being aware of a diary: "the substance of the information which was in the diary was information that I knew about generally. But as to excerpts from a written diary, I don't – I just don't recall ever seeing them and..." (V-15, 455). And, he did not recall being told by a prosecutor about the diary. (V-15, 456). Information about a reconciliation contained in the diary was consistent with the defense theory in the case. (V-15, 456).

Judge Bronson was aware of the prior murder in California and knew of Peede's assertion of self-defense. He also recalled "reading a number of reports" regarding the murder. (V-15, 457). However, he did not recall receiving a statement of John Bell Logan or Eleanor Bell. (V-15, 458).

Judge Bronson said that this case went to trial unusually quick. Peede resisted having his case continued and did not assist his attorneys in preparation. It was his position, "from the first day I met him until the last time I saw him, that - - basically, he acknowledged that he killed his wife, Darla, and that he wanted to be executed for it, and he didn't want a defense to be raised on his behalf, and he demonstrated that throughout the time that I represented him." (V-15, 459). Judge Bronson brought DuRocher in on the case because he thought that he might be biased against him as an African-American. However, Bronson testified that Peede did not like DuRocher either. (V-15, 460). Later, Bronson came to realize, "that Mr. Peede was just a mean-spirited person, and it didn't matter who he was talking to." (V-15, 460).

Judge Bronson did not believe Peede was incompetent when he filed a motion for a confidential competency evaluation prior to trial. (V-15, 466). He filed it to make sure all the bases were "covered" and it was never his impression that Peede was delusional. (V-15, 466). Peede felt guilty about killing his wife and asked for the electric chair. (V-15, 467).

Judge Bronson testified that since the attorneys were not following his directives, he would not participate. (V-15, 468). Peede was consistent in his behavior and his refusal to

cooperate in his own defense. (V-15, 469). Judge Bronson did not learn of the skin disease Peede had as a child, noting that "Peede certainly could have been the source of information like that and, of course, he never provided that information to me." (V-15, 471). Bronson tried to elicit information about Peede's family and life from him, his background. He used a form from the public defender's office at the time which contained "boilerplate" information he would have asked Peede. However, Peede was not willing to provide information that might have been helpful to his case. (V-15, 471). That was the reason he sought out DuRocher's help, because Peede was not opening up to him. (V-15, 472). "I asked Mr. Peede countless numbers of times about his family and his background, and all the responses were the same. He felt that he was guilty from killing his wife, he did not want to defend this case, and he did not want any defense asserted. And, basically, from that, I gleaned that he did not intend to ever reveal information about his family or anything else that was helpful to the case." (V-15, 472). With regard to letters gathered from people on Peede's behalf, Judge Bronson was sure that he gathered that information "from independent sources, not from Mr. Peede." (V-15, 474).

Judge Bronson testified that when this case was tried discovery was less informal and he would go to the prosecutors'

office to look at files. They were in the same building and it was not the rigid paper practice they have now. (V-15, 477). It is possible that a statement from the California murder was part of a larger collection that he examined at the prosecutor's office at the time of trial. (V-15, 477). At the time Peede denied ever receiving previous mental health treatment. (V-15, 478). Peede never appeared delusional or that he did not understand what was going on. (V-15, 479). In talking about the murder, Peede related that he positioned Darla's body upright against a tree because he wanted her to be found and have a Christian burial. (V-15, 480).

His investigator talked to Delmar Brown who thought that Peede needed mental health treatment but that he did not think he was insane. (V-15, 482). He had Dr. Kirkland examine Peede a second time in order to develop mitigation with respect to "emotional distress or something of that nature." (V-15, 484).

State's Exhibit 12 reflected that he talked to Lieutenant Biggs of the Hillsborough Police Department. He was familiar with the family, having known them for 14 years, and provided background information. (V-15, 487). He also interviewed Delmar Brown and received family background. Also, he interviewed Hoyt Crabtree who knew about Peede's family background, "his father's death, and his mother's suicide, etc."

(V-15, 488). He also recalled interviewing Rebecca Keniston, who told him that Darla voluntarily went to the airport to pick Peede up. (V-15, 262). From talking with Russell Keniston, Bronson was aware that Darla had thoughts of reconciling with Mr. Peede. (V-15, 488). Judge Bronson admitted that Darla's statements of intention at the time of her meeting with Peede were relevant and "certainly easier" to "be admitted" into evidence than "the diary itself." (V-15, 490).

(ii) Prosecutor and Trial Judge

Prosecutor Dorothy Sedgwick testified that she received a diary that Darla Peede kept. (V-14, 339). She identified apparently part of a journal writing by Darla dated December 6th, 1982. (V-14, 341-42). Although specific discovery documents did not list the diary as something that was turned over to the defense, Sedgwick testified that "I do recall from memory, that Theotis Bronson was aware of the diary and had it and looked at it." (V-14, 352). She recalled coming back from court and Bronson and former prosecutor Greg Reese were gong over things and "he looked at the diary." (V-14, 353). Sedgwick asked Bronson if he wanted a copy of the diary, "to which he said, no, that he didn't think anything about it was admissible, which I told him, yeah, that's what we thought, also." Sedgwick recalled "very clearly, that conversation about

the diary with Theotis Bronson." (V-14, 353). Sedgwick did not view the diary or journal as exculpatory and the entries by Darla preceded the murder by months. To be admissible under the state of mind exception, they would have to have been at about the time of the relevant conduct, to explain her action at that particular time. (V-14, 354). They did not attempt to verify the writing in the dairy, because they did not see "anything that appeared, you know, to us as prosecutors, incriminating or exculpatory or admissible, we really did not do any further investigation on it..." (V-14, 355).

Sedgwick agreed that the State's theory was always that Darla went to the airport voluntarily but that at some later point, the kidnapping occurred. (V-14, 357). Sedgwick recalled speaking to Darla's two daughters who stated that Darla was very specific, if she wasn't back by midnight, to call the authorities. Darla gave names and numbers of people to contact in North Carolina if she was not back by that time. She was afraid that Peede was going to kidnap her and force her to go to North Carolina. (V-14, 361). And, Peede gave a confession on a tape, confirming that he planned to bring Darla to North Carolina so he could get at these two other people. (V-14, 362).

Judge Cycmanik testified that he presided over Peede's trial and that based upon his observations, Peede made a knowing and voluntary decision to absent himself from the courtroom. He did not think it was a product of delusions or hallucinations. He had many occasions as a judge to assess competency and he did not view any interaction or exchange with Peede that led him to conclude a mental status or competency examination was warranted. (V-15, 501-02).

(iii) Mental Health Experts

Dr. Faye Sultan, a clinical psychologist, licensed in North Carolina, testified on behalf of Peede. (V-19, 567). Dr. Sultan has testified on behalf of defendants in North Carolina and other states where individuals are facing the death penalty. (V-19, 573). She acknowledged that she was the subject of an investigation by the North Carolina Psychological Board. Although the "investigation" was later dropped, Dr. Sultan acknowledged that they found it necessary to caution her in "several" areas regarding her role as a psychologist testifying in forensic settings. (V-19, 577). They directed her attention to the American Psychological Association's Ethical Principles and Code of Conduct. (V-19, 577-78). They quoted a passage which required that psychologists testify truthfully in forensic settings and candidly and fairly disclose the basis for their

testimony and conclusion. (V-19, 578). Dr. Sultan was also confronted with a federal court decision which described her testimony as follows: "[A]nd incredibly – while Dr. Faye Sultan, a well known anti-death penalty witness, spoke about Petitioner's drug abuse, sex abuse, suicide attempts, and incredibly concluded unequivocally that based upon Petitioner's handwriting the Petitioner suffered from organic brain syndrome." (V-19, 579-80). Dr. Sultan testified that she had never had her license suspended or revoked in North Carolina. (V-19, 584).

Dr. Sultan admitted that she has spoken to a group whose primary purpose was abolition of the death penalty on "[s]everal" occasions. (V-20, 742). She estimated that she has testified about "35" times in capital cases and had never been called on behalf of the State in a capital case. (V-20, 742). She opined that any psychologist who is a member of the American Psychological Association who works on behalf of the death penalty "maybe is going to be guilty of an ethics infraction" based upon that group's support for a moratorium. (V-20-741-42).

From her interviews, Sultan learned that Peede had a strong attachment to his mother, that she saw him as a good child and cared about him, but thought that he never performed well

enough. Her disappointment related to his performance or underachievement in school. (V-19, 594). Peede told Dr. Sultan that "he didn't like school very much." (V-20, 596).

Peede viewed himself as sexually inadequate and that all of his relationships were characterized by his perception, whether real or imagined, of his partner's infidelity. (V-19, 600). His second wife, according to Peede, admitted her infidelity. (V-19, 601-04). Peede's mother committed suicide in 1977 and Peede's behavior was not the same after that event. (V-19, 606).

Peede discussed his California convictions, asserting that he thought an underage girl was being harassed at the bar, and that he came to her aid. An altercation occurred outside of the bar and he thought he would be hurt so he fired his gun and hit two people. (V-19, 607).

During his incarceration in California he ran across adult magazines which advertised swinging. He believed he saw Geraldine's picture in several of these magazines. (V-19, 607). He recognized their home in several pictures and he was convinced that it was her. (V-19, 607).

Peede met and married the victim, Darla, shortly after being released from prison. He soon became convinced, however, that Darla was involved in swinging with Geraldine. (V-19,

610). Peede accused Darla of being unfaithful to him. (V-19, 611). Darla denied that she was involved in swinging or had been unfaithful to him. (V-19, 611-12). Peede was frantic because his marriage was not working out and had been "violent and abusive to her in the past." (V-19, 612). His response was to drink heavily and smoke marijuana. (V-19, 612).

When Peede was out on bail awaiting trial for the California murder, several relatives complained to the Sheriff's Department about Peede's deteriorating mental state. They said that they were "quite afraid of him," that he was "violent" and "out of control." (V-19, 623). Peede's aunt described an incident where he became angry with her and "struck her in the face and knocked her to the ground." (V-19, 623). She said that that was just "one of many times that I heard about in which Mr. Peede's emotions overwhelmed him and he struck out in an aggressive way, in a physical way." (V-19, 624). Through interviews and affidavits she thought the relatives did not view Peede as a normal person, "he began to threaten people, that he attacked his cousin, Buck, as told by Delmar Brown." (V-19, 626).

Dr. Sultan discussed the homicide with Peede by telling him things that she had already learned through Peede's discussions with Ms. Moore over the years in which they had corresponded.

Dr. Sultan was aware that Peede became emotional when discussing the murder and would refuse to discuss it. (V-19, 615). Peede agreed that at some point he picked up a hitchhiker and that he and Darla had sex in the backseat. (V-19, 615). Peede thought that it was crazy to have sex with her in front of a stranger. At some point, Peede admitted he became very angry with Darla and "he recalled that he stabbed her." (V-19, 616). He maintained his composure by gripping the table and answering questions by stating yes or no. Some things he just did not want to talk about. He also expressed intense remorse and began crying. (V-19, 615-17).

Peede agreed to take the MMPI but only if he could ask Dr. Sultan about individual questions. Peede took the test, asking questions about items out loud, but, Dr. Sultan did not answer any questions. While Peede did leave some items blank, the test was valid in that he answered enough items to yield a valid test. (V-19, 629). Peede scored high on the suspiciousness, paranoia, and obsessiveness scales. Peede also scored highly on the depression scale. (V-19, 631-32). On cross-examination, Dr. Sultan also admitted that the psychopathic deviate scale was also elevated above the norm. (V-19, 688).

Dr. Sultan reviewed Dr. Kirkland's report and testimony in this case. She could not tell that he relied on any collateral

data or information. (V-19, 634). From her perspective, the lack of collateral information would render an examination for mitigating evidence greatly deficient. (V-19, 634). She thought that Dr. Kirkland described symptoms that Peede had, but, thought he failed to render any formal psychological diagnosis. (V-19, 635).

On cross-examination, Dr. Sultan agreed with Dr. Kirkland's conclusion that Peede has a "type" of paranoid disorder. (V-19, 129). However, she never talked to Dr. Kirkland to determine what he reviewed or how he arrived at his conclusions. But, she agreed with parts of Dr. Kirkland's report, such as that he was "obsessed" and noted that Peede exhibited delusional thinking. (V-19, 691).

Dr. Sultan came up with the diagnosis of "Delusional Disorder, Jealous Type," which was an Axis I disorder. (V-19, 639). This disorder represents a limited form of psychotic thought, that is, outside of talking about jealously, "who's being unfaithful, whatever, the individual may sometimes appear to function quite well." (V-641). It is a non-bizarre delusion in that it is "theoretically possible, as with the jealous type, for someone to be unfaithful to someone else." (V-19, 643). Peede also probably qualified for a couple of personality

disorders, but "Paranoid Personality Disorder [w]as the one that best describes him." (V-19, 652).

Dr. Sultan thought that that both statutory mental mitigators applied in this case. (V-19, 657-58). She testified that Peede was not acting with a rational mind, "that his behavior was the product of a rage that he experienced because of the psychotic thing that he believed and he was not able to conform his conduct." (V-19, 659). Dr. Sultan also thought a number of non-statutory mitigators applied, low self-esteem, life long struggle with depressive symptoms, suicide attempt, abuse of alcohol and drugs, and the lack of a normal childhood, based upon his skin condition and emotionally and physically abusive family. (V-19, 663). Also, the suicide of his mother led to a deterioration of his condition and "in that sense I would offer that as possibly to be considered mitigating." (V-19, 663). In Dr. Sultan's opinion, Peede expressed extreme remorse for the killing of Darla. Id.

Dr. Sultan agreed that Peede was able to discuss issues that were painful to him, such as the alleged unfaithfulness of his wives to the suicide of his mother. (V-19, 673). She read the police reports surrounding the California homicide and agreed that Peede shot at "um, people who were not in pursuit of him." (V-19, 674). Peede's notion that Darla was also posing

in Swinger magazines did not arise until after Darla and Geraldine met and became friends. (V-19, 674-75). Peede's thought was that Darla came to North Carolina and was drawn into these activities by his former wife, Geraldine. (V-19, 675). The reason Peede and Darla separated, Dr. Sultan acknowledged was "there had been violence between them, that Mr. Peede had hurt her in one or more explosive episodes, and that she basically had fled." (V-19, 676). So, Peede displayed violent outbursts before the murder in Florida. (V-19, 676).

Dr. Sultan acknowledged that Peede admitted on his taped confession the reason he wanted Darla to come back to North Carolina was that he could get access to Geraldine and her boyfriend so that he could kill them. (V-19, 677). Darla was supposed to attract them so that Geraldine would be willing to meet with Peede. (V-20, 753). Dr. Sultan agreed that in a "theoretical sense" Peede "knows that killing is wrong." (V-19, 695). And, he was concerned about killing innocent people in making arrangements to kill his targeted victims. (V-19, 695). Therefore, Dr. Sultan agreed that he had a concept of right and wrong. Id. Indeed, on cross-examination, Dr. Sultan agreed that she was not prepared to offer an opinion as to whether or not Peede knew right from wrong at the point he killed Darla. (V-20, 738).

In his taped confession, Dr. Sultan agreed that Peede apparently recalled how many times he stabbed Darla and where he stabbed her. (V-19, 701). And, in his statement, he thinks about possibly getting her help, but, then he hears her breathe her last breath and he realizes that she is dead. (V-19, 702). Therefore, just two days after the murder, he apparently possessed a recollection of the actual events surrounding the murder. (V-19, 702-03). The only thing Peede refused to comment on was something that would impugn her reputation, and Peede confirmed that the subject that enraged him was her unfaithfulness. (V-19, 702-03).

Peede was able to make decisions and act to accomplish his goals when he went to Miami, negotiating the sale of his motorcycle. (V-20, 713). And, he went to Miami with a plan to kill Geraldine and Calvin Wagner. (V-20, 719). Peede had the ability to distinguish between those he was angry with and those whom he considered innocent. (V-20, 720). Even after the murder, he was still thinking about how he could get to his targets in North Carolina. (V-19, 678). He even loaded a shotgun and put it in a place where he could get it. (V-19, 678).

Dr. Sultan admitted that Peede has a history of violent outbursts. (V-19, 682). Many of those incidents had nothing to

do with a swinger magazine, Geraldine, or infidelity. (V-19, 683).

Dr. Brad Fisher, a clinical psychologist, licensed in North Carolina, testified that he has probably examined defendants in all "37 states that have the death penalty." (V-20, 773). He has never been retained or called by the State in any capital case. Id. He acknowledged that he was not licensed in Florida and it would be fair to say that he was not familiar with the standard of practice at any given time for psychologists in Florida. (V-20, 776-77).

Dr. Fisher's impression of Peede was that he was a paranoid individual. It was consistent among the doctors who have examined Peede: "His nature is suspicious, paranoid, guarded, and that is his style of functioning on day-to-day basis." (V-20, 782). Peede refused to complete the MMPI-II. (V-20, 783-84). For a formal diagnosis, Dr. Fisher concluded: Peede has "Delusional Disorder. I called it paranoid disorder." (V-20, 784). His area of delusion and paranoia relate to jealousy. Id. Dr. Fisher testified that Doctors Kirkland, Krop, Burns, speak to the paranoia and delusional thinking when it comes to Darla and Geraldine. (V-20, 786).

Dr. Fisher thought that Peede's conduct at the time he pulled off the road and stabbed Darla was delusional, not

grounded in reality. (V-20, 790). Dr. Fisher thought that Dr. Kirkland's testimony was deficient in that although he talked about paranoia and delusion he did not speak to how it related to the crime. (V-20, 791). Dr. Fisher testified that he was doing these kinds of evaluations in Florida in 83, 84. (V-20, 791). He believed that Dr. Kirkland did not rely on collateral data or material. (V-20, 791). He thought that the "general rule" for a psychologist or psychiatrist would be to look beyond the self-report in forensic cases "where the possibility of malingering is there." (V-20, 792).

Dr. Fisher testified that Peede met the requirements for both statutory mental mitigators under Florida law. (V-20, 792-93). The extreme emotional distress mitigator applied based upon Peede's paranoia and jealousy, he did not have coherent thinking or coherent emotions at the time that Darla was killed. (V-20, 793). He did admit that Peede was capable of "loose planning here where Darla is going to be used to pull out Geraldine and Calvin and that he is going to do them in." (V-20, 795). He was substantially impaired in his ability to conform his conduct because although he had "reason" his reason was based on a "delusional process that had a different reality than we normally carry." (V-20, 797).

Peede has lost his temper in the past and he was aware of the California shooting, but asserted "there wasn't a description given to me of that barroom fight in California" but it did "involve women somehow." (V-20, 798). Dr. Fisher thought that certain non-statuory mitigators also applied, relating to his childhood and his mother who was abusive, "by some reports physical, by other reports more verbal." (V-20, 799). He had a medical condition, Scoliosis as a child; he had a fixation on his sexual inadequacy, and poor self-esteem. (V-20, 799-800). Peede's abuse of alcohol and drugs "would tend to throw him off the edge and make him meaner and make him more untrustworthy..." (V-20, 801).

Dr. Fisher agreed that Peede was able to discuss his background to him. And, he thought that his background information was reliable except for the contents of the delusion itself. (V-20, 806). Dr. Fisher admitted that Peede was able to recall events surrounding the murder. Peede stated that he pulled off the road before stabbing Darla and that he acknowledged he stabbed her, but, that information was also provided by the police -- after "they prompt him with that." (V-20, 808). Peede was able to recall that he stabbed Darla in describing the murder. (V-20, 809-10). He also recalled in his statement that they were discussing the subject, he became

angry, pulled off of the road, and described an overpass. (V-20, 810). It was "possible" if Peede said he smacked her prior to stabbing her that it reflected a memory. (V-20, 810-11). And, after seeing Peede's statement again, Dr. Fisher agreed that Peede recalled hitting her "about four times." (V-20, 811). With respect to the first stabbing, Peede was able to place that as occurring back in Miami. (V-20, 812-13).

He interviewed Peede three times, and on the last two, Peede was able to relate more of the events surrounding the stabbing: "To some extent, yes." (V-20, 814). Dr. Fisher admitted that it is natural for someone with remorse over a murder to become extremely upset in recalling the murder. (V-20, 839).

Dr. Fisher admitted he did not know what Peede's reality was at the time of the stabbing. (V-20, 816). He certainly knew right from wrong when he picked Darla up at the airport. (V-20, 816). Although Peede was diagnosed as Schizophrenic by the California Department of Corrections, he did not see any Axis I diagnosis from DOC personnel in Florida. (V-20, 818). When he examined Peede he was not psychotic and he believed he had a circumscribed mental condition. (V-20, 819). The best way to describe Peede is that he is a person with a Delusional Disorder, paranoid jealous type, "not to say he's psychotic."

(V-20, 820). Dr. Kirkland developed a similar final diagnosis, "[p]aranoia was in there and delusional thinking was in there." (V-20, 820).

Peede was able to recognize the need to draw Calvin and Geraldine out from work because he did not want to hurt innocent people. (V-20, 821). He was also able to contemplate whether it was right or wrong to kill police officers. (V-20, 822-23). He thought that mental illness was the reason for Darla's murder: "I'm saying it's a -- in my opinion, a likely hypothesis that it was, but I cannot say it was." (V-20, 835).

Dr. Sidney Merin, a psychologist specializing in clinical and neuropsychology testified that he was board certified in professional psychology, clinical psychology, neuropsychology, behavioral medicine and medical psychotherapy. (V-20, 876). He has been retained almost evenly by the defense and State in criminal cases although has testified more for the State based upon the results of his work. (V-21, 880). However, for the past five years, Dr. Merin admitted he has been retained by the State in the overwhelming majority of his forensic cases. (V-21, 916).

Peede did not allow Dr. Merin to examine him when he went to Union Correctional. (V-21, 882-83). This was a choice that Peede made; it was not that he was unable to see him. (V-21,

948). Peede agreed to see the defense experts, Dr. Sultan, Dr. Fisher, and Dr. Teich. (V-21, 948). He reviewed some 70 documents in preparation for his testimony, including a videotape from Dr. Teich, competency proceedings from May 2000, and the testimony of various experts, and their reports. (V-21, 884-85).

Dr. Merin had an opportunity to hear the taped confession of Peede, a videotape and audiotape. From his review of the materials, Dr. Merin was able to conclude that Peede had a Paranoid Personality Disorder with borderline antisocial features, an Axis II disorder. He also thought that Peede suffered from depression, but, that it was "a situational type of depression." (V-21, 891). Paranoid Personality Disorder is a long term behavioral disorder: "It's not a psychosis. It's a behavioral disorder wherein the paranoia extends across and into a wide variety of facets of the individual's life, not just in a circumscribed area." (V-21, 893). He rejected a Delusional Disorder because there was no evidence of psychosis anywhere in the records, other than a single note from Dr. Arora, who diagnosed Schizophrenia. (V-21, 894).

Dr. Merin did not believe that Peede suffered from delusions with regard to Darla and Geraldine. Dr. Merin characterized it as an obsession and that Peede possessed an

obsessive-compulsive type of personality. It was an illusion, which is different from a delusion. "An illusion is a misperception of an objective event." (V-21, 897).

Dr. Merin was able to render an opinion that Peede knew the wrongfulness of his actions at the time of Darla's murder based upon all the documents he reviewed and "his own statements." (V-21, 900). He was capable of "conforming his behavior to the requirements of the law and knew right from wrong." (V-21, 900). He rejected the prospect of a delusion because "there were so many things that he had done immediately before and afterwards that required that I simply reject that prospect of a delusion." (V-21, 900). Even if Peede had the belief that Darla and Geraldine posed in a swinger magazine, those delusional features, preexisted this killing. There was nothing at all in the records to suggest he was acting on a delusion at that particular time. "Certainly, he knew right from wrong, as evidenced by his behavior immediately before this event, and his behavior immediately thereafter." (V-21, 901). He did not think that simply hearing a "swinger" song would prompt Peede to murder Darla. The song may have prompted some feelings of anger "which then allowed the basic personality to come out, which I concluded was antisocial." (V-21, 902). He knew what he was doing, he pulled over to the side of the road, jumped in the

backseat, stabbed her, and decided he would look for a hospital. All of those acts indicate he "was aware of the right and wrong" of his acts. (V-21, 903). After she breathed her last breath, he "made an effort to hide the signs of this killing by wiping up the blood, by covering Darla up just in the event he was stopped for some reason, or somebody at a gas station would look in and see a body in there." (V-21, 903). Ultimately, he continued up I-95 to Georgia and put her body out in a field. (V-21, 903).

Peede has always been an angry person. He operated his life on the basis of a personality disorder, he has "always been impulsive" even as a kid. (V-21, 904). By the time he was 16 or 17 and driving, he had "many, many speeding tickets." (V-21, 904). He faked his parents' signatures to run off to South Carolina and get married, his behavior was "out of the norm." (V-21, 904-05). His Paranoid Personality Disorder predated any notion of a swinger magazine. "He's always been a guarded, very suspicious, critical person, untrusting, irascible type of individual." (V-21, 905). He refused to see certain mental health examiners which had nothing to do with a sexually based delusional disorder. He would not take psychological tests, "not at all uncommon for Paranoid Personality Disorder for fear of what they may reveal." (V-21, 905-06). He has always "been

a rather impulsive and unstable personality." (V-21, 906). Peede was competent and not insane at the time of trial. (V-21, 907).

Dr. Merin thought that since Peede has always been an impulsive, angry, aggressive individual, he did not think Peede was acting under an extreme mental or emotional disturbance at the time of the murder. (V-21, 907). He was able to appreciate the criminality of his behavior at the time he murdered Darla. Peede knew what a knife was and what it's used for, having already cut Darla en route from Miami. (V-21, 908). He planned to use Darla to kill Geraldine and Mr. Wagner. He even thought momentarily of killing the police if they interfered with his plans, but, reasoned that they had not done anything to him, "so why kill them?" (V-21, 909). That was significant because it showed the "logic" of his thinking and was coherent; he was able to make decisions. (V-21, 909). In fact, all along the way he was able to make decisions. Id.

Dr. Merin was familiar with the standard in forensic cases back in 1983 and 1984. (V-21, 910). Dr. Kirkland saw Peede on two occasions, once for an hour, another for 40 minutes. For the most part, psychiatrists back then took a patient history and conducted a mental status examination. (V-21, 911). It would not be a particular problem to utilize the kind of

information used by Dr. Kirkland in this case if the background provided by the defendant had been accurate. As a psychologist, Dr. Merin would want additional examinations, "but that's what psychiatrists did." (V-21, 911). Since that time, psychologists and psychiatrists tend to do a better job for the most part, "take some extra steps in trying to make a determination." (V-21, 912).

Dr. Merin agreed that Dr. Kirkland found a significant mental disorder and that he went on to testify that Peede was under an extreme mental or emotional distress at the time of the murder, a conclusion that Dr. Merin disagreed with. (V-21, 913). But, Dr. Kirkland's conclusion that Peede suffered from a Paranoid Disorder was consistent with the conclusion that he arrived at with respect to Peede. (V-21, 913).

Dr. Edgar Frank, a psychiatrist who testified during the competency hearing, was called again by the State. (V-21, 952). Dr. Frank began interacting with and observing Peede in the last half of 2002. (V-21, 957). He was to observe Peede and evaluate him for any mental illness and make a report to a judge. He conducted several mental status exams on Peede. "He was very engaging. He liked to talk and make small talk. I probably did see him twice a week during that time, but only evaluated him formally three times during that period of time."

(V-21, 959). He also had other people report their observations of Peede, such as a psychological specialist. He was looking for indications of mental illness. (V-21, 959). Dr. Frank estimated he had about nine hours of face to face time with Peede over two or three months. (V-21, 962).

He was asked to examine Peede's competency back at the original trial and the time of his offense. (V-21, 963). Also, Dr. Frank was asked to examine issues surrounding potential mitigation. Id. [Exhibit 17]

In Dr. Frank's opinion, Peede was sane at the time of the offense in 1983. (V-21, 967). Dr. Frank, however, did think that Peede suffered from a Delusional Disorder, Jealous Type. (V-21, 967). This was based upon Peede's belief that his second and third wives had appeared or advertised in swinger magazines. Id. There was at least some basis for his belief, in that they both knew each other. (V-21, 968). He also thought that Peede had a Personality Disorder with Anitsocial and Borderline features or traits. (V-21, 968). Neither of his mental illnesses interfered with his ability to appreciate the wrongfulness of his behavior. (V-21,969). The facts of the crime itself show that he "was very aware that what he had done was wrong." (V-21, 970). He tried to take her to the hospital, he then tried to hide her body after she died, he was afraid of

being caught. "Particularly in fear that being caught would actually prevent him from completing his mission of killing, or at least seriously harming Geraldine Peede, and I believe it was Calvin." (V-21, 970).

Peede had a good recollection of events surrounding the murder in his taped confession. (V-21, 971). He thought it was significant that the murder only occurred after the hitchhiker left the vehicle. He hid the murder, and, he pulled off the road, put the car in park, got the folding knife, which takes "time." (V-21, 973-74). "So there was a lot that went on between the point when he decided to attack her, at a minimum, when he decided to attack her, and it actually -- he actually did inflict the mortal wound. Among other things, in the transcript he states that he hit her four times, not just smacked her, but hit her four times." (V-21, 974). The details contained in Peede's recollection tend to contradict any suggestion that Peede was actively psychotic; an individual who was very psychotic would have difficulty remembering events. (V-21, 974).

The Delusional Disorder Peede has is very circumscribed, this disorder is a disturbance of "interpretation" rather than a disturbance of "perception." (V-21, 975). Such a disorder does

not impinge on the ability to understand right from wrong. (V-21, 976).

Peede was competent to stand trial in 1983. Dr. Frank could not see an indication in the record which suggested Peede was incompetent. Now, Peede will act out "often when he doesn't get his way." (V-21, 978). For example, Peede will refuse medical exams unless he has a reason to seek treatment. "When I need to see them, I go." (V-21, 981). The same pattern can be seen with Peede agreeing to see the defense experts, but, not, apparently, those retained by the State. (V-21, 981).

Dr. Frank did agree that the mental mitigator of extreme emotional disturbance applied in this case. Peede appeared to be suffering from Delusional Disorder, Jealous Type, which he would consider an "extreme emotional disturbance." (V-22, 986-87). He thought that it provided a motive for the crime. (V-22, 987). Now, with that disorder, functioning is not markedly impaired and behavior is not obviously odd or bizarre. (V-22, 988). Dr. Frank did not think that Peede qualified for the other statutory mental mitigator, that Peede's capacity to conform his conduct to the requirements of the law was substantially impaired. (V-22, 990-92). Peede should have been able to conform his behavior to the requirements of the law. (V-22, 992).

(iv) Lay Witnesses

Peede called three lay witnesses to testify about Peede's background. Relevant facts relating to their testimony will be discussed in the argument, *infra.*

SUMMARY OF THE ARGUMENT

ISSUE I--The trial court did not abuse its discretion in finding Peede competent to proceed. Peede had no mental illness which would impair his ability to discuss the events of the murder with his attorneys.

ISSUE II--Trial defense counsel conducted a reasonable investigation into Peede's background in preparation for the penalty phase. Defense counsel were hampered by Peede's complete refusal to cooperate, but, nonetheless, contacted potential witnesses in North Carolina, employed an investigator to develop potential mitigation, and, retained a well respected psychiatrist to examine Peede. Ultimately, trial counsel presented letters from 13 friends and family members on Peede's behalf and the testimony of Dr. Kirkland which established the emotional distress statutory mitigator.

ISSUE III--Peede's Ake claim is procedurally barred as an issue which could have been raised on direct appeal. In any case, no deficiency has been shown in either the qualifications or the

examination of the psychiatrist who examined Peede and testified on his behalf at the time of trial.

ISSUE IV--Peede has not shown that the State failed to disclose any material, exculpatory information. The diary was available to defense counsel at the time of trial and was not admissible. Moreover, defense counsel admitted he was generally aware of the information contained in the diary. Similarly, the defense was well aware of information relating to the California murder and aggravated assault committed by Peede.

ISSUE V--Peede has shown no deficiency in trial counsel's performance which casts any doubt upon the reliability of his convictions or sentence.

ISSUE VI—Peede presented no expert testimony to establish that he was incompetent during his trial. Further, Peede's trial attorneys observed no basis to question his competency.

ISSUE VII--Ring v. Arizona did not invalidate Florida's capital sentencing statute.

ARGUMENT

I.

WHETHER THE TRIAL COURT ERRED IN FINDING PEEDE COMPETENT TO PROCEED WITH HIS POST-CONVICTION HEARING? (STATED BY APPELLEE)

A. Applicable Legal Standards

In Alston v. State, 894 So. 2d 46, 54 (Fla. 2004), this Court stated:

> The criteria for determining competence to proceed is whether the prisoner "has sufficient present ability to consult with counsel with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the pending collateral proceedings." Hardy v. State, 716 So. 2d 761, 763 (Fla. 1998) (quoting Dusky v. United States, 362 U.S. 402, 402, 4 L. Ed. 2d 824, 80 S. Ct. 788 (1960)); see also § 916.12(1), Fla. Stat. (2003); Fla. R. Crim. P. 3.211(a)(1) , 3.851(g)(8)(A).
>
> "It is the duty of the trial court to determine what weight should be given to conflicting testimony." Mason v. State, 597 So. 2d 776, 779 (Fla. 1992). "The reports of experts are 'merely advisory to the [trial court], which itself retains the responsibility of the decision.'" Hunter v. State, 660 So. 2d 244, 247 (Fla. 1995) (quoting Muhammad v. State, 494 So. 2d 969, 973 (Fla. 1986)). Thus, when the experts' reports or testimony conflict regarding competency to proceed, it is the trial court's responsibility to consider all the relevant evidence and resolve such factual disputes. See, e.g., Hardy, 716 So. 2d at 764 (citing Hunter, 660 So. 2d at 247).
>
> "Where there is sufficient evidence to support the conclusion of the lower court, [this Court] may not substitute [its] judgment for that of the trial judge." Mason, 597 So. 2d at 779. A trial court's decision regarding competency will stand absent a

> showing of abuse of discretion. See, e.g., Hardy, 716 So. 2d at 764; Carter v. State, 576 So. 2d 1291, 1292 (Fla. 1989).

Consequently, in Alston, this Court noted that "the issue to be addressed by this Court is whether the circuit court abused its discretion in finding" the defendant "competent to proceed in his postconviction proceedings." Alston, 894 So. 2d at 54. No such abuse of discretion has been shown in this case.

B. The Trial Court Did Not Abuse Its Discretion In Finding Peede Competent To Proceed

In the order denying post-conviction relief, the trial court again rejected Peede's competency claim, stating in part:

> On February 11, 2002, this Court granted the defense's Motion to Determine Defendant's competency, and appointed mental health experts to examine Defendant. On April 1, 2003, Dr. Alan Burns filed a report wherein he stated that he could not render an opinion as to Defendant's competency because Defendant was uncooperative and terminated the evaluation after only ten minutes.
>
> On December 16, 20002, Dr. David Frank filed a report, having been assigned as Mr. Peede's attending psychiatrist at Union Correctional Institution, on October 15, 2002. Dr. Frank reported that during the seven week observation and evaluation period, Mr. Peede exhibited no signs or symptoms of psychosis, thought disorder, depression, mania, or any other major mental disorder. Dr. Frank observed that Mr. Peede does have anger management deficits, as exhibited by the sudden onset of anger without provocation.
>
> On May 30, 2003, Dr. Gloria Calderon filed a report in which she stated that Mr. Peede has refused to come out of his cell for his weekly psychiatric appointments. She and another Department of Corrections doctor have met with Mr. Peede several

> times at his cell and out in the yard. She reported that he was pleasant, cooperative, and spontaneously verbal and relevant. The Court held a hearing on July 18, 2003, at which it heard the testimony of Dr. Frank and arguments of counsel, as well as conducting the Court's own colloquy with Defendant.
>
> . . .
>
> ...Having evaluated the experts' reports, viewed Mr. Peede's in-court behavior, and carefully considered the testimony of Dr. Frank and this Court's discussion with Defendant, the Court finds Defendant to be competent. Simply put, Mr. Peede *could* assist his attorneys, if he wanted to, but is instead *choosing* not to discuss the facts of this case. It is clear to this Court that Mr. Peede is not incompetent, simply uncooperative.

(V-25, 1606-07).

Competent, substantial evidence supports the trial court's conclusion that Peede was competent to proceed in this case. The two defense experts who found Peede incompetent provided very little support for their findings. Dr. Fisher found Peede to be of average intelligence and that he was "in general cooperative." (V-25, 1447). Peede was not schizophrenic. Dr. Fisher found Peede incompetent because he would not discuss the details surrounding the murder with him.[4] (V-25, 1449). Peede would become emotional when discussing the facts and Dr. Fisher

[4]If refusing to discuss details of the murder rendered a defendant incompetent, any defendant maintaining his innocence would be considered incompetent. Moreover, mental illness and competency to stand trial are distinct issues; "not every manifestation of mental illness demonstrates incompetence to stand trial." Card v. Singletary, 981 F.2d 481, 487 (11th Cir. 1992), cert. denied, 114 S. Ct. 121 (1993).

felt that he risked termination of the interview if he pursued it further. Id. Dr. Fisher did not articulate any specific mental infirmity preventing Peede from relating the facts of the murder: "I didn't have a good explanation for that inability; that I perceived he's got the brain power, he, probably has the memory but he couldn't do it." (V-25, 1450). Peede did have a grasp of the other aspects of his case and did understand "what these proceedings are, what the proceedings are against him. He knows what he's accused of, he knows when it happened, he knows what the sanctions are. So he does know these things." (V-25, 1452).

Interestingly enough, while Peede refused to see the court appointed doctors, or, later, the doctor retained by the State, Dr. Merin, he did agree to see the defense experts. This suggests again that Peede was making conscious choices in this case, one based upon his own perceived best interest. Nonetheless, one of the court appointed doctors was subsequently able to render an opinion on competency based upon his review of a videotape interview by a defense doctor and review of relevant records. In addition, upon the second request for a competency determination, Peede was observed by Dr. Frank who noted that he had observed Peede while in TCU and noted that nothing in his interaction or observations of Peede would suggest that he was

incompetent. His unwillingness to discuss the facts of his wife's murder was not due to mental illness. (V-18, 554-55). Peede clearly had the "ability" to discuss the facts with his attorneys should he choose to do so. Id. at 555-56.

Dr. Gloria Calderon, Senior Physician for Union Correctional, testified that Peede refused scheduled appointments with psychiatry and observed Peede in his cell, noting that he was pleasant, otherwise, compliant, and was not on any psychotropic medication. (V-25, 1584).

Finally, evidence developed during the post-conviction hearing establishes that Peede in fact, did talk about the circumstances of the murder with defense expert Dr. Sultan. While she had to approach the subject delicately, Peede was able to provide Dr. Sultan with information surrounding the offense. Thus, as the trial court found, the evidence below clearly establishes that Peede possessed the ability to cooperate with his attorneys and discuss the murder, should he choose to do so.

Peede takes issue with the procedure employed by the trial court for determining his competency. Specifically, he contends that the procedures prescribed under Rule of Criminal Procedure 3.211 were not followed. (Appellant's Brief at 38-41). Petitioner is somewhat vague in which requirements were not met, simply listing the information that should be contained in the

reports under Rule 3.211(d). If there was any defect in the procedure employed below, it was only because of Peede's complete refusal to cooperate with psychiatric examinations. Moreover, it must be remembered that Peede has already had one full competency hearing, wherein collateral counsel called two defense experts to testify. After this hearing, Peede was found competent to proceed. A second competency hearing on essentially the same grounds, Peede's emotional refusal to discuss details of his ex-wife's murder, was not warranted. Based upon this record, the trial court would have been well within its discretion to reject defense counsel's motion.[5]

In Hunter v. State, 660 So. 2d 244 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996), the defendant claimed the trial court erred in denying a renewed motion to determine competency. "In this motion, defense counsel made several observations about his client's continuing unusual behavior, including Hunter's repeated threats to disrupt the proceedings." Hunter, 660 So. 2d at 248. Defense counsel also referred to a second report from one of his experts "which primarily discussed mitigating circumstances, but also opined that Hunter was incompetent to

[5]The trial court asked defense counsel a salient question given the posture of this case: "So, you are saying that you can just successively keep filing motions? Do you have a basis for that?" (V-18, 550). Defense counsel simply stated that the rule did not The mention prior competency determination. Id. at 550-51.

stand trial." Id. This Court found the trial court did not err in refusing to conduct a second competency hearing, noting that a presumption of competence attaches from a previous determination of competency to stand trial. "While there was continuing evidence of incompetence, it was the same or similar to the evidence previously asserted and was not of such a nature as to mandate a new hearing." Hunter, 660 So. 2d at 248. See also Oats v. State, 472 So. 2d 1143 (Fla.), cert. denied, 474 U.S. 865 (1985). Defense counsel's motion questioning Peede's competency was based essentially upon the same grounds as the motion filed by previous counsel. As the State argued, the motion did not provide "reasonable grounds" to once again order Peede examined for competency.[6] Nonetheless, exercising an abundance of caution, the court appointed Dr. Berns, who had previously considered the question of Peede's competency, to attempt another examination. Predictably, Peede refused to

[6]Indeed, the State maintains that no competency hearing was even necessary to proceed with the evidentiary hearing in this case. In Carter v. State, 706 So. 2d 873 (Fla. 1997), this Court held that a "judicial determination of competency is required when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in postconviction proceedings in which factual matters are at issue, the development or resolution of which require the defendant's input." 706 So. 2d at 875. Thus, where the defendant's postconviction claims do not raise issues requiring his factual input, a competency determination is not required. Appellant failed to establish that there were any factual issues which required his input in order to proceed with the evidentiary hearing.

cooperate, terminating the interview with Dr. Berns, after only ten minutes. At least two experts did examine or attempt to examine Peede for his latest competency determination. [Dr. Berns and Dr. Frank].

Dr. Berns was unable to render a conclusion regarding Peede's competency due to his lack of cooperation with the examination. On Dr. Berns' recommendation, Peede was transferred to the state hospital for a period of observation by prison mental health personnel. After the requested period of observation the court held a hearing on Peede's competency. After hearing the testimony of Dr. Frank and considering the court's observation of Peede and the hearing colloquy, Peede was again found competent to proceed. Peede successfully delayed his evidentiary hearing for nearly two years by refusing to cooperate with counsel.

The trial court reviewed the evidence, had the opportunity to observe Peede and concluded that he was competent to proceed. Nothing Peede has offered on appeal suggests the trial court abused its discretion in finding him competent. The trial court's competency finding should be affirmed on appeal. See Hertz v. State, 803 So. 2d 629, 640-41 (Fla. 2001) (affirming trial court's competency finding despite conflicting expert testimony).

II.

WHETHER THE TRIAL COURT ERRED IN DENYING PEEDE'S PENALTY PHASE INEFFECTIVE ASSISTANCE CLAIMS? (STATED BY APPELLEE)

Appellant next complains that his defense attorneys rendered ineffective assistance during the penalty phase. The State disagrees.

A. Standard of Review

This Court summarized the appropriate standard of review in State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000):[7]

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

This Court has stated that "[w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). Consequently, this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial

[7]This standard applies to all issues of ineffectiveness addressed in this brief.

court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984) (citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

B. Preliminary Statement on Applicable Legal Standards for Ineffective Assistance of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" Waters v. Thomas, 46 F.3d 1506 (11th Cir.) (*en banc*), cert. denied, 516 U.S. 856 (1995) (citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had

counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

C. The Trial Court Properly Rejected Appellant's Ineffective Assistance Claims After the Hearing Below

(i) Peede's Social And Family Background

The trial court entered an extensive, well reasoned order, finding that defense counsel did not render deficient performance in investigating or presenting Peede's "background." The trial court stated, in part:

> In this case, Defendant argues that counsel was ineffective for (1) failing to investigate "background information" and call several background witnesses at the penalty phase of trial; and (2) failing to give Dr. Kirkland sufficient background information to form an accurate opinion of Defendant's mental health.
>
> First, a defendant may not fail to provide counsel with the names of witnesses who could assist in presenting mitigating evidence, and then complain that counsel's failure to pursue such mitigation was unreasonable. *See Cherry v. State,* 781 So. 2d 1040, 1050 (Fla. 2001). In this case, Mr. Peede refused to cooperate with his counsel by giving them requested background information; refused to provide them with the names of potential mitigation witnesses; and,

refused to assist by providing any mitigating evidence or circumstances. Therefore, Mr. Peede cannot now complain about counsel's alleged failure to pursue this alleged mitigating information or evidence. *Id.*

Second, the Court finds that counsel's actions in attempting to locate and interview background witnesses - despite the lack of cooperation from Mr. Peede was reasonable and adequate. Counsel employed an investigator and also independently interviewed a number of Defendant's family members and friends. Because all of these witnesses were either unable or unwilling to travel to Florida for the trial, counsel could not have called them to testify even it would have made strategic sense to do so (over their client's objections). [fn4]

Third, the testimony of the three defense witnesses called at the evidentiary hearing established that Defendant had always been an angry and suspicious person, believing that his friends had been sleeping with his wife. The testimony further revealed that Defendant was prone to explosive fits of temper, impulsive behavior, and that he had even struck his Aunt Nancy, who had been a second mother to him. One of these witnesses, by simply walking into the courtroom, elicited a violent and disruptive reaction from Mr. Peede, in which Mr. Peede threatened to kill the witness and said that he would do so if given the opportunity. Therefore, counsel clearly faced a situation in which it may have been less than desirable - and potentially disasterous [sic] - to have called these or similar witnesses to provide the "background" information that the defense now claims should have been presented to the jury. Although these witnesses also testified as to some difficulties Defendant had faced (such as his mother's suicide), the Court cannot imagine how most of this testimony would have been mitigating, and does not find a reasonable probability that it would have changed the jury's recommendation of death.

Therefore, the Court concludes that the Defendant has failed to prove either a deficient performance on the part of his trial counsel, nor prejudice, with respect to this claim.

> [fn3] A reasonable probability is one that is sufficient to undermine confidence in the outcome. *See Strickland v. Washington, 466* at 694.
>
> [fn4] Counsel was successful in producing 13 letters (from many of these potential witnesses) which were introduced into evidence at the penalty phase. However, the Court did not find any basis for mitigation in the letters.

(V-26, 1779-81).

As the trial court noted below, Peede refused to cooperate with his trial defense attorneys who were attempting to prepare for the penalty phase. Judge Bronson testified: "I asked Mr. Peede countless numbers of times about his family and his background, and all the responses were the same. He felt that he was guilty from killing his wife, he did not want to defend this case, and he did not want any defense asserted. And, basically, from that, I gleaned that he did not intend to ever reveal information about his family or anything else that was helpful to the case." (V-15, 472). With regard to letters gathered from people on Peede's behalf, Judge Bronson was sure that he gathered that information "from independent sources, not from Mr. Peede." (V-15, 474). Moreover, Judge Bronson reviewed notes from his public defender's file which reflected he talked to several individuals in North Carolina who provided family background evidence on Peede. (V-15, 487-88). Thus, the record

clearly reflects that defense counsel did conduct a reasonable investigation into Peede's background.

Peede's refusal to cooperate with his defense attorneys is a valid consideration in the determination of whether counsel rendered deficient performance. See Rutherford v. State, 727 So. 2d 216 (Fla. 1998) (noting defendant's refusal to cooperate was a critical factor in determining that defense counsel did not render deficient performance). See also Power v. State, 886 So. 2d 952 (Fla. 2004) and Hodges v. State, 885 So. 2d 338 (Fla. 2003). Even though Peede refused to cooperate with his defense attorneys below with regard to penalty phase mitigation, they employed an investigator and gathered evidence in the form of 13 letters from individuals in North Carolina regarding Peede's life and character. Defense counsel testified that these individuals refused to come to Florida to testify on Peede's behalf.[8] (V-15, 437, 445). Nonetheless, defense counsel's strategy was to use the letters to portray Peede as a polite, pleasant, and good person. (V-15, 437).

Collateral counsel only presented three lay background witnesses on Peede's behalf during the evidentiary hearing below

[8]DuRocher thought that most of the people who submitted letters on Peede's behalf were of advanced age. (V-15, 445). It was established during the evidentiary hearing that one of these individuals, Peede's Aunt, would have been willing to come to Florida to testify on Peede's behalf.

and no truly compelling mitigating evidence was developed. And, the evidence which was presented, as noted by the trial court, was largely, if not entirely, offset by negative information about Peede. Such information certainly would have countered trial counsel's strategy of attempting to portray Peede as a nice, polite, "good person." (V-15, 437).

For example, Peede clearly was unhappy with collateral counsel for calling his childhood friend John Bell to testify on his behalf. Indeed, Peede threatened to kill John Bell when he was called to testify against his wishes. (V-14, 274). This display of potential dangerousness would alone outweigh the value of any non-statutory mitigation presented by Mr. Bell or, for that matter, the two additional witnesses called by collateral counsel. Moreover, while Bell did testify about Peede's skin condition as a child, he noted that despite this condition Peede was able to play with other kids his age. (V-14, 291). He also testified that Peede's family was well off, and that Peede had a temper. (V-14, 292, 295). Moreover, collateral counsel did not establish that Bell was available to testify in 1984, because after hearing of Peede's second murder, Bell admitted he was laying low, and did not want anything to do with Peede. (V-14, 308).

Another background witness, Peede's cousin Michael Brown, noted that Peede had a temper, and that he was "overly aggressive" with girls: "[I]f they did not respond to his advances, he may get mad about that and say something very disparaging to them." (V-14,315).

Peede's 71-year-old aunt, testified that her sister felt that Peede, her only child, was the most important person in her life and that his education was very important to her. (V-14, 237). However, Peede didn't like school and he "didn't do that well." (V-14, 237-38). Her sister didn't "beat the child" but, she "spanked him" when he didn't behave or do well on his homework. (V-14, 238-40). Peede grew up in comfortable circumstances. (V-14, 240). She also related an incident where Peede struck her on her shoulder, causing her to 'trip' over a rubber mat and fall to the floor. (V-14, 256). Her testimony did not establish that Peede was abused as a child or that he suffered any kind of deprivation. Thus, while she may have provided some beneficial testimony regarding Peede's childhood medical conditions and the impact of her sister's suicide on Peede, her testimony on the whole, did not provide compelling mitigation.

Appellant's reliance on Wiggins v. Smith, 539 U.S. 510 (2003), to support his claim that counsel was ineffective is

misplaced. In Wiggins, counsel had failed to investigate and discover evidence that Wiggins suffered severe "abuse" and "privation" in the first six years of his life, in custody of an alcoholic, absentee mother. Moreover, "[h]e suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care." 539 U.S. at 535. Appellant's family history and background is unremarkable in comparison. Moreover, while appellant's aunt discussed appellant's childhood illnesses at the evidentiary hearing, he was **nearly forty** at the time he committed the charged murder, and thus far removed in time from that period in his life. See Tompkins v. Moore, 193 F.3d 1327, 1337 (11th Cir.1999) (finding no prejudice for counsel's failure to present evidence of physical abuse as a child where the defendant was twenty-six at the time of the crime, noting that where a defendant is not young at the time of the offense "'evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight.'")(quoting Francis v. Dugger, 908 F.2d 696, 703 (11th Cir.1990)); Mills v. Singletary, 63 F.3d 999, 1025 (11th Cir.1995) ("We note that evidence of Mills' childhood environment likely would have carried little weight in light of the fact that Mills was twenty-six when he committed the crime."). And, the State notes

that the circumstances of this murder and Peede's **prior murder conviction,** renders this case more aggravated than Wiggins.

(ii) Mental Status Evidence

Trial counsel were not ineffective in failing to provide background material to their mental health expert. The trial court rejected this claim below, stating, in part:

> Similarly, Defendant has failed to demonstrate any prejudice with respect to the claim that counsel failed to provide sufficient background information to Dr. Kirkland. At trial, Dr. Kirkland testified that he and Defendant discussed Defendant's "background, his own personal history in regards to health, his other factors involving his life and life style, his marriages, his successes and his failures, his previous problems, and particularly in relating to some problems that existed with his second wife and then with his third wife, Darla." Dr. Kirkland was also aware that Defendant had not slept for two days prior to the murder. (See R. 950-51). Defendant has not demonstrated that talking to the background witnesses called at the evidentiary hearing, or additional witnesses, would have significantly enhanced or changed Dr. Kirkland's understanding and opinion of Defendant's mental state.
>
> In fact, at the evidentiary hearing, defense expert Dr. Fisher testified that Defendant's description of his background to him was reliable when compared with other sources. As discussed above, in Claim 2, this Court has reviewed the trial testimony and findings of Dr. Kirkland and has compared it to that of the defense experts who testified at the hearings. The Court finds that considering the changes in nomenclature and testing since 1983, the current experts' testimony differed insignificantly from the conclusions and opinions given by Dr. Kirkland at the time of Defendant's trial. Therefore, the Court concludes that no relief is warranted as to this claim.

(V-26, 1781). The trial court's order is well supported by the evidence developed below during the evidentiary hearing.

Dr. Kirkland was a well qualified, highly regarded mental health expert who was retained by Judge Bronson early in the case to evaluate Peede for sanity and competency. He was retained again to examine Peede for the penalty phase. (V-15, 402). At the time Peede's case was tried, Dr. Kirkland was recognized as "one of the preeminent forensic psychiatrists in the area, and was frequently called by both the State and Defense to do these kinds of evaluations and make these kind of reports." (V-15, 403). Although he did not provide background material to Dr. Kirkland, DuRocher testified that he was "sure I discussed some of the background with him." (V-15, 402). If Dr. Kirkland had asked for additional background information, DuRocher would have supplied it. (V-15, 434). Moreover, there was no indication that Peede was unable to relate accurately his background to Dr. Kirkland. In fact, as noted by the trial court, Dr. Fisher acknowledged that Peede was a fairly accurate historian with respect to his background. (V-20, 806).

Peede argues that records from Peede's California incarceration were important because they showed that Peede was diagnosed as schizophrenic. (Appellant's Brief at 55). However, not one of the many experts who testified below

believed that Peede was schizophrenic. Thus, a single incorrect previous diagnosis contained in Peede's corrections file from California cannot form the basis for finding Dr. Kirkland's examination in the instant case was inadequate.

Appellant largely ignores the fact that Dr. Kirkland provided favorable evidence to Peede during the penalty phase. In fact, he testified that the statutory mitigating factor of extreme emotional disturbance applied in this case. Peede did not call Dr. Kirkland to testify during the hearing below and there is no basis to conclude that his opinion, already favorable to Peede at the time of the penalty phase, would have changed with the benefit of any background material obtained by collateral counsel. Consequently, defense counsel cannot be considered ineffective in failing to provide the additional background material Peede claims should have been obtained and provided to him. See e.g. Carroll v. State, 815 So. 2d 601, 611 (Fla. 2002) (Even "assuming trial counsel was deficient for failing to provide the additional background information" defendant failed to demonstrate prejudice under Strickland where the experts would not have changed their opinions with the benefit of such material); Engle v. Dugger, 576 So. 2d 696, 701 (Fla. 1991) ("Counsel had Engle examined by three mental health experts, and their reports were submitted into evidence. There

is no indication that counsel failed to furnish them with any vital information concerning Engle which would have affected their opinions.").

In any case, simply because Peede found two defense oriented experts from out of state who would also find that the murder was committed while Peede's ability to conform his conduct to the requirements of the law was substantially impaired [in addition to the emotional disturbance mitigator found by Dr. Kirkland], does not establish the examination of Dr. Kirkland was inadequate. It is by now well established that a defendant is not entitled to post-conviction relief simply because he is able to obtain the opinions of more favorable experts. See Cherry v. State, 781 So. 2d 1040, 1052 (Fla. 2001) ("The fact that Cherry found a new expert who reached conclusions different from those of the expert appointed during trial does not mean that relief is warranted under Florida Rule of Criminal Procedure 3.850, [citation omitted], especially where there is no evidence other than Dr. Crown's [post-conviction defense expert] statement that Dr. Barnard conducted a superficial examination that Dr. Barnard's evaluation was insufficient."); Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002) ("We have held that counsel's reasonable mental health investigation is not rendered incompetent 'merely because the

defendant has now secured the testimony of a more favorable mental health expert.'")(quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000); Downs v. State, 740 So. 2d 506 (Fla. 1999) ("The fact that Downs has found experts willing to testify more favorably concerning mental mitigating circumstances is of no consequence and does not entitle him to relief.")(citations omitted). Moreover, the more credible testimony of Dr. Frank and Dr. Merin disputed the defense experts' finding regarding Peede's capacity to conform his conduct to the requirements of the law. Thus, the record provides ample support for the trial court's denial of relief.

(iii) Prejudice

Even assuming, *arguendo*, Peede has established some deficiency in counsel's penalty phase presentation, he has not established any resulting prejudice. As noted above, the mitigation developed by collateral counsel was not compelling and was partially countered by evidence showing Peede's temper, the fact he was mean to women who rejected his advances from an early age, and, that he threatened to kill a witness called on his own behalf. The facts surrounding his kidnapping and murder of Darla, as well as the facts of his prior murder conviction, clearly overcome the mitigation presented by collateral counsel during the hearing. Moreover, the additional mental mitigating

evidence was offset by the testimony of Dr. Merin and Dr. Frank. See Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989) (counsel's failure to present psychiatric testimony which would have been strongly disputed by the State's expert witnesses would not have affected the outcome of the sentencing proceeding in light of the strong aggravating circumstances); Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (three aggravating factors of during a burglary, HAC, and prior violent felony overwhelmed the mitigation testimony of family and friends offered at the postconviction hearing); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (no reasonable probability of different outcome had mental health expert testified, in light of strong aggravating factors); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989) (postconviction evidence of abused childhood and drug addiction would not have changed outcome in light of three aggravating factors of HAC, during a felony, and prior violent convictions).

Collateral counsel simply has not produced the quantity nor quality of mitigating evidence to establish that the outcome of his sentencing proceeding was unfair or unreliable. Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a

reasonable probability of a different result"). This case presents a better factual situation for the State than Hodges v. State, 885 So. 2d 338, 351 (Fla. 2003), where this Court found no prejudice based upon trial counsel's alleged penalty phase deficiencies. In Hodges, this Court compared the defendant to Wiggins and stated:

> In assessing the prejudice prong of the Strickland standard, the Wiggins Court reweighed the evidence in aggravation against the totality of the mitigating evidence, and determined the evidence of severe privation, physical and sexual abuse and rape, periods of homelessness and diminished mental capacities, comprised the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Wiggins, 539 U.S. at 535. Noting that in Maryland, the death recommendation must be unanimous, the High Court determined, "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that one juror would have struck a different balance." Id. at 537.
>
> A similar analysis in the instant matter fails to yield a similar result. Certainly, the absence of generalized evidence pertaining to the asserted social dysfunction of Hodges' entire hometown, and his exposure to environmental toxins in the general area, even when coupled with more specific evidence regarding his abusive and impoverished upbringing, would not have rendered the sentencing proceeding unreliable. The jury recommended a death sentence by a ten-to-two majority, and the trial court found that the State had established two serious aggravators: commission of murder to disrupt or hinder law enforcement and that the act was committed in a cold, calculated, and premeditated manner. See Hodges I, 595 So. 2d at 934. Even with the postconviction allegations regarding Hodges' upbringing, it is highly unlikely that the admission of that evidence would have led four additional jurors to cast a vote

> recommending life in prison. See Asay, 769 So. 2d at 988 (determining that there was no reasonable probability that evidence of the defendant's abusive childhood and history of substance abuse would have led to a recommendation of life where the State had established three aggravating factors, including CCP); see also Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997).

Hodges v. State, 885 So. 2d 338, 350-351 (Fla. 2003)

In this case, the vote in favor of death was 11-1, not 10 to 2 as in Hodges. Moreover, two serious aggravators, applied, including one of the most weighty, prior violent felony. Indeed, the aggravating factors are stronger in this case than Hodges. One of the prior violent felonies committed by Peede was a murder, clearly among the most weighty under Florida's statutory scheme. See generally Ferrell v. State, 680 So. 2d 390 (Fla. 1996) (prior second degree murder); Lindsey v. State, 636 So. 2d 1327 (Fla.), cert. denied, 513 U.S. 972 (1994) (contemporaneous first degree murder and prior second degree murder); Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993) (death sentence affirmed where single aggravating factor of prior second-degree murder of fellow inmate was weighed against numerous mitigators). Peede failed to demonstrate prejudice under Strickland.

III.

WHETHER APPELLANT WAS DENIED AN ADEQUATE MENTAL HEALTH EXAMINATION IN VIOLATION OF AKE V. OKLAHOMA? (STATED BY APPELLEE)

The trial court extensively analyzed this issue in rejecting this claim below, stating:

> Due process requires that a defendant have access to a "'competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense.'" *Mann v. State,* 770 So. 2d 1158, 1164 (Fla. 2000) (quoting *Ake v. Oklahoma,* 470 U.S. 68, 83 (1985)). Prior to his original trial, Defendant was evaluated by Dr. Robert Kirkland. Dr. Kirkland also testified on behalf of Defendant at trial, and presented evidence of mitigation.
>
> As defense counsel Mr. DuRocher testified, Dr. Kirkland "through the late '70s and into the '80s, was recognized by the Courts of this circuit as one of the preeminent forensic psychiatrists in the area, and was frequently called by both the State and defense to do these kinds of evaluations and make these kind of reports." The Court finds that Dr. Kirkland's evaluations and assistance were appropriate and met the due process requirements recognized by the United States Supreme Court in *Ake.*
>
> First, the Court would note that Dr. Kirkland did not have available to him all of the background information regarding Defendant now available to the defense experts called at the evidentiary hearing. Yet, the Court finds that Dr. Kirkland's findings and conclusions did not vary materially from the findings and conclusions of the defense's current experts.
>
> Dr. Kirkland described Mr. Peede's personality as including "strong paranoid elements" and testified that Mr. Peede had a "specific paranoia" regarding his former wives' infidelity that did not appear to be

based in reality. Dr. Kirkland also found and testified that Mr. Peede was "very vulnerable to having rather severe emotional outbursts," and that Mr. Peede himself felt that he was insane at the time of the murder.

Similarly, the defense experts called at the evidentiary hearing, Dr. Faye Sultan and Dr. Brad Fisher, diagnosed Mr. Peede as having a paranoid personality disorder and as suffering from the narrowly circumscribed "delusional disorder" described above. Dr. Sultan and Dr. Fisher both testified that Mr. Peede was prone to severe emotional outbursts, including violent outbursts that were completely unrelated to his delusion. In addition, the defense experts testified that there was nothing about the structure of Mr. Peede's delusion itself that would have prevented him from judging between right and wrong.

Dr. Sultan admitted on cross-examination that Dr. Kirkland diagnosed the presence of Mr. Peede's paranoid disorder and noted Mr. Peede's obsessive and delusional thinking. Dr. Fisher also testified that Dr. Kirkland's opinions were consistent with his own diagnosis. In fact, it appears that much of the difference between Dr. Kirkland's conclusions and those of the current defense experts is semantic. As explained by Dr. David Frank, testifying for the State, the earlier version of the Diagnostic and Statistical Manual (or "DMS III") references a "paranoid disorder" that is now referred to in the current version of the Manual (the "DSM-IV-TR") as a "delusional disorder." Therefore, although Dr. Kirkland did not label his diagnosis as a "delusional disorder," it appears that this was simply because he quite appropriately used the term ("paranoia") recognized by the then-current diagnostic manual.

Additionally, both Dr. Kirkland and the defense's current experts testified that Mr. Peede was suffering under an extreme mental and emotional disturbance at the time of the murder. Relying on Dr. Kirkland's testimony, the trial court found that this statutory mitigating circumstance applied in the case. The trial court, also relying on Dr. Kirkland's testimony,

> recognized Mr. Peede's "specific paranoia" (again, now termed a "delusional disorder"), which was considered at the time of sentencing.
>
> Unlike Dr. Kirkland, both of the defense's current experts believed that Mr. Peede should have been considered as qualifying for the statutory mitigating circumstance that "{t]he capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of law was substantially impaired." However, this legal conclusion appears inconsistent with these experts' testimony that Mr. Peede's delusional disorder did not affect his ability to tell right from wrong. Additionally, both Dr. Frank and Dr. Sydney Merin, the State's other expert witness, opined that Mr. Peede *did* know right from wrong and *was* capable of conforming his behavior to the law at the time of the murder.
>
> Having carefully considered the testimony of all of these experts, the Court finds that Dr. Kirkland cannot be faulted for failing to opine that Mr. Peede's capacity to appreciate the criminality of his conduct was substantially impaired at the time of the murder. The fact that Defendant may now have found experts whose opinions are more favorable to him does not render incompetent the evaluation and opinions of Dr. Kirkland. *See Gaskin v. State,* 822 So. 2d 1243, 1250 (Fla. 2002).
>
> Additionally, the Court finds that the Mr. Peede received an adequate and appropriate psychiatric examination from a well-qualified professional who appropriately assisted in the preparation and presentation of his defense. The Court finds no due process violation and no basis for relief on this claim.

(V-26, 1776-78)

The State can add little to the extensive and detailed order of the trial court. However, to the extent that appellant is asserting an Ake claim, and is not simply reasserting his

ineffective assistance of counsel claim, that claim is procedurally barred.[9] See Moore v. State, 820 So. 2d 199, 203, n.4 (Fla. 2002) (affirming summary denial of an Ake claim in a post-conviction motion because Ake claims should be raised on direct appeal and therefore, are procedurally barred in post-conviction litigation); Dufour v. State, 905 So. 2d 42, 53-54 (Fla. 2005) (finding Ake claim procedurally barred because it was not raised on direct appeal). In any case, it is by now well established, that a mental health examination is not inadequate simply because a defendant is later able to find experts to testify favorably in his behalf. See Jones v. State, 732 So. 2d 313, 320 (Fla. 1999), citing Correll v. Dugger, 558 So. 2d 422, 426 (Fla. 1990); and State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). A new sentencing hearing is mandated only where the mental examinations were so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage. See Sireci, 502 So. 2d 1221, 1224. No such serious deficiency has been shown in this case.

As recognized by the trial court below, trial counsel did not ignore potential mental health issues in this case. Judge Bronson retained Dr. Kirkland early on in his representation of

[9]Procedurally barred claims are reviewed de novo. Questions of fact are reviewed by the competent, substantial evidence standard.

Peede. The defense presented no evidence to suggest, much less establish that Dr. Kirkland lacked the training, knowledge, qualifications, or experience to conduct a forensic evaluation of the appellant at the time of trial. The record reflects that Dr. Kirkland interviewed appellant twice, provided a written report, and provided favorable testimony in the penalty phase. See Gorby v. State, 819 So. 2d 664, 681 (Fla. 2002).

Appellant's attack upon the quality of the mental health assistance available to him, or, his counsel's provision of background materials to the expert is without merit. Ake v. Oklahoma, 470 U.S. 68 (1985) simply requires a state to provide expert mental health assistance when a defendant's mental state is at issue. Appellant received State funded expert assistance prior to and during trial. See Provenzano v. Singletary, 148 F.3d 1327, 1333-34 (11th Cir. 1998).

Appellant's assertion that Dr. Kirkland's examination was inadequate because he did not conduct standardized psychological testing of the appellant is without merit. (Appellant's Brief at 75). Dr. Kirkland is a psychiatrist, a medical doctor, not a psychologist.[10] In any case, Peede did not even comply with one

[10]Dr. Merin was familiar with forensic work in the 1983 and 1984 time frame and testified that psychiatrists back then would take a history and conduct a mental status examination. (V-21, 911).

defense expert's attempt to administer psychological testing. (V-20, 783-84).

Dr. Kirkland's discussion of Peede's paranoia and his finding that Peede was under extreme emotional distress was remarkably similar to the description provided by defense expert Fisher. According to Dr. Fisher: Peede has "Delusional Disorder. I called it paranoid disorder." (V-20, 784). He also noted that the doctors who examined Peede, including Dr. Kirkland, talked about the paranoia and delusional thinking when it comes to Darla and Geraldine. (V-20, 786). Indeed, a comparison of the trial testimony of Dr. Kirkland with that of the two defense experts called during the hearing demonstrates that even without the additional material the later experts reviewed, Dr. Kirkland, had at the time of trial, come to an understanding of Peede's mental status which differed little in essentials from those of the experts who testified in the 2004 hearing.

Peede again mentions that Dr. Kirkland was unaware of Peede's prior diagnosis of Schizophrenia, apparently from one reference to Department of Corrections records from California. However, as noted above, no expert testified that Peede was in fact, or, had ever been Schizophrenic. The presence of a single

past, apparently inaccurate diagnosis does not render Dr. Kirkland's examination inadequate.

In conclusion, the trial court properly determined that Defendant received competent mental health expert assistance. Thus, no relief is warranted.

IV.

WHETHER THE TRIAL COURT ERRED IN REJECTING HIS CLAIM THAT THE STATE WITHELD MATERIAL, EXCULPATORY INFORMATION FROM THE APPELLANT? (STATED BY APPELLEE)

Appellant contends that the state withheld material, exculpatory, evidence in this case. The State disagrees.

(i) Darla Peede's Journal

The trial court did not find any Brady violation based upon appellant's assertion that Darla's diary or journal was not turned over to the defense. The trial court, stated, in part:

> Neither trial counsel had any recollection of receiving this information from the State, and the diary was not found in any of the trial attorney files. However, Ms. Sedgwick, one of the trial prosecutors, testified that she specifically remembered showing the diary to Mr. Bronson, and discussing its admissibility. She stated that Mr. Bronson had looked at the diary, she asked him if he wanted a copy of it, and he said no, because he did not think it was admissible.
>
> The Court does not find it unusual that counsel does not remember seeing the diary, nor did he want a copy of it. In addition to its questionable admissibility, its relevance was also doubtful. The

> diary had been written in December 1982, yet the murder occurred on March 31, 1983. Defendant argues that the exculpatory value of the diary was to show that Darla wanted to reunite with her husband, which would have supported the defense theory that Defendant did not kidnap or intend to kill his wife. In fact, Mr. DuRocher testified that Tonya Bullis, Darla's daughter, appeared at trial, and could have testified that Darla voluntarily went to pick up Defendant at the airport, hoping for a reconciliation. However, Defendant would not allow counsel to cross-examine her. Mr. DuRocher also conceded that the diary contained information that would have been damaging to the defense.
>
> Moreover, Defendant has not established with a reasonable probability how a different outcome could have been obtained had trial counsel been given a copy of the diary. The Court concludes that Defendant has not established that the State suppressed this evidence, or that any prejudice ensued. Thus, no relief is warranted.

(V-26, 1783).

"To establish a Brady violation, a defendant must show [the following]: 1) evidence favorable to the accused, because it is either exculpatory or impeaching; 2) that the evidence was suppressed by the State, either willfully or inadvertently; and 3) that prejudice ensued." Guzman v. State, 868 So. 2d 498, 508 (Fla. 2004) (citing Jennings v. State, 782 So. 2d 853, 856 (Fla. 2001)). "The test for prejudice or materiality under Brady is whether, had the evidence been disclosed, there is a reasonable probability of a different result, expressed as a probability sufficient to undermine confidence in the outcome of the proceedings." Id. (citing Cardona v. State, 826 So. 2d 968, 973

(Fla. 2002). The determination that suppressed evidence was not material under Brady is subject to *de novo* review on appeal.

First, the State did not suppress favorable evidence. As the trial court noted below, Dorothy Sedgwick specifically recalled discussing the diary of Darla Peede at the time of trial with Judge Bronson. Sedgwick testified: "I do recall from memory, that Theotis Bronson was aware of the diary and had it and looked at it." (V-14, 352). Sedgwick asked Bronson if he wanted a copy of the diary, but he said, "no," he did not think it was admissible. (V-14, 353). While Judge Bronson did not recall the conversation and had no recollection of seeing the diary, he did state that he was generally aware of the substance of information in the diary. "[T]he substance of the information which was in the diary was information that I knew about generally." (V-15, 455).

Aside from failing to show that the diary was not made available to the defense, Peede did not establish that the diary was material. Indeed, the contents of the diary from the deceased victim was not independently admissible under any evidentiary theory. And, while appellant opines it might have been used to impeach Darla's daughters and been used to rebut the State's kidnapping theory, Peede failed to call any witnesses to establish the relevance and weight of the diary as

impeachment. Since Peede failed to call any witness who might conceivably be impeached with the journal, he has failed to establish any basis for reversal of his conviction. See Spencer v. State, 842 So. 2d 52 (Fla. 2003) (this court noted that reversible error cannot be predicated on "conjecture" in rejecting an ineffectiveness claim where collateral counsel failed to call an allegedly impeaching witness during the evidentiary hearing) (citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1074)); See Vining v. State, 827 So. 2d 201, 208 (Fla. 2002) (affirming trial court's conclusion that Vining failed to establish prejudice from withheld items "because Vining did not show any inconsistencies between the times and the trial testimony nor did he show how the items could have been used to impeach the witnesses.").

Even if the diary did not constitute inadmissible hearsay, it would be of no value to the defense because it was written months prior to Darla's murder. Moreover, trial counsel was generally aware of the contents, that Darla at one time wanted to reconcile with Peede, and, therefore, even if the diary itself were not disclosed, Peede cannot establish a violation of Brady.[11] See State v. Muhammad, 866 So. 2d 1195, 1202-1203 (Fla.

[11]From talking with Russell Keniston Judge Bronson was aware that Darla had thoughts of reconciling with Peede. (V-15, 488).

2003) (noting that defendant failed to show prejudice based upon written statements of prison personnel where "there has been no demonstration that the allegedly withheld documents contained any information not already disclosed to Muhammad by other means."); Armstrong v. State, 862 So. 2d 705, 715 (Fla. 2003) (finding no reasonable probability of a different result where "Armstrong was in fact in possession of the same information he would have had if he had received the actual transcripts of Noriega's investigative statements.").

As to sentencing, again the diary itself would not be independently admissible. But, even if it was admissible, the diary would mainly serve to humanize the victim and place before the jury the writings of an apparently kind and religious woman, a mother, and wife, who Peede kidnapped, beat, and, stabbed in the throat, causing her death. There is not the slightest chance that only if the diary had been turned over that Peede would have received a lesser sentence in this case.

In conclusion, Peede failed to show that any relevant, admissible evidence could be gained from the diary, much less show a reasonable probability of a different result at trial.

(ii) Statements Relating To The California Murder

The trial court denied this claim below, stating:

Also, he knew from interviewing Rebecca Keniston that Darla went to the airport voluntarily to pick Peede up. (V-15, 262).

> Defendant contends that the State failed to disclose the witness statements from his California case, which allegedly "gave great insight into [Defendant's] mental health illnesses. . . ." On cross-examination by the State, Mr. DuRocher identified the statement of Austin Backus, taken at the Eureka Police Department by Detective Russell, describing the gunfight and shooting where Defendant shot two people. He conceded that this statement was located in the Public Defender's trial file, and he had read it "back at the time." He concluded that this statement was taken by the same detective who had taken the other witness statements, shown to him on direct examination, and which he did not recall seeing before trial. Whether he obtained Mr. Backus's statement from the Eureka Police Department or through discovery with the State, he undoubtedly knew that in all likelihood more statements and information existed from the California case.
>
> Defendant incorrectly argues that the State has a "responsibility to **find** and turn over all possible exculpatory and impeachment evidence." (Emphasis added). However, "[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." *Provenzano v. State,* 616 So. 2d 428, 430 (Fla. 1992). Clearly, defense counsel knew about the California conviction, and the existence of at least one witness statement. Thus, they knew or should have known of the existence of reports and other witness statements, and could have obtained them through the use of reasonable diligence. Accordingly, the Court concludes that no *Brady* violation occurred and this claim is without merit.

(V-26, 1783-84)

Trial defense counsel investigated the California murder, and aggravated assault committed by Peede. Judge Bronson recalled "reading a number of reports" regarding the murder.

(V-15, 457). He also noted that discovery was less formal when this case was tried and they would often go to the prosecutor's office to look at files. (V-15, 477). It was possible that a statement from a witness in the California case contained in the defense file was part of a larger collection he had reviewed at the time of trial. (V-15, 477). DuRocher testified that they were aware of the California murder and even "had a conversation with the lead investigator there." (V-15, 408). He did not recall seeing a statement by Eleanor Bell or Mr. Bateman and did not know how it fit within "the Peede murder trial." (V-15, 415). The public defender file did contain the statement of Austin Backus, a witness to the California case. (V-15, 415).

Thus, the record makes it clear that trial counsel had substantial information regarding the California offenses and although some of the witness statements may or may not have been turned over to the defense, they clearly had equal access to information concerning Peede's prior violent felonies. In any case, the information related by Bell about Peede's childhood illnesses and the suicide of his mother was information known to Peede and cannot form the basis for a Brady violation. See Walton v. State/Crosby, 847 So. 2d 438 (Fla. 2003) (Brady claim cannot stand where defendant knew of relationship between himself and Fridella and Fridella's troubles with her husband);

Jones v. State, 845 So. 2d 55 (Fla. 2003) (rejecting Brady claim that state failed to disclose its knowledge of Jones's possible substance abuse because no one was in a better position to know if he had a substance abuse problem than Jones himself).

For all of the foregoing reasons, the trial court's order denying appellant's Brady claim should be affirmed.

V.

WHETHER PEEDE WAS DENIED THE EFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL? (STATED BY APPELEE)

Appellant claims that if counsel had access to the material referenced in his Brady claim but failed to use it, then his claims should be considered under the alternative theory of ineffective assistance. The problem with this theory is that it was not fairly presented to the trial court below. Appellant's motion raising the Brady claim briefly mentioned ineffective assistance in the title of his Amended Motion for Post-Conviction Relief. However, the claim was presented exclusively as a Brady violation. (V-5, 517-25)[referencing record on appeal from summary denial]. Appellant's attempt to argue his claim on this alternative theory should be rejected. See Arbelaez v. State, 775 So. 2d 909, 915 (Fla. 2000) (where a motion lacks sufficient factual allegations the motion may be

summarily denied); Vining v. State, 827 So. 2d 201 (Fla. 2002) (noting that motion should have been fully pled at the time it was filed and that it was inappropriate to add an additional allegation of ineffectiveness on a motion for rehearing). In any case, appellant provides no supporting argument on appeal which could support a finding that his counsel was ineffective. Thus, his claim provides no basis for post-conviction relief.

VI.

WHETHER PEEDE WAS INCOMPETENT WHEN HE WAS TRIED IN 1984? (STATED BY APPELLEE)

The trial court rejected Peede's claim below, stating, in part:

> At the evidentiary hearings, the defense experts testified that Defendant suffered from a delusional disorder that was narrowly "circumscribed." According to this testimony, Mr. Peede holds to the belief, not fully grounded in reality, [fn2] that his former wives were unfaithful to him; that they posed in pornographic magazines; and, that they advertised in "swinger" magazines. These false beliefs (or "delusions") formed the motive for Mr. Peede's murder of his wife, Darla, and his plan to kill his former wife, Geraldine.
>
> The experts testified that Mr. Peede's delusional disorder was narrowly confined to this one topic. Therefore, other than this mistaken belief regarding the infidelity of his former wives, Mr. Peede's thoughts are fully grounded in reality. It is also clear that Mr. Peede's delusional disorder did not affect his ability to understand right from wrong. Further, no expert has opined that Mr. Peede's delusional disorder rendered him incompetent at the

> time of his trial; and, the State's experts specifically opined that Mr. Peede was competent at the time of his trial.
>
> In addition, Defendant's trial counsel, Mr. Joe DuRocher and Mr. Theotis Bronson, described Mr. Peede as smart, thoughtful and deliberate. Although Mr. Peede admitted his guilt and did not want to put on a defense at trial, it is clear from the testimony of both counsel that this was a knowing, reasoned and thought-out position. In addition, the judge who presided over the trial, Mr. Michael Cycmanick, testified as to his interactions with Mr. Peede at the trial. Because Mr. Peede decided to absent himself from the proceedings when his counsel began cross-examining witnesses (and otherwise mounting a defense) over his objection, Judge Cycmanick personally inquired of Mr. Peede and determined that he was fully competent and acting intelligently, freely and voluntarily in choosing to absent himself from the proceedings.
>
> Having carefully considered all of the evidence, the Court finds that Mr. Peede was clearly competent to stand trial, and that this claim is wholly without merit.
>
> > [fn2] No one could say with any certainty the extent to which Mr. Peede's firmly held belief in his wives' infidelity had a basis in truth. However, because others appear to contradict his belief in material respects (and/or because they have seen no evidence that his beliefs are true), the experts concluded that these beliefs were not grounded in reality, and therefore term it a "delusion."

(V-26, 1775-76)

As the trial court noted below, no defense expert testified during the evidentiary hearing that Peede was incompetent at the time of his trial in 1984. And, the two experts called by the

State, Dr. Merin and Dr. Frank, specifically testified that in their opinion Peede was competent at the time of his trial. (V-21, 907; V-21, 978). Moreover, the expert who examined Peede at the time of trial, Dr. Kirkland, found Peede competent.[12] And, the trial attorneys testified that they did not believe Peede was incompetent. Consequently, there is absolutely no basis in this record for finding that Peede was incompetent to proceed with his trial in 1984. See James v. Singletary, 957 F.2d 1562, 1571-72 (11th Cir. 1992) (failure to hold competency hearing harmless error if defendant was competent at the time of trial). The trial court's order denying relief should be affirmed.

VII.

WHEHTER PEEDE'S SENTENCE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA?

The Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) do not provide any basis for questioning appellant's conviction or resulting death sentence. This Court has repeatedly rejected petitioner's claim that Ring invalidated Florida's capital sentencing procedures. See Duest v. State, 855 So. 2d 33, 49

[12]Although Judge Bronson filed a motion for a confidential competency evaluation prior to trial, he did that simply to make sure that all his bases were "covered" and it was never his impression that Peede was delusional. (V-15, 466).

(Fla. 2003); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures nor require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003) (rejecting Ring claim in a single aggravator {HAC} case); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Even if Ring has some application under Florida law, it would not retroactively apply to this case. In Schriro v. Summerlin, 124 S.Ct. 2519 (2004), the Supreme Court held that Ring announced a new "procedural rule" and is not retroactive to cases on collateral review. See also Turner v. Crosby, 339 F.3d 1247, 1283 (11th Cir. 2003) (holding that Ring is not retroactive to death sentences imposed before it was handed down). This Court recently decided that Ring is not retroactive to cases on post-conviction review.[13] Johnson v. State, 904 So. 2d 400 (Fla. 2005); See also Monlyn v. State, 894 So. 2d 832 (Fla. 2005) and Windom v. State, 886 So. 2d 915 (Fla.

[13]See Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002) (rejecting the claim that Ring is retroactive in federal courts); Whisler v. State, 36 P.3d 290 (Kan. 2001) (state supreme court rejecting retroactivity of Apprendi).

2004)(Cantero, J., concurring). Finally, prior violent felony aggravator takes this case out of consideration from the class of cases to which Ring might conceivably apply. See Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) (rejecting Ring claim noting that one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony); accord, Lugo v. State, 845 So. 2d 74, 119 n.79 (Fla. 2003); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to affirm the denial of post-conviction relief in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Linda McDermott, Esq., Special Assistant CCRC-Southern Region, 141 N.E. 30th Street, Wilton Manors, Florida 33334-1064; to the Honorable Alan C. Lawson, Circuit Court Judge, 425 N. Orange Avenue, Orlando, Florida 32801; and to Chris Lerner, Assistant State Attorney, 415 N. Orange Avenue, Orlando, Florida 32801, this 9th day of January, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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