IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2094

LOWER TRIBUNAL No. 1983-CF-001682-O

ROBERT IRA PEEDE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Peede's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Peede's claims after an evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R." - record on direct appeal to this Court;

"PC-R1." - record on appeal after postconviction summary denial;

"PC-R2." - record on appeal after remand from this Court;

"D-Ex." - Defense exhibits entered at the evidentiary hearing and made part of the postconviction record on appeal.

"S-Ex." - State exhibits entered at the evidentiary hearing and made part of the postconviction record on appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Peede has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the

issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Peede, through counsel, urges that the Court permit oral argument.

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STATEMENT OF THE CASE

On May 25, 1983, Mr. Peede was charged by indictment with one count of first-degree murder (R. 1008). He pled not guilty. After a jury trial, Mr. Peede was found guilty on February 17, 1984 (R. 1235). The jury recommended death by a vote of eleven (11) to one (1) (R. 1247).

On August 27, 1984, the trial court imposed a sentence of death on the count of first-degree murder (R. 1251-2).

On direct appeal, the Florida Supreme Court affirmed Mr. Peede's convictions, but overturned the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner without any pretense or moral justification. This Court found that there was no heightened premeditation proven which would substantiate the aggravating circumstance. Peede v. State, 474 So. 2d 808 (Fla. 1985).

In response to a death warrant signed on May 6, 1988, Mr. Peede filed his initial Rule 3.850 motion on June 6, 1988 (PC-R1. 4). In it's response, the state conceded than an evidentiary hearing should be held on Peede's competency to stand trial, the adequacy of his psychiatric evaluation, ineffective assistance of counsel claims, and the alleged Brady violation (PC-R1. 207-23). After granting a stay, the state

court scheduled an evidentiary hearing for October 7, 1988 (PC-R1. 224). However after continuances were requested by both the State and the defense, the evidentiary hearing was postponed (PC-R1. 17-42).

Postconviction counsel for Mr. Peede filed an amended 3.850 motion on February 21, 1995 (PC-R1. 448-612). On June 21, 1996, the state court issued an order reversing the original grant of an evidentiary hearing and summarily denying Mr. Peede's remaining 3.850 claims (PC-R1. 632). A Motion for Rehearing was filed on July 9, 1996 (PC-R1. 1637). The motion was denied by the circuit court on January 27, 1997 (PC-R1. 1689). Mr. Peede appealed the summary denial of his 3.850 motion to this Court (PC-R1. 1690).

This Court remanded Mr. Peede's case to the circuit court for an evidentiary hearing. Peede v. State, 748 So. 2d 253 (Fla. 1999). This Court directed the circuit court to hold a hearing on Mr. Peede's competency to stand trial claim, inadequate psychiatric evaluation claim, ineffective assistance of counsel claims, trial counsel failed to present an insanity defense claim, Brady claim, and whether or not state agencies improperly withheld files from Mr. Peede's postconviction counsel. Id. at 254.

After the remand, Mr. Peede’s postconviction counsel doubted that Mr. Peede was competent to proceed (PC-R2. 1172-99). A competency hearing was held on May 24, 2000. Several experts testified about Mr. Peede’s competency to proceed in postconviction as well as his other mental health impairments which affected him throughout his life (PC-R2. 1405-1536). Several physical and psychological medical records pertaining to Mr. Peede were introduced during that hearing. Due to Mr. Peede’s resistance to meeting the court-appointed experts, some experts submitted their reports to the court based solely on the records introduced at the competency hearing (PC-R2. 1221-8). After reviewing these reports and hearing arguments, the lower court found Mr. Peede competent to proceed in his postconviction proceedings (PC-R2. 1237).

During the competency proceedings, Mr. Peede requested new counsel due to continuous conflicts with his appointed counsel. These conflicts resulted in a series of motions and hearings regarding the need to appoint “conflict-free” counsel (PC-R2. 1243-7, 1286-7, 1385).

Once new counsel was appointed, Mr. Peede’s competence to proceed again became an issue. A motion to determine competency was filed on December 6, 2001 (PC-R2. 1393-8). The State

responded stating that the issue had already been resolved (PC-R2. 1399). The state court ordered Mr. Peede transported to the Transitional Care Unit (TCU) at Union Correctional Facility on September 9, 2002, to determine his competency and what other possible impairments were affecting his mental state (PC-R2. 1560). The court ordered supplemental reports on Mr. Peede's competency on regular intervals (PC-R1 1388-90). A second competency hearing was held. At the hearing, Dr. David Frank, the psychiatrist who monitored Mr. Peede while in T.C.U., testified about Mr. Peede's mental health problems. However, the circuit court found Mr. Peede competent to proceed (PC-R2. 1606-7).

On November 10 and 12, 2003, and January 12 through 14, 2004, an evidentiary hearing was held. The hearing was limited to the four claims specifically delineated by this Court in its opinion remanding the case for a hearing. The claims were: the ineffectiveness of counsel during the penalty phase, Brady violations, and Mr. Peede's competency to proceed at trial. After the hearing, the circuit court denied all relief (PC-R2. 1774-86). Mr. Peede filed a motion for rehearing on August 30, 2004 (PC-R2. 1897-1912). The circuit court denied the motion on September 23, 2004. A Notice of Appeal was timely

filed on October 20, 2004 (PC-R 1918-19). This appeal follows.

STATEMENT OF THE FACTS

THE TRIAL

Shortly after Mr. Peede's extradition back to Florida, the Orange County Public Defender's Office was appointed to represent him. Theotis Bronson was first assigned to represent Mr. Peede. Just before trial commenced, Joseph DeRoucher, the Public Defender for Orange County, joined the defense as penalty phase counsel. A motion for a psychiatric examination was requested by trial counsel on June 2, 1983 (R. 1015-6). Dr. Robert Kirkland was appointed to evaluate Mr. Peede. That evaluation occurred on October 11, 1983, at the Orange County Jail, for the purposes of determining if Mr. Peede was competent to stand trial or insane at the time of the offense (R. 1239). Dr. Kirkland evaluated Mr. Peede for a total of an hour and a half (R. 935). He conducted no psychological testing, received no medical records, and spoke with no collateral witnesses (R. 953-5).

In his report, Dr. Kirkland stated that Mr. Peede's behavior was "highly suggestive of a paranoid disorder", but he did not find him insane or incompetent to stand trial.[1] (R.

[1]Dr. Kirkland's conclusions were not presented to the jury (R. 1241-2).

1239). Dr. Kirkland also stated that he did not feel he could be of any assistance to the defense at that time (R. 1239). No further contact was had with Dr. Kirkland and defense counsel until shortly before the penalty phase of Mr. Peede's trial (PC-R2. 176).

Prior to Mr. Peede's trial, he requested that he be allowed to represent himself. The trial court inquired about Mr. Peede's background and in doing so, Mr. Peede indicated that he had seen mental health professionals in his past, though he did not think that he ever saw a psychiatrist (R. 1435). At the conclusion of the court's inquiry, the court denied Mr. Peede's request to represent himself (R. 1439).

During the State's opening argument, the prosecutor informed the jury that Mr. Peede had murdered his wife and that the murder was premeditated. The prosecutor also told the jury that the victim, Darla Peede "was afraid that [Mr. Peede] was going to kill [her]." (R. 503). So, Darla had moved to Miami and "did all the things you do when you're about to set up a life on your own away from your husband . . ." (R. 503-4).

Indeed, the State presented the testimony of Darla Peede's daughters, Tanya Bullis and Rebecca Keniston. Ms. Bullis testified that on the day her mother went to meet Mr. Peede at

the airport, that her mother told her that she “was afraid of being taken to North Carolina.” (R. 599-600). Additionally, Ms. Bullis’ mom told her that she was afraid if being put with the other people that Mr. Peede had threatened to kill on Easter (R. 600).

Trial counsel countered the prosecutions factual scenario during his opening statement when he told the jury that Darla Peede’s death occurred at the hands of Mr. Peede, but that it occurred while Mr. Peede was in a “fit of rage” (R. 508). Trial counsel also told the jury that Mr. Peede was described as having two distinct personalities: calm and serene and at “[o]ther times things would set him off, drive him into a rage . . .” (R. 508). Yet, despite, trial counsel’s comments to the jury about Mr. Peede’s mental state, at Mr. Peede’s capital trial, no expert testimony or evidence was presented to the jury in this regard at the guilt phase.

At trial, the jury learned that Mr. Peede confessed to the killing his wife shortly after he was arrested in North Carolina. In his confession, he admitted killing his wife, Darla Peede, during their trip from Florida to North Carolina (S-Ex. 14). However, during the confession, he repeatedly stated that the could not remember the actual killing, but that

he just “nutted up.” (S-Ex. 227).

Mr. Peede also told law enforcement that during the drive to North Carolina, he and Darla began to discuss the fact that Mr. Peede had seen her picture in some magazines containing naked females (R. 721). Mr. Peede was angry and upset about her posing for these magazines (R. 749). Mr. Peede told law enforcement that he never intended to kill his wife (R. 730). Mr. Peede also believed that his wife had posed for some photos with his ex-wife and a man named, Calvin Wagner (R. 722).

Throughout the course of his trial, Mr. Peede’s behavior was extremely bizarre. During the course of the trial, Mr. Peede would appear with paperclips in his ear and a hand drawn “x” between his eyes (PC-R2. 398). Also, he refused to wear the civilian clothes brought by his attorneys and insisted upon wearing his jail jumpsuit (R. 1207, 1209).

At several points he demanded that no cross examination be conducted of several key witnesses in the State’s case. These witnesses included Darla Peede’s daughter, Tanya Bullis and Mr. Peede’s ex-wife, Geraldine Peede (PC-R1. 1248-9, 1274-6). Mr. Peede told the jury that his attorneys were acting against his wishes in cross-examining these witness (PC-R1. 1275-6). Soon afterwards, Mr. Peede requested that he be allowed to absent

himself from the remainder of the trial (PC-R1. 1305). After the trial court and counsel met with him at the jail, the decision was made to waive Mr. Peede's presence at his trial (PC-R1. 1306-21). Thereafter, the jury, who received no explanation as to Mr. Peede's disruptive conduct, soon convicted him of first degree murder (PC-R1. 1234-5).

After the guilt phase, trial counsel requested that another mental health examination be conducted for the purposes of the penalty phase. The trial court ordered Dr. Kirkland to re-evaluate Mr. Peede on February 24, 1984 (R. 1240). The report from that examination was filed with the trial court on March 2, 1984 (R. 1241-2). The evaluation lasted only forty minutes (D-Ex. 10).

After explaining Mr. Peede's account of how the murder took place, Dr. Kirkland concluded that the entire event was a "mitigating circumstance", but that Mr. Peede was not insane at the time of the offense. However, he did "feel that the capital felony was committed while the defendant was under the influence of extreme mental and emotional disturbance." (R. 1241). This report was not provided to the jury during the penalty phase.

In preparation for the penalty phase, trial counsel contacted Percy Brown, a cousin of Mr. Peede's, who still living

in North Carolina. They requested that he gather letters on Mr. Peede’s behalf from several family members to use during the penalty phase (S-Ex. 7; R. 954-6). The letters were sent to trial counsel and were the only exhibits introduced during the penalty phase on Mr. Peede’s behalf.

The penalty phase took place on March 5, 1984. During the hearing, the State called two witnesses to testify about Mr. Peede’s prior second degree murder conviction from California. One witness was a police officer who investigated the case, and the other was Austin Backus, who witnessed the shooting, while he was a young teenager (R. 937, 940).

In mitigation, trial counsel introduced the letters and called only Dr. Kirkland to testify (R. 948). During his testimony, Dr. Kirkland gave no specific diagnosis of what Mr. Peede’s condition was, but stated that Mr. Peede’s description of events showed “strong paranoid elements.” (R. 952). He further stated that it was his opinion that Mr. Peede committed the murder while under the influence of extreme mental and emotional disturbance (R. 950).

The extent of Dr. Kirkland’s testimony can be summarized in a single question and answer about Mr. Peede’s mental state:

> Q: Were you able to identify in Mr. Peede any, any[sic] recognizable mental illness?

> A: I felt, and I continue to feel, that Mr. Peede has certain, certain type of character structure that he is maybe, in lay terms, he's sort of a tough guy, macho, explosive at times. But I was most impressed with certain rather strong paranoid elements that developed into a scenario involving the two wives, and which I think played a large part in Darla's death.

(R. 951-2). And, on cross-examination, the State impeached and minimized Dr. Kirkland's testimony based on the fact that his opinion was based solely on Mr. Peede's self-report and no medical or other background information; not even the letters provided by his family (R. 954-6).

The jury recommended death by a vote of eleven to one (R. 1247).

The trial court sentenced Mr. Peede to death on March 23, 1984, finding that the aggravating circumstances of a prior violent felony and the offense being committed in a cold, calculated, and premeditated manner had been established and were not outweighed by the sole mitigating factor that Mr. Peede was under the influence of extreme mental or emotion disturbance at the time of the offense (R. 1263-5). In weighing the mental health mitigation, the trial court minimized the import of the statutory mitigator: "Viewing the testimony of Dr. Robert Kirkland that the Defendant experienced a specific paranoia that

the victim and his ex-wife, Geraldine Peede, were posing in nude magazines, the Court, **giving the Defendant the benefit of the doubt**, will consider it a mitigating circumstance.[2]" (R. 1264). Thus, the court also minimized Dr. Kirkland's testimony because it was based solely on self-report. In terms of other mitigation, the trial court gave no weight to the letters sent by Mr. Peede's family (R. 1265). No other mitigation was found by the trial court (Id.).

DIRECT APPEAL

On direct appeal, this Court struck the aggravating circumstance that the murder had been committed in a cold, calculated an premeditated manner:

> Although we find that the evidence of premeditation is sufficient to support a finding of premeditated murder, there was no showing of the heightened premeditation, calculation, or planning that must be proven to support a finding of the aggravating factor that Darla's murder was cold, calculated, and premeditated. The record supports the conclusion that Peede intended to take Darla back to North Carolina as a lure to get Geraldine and Calvin to come to a location where he could kill them. It does not establish that he planned from the beginning to murder her once he had completed his plan in North Carolina. By prematurely murdering her at the time he did, he eliminated his bait.

Peede v. State, 474 So. 2d 808, 817 (Fla. 1985). However, this

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[2]During the trial, Geraldine Peede denied ever taking nude photographs or posing in any "Swinger" type magazines (R. 1268-

Court concluded that the remaining two aggravating factors: prior violent felony conviction and committed in the course of a kidnapping, outweigned "the one marginal mitigating circumstance" found by the trial court. Id. at 818.

POSTCONVICTION PROCEEDINGS

After this Court remanded Mr. Peede's case for an evidentiary hearing, postconviction counsel requested that the circuit court determine if Mr. Peede was competent to proceed. Experts were appointed and hearings were held on March 24, 2003.[3] During the hearings, four doctors testified regarding Mr. Peede's competency. Two doctors found Mr. Peede to be incompetent due to his inability to assist postconviction counsel (PC-R2. 1452, 1488). The other two doctors could not make a diagnosis because Mr. Peede refused to see them (PC-R2. 1464, 1468). However, those doctors could not rule out the possibility of Mr. Peede being unable to assist his counsel (PC-R2. 1464, 1468). The court determined that Mr. Peede was competent to proceed on June 22, 2000 (PC-R2. 0128).

After the hearing, the circuit court granted Mr. Peede's counsel's motion to withdraw (PC-R2. 1286-1287). New counsel

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9, 1272-3).

[3]At the hearing Mr. Peede requested that new counsel be

was appointed to represent Mr. Peede (PC-R2. 1385).

Mr. Peede's new counsel also believed Mr. Peede was incompetent to proceed. Postconviction counsel related information to the court regarding their contacts with Mr. Peede: New counsel explained to Mr. Peede that they required input from him in order to prepare for his evidentiary hearing, during a telephone conversation on November 6, 2001 (PC-R2. 1394). Mr. Peede's response to counsel was, "there is nothing wrong with me and I'm not going to talk to anybody. I'm not crazy." (PC-R2. Id.). Subsequently, Mr. Peede's counsel met with Mr. Peede in person at Union Correctional Institution on November 13, 2001 (PC-R2. Id.). Mr. Peede informed counsel that it was very difficult for him to talk about himself and began to weep (PC-R2. 1395). Counsel's attempts to calm Mr. Peede failed and he became increasingly emotional (PC-R2. Id.). Mr. Peede related that there are "things that I don't like about myself." (PC-R2. Id.). Suddenly, Mr. Peede's facial expression altered and he began yelling "it's a lie, it's a lie" and began hyperventilating (PC-R2. Id.). His face reddened and he told counsel, "if Darla loved me, then she would have never posed for pornographic pictures." (PC-R2. Id.). As Mr. Peede talked, he

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appointed to represent him.

began shaking (PC-R2. Id.). When he finished his explanation, he began crying uncontrollably (PC-R2. Id.). For the next ten minutes, Mr. Peede stood in a corner facing the wall with his back toward counsel (PC-R2. 1396). He continued to shake (PC-R2. Id.). Mr. Peede did not respond to attempts to comfort him (PC-R2. Id.). After several minutes, he sat down (PC-R2. Id.). He was silent (PC-R2. Id.). Then he began crying again and got up and went to the corner (PC-R2. Id.).

Additionally, postconviction counsel was aware that Mr. Peede had a history of bizarre behavior when discussing his life. For example, during a meeting with Dr. Teich, defense's mental health expert, Mr. Peede became so upset that he repeatedly banged his head against the table. Dr. Teich had to restrain Mr. Peede from hurting himself by cradling Mr. Peede's head in Dr. Teich's hand. (PC-R2. 1502-1503) .

The court ordered a competency evaluation and appointed Dr. Berns to conduct the evaluation (PC-R2. 1219). The court ordered Mr. Peede moved to the Transitional Care Unit (TCU) to better facilitate the competency proceedings (PC-R2. 1563). During his stay there, Mr. Peede was monitored by Department of Corrections employee, Dr. Frank. Dr. Frank was never instructed to perform a competency evaluation of Mr. Peede.

A second competency hearing was held on July 18, 2003. The only witness called to testify at the hearing was Dr. Frank. Dr. Frank explained that he evaluated and monitored Mr. Peede for signs of mental illness and to determine if Mr. Peede could maintain the activities of daily living (PC-R2. 0539). Dr. Frank considered Mr. Peede to be competent even though he did not consider the factors related to competency to proceed in postconviction proceedings (PC-R2. 0542). Additionally, in response to the court's questioning Mr. Peede's ability to assist postconviction counsel, Mr. Peede stated: "Truth is, it hurts too much. So I'm not thinking about it, and I don't want to talk about it . . . I don't think about it and 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." (PC-R2. 0553). The circuit court found Mr. Peede competent. Mr. Peede appealed the circuit's finding of competency on September 2, 2003, prior to his evidentiary hearing. This Court dismissed Mr. Peede's appeal as prematurely filed. Peede v. State, 868 So. 2d 524 (2004).

An evidentiary hearing was held on November 10 and 12, 2003 and January 12 through 14, 2004, on Mr. Peede's claims of ineffective assistance of counsel in both the guilt and penalty

phases, a Brady v. Maryland, that Mr. Peede was incompetent at the time of his trial, and was deprived of a meaningful mental health expert in violation of Ake v. Oklahoma.

At the evidentiary hearing, evidence was presented regarding two key pieces of exculpatory evidence which were never disclosed to trial counsel. Additionally, evidence was presented establishing substantial mitigation which was available at the time of trial but never investigated or presented to the jury or the judge who sentenced Mr. Peede to death.

The evidence in mitigation establishes that: Robert Ira Peede was born on June 30, 1944 to Florentina (Tina) Brown Peede and John Ira Peede (PC-R2. 234). They lived in North Carolina, and he had no other siblings (PC-R2. Id.). While his family appeared stable and well-to-do, that was only their public face. John Peede was known to have numerous affairs during his marriage to Tina (PC-R2. 620-621). Because of this public humiliation, Tina began to drink (PC-R2. Id.). She also retaliated by having affairs of her own (PC-R2. Id.). As Robert grew up, he was constantly surrounded by his parents' lack of fidelity and sexual improprieties which had a profound impact on his own relationships (PC-R2. Id.).

Mr. Peede's relationship with his mother was especially contentious because she took most of her frustration out on her only child, Robert (PC-R2. 573-575, 594, 619). Robert, as the only child, was under extreme pressure from his mother to excel in his education (PC-R2. 238-239). When he failed to learn at a fast enough pace or bring home the best grades, his mother would beat him (PC-R2. 239-241). Tina's sister, Nancy, who lived with the Peedes most of Robert's childhood recalled several beatings Robert suffered because he could not learn as other children did (Id.). It seemed like the beatings had more to do with Tina's mood rather than misbehavior (PC-R2. 241). Tina became so upset at Robert over his poor education, that she began to beat him several times a week for no reason (PC-R2. 239-241). The relationship between mother and son rapidly deteriorated.

Robert Peede also suffered extreme physical impairments during his teenage years through his early adulthood. He developed scoliosis and was hospitalized for six months in a body cast (PC-R2. 243). Outside of his Aunt Nancy, no other family members visited him (PC-R2. Id.). Mr. Peede also suffered from a rare skin condition which would cause his hands and feet to blister if any pressure was placed on them (PC-R2. 235-236, 290-291, D-Exs 15 & 16). Due to this, he was unable to

walk without extreme pain (Id.). In most instances, he had to be carried around in a wagon to prevent his skin from blistering and peeling off. (Id.). When not traveling in the wagon, he was physically carried by his mother (D-Ex. 241). Mr. Peede also required speech therapy to assist in his problems speaking (PC-R2. 237).

These disabilities had a profound impact on Robert Peede's adolescence. While he was close with his two cousins, Michael and Lynwood Brown, he was unable to play with them in any meaningful way (PC-R2. 311-314). While they played baseball and participated in other activities, he was relegated to his wagon watching from afar (PC-R2. 292, 314). In an effort to compensate for his physical handicaps, Mr. Peede was very generous with his money and possessions (PC-R2. 241). He would often give his friends cash or buy them whatever they wanted in an effort to feel included (PC-R2. 292).

When Mr. Peede's generosity failed to gain the friends he so desperately wanted, he began taking the blame when his cousins misbehaved (PC-R2. 241). Even when it was obvious the Mr. Peede could not be involved with certain actions, he still accepted responsibility for other's conduct. This would often result in further beatings from his mother who saw this as his

continuing failure to live up to expectations (PC-R2. 238). For example, once, his cousin Michael broke an expensive toy and Mr. Peede told everyone he did it so that he would take the beating over his cousin (PC-R2. 241). When Nancy confronted him because she saw Michael break the toy, he continued to state that it was he who broke it (Id.).

Many of Mr. Peede's family members recognized the he suffered from mental problems. Robert Peede was easily manipulated, very moody, and would keep things bottled up inside until he would often explode in loud rants (PC-R2. 296). Often family members would never know what to expect from one moment to the next with Mr. Peede's behavior (PC-R2. 296-297). These episodes caused Tina to take him to a psychiatrist when he was eight or nine years old (PC-R2.627). Robert would be treated by this doctor twice a week for several years (PC-R2. Id.). And, it was learned that some Mr. Peede's childhood trauma resulted from his witnessing his father skin minks after they hunted (PC-R2. 242). Mr. Peede explained that he could not understand why his father was hurting such beautiful animals (PC-R2. 628). However, the treatment sessions did not curtail the extreme mood swings in Mr. Peede's experienced (PC-R2. 628).

Mr. Peede also had a difficult time interacting with women.

While his cousins, with whom he was very close, were socializing and dating, Mr. Peede was extremely awkward around women (PC-R2. 293). He constantly questioned his own sexual adequacy in his romantic relationships (PC-R2. 293, 315-316). However, he felt things were changing when he met Kay Albright (PC-R2. 316, 294). Although she was eighteen and he, only sixteen, they soon began to date (PC-R2. 294). Soon afterwards they married (PC-R2. Id.). Mr. Peede stayed in school while they were married. The couple lived with Mr. Peede's parents (PC-R2. 244-245).

Life began to stabilize for Mr. Peede after his marriage. Mr. Peede became a father at the age of 17 when his son, Michael Peede, was born (PC-R2. 598). A new father, Mr. Peede was not even eighteen years of age. However, his joy was short lived because Kay left Mr. Peede a few years after Michael's birth to reunite with a former boyfriend (PC-R2. 245). She soon moved to California, with their son (PC-R2. Id.). Mr. Peede did not see his son for a long time afterwards (PC-R2. Id.). He took the collapse of his marriage very hard (Id.). His relationship with his first wife caused him to further question his sexuality (PC-R2. 599). Because he had seen his parents consistent infidelity, and then his own wife left him for another man, Mr. Peede doubted the loyalty of women (PC-R2. 597-598, 602, 610).

While he greatly wanted to be in a relationship, he was unable to trust any woman to be faithful to him (PC-R2. Id.). Mr. Peede's conflict with women caused him to attempt suicide by shooting himself in the stomach; he believed he was saving his girlfriend the trouble (PC-R2. 662).

However, Mr. Peede did marry again. This time to a woman named Geraldine. However, their relationship was far from harmonious. Geraldine would often insist that Mr. Peede spend all his time outside of work with her (PC-R2. 296). His cousins and many of his friends did not get along with Geraldine which, once again, alienated Mr. Peede from his social circle (Id.). Mr. Peede's friends were not allowed to come to his house while his wife was there. His friends nicknamed his wife "Death Ray." (Id.). Another reason that Mr. Peede's friends ceased interacting with him was that he began accusing them of sleeping with is wife (PC-R2. 297, 320). Even though they constantly told Mr. Peede that they did not like his wife and would never betray him in such a way, he still believed they were having affairs with his wife (Id.). On some occasions, these confrontations with his friends became violent and caused Mr. Peede to further isolate himself (PC-R2. 297). During the evidentiary hearing, Mr. Peede could not resist screaming at

John Logan Bell because Mr. Peede believed Bell had slept with Geraldine and fathered one of Mr. Peede’s children, even though that was not true and impossible. (PC-R2. 273-278).

As an adult, Mr. Peede’s life took a drastic turn with the death of his mother. Because of the stresses in her own marriage, Tina Peede began drinking even more heavily and taking Valium (PC-R2. 247-248). Her sister, Nancy often found bourbon and whiskey bottles laying around the house (Id.). Mr. Peede was very concerned about his mother’s increased alcoholism (PC-R2. 249). In an attempt to force her to stop drinking, he refused to allow his children to visit her (Id.). Tina saw this as another failure in her own life (PC-R2. Id.). After a fight between Geraldine and Tina, in which Mr. Peede interjected and refused to allow his mother to see her grandchildren, Tina shot herself in the head with a shotgun (PC-R2. 249). Mr. Peede’s aunt, Nancy, cleaned up Tina’s home afterwards (PC-R2. Id.). She found empty vodka and bourbon bottles along with Valium pills all over the floor (PC-R2. Id.).

After his mother’s death, Mr. Peede could no longer cope and he set off for California (PC-R2. 250).

While in California, Mr. Peede visited with his son (PC-R2.600). However, Mr. Peede soon found that he could not cope

with being around his first wife and he set off again (PC-R2. Id.). While at a bar in Eureka, California, he got into a fight with the bartender when the bartender tried to kick out an underage woman (PC-R2. 607). Mr. Peede shot two men who chased him out of the bar (PC-R2. Id.). He was charged with homicide and assault and pled guilty (PC-R2. 929-934). He was sentenced to eight years in prison (R. Id.).

While in prison, Mr. Peede's mental health problems escalated. He was diagnosed with schizophrenia and reported delusions involving his ex-wives (PC-R2. 1221-8). He explained that Geraldine was posing in "swinger" magazines (PC-R2. 253). Although the magazine photos show no faces, he insisted that it was her because of the number of bricks in the fireplace behind the woman in the picture (PC-R2. 254). When his aunt, Nancy, visited him in prison, she could not believe Mr. Peede's mental state (PC-R2. 252). He insisted that she leave at once before the "people" get her (Id.).

After being released from prison, Mr. Peede met Darla. They married ten days later (PC-R2. 609). Darla soon realized that Mr. Peede had serious psychological problems (D-Ex. 7). Darla wanted Mr. Peede to obtain psychiatric help as soon as he returned to North Carolina (D-Ex. 7). However, that help never

came. Darla went to live with her daughters in Miami, Florida soon after Mr. Peede returned to North Carolina (PC-R2. 611). Mr. Peede hoped to reconcile with her, but his delusional beliefs about her infidelity clouded his thinking about his wife (PC-R2. 613). On the trip from Miami to North Carolina, Mr. Peede stabbed his wife, killing her (PC-R2. 616). Mr. Peede expressed his overwhelming remorse about killing Darla (PC-R2. Id.).

Also, during the evidentiary hearing, several experts were called to give their assessment of Mr. Peede's mental condition. Dr. Faye Sultan, a psychologist, not only interviewed Mr. Peede on several occasions, but met with several family members and reviewed extensive medical records detailing Mr. Peede's physical and psychological impairments. After reviewing this information, she opined that Mr. Peede "met[] all of the diagnostic criteria for Delusional Disorder, Jealous Type, which is one of the psychotic disorders." (PC-R2. 639). This Axis I disorder is described as "a presence of one or more nonbizarre delusions that persist for at least a month, a delusional belief that is simply not true. Apart from the direct impact of the particular delusions, psychosocial functioning may not be markedly impaired and the behavior of the person might not be

obviously odd or bizarre." (PC-R2. 639-640). Mr. Peede was also diagnosed with an Axis II, Paranoid Personality Disorder (PC-R2. 652).

Dr. Brad Fisher, who also evaluated Mr. Peede, agreed with Dr. Sultan's diagnosis (PC-R2. 777-778, 782). Dr. Fisher testified about the pervasiveness of Mr. Peede's psychosis over time (PC-R2. 777-778, 782). As to the delusional disorder diagnosis, Dr. Fisher testified:

> [H]e's paranoid generally but he has Delusional Disorder, 297.1, in particular areas, which his are in the area of paranoia that are related to jealously. So you say he's got a problem generally, this paranoia. But he has a delusional disorder, a more pronounced mental disorder when it gets into the area of jealously and paranoia.

(PC-R2. 784). Dr. Fisher explained that Mr. Peede's paranoia was identified by previous doctors who evaluated Mr. Peede during competency evaluations, and from the statements of friends and family throughout his life (PC-R2. 786).[4] And, based on Dr. Fisher's assessment, Mr. Peede's paranoid personality and delusional disorder were well established prior to the murder of

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[4]Both Drs. Berns and Krop diagnosed Mr. Peede as suffering from a paranoid disorder during their evaluations (PC-R2. 1221-8). Additionally, Dr. Fisher reviewed statements from Mr. Peede's family and friends regarding past manifestations of paranoid behavior. Also, his analysis of past medical records supported his findings (PC-R2. 780).

his wife (PC-R2. 787-788).

Dr. Fisher testified further regarding the thoroughness of Dr. Kirkland's evaluation prior to and during Mr. Peede's trial[5]:

> He speaks in his reports to the same – this same delusional system. He had delusional problems and paranoia. But when it comes to the testimony, the testimony did not speak to these delusional systems, the delusion itself or the delusional systems. Neither did it speak to how this delusional process and the paranoia might have related to the crime. So that whereas he had them in the report, or at least he spoke to the delusional issue and to the paranoia, it didn't come out and neither was it connected with a crime in the actual testimony that he gave.

(PC-R2. 791).

Dr. Fisher also testified to the norms, back in 1983 for conducting psychological evaluations, since he also evaluated patients in that time period. This included going beyond just the information obtained from a patient. "[L]ook beyond just self-report, especially in these forensic cases where the possibility of malingering is there. And this is almost always done through records that are there." (PC-R2. 792).

Dr. Frank, who was employed by the Florida Department of Corrections, Transitional Care Unit, at the time he evaluated Mr. Peede, and called to testify by the State, also agreed that

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[5]Dr. Fisher reviewed Dr. Kirkland's two reports and his trial testimony (PC-R2. 790).

Mr. Peede suffered from Delusional Disorder of the Jealous Type[6] (PC-R2. 967).

Even the State's other expert, Dr. Sidney Merin, diagnosed Mr. Peede as a paranoid personality disorder. And while Dr. Merin disagreed with the other experts about the diagnosis of delusional disorder, he testified that they performed thorough and "good" evaluations (PC-R2. 931). Further, Dr. Merin did not have the opportunity to meet with Mr. Peede and only relied on background information for his assessment (PC-R2. 883-888).

As to statutory mental health mitigation, three of the four experts who testified at the evidentiary hearing, found that Mr. Peede qualified for the statutory mitigator that he was under the influence of an extreme mental or emotional impairment at the time of the offense.[7] Unlike, Dr. Kirkland's opinion at trial, the mental health experts who testified at the postconviction hearing based their opinions on a comprehensive evaluation of Mr. Peede, including interviewing him, testing, background materials and collateral information (PC-R2. 587-593,

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[6]Dr. Frank monitored Mr. Peede for a period of three months during his stay at the Transitional Care Unit. During that time, he had three formal evaluations with him (PC-R2. 958-959).

[7]This was the opinion of Drs. Sultan, Fisher and Frank (PC-R2. 657-658, 793, 452).

779-783, 957-960, 961-966). Additionally, both Drs. Fisher and Sultan opined that Mr. Peede also qualified for the statutory mitigating circumstance that due to his mental impairment, he was unable to conform his conduct to the law (PC-R2. 797, 658-659). They opined that the pervasiveness of his delusional disorder fully manifested itself during the time that Mr. Peede stabbed his wife (PC-R2. 650-796). Drs. Sultan and Fisher explained how Mr. Peede believed that Darla Peede and his ex-wife, Geraldine Peede, had been grossly unfaithful to him by not only having affairs with his family and friends, and also posing in "Swinger" magazines (PC-R2. 787, 789-790, 646-651). And, how Darla Peede's constant denials of such behavior enraged Mr. Peede to the point where he suffered a psychotic break (PC-R2. 648, 769-770). Both experts, reviewing the extensive documentary and testimonial evidence, found ample proof of Mr. Peede's delusional system which played a key part in his violent behavior (PC-R2. 787, 789-790, 646-651).

At the evidentiary hearing, Joseph DeRocher, former Public Defender for Orange County, testified that he ultimately assigned himself to assist Theotis Bronson in representing Mr. Peede (PC-R2. 383). Initially, Mr. DuRocher did not believe Mr. Peede's case would be prosecuted as a death penalty case and

thus, only one attorney, as opposed to the standard two attorneys, was assigned to represent Mr. Peede (PC-R2. 380). Mr. DuRocher explained that he became involved about a month before the trial, when Mr. Peede had been offered a plea deal for life in prison if he pleaded guilty (PC-R2. 383).

Theotis Bronson was an assistant public defender when he represented Mr. Peede (PC-R2. 450). This was his first capital case (PC-R2. 381).

Trial counsel testified about their investigation into the case, in general, and Mr. Peede’s background, specifically. As to background information, a request was made for the records about Mr. Peede’s prior convictions in California (PC-R2. 385). Trial counsel received a response indicating that the file was “voluminous” and listed several additional state agencies who would have records on Mr. Peede (PC-R2. 440; S-Ex. 112-113). While the trial investigator did obtain signed releases from Mr. Peede, no further action was taken to obtain the records from California (PC-R2. 441). Thus, Mr. DuRocher, penalty phase counsel admitted that he never saw the files from California (PC-R2. 407). The trial investigator also contacted friends and family members of Mr. Peede (PC-R2. 393). Notes in trial counsel’s files document telephone conversations between he and

Percy Brown, Nancy Wagoner, and several other people in North Carolina (S-Ex. 117-118, 121).[8] However, after trial counsel's initial contacts with some of Mr. Peede's family members and friends, counsel never spoke to the witnesses again or requested that any testify on behalf of Mr. Peede (PC-R2. 430).[9] This was so despite trial counsel's admission that he would have liked to have presented live witness testimony at the penalty phase (PC-R2. 447). And, none of the information was provided to a mental health expert (PC-R2. 402-403).

Indeed, trial counsel learned that Delmar Brown, Mr. Peede's uncle, had information about his nephew:

> Q: Mr. Brown was telling, was he not, Mr. Deprizio the fact that Mr. Peede had been sent out to California, **that he may have some mental problems, but that he hadn't received any treatment**, and the extent

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[8]Even though trial counsel traveled to North Carolina to speak to witnesses listed by the State, he met with none of Mr. Peede's family and friends to discuss mitigation or background information (PC-R2. 471).

[9]Nancy Wagoner, Mr. Peede's aunt, called trial counsel asking if she could help her nephew (S-Ex. 123). Ms. Wagoner was Mr. Peede's aunt and lived with he and his parents when Mr. Peede was young. She had informed trial counsel about Mr. Peede's mother's suicide and the profound affect it had on his mental stability (PC-R2. 443, 473-474; S-Ex. 6). She explained his bizarre behavior after the suicide and her belief that Mr. Peede needed psychological help (S-Ex. 6). She also stated her willingness to come and testify on Mr. Peede's behalf as character witness (PC-R2. 474). Trial counsel did not ask her to testify for Mr. Peede (PC-R2. 474).

to which he saw him as being mentally involved is that correct?

A: Correct?

(PC-R2. 482)(emphasis added). See also S-Ex. 10. The information concerning Mr. Peede's mental health problems was not investigated further or relayed to a mental health expert.

Likewise, Mr. Peede informed trial counsel that he believed he had a "split personality", but this information was not conveyed to a mental health expert (PC-R2. 491). Mr. Peede also told his attorney about his belief about the extensive infidelities of his wives. He explained, in detail, that their pictures were found in swinger magazines and the swinger clubs they went to (S-Ex. 11). Mr. Peede also told the defense investigator that he killed his wife because "she made him crazy and he stabbed her." (S-Ex. 10). Mr. Peede went on to state that "he couldn't remember when or where he actually killed her. He just pointed out an area that looked good." (S-Ex. 10). Again, none of this information was discussed with a mental health expert (PC-R2. 469-472).

Even Mr. Peede's jail records indicated mental health problems; he had been prescribed Elavil by medical personnel at the jail (PC-R2. 469). Trial counsel never obtained Mr. Peede's jail records and were unaware that he had been taking medication

(PC-R2. 404, 469).

After the guilt phase, trial counsel did request that Dr. Kirkland be appointed to conduct an evaluation of Mr. Peede for mitigation purposes (PC-R2. 401-402). The order appointing Dr. Kirkland was signed ten days before penalty phase commenced (R. 1240). No background information or collateral information was provided to Dr. Kirkland and Dr. Kirkland conducted no testing (PC-R2. 402-403).

As to Mr. Peede's Brady claim, he introduced evidence that Darla's diary and files from his conviction in California had been suppressed by the prosecutors in his case.

Darla Peede's diary contained entries that made clear that she wanted to reconcile with her husband and assist him in obtaining mental health help (D-Ex. 13-19). Neither Mr. Bronson nor Mr. DuRocher believed that he had seen the diary until just before the evidentiary hearing (PC-R2. 388, 455). Mr. Bronson denied that he had been told about the diary (PC-R2. 456). Mr. DuRocher testified that he wished he'd had the diary because it looked helpful and was consistent with the defense's theory and argument that Darla had willingly agreed to leave Miami with Mr. Peede (PC-R2. 390, 448). Mr. Bronson agreed with Mr. DuRocher's assessment of value of the diary (PC-R2. 456-457).

As to the documents regarding Mr. Peede's convictions in California, the documents concerned the Eureka Police Department's investigation of the shooting that occurred and with which Mr. Peede was charged. The Eureka Police Department conducted an extensive investigation, which included sending personnel to North Carolina to interview Mr. Peede's family member and friends. John Logan Bell, Jr., provided a statement to law enforcement in which he explained Mr. Peede's behavior after his mother's suicide. He told law enforcement:

> After his mother committed suicide, Robert took it very hard, due to the fact that they were very close. **And he blamed himself I think for it, and . . . got extremely paranoid. And blamed himself for the . . . thought that he was directly responsible for her shooting herself. And took it very hard.**

(D-Ex. 17)(emphasis added). The reports contained in the police file concerned background information about Mr. Peede, his mental health and the circumstances of the crimes committed in California. They contain classic mitigating evidence.

Both trial counsel testified that they did not recall receiving the statements made by Mr. Bell or others (PC-R2. 408-409, 457-458).

SUMMARY OF ARGUMENT

1. Mr. Peede was and is not competent to proceed during his postconviction proceedings and evidentiary hearing.

2. Mr. Peede was deprived of effective assistance of counsel at the penalty phase of his capital trial. Trial counsel unreasonably failed to investigate and present compelling and substantial mitigating evidence. Family members and friends were willing to speak to trial counsel and discuss Mr. Peede's tragic and difficult life. But, trial counsel failed to obtain the compelling mitigation or present it to the jury and judge who sentenced Mr. Peede to death. Indeed, witnesses were available who offered to testify on Mr. Peede's behalf, but, trial counsel failed to secure their testimony.

In addition, trial counsel was certainly aware that Mr. Peede suffered from some form of mental health problem; Mr. Peede told trial counsel this himself. Yet, trial counsel failed to discover Mr. Peede's extensive history of psychological impairments. The failure to obtain voluminous records of Mr. Peede's psychological problems deprived him of the effective assistance of counsel to which he was entitled during the penalty phase of his trial.

3. Furthermore, Mr. Peede was deprived of the effective assistance of a mental health expert at his capital trial. Evidence should have been presented about Mr. Peede's mental state at both the guilt and penalty phases of his capital trial.

The evidence regarding Mr. Peede's mental problems would have explained much about the killing of his wife. And, it would have provided the jury with a better understanding of Mr. Peede's bizarre behavior during trial. Trial counsel was ineffective in failing to ensure that a competent mental heath evaluation occurred, from which relevant and critical information and testimony would have been obtained. And, also, Mr. Peede was denied the effective assistance of a mental health expert in violation of Ake v. Oklahoma.

4. Mr. Peede was deprived of his rights to due process when the State failed to disclose exculpatory evidence in its possession to Mr. Peede. Confidence in the reliability of the outcome of the proceedings is undermined by the non-disclosures. The State possessed evidence which would have rebutted the State's theory that Mr. Peede killed his wife in the course of a kidnapping. Due to the State's non-disclosures, Mr. Peede was unable to demonstrate that his wife was determined to reconcile with him and assist him in obtaining mental health treatment by perhaps the most powerful evidence of all – her own words as written in her diary.

Likewise, the State failed to disclose evidence that would have rebutted the prior violent felony conviction, explained why

Mr. Peede received a lenient sentence in California and provided classic mitigating evidence of behalf of Mr. Peede. The evidence demonstrates that confidence is undermined in both the jury's verdict of guilt and recommendation that Mr. Peede be sentenced to death.

5. Mr. Peede was deprived of the effective assistance of counsel at his capital trial. Trial counsel failed to investigate and prepare evidence that would have made it impossible to convict Mr. Peede of first degree murder. And, when cumulative consideration is given to the wealth of evidence that did not reach Mr. Peede's jury, either because the State failed to disclose it or because trial counsel failed to discover it, confidence in the reliability of the outcome is undermined.

6. Mr. Peede's conviction and sentence are unconstitutional under Ring v. Arizona.

STANDARD OF REVIEW

Mr. Peede has presented several issues which involve mixed questions of law and fact. Thus, a de novo standard applies. Bruno v. State, 807 So. 2d 55, 61-2 (Fla. 2001).

Mr. Peede's claim that the United States Supreme Court's decision in Ring v. Arizona, 122 S.Ct. 2428 (2002), applies to

his case is a question of law. As such, the standard of review is de novo, as well. See Barnhill v. State, 834 So. 2d 836, 843 (Fla. 2002).

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN DETERMINING THAT MR. PEEDE WAS COMPETENT TO PROCEED IN POSTCONVICTION.

A. THE COURT'S JUNE 22, 2000, DETERMINATION THAT MR. PEEDE WAS COMPETENT WAS UNREASONABLE.

1. The Legal Standard For Competency

Competency to proceed requires satisfying a two-prong test. That test is met upon a showing of "whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). The Dusky standard is applicable in capital postconviction proceedings, when a defendant's competency is suspect. Carter v. State, 706 So. 2d 873 (Fla. 1997).

Florida Rule of Criminal Procedure 3.211 outlines the factors relevant to a competency determination, including a defendant's ability to:

(i) appreciate the charges or allegations against the defendant;

(ii) appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against the defendant;

(iii) understand the adversary nature of the legal process;

(iv) disclose to counsel facts pertinent to the proceedings at issue;

(v) manifest appropriate courtroom behavior;

(vi) testify relevantly; and

(B) any other factors deemed relevant by the experts.

Fla. R. Crim. P. Rule 3.211.

2. The May 24, 2000, Competency Hearing.

a. Dr. Fischer's Testimony

At the May 24, 2000, competency hearing Dr. Brad Fischer testified that Mr. Peede is unable to "provide relevant information about his case" to anybody (PC-R2. 1448-1450). Dr. Fischer did not see his refusal to discuss the events of the murder "as a lack of cooperation" he "saw it as a lack of ability" (PC-R2. 1458). Dr. Fischer explained Mr. Peede's attempts "to act like nothing was wrong. And all of a sudden, he snaps when it comes to talk ... about Darla ..." (PC-R2. 1459-1460).

b. Dr. Teich's Testimony

Dr. Teich testified that Mr. Peede is not competent "to a

reasonable degree of medical certainty” (PC-R2. 1488). This opinion was based on a thorough review of Mr. Peede’s background and records and two lengthy clinical interviews (PC-R2. 1487-1489). Dr. Teich described the childhood physical abuse suffered by Mr. Peede at the hands of his mother, the exacerbation of that abuse due to Mr. Peede’s rare skin condition and the effect of his mother’s suicide on Mr. Peede (PC-R2. 1493-1494). Dr. Teich testified that Mr. Peede has a paranoid personality disorder that leads to delusional thinking (PC-R2. 1495-1497). Dr. Teich also diagnosed Mr. Peede with borderline personality disorder which leads his thinking to shift from rational to psychotic and a depressive personality disorder (PC-R2. 1498-1499). Dr. Teich continued to describe Mr. Peede’s bizarre reaction to questions about Darla’s murder where Mr. Peede ran against the wall, then began banging his head against a wooden table and was “literally screaming, grunting like an animal, I’ve never heard (sic) come out of a human before” (PC-R2. 1503).

Dr. Teich explained that Mr. Peede’s main focus is to keep “himself from losing control and being overwhelmed by his emotions” (PC-R2. 1506). In response to the court’s inquiry about, Mr. Peede’s apparent “overall condition ... of

understanding, rational demeanor", Dr. Teich explained that in reality Mr. Peede's decision making is based on his distorted emotions which create a seemingly rational reason to support those decisions (PC-R2. 1511-1512). For example, Mr. Peede is convinced that his wives were posing nude in swinger magazines and it didn't matter how many people told him those were not photos of his wives, "nobody could rationally make any difference in his conclusion; it's a conclusion he reached first and then the details were placed on top to support his conclusion" (PC-R2. 1513-1514).

Dr. Teich informed the court that Mr. Peede is unable to consult with counsel, that his rational understanding of the proceedings is compromised due to his underlying belief that the proceedings really don't matter anyway and that he is unable to testify relevantly.

c. Mr. Peede's Statements During the Hearing.

Throughout the hearing Mr. Peede demonstrated his inability to assist his lawyers and his irrational thought process. For example, when his attorney questioned Mr. Peede about Mr. Peede stopping the interview with Dr. Fisher when he asked Mr. Peede about the events surrounding Darla's death, Mr Peede responded: "Get off that subject. That's none of your business" (PC-R2.

1478-1479). Mr. Peede then told his attorney “to go to hell” (Id.). Mr. Peede continuously disrupted the hearing.

d. The Court’s Erroneous Determination.

The circuit court determination that Mr. Peede was competent was unreasonable in light of the above testimony. The court’s conclusion that Mr. Peede’s “overall condition in court seems to be one of understanding, rational demeanor” because he is able to provide reasons why he does not wish to discuss the issues in his case (PC-R2. 1511). The court also concluded that Mr. Peede’s refusal to testify because “nobody would believe his testimony” was a rational, tactical decision (PC-R2. 1508-1509).

The court stated:

> Unless we’re able to find perfect people to put through the criminal justice system no one is going to be without some emotional baggage, and going to affect their ability to act appropriately, to respond appropriately, to pursue the best avenues from the defense, things of that nature. There is no such perfect human being left on earth.

(PC-R2. 1512-1513).

The court’s conclusions are not reasonable in light of the facts or the law. The legal standard for competency includes, in part, whether or not the defendant is able to assist counsel, is rational, and can manifest appropriate courtroom behavior. The legal standard utilized by the court was that “we” seem to

be unable to find “perfect” criminals and that they all have “emotional baggage” so we can’t expect too much out of defendants. Further, the two experts who provided an opinion as to Mr. Peede’s competency both found him to be incompetent. There was no reasonable basis to dispute these findings.

B. THE COURT’S JULY 24, 2003, DETERMINATION THAT MR. PEEDE WAS COMPETENT WAS UNREASONABLE.

1. The Procedures for Establishing Competency.

In Carter, this Court held that a competency hearing will be

granted, “after a capital defendant shows there are specific factual matters at issue that require the defendant to competently consult with counsel.” 706 So. 2d at 875. Once that requirement is met, the trial court must order a competency hearing, complying with the guidelines set forth in Florida Rules of Criminal Procedure 3.210 through 3.212. Rule 3.210 (b) states that a defendant be examined by not more than three but no less than two experts. Also, when experts draft reports documenting their results, those reports must comply with Rule 3.211.

2. Mr. Peede’s Inability to Assist Counsel.

Postconviction counsel provided a basis for questioning Mr. Peede’s competency during postconviction proceedings. During

the initial meeting between Mr. Peede and Attorney Kenneth Malnik, Mr. Peede became extremely agitated and distraught when counsel attempted to discuss the substantive matters of the case. Repeated attempts by counsel to speak with Mr. Peede regarding evidentiary hearing claims were unfruitful.[10] Mr. Peede's assistance was vital in preparing for the evidentiary hearing as the hearing encompassed factual claims regarding ineffective assistance of counsel both in the guilt and penalty phases, mitigation involving his childhood, and a prior conviction.[11]

Recognizing that Mr. Peede met the factual basis to support a competency evaluation, the circuit court appointed one psychiatrist, Dr. Alan Berns, to evaluate Mr. Peede. Mr. Peede's evaluation was scheduled for March 12, 2002. Dr. Berns met with Mr. Peede and his legal representatives. During the evaluation, Mr. Peede accused Dr. Berns of being, "a hitman for

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[10]While Mr. Peede has had a prior competency evaluation, and been found competent, that fact should not prejudice his second claim of incompetence to proceed. For as in a trial situation, "the evidence must indicate a present inability to assist counsel or understand the charges." <u>Medina v. Singletary</u>, 59 F.3d 1095, 1107 (11th Cir. 1995).

[11]These claims are factual in nature requiring the assistance of the client. They do not fall within the exempt legal claims which do not necessitate a defendant's assistance

the state, you’ve killed three people.” (PC-R2. 1543). While understanding who his counsel was, Mr. Peede had no comprehension of the purpose of the examination. He believed that Dr. Bern’s examination was for insanity rather than competency (PC-R2. Id.). When Dr. Berns’ questions turned to a discussion of the murder, Mr. Peede stated, “I won’t discuss it. If I want it, mental pain.” (PC-R2. Id.). The examination came to an abrupt end when Dr. Berns persisted in trying to get Mr. Peede to discuss the facts of his case (Id.). After Dr. Berns was unable to make a diagnosis of Mr. Peede based on his meeting, he recommended that Mr. Peede receive an in depth forensic evaluation (PC-R2. 1545). The State and postconviction counsel stipulated to the transfer of Mr. Peede to the TCU at UCI (PC-R2. 1563).

Dr. Calderon’s attempted to examine Mr. Peede at TCU. Mr. Peede refused to meet with her (PC-R2. 1584). After the encounter with Dr. Berns, Mr. Peede could not deal with the possibility of being forced to talk about his case with anyone.

Mr. Peede is unable to discuss matters related to his convictions; when he is confronted with this subject he shuts down. His incompetence inhibits his ability to discuss anything

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under Carter.

pertinent to his case.

His refusal to meet with experts and discuss his case stems from his mental impairments, which also make him incompetent. An incompetent person cannot waive a competency hearing by refusal because their mental state is such that the defendant truly cannot understand the choice he is making. See Hull v. Freeman, 932 F.2d 159, 169 (3rd Cir. 1991) citing Commonwealth v. Higgins, 492 Pa. 343, 349 (Pa. 1980). Mr. Peede's refusal to meet with experts constricts his counsel from effectively representing him in postconviction matters.

This Court has recognized the importance of a defendant's ability to confer with his postconviction counsel regarding factual matters.

> There can be no question that a capital defendant's competency is crucial to a proper determination of a collateral claim when the defendant has information necessary to the development or resolution of that claim. Unless a defendant is able to assist counsel by relaying such information, the right to collateral counsel, as well as postconviction proceedings themselves would be practically meaningless.

Carter v. State, 706 So. 2d 873, 875 (Fla. 1997). As in trial situations, the need for a defendant's assistance assures that the proceedings were fair and, "ultimately serves to protect both the defendant and society against erroneous convictions." Watts v. Singletary, 87 F.3d 1282 (11th Cir. 1996).

Mr. Peede's inability to deal with the facts of his case makes him incompetent to assist his postconviction counsel. He is unable to help ensure that his trial was just and free of unconstitutional infringements upon his rights. Finding Mr. Peede competent, even though his mental instability renders him incapable of dealing with the facts of this case, violates the protections established in Carter.

Further, Mr. Peede's bizarre behavior at the evidentiary hearing provides proof that he was incompetent to proceed. During the hearing Mr. Peede disrupted the proceedings, shouted at defense witnesses and ultimately requested to be removed, which he was (PC-R2. 273-289). Mr. Peede's inability to "manifest appropriate courtroom behavior" further demonstrates his incompetence.

3. Faulty Evaluations Do Not Meet The Statutory Requirements.

Fla. Crim. Pro. 3.211(a)(2) explicitly states the requisite information to be included in any reports submitted to the Court. Furthermore, Rule 3.211(d) details what must be included in a written report submitted to the Court. This includes:

(1) identify the specific matters referred for evaluation;

(2) describe the evaluative procedures, techniques, and tests used in the examination and the purpose or purposed of each;

(3) state the expert's clinical observations, findings, and opinions on each issue referred for evaluation by the court, and indicated specifically those issues, if any, on which the expert could not give an opinion; and

(4) identify the sources of information used by the expert and present the factual basis for the expert's clinical findings and opinions.

Under the guidelines set forth in Carter, these rules must be followed in a court ordered evaluation of the defendant. The evaluation conducted in Mr. Peede's case is woefully deficient and is in violation of these requirements.

The evaluations conducted by Drs. Calderon and Frank fail to meet the statutory requirement of Rule 3.210 and 3.212. Dr. Calderon's report is a sparse 2 paragraph synopsis of her attempts to see Mr. Peede (PC-R2. 1584). The report does not explain whether her attempts to see Mr. Peede satisfy the court ordered competency evaluation or basic psychiatric care. There is no court order appointing her to evaluate Mr. Peede for competency purposes. Since Dr. Calderon is employed by UCI, it is unclear whether her evaluation was part of her normal psychiatric duties or whether she was appointed to conduct a competency evaluation.

She relied solely on Mr. Peede's assessment that he does not need mental health services as a recommendation to remove

him from further psychiatric treatment. However, this is not a justification for determining competency. As in Lafferty v. Cook, where the defendant was suffering from paranoid delusions, the Court found the trial court's competency evaluation defective. 949 F. 3d 1546 (10th Cir. 1991). "A defendant suffering from this illness may outwardly act logically and consistently but nonetheless be unable to make decisions on the basis of a realistic evaluation of his own best interests. ... Indeed, a defendant operation in a paranoid delusional system may well believe that he is not mentally ill." Id. at 1555-6. This is especially true as Mr. Peede, who suffers from the same mental disorder as Defendant Lafferty.

Also, there is no explicit notice to postconviction counsel of Dr. Calduron's attempts to evaluate Mr. Peede. Since it appears that she was not court appointed, it is questionable whether postconviction counsel was aware of her attempted evaluations. Unlike Dr. Berns' report which goes into great depth about Mr. Peede's prior psychological and medical background, Dr. Calderon's report shows no understanding of Mr. Peede's history or why he was transferred to TCU.

Dr. Frank monitored Mr. Peede during his stay at TCU. However, he never performed any type of competency evaluation

(PC-R2. 539). Moreover, he was specifically told not to do any type of competency evaluation (PC-R2. 540-541). His report does not meet any of the requirements of the statute that is why his testimony during the competency hearing is problematic.

Dr. Frank's report does not mention whether he found Mr. Peede competent to assist his counsel, or if he can manifest appropriate courtroom behavior during the evidentiary hearing (PC-R2. 1566-1568). No where in his written report does he mention competency or that his report is for such an evaluation. In fact, he did not realize that that was why Mr. Peede was at TCU until Mr. Peede's counsel informed him so, after his evaluation of Mr. Peede (PC-R2. 541-542, 555-556). His report does not mention whether any psychological testing was done or what background materials were studied in making his diagnosis (PC-R2. 1566-1568).

While Dr. Frank did testify at the hearing that he believed Mr. Peede to be competent, he still questioned Mr. Peede's ability to assist counsel:

> I saw nothing that would indicated that he would meet all the criteria for competency, with the possible exception of the issue of being able to give the information to his attorney. And again, he has the ability, and that's what it actually asks 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 you know, also that he is able to. So those two things.
>
> I think he understands he's expected to, he's chosen not to, but he is able to, and what's stopping him is, I think the words have been used: **"too emotionally charged. It hurts too much to discuss that."** The thought of going over, you know, the events around the crime are greater than the thought of dying to him.

(PC-R2. 555-556)(emphasis added). Dr. Frank did not explain either in his report or during the competency hearing on what grounds he made this diagnosis. His only justification was that he had seen and spent time with Mr. Peede (PC-R2. 542). However, Dr. Frank had no background or collateral evidence to support his findings or fully assess Mr. Peede's mental condition.

The evaluations of Mr. Peede are replete with errors. Mr. Peede is entitled to a thorough and appropriate evaluation to determine his competency to proceed in postconviction.

4. The Competency Hearing Did Not Provide a Basis for Determining Competency.

Realizing that the evaluation conducted by Dr. Frank may not reach the statutory standards, the circuit court attempted to question Mr. Peede about his resistence to assisting counsel:

> THE COURT: Mr. Peede, why won't you talk to your lawyers about these things?
>
> THE DEFENDANT: Truth is, it hurts too much. So

> I don't think about it, and I don't want to talk about it.
>
> THE COURT: So it's just a decision. You decided not to talk about these things with your attorney because it's painful for you; is that what you're saying? Emotionally painful for you? Did you hear my question, Mr. Peede?
>
> THE DEFENDANT: 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.
>
> THE COURT: Anything we can - anything else we need to address at this hearing?

(PC-R2. 552-553). The colloquy between the court and Mr. Peede does not provide a basis to determine Mr. Peede's competency. Carter requires courts to order evaluations that meet the statutory requirements specified. Merely questioning a defendant about the reason for his incompetence is not a basis upon which to support a finding of competence. There is no competent, substantial evidence to support the circuit court's determination of competence.

Because the competency examinations and hearings did not meet the statutory requirements, Mr. Peede is entitled to a competency evaluation which meets the statutory requirements.

ARGUMENT II

MR. PEEDE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL. MR. PEEDE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

WERE VIOLATED.

A. INTRODUCTION

As explained by the United States Supreme Court, an ineffective assistance of counsel claim is comprised of two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

In Williams, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase of a capital case until shortly before trial, "failed to conduct an investigation that would have uncovered extensive records," "failed to seek prison records," and "failed to return phone calls of a certified public accountant." 120 S.Ct. at 1514.

The United States Supreme Court further explained the obligations of trial counsel in a capital case in Wiggins v. Smith, 123 S.Ct. 2527 (2003). In Wiggins, the Supreme Court addressed counsel's decision to limit the scope of the investigation into potential mitigating evidence and the

reasonableness of that decision. The Court stated:

> [A] court must consider not only the quantum of evidence already known to counsel, **but also whether the known evidence would lead a reasonable attorney to investigate further.** Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. **Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.**

Wiggins, 123 S. Ct. at 2538 (emphasis added).

Recently, the obligations of trial counsel in investigating and preparing for a capital penalty phase were again addressed in Rompilla v. Beard, 125 S.Ct. 2456 (2005). In Rompilla, the Supreme Court held, "when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, **his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial**." Id. at 2460 (emphasis added). At issue was trial counsel's neglect in obtaining the file regarding a prior violent felony conviction which was to be used as an aggravating circumstance against Mr. Rompilla.

Mr. Rompilla's counsel had spoken to their client and family members on several occasions but had not received any helpful mitigation evidence. Mr. Rompilla was evaluated by

mental health experts prior to trial in an effort to find mitigation evidence. See Rompilla, 2456 S.Ct. at 2461. However, the Supreme Court found that trial counsel's efforts fell below and objective standard of reasonableness for failing to obtain records which would have provided significant "mitigation leads." Id. at 2468.

> Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction **to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize.** Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim.

Id. at 2465 (emphasis added). Re-emphasizing the importance of the ABA Standards for Criminal Justice as a model for reasonable conduct, the Supreme Court found that when trial counsel fails to "conduct a prompt investigation of the circumstances of the case[,]" that attorney has failed to provide effective assistance.[12] Id. at 2466.

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[12] In Rompilla, the Supreme Court looks to the 1982 ABA Standards for Criminal Justice as the guiding principle for effective assistance of counsel. These standards would be applicable to Mr. Peede's counsel because his trial commenced in 1984.

As the United States Supreme Court has done, this Court has also recognized that trial counsel has a duty to conduct an adequate and reasonable investigation of available mitigation and evidence which negates aggravation. State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996); see also, Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995). In Mr. Peede's case, trial counsel failed to conduct an adequate or reasonable investigation into his case.

B. DEFICIENT PERFORMANCE

Under the obligations explained in Williams v. Taylor, Wiggins v. Smith, and Rompilla v. Beard, counsel's performance during the penalty phase was deficient. "[I]nvestigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Wiggins, 123 S.Ct. at 2527 (emphasis on original)(citations omitted). Indeed, in a sentencing proceeding, "The basic concerns of counsel . . . are to **neutralize the aggravating factors advanced by the state**, and to present mitigating evidence." Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994), cert. denied, 115 S. Ct. 499 (1994)(emphasis added).

At the evidentiary hearing, penalty phase trial counsel explained the importance of conducting a thorough and comprehensive background investigation to uncover mitigation and the necessity to prepare a life history for a capital defendant:

> Q: Okay. And was it the theory, back in early 1980's, that the preparation for a penalty phase should begin upon receipt of the file?
>
> A: Yes.
>
> Q: Can you explain to the Court why the – rationale for that?
>
> A. Surely, You're looking for mitigation wherever you can find it. And in–and so, in any case– especially in a case like this, where there was virtually no connection of either Mr. Peede, the defendant, or the victim, Mrs. Peede – Darla Peede, with Orange County, but other than that, there was no – and so – any mitigation was going to have to come from someplace else.
>
> **And the Discovery became most important to develop contacts that would lead to information going back, if possible, to Mr. Peede's birth, his early education, his family life, all those aspects that you normally would have locally that you could develop. So we had a heightened concern, I'd say, in a case like that. But everything you're receiving in the trial phase of the Discovery potentially has a link to the penalty phase. And so – so we're thinking about that from the beginning of the case, yes.**

(PC-R2. 391-392)(emphasis added). But, despite trial counsel's understanding of his obligation to uncover mitigation and prepare a life history for his client, in Mr. Peede's case, trial counsel failed to investigate the leads he was looking

for to complete the social history on their client. There were several witnesses and documents available which would have provided the very information that trial counsel wanted regarding Mr. Peede's tragic upbringing and life and that would have demonstrated Mr. Peede's deteriorating mental health.

As trial counsel explained, because Mr. Peede was not from Florida, it was imperative to gather evidence from North Carolina[13] and California[14]. And, while trial counsel and his investigator contacted some witnesses by letter or phone, trial counsel failed to pursue the valuable mitigating evidence that was obtained by such efforts. For example, Mr. Peede himself informed trial counsel about members of his family whom the defense could contact, but trial counsel did nothing more than speak to these witnesses by phone in brief conversations.

Early in Mr. Peede's case, trial counsel contacted Mr. Peede's former trial counsel, Mr. Parsons, in California, but did not speak with him or contact the other agencies that had information about Mr. Peede's prior conviction. Mr. Parsons,

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[13]Mr. Peede was born and raised in North Carolina; he also lived there for much of his adult life.

[14]After his mother's suicide, Mr. Peede traveled to California. It was in California that Mr. Peede's only prior violent felony conviction occurred.

Mr. Peede’s trial counsel in California informed trial counsel in a letter that:

> Further information might be secured from the Office of the District Attorney, (address omitted) or, you might seek information from the Humbolt County Probation Department, (address omitted). In addition, I would assume that the California Department of Corrections should have a file on Mr. Peede. . . .For your information, I possess boxes of files, transcripts, documents, letters, memoranda, and reports concerning Mr. Peede, and his case in Humboldt County, noted above.

S-Ex. 3. Trial counsel failed to contact any of the agencies suggested by Mr. Parsons or pursue the materials that Mr. Parsons’ indicated he possessed. The files and records referenced by Mr. Parsons contained a wealth of valuable information. The records not only included statements of John Logan Bell, Jr., Eleanor Bell, and Richard Bateman, but California Department of Corrections’ files which showed that Mr. Peede had been diagnosed as schizophrenic by medical personnel, while he was incarcerated (PC-R2. 1221-8).

Indeed, the statement of John Logan Bell, Jr. explained Mr. Peede’s behavior after his mother’s suicide. This event would have provided a clear indication of the beginning of the downward spiral of Mr. Peede’s mental well-being:

> After his mother committed suicide, Robert took it very hard, due to the fact that they were very close. **And he blamed himself I think for it, and . .**

> **. got extremely paranoid. And blamed himself for the . . . thought that he was directly responsible for her shooting herself. And took it very hard.**
>
> * * *
>
> . . . He said that his mother . . . he felt that he was enough responsible for his mother shooting herself, as if he had taken the gun and done it himself.

(D-Ex. 15)(emphasis added). The statement of Mr. Bell also included information about Mr. Peede's serious medical illnesses while growing up (Id.). This information was significant because it explained why Mr. Peede was so much of a loner growing up and the impact that this loneliness had on his early adolescence and adulthood.

Likewise, the California correctional records also include information about visits of family members, like Nancy Wagoner who visited Mr. Peede after his arrest. Trial counsel could have obtained critical mitigation witnesses from the records. Had trial counsel contacted Nancy Wagoner, Mr. Peede's aunt and inquired about Mr. Peede's mental state while incarcerated in California, they would have learned that Mr. Peede's appearance had changed drastically after he left North Carolina. Ms. Wagoner described him as "real unkept, shaggy old beard and shaggy hair and frankly, he didn't look like he had had a bath. He just didn't look like Robert at all." (PC-R2. 251-252).

During their conversation at the jail, Mr. Peede's paranoia was very evident:

> Q: And what, if anything, did he say to you when you – when you came out to see him?
>
> A: He told me they were going to kill me.
>
> Q: He – okay. When you say they were going to kill you, did he refer to who?
>
> A: No.
>
> Q: Was this meeting face-to-face or was this meeting . . .
>
> A: There was a glass between us. He had his hand like this and I had mine and he was crying and saying Aunt Nancy, go away, they're going to kill you, go away. I said, no one is going to kill me. He says they are. And I said, who is going to kill me. He said, they are. And then, finally, he said promise, promise. I said, I promise; I'm out of here. And I left and I didn't go back.
>
> Q: And why did you – you did you leave him?
>
> A: Because **I felt that he was so fragile**, that if I went back after I said I wouldn't, then he didn't have anyone left to depend on for the truth. And it was best that I leave him alone and let him try to work it out on his own.

(PC-R2. 252)(emphasis added). Thus, by obtaining the readily available records, trial counsel would have known that Ms. Wagoner visited Mr. Peede while he was incarcerated, and may have had information about his mental state. Indeed, she did. This information would have been extremely helpful in supporting

mitigation and in rebutting the strength of the prior violent felony aggravator. Much like the case in Rompilla, where defense counsel failed to obtain the file about the prior violent felony aggravator, trial counsel for Mr. Peede failed to obtain the files and records concerning Mr. Peede's prior felony convictions in California.

Additionally, trial counsel could have provided the information to Dr. Kirkland so that he could explain the significance of Mr. Peede's being diagnosed as schizophrenic, as well as explaining his paranoid conduct which seemed to lead to both the killings in California and Florida.

Likewise, other materials were available but never obtained by trial counsel, including Mr. Peede's Orange County Jail records; Durham County, North Carolina Hospital Records; and Watts Hospital Records (S-Ex. 17). The records would have been easily obtained had trial counsel made the attempt. The records include Mr. Peede's prior diagnosis of schizophrenia, the fact that he had been prescribed and was taking the drug Elavil while at the Orange County Jail, his history of blistering on his skin and its impact on his childhood, scoliosis, and his attempted

suicide.[15]

In addition, trial counsel had extensive “mitigation leads” provided by Mr. Peede’s own family. Trial counsel contacted family members who provided valuable information about Mr. Peede’s mental health problems and the roots of his psychosis. The trial investigator, Doug DePrizio, spoke to Delmar Brown[16], Mr. Peede’s uncle, on July 19, 1983 regarding his knowledge of Mr. Peede. At the evidentiary hearing, trial counsel testified about those communications:

> Q: Mr. Brown was telling, was he not, Mr. Deprizio the fact that Mr. Peede had been sent out to California, **that he may have some mental problems, but that he hadn’t received any treatment**, and the extent to which he saw him as being mentally involved is that correct?
>
> A: Correct?

(PC-R2. 482)(emphasis added).

Trial counsel also spoke with Percy Brown and James Parler. Trial counsel spoke with Percy Brown, on February 16, 1984, **after** the guilty verdict was returned (PC-R2. 431). Mr. Brown explained how Geraldine Peede stood to inherit two-thirds of Mr.

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[15]Mr. Peede had previously attempted to kill himself by shooting himself in the stomach (PC-R2. 662).

[16]Mr. Peede provided trial counsel with his uncle’s name (PC-R2. 430).

Peede’s trust accounts if he was executed (S-Ex. 5). Mr. Brown knew of this because he had help set up the trust for Mr. Peede’s father (Id.). Had this information been obtained prior to trial, it could have been used as impeachment against Geraldine Peede as bias against her ex-husband.

And, although trial counsel traveled to North Carolina to interview witnesses listed by the State, he made no attempt to interview a single family member or friend of Mr. Peede’s for mitigating evidence (PC-R2. 471).

Even when witnesses contacted trial counsel and informed them of mitigating information, nothing was done to further develop the information, or secure the presence of the witnesses for penalty phase. Nancy Wagoner, Mr. Peede’s aunt, who was described by witnesses as Mr. Peede’s “best friend” contacted trial counsel and provided information about Mr. Peede. Later, just before trial, Ms. Wagoner contacted trial counsel “to find out if [they] want her here for trial. She believes that if Robert needs her, either for comfort or for a (sic) character witness testimony, she should (and wants to) come.” (S-Ex 6). Counsel wrote “N. Wagoner – Ready to come – ”. Ms. Wagoner had told trial counsel that Mr. Peede’s “problems stem from [mother’s] suicide” and that Mr. Peede would “not kill anyone in

his right mind" (Id). She also told trial counsel that there was "something terribly wrong w/R's life" (Id.). Trial counsel failed to conduct a more through interview with Ms. Wagoner, have her speak to a mental health expert or testify at Mr. Peede's penalty phase.

Had trial counsel thoroughly interviewed Nancy Wagoner, trial counsel would have learned substantial, compelling mitigating information. Unlike any other witness, Ms. Wagoner lived with Mr. Peede when he was young (PC-R2. 234). Ms. Wagoner witnessed the physical abuse Mr. Peede suffered at the hands of his parents (PC-R2. 238-240, 242). She also knew of his serious medical problems as a child and the impacts those problems had on Mr. Peede's childhood and adolescence (PC-R2. 235-236, 243-244). Ms. Wagoner knew about the circumstances of Mr. Peede's mother's alcoholism and suicide and the profound affect the suicide had on Mr. Peede's mental stability (PC-R2. 473-474).

During her conversation with trial counsel, she described Mr. Peede's bizarre behavior after his mother's suicide. Based upon her interaction with her nephew, she believed that he needed psychological help (S-Ex. 6). Trial counsel failed to provide the information that was and information that could have

been obtained to Dr. Kirkland. Ms. Wagoner never testified at Mr. Peede's trial, although she was clearly willing and able to do so.

At trial, counsel submitted letters from some of Mr. Peede's family and friends. However, the trial court found "no mitigating factors in the letters". During the evidentiary hearing, trial counsel discussed his opinion about the importance of obtaining live character testimony:

> Q: And to the best of your knowledge, all the letters that you submitted were as a result of all those people declining to come to Florida to testify?
>
> A: Well, I can't say completely that they declined. But for what – one reason or another, they did not come or one – my thought was, most were unable to come, and some may have declined. But I think a number of them were older people, and people had other obligations and commitments that, you know, led them to write a letter, but not take a cross-country trip.
>
> Q: With respect to Ms. Wagoner and the letters that I've – correspondence I showed you, didn't she not indicate that she would be available if needed?
>
> A: She did indicate that, yes.

(PC-R2. 444-445). Trial counsel specifically testified that he would have preferred to have live witnesses testify, yet, he made no efforts to secure the attendance of the witnesses who

did offer to testify, like Nancy Wagoner.[17] Trial counsel's decision to wait until after the guilt phase to prepare for the penalty phase limited trial counsel's ability to secure live witnesses to testify about Mr. Peede's background.

As to mental health mitigation, trial counsel failed to uncover records and information about Mr. Peede's deteriorating mental health. And, the information that was discovered was never provided to Dr. Kirkland.

Trial counsel did not request that a mental health evaluation for mitigation be conducted until after Mr. Peede was convicted (PC-R2. 465). Dr. Kirkland was appointed less than two weeks before the penalty phase (PC-R2. 401). Dr. Kirkland conducted no testing, reviewed no background records and was

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[17]Arguably, Nancy Wagoner's testimony was the most important and compelling lay testimony trial counsel could have presented. Ms. Wagoner knew Mr. Peede for his entire life, knew about his mental problems and witnessed his deteriorating mental health over the years. Ms. Wagoner knew that Mr. Peede's parents physically abused him as a child. She knew that he suffered from serious health problems as a child and teenager. She knew that Mr. Peede's health problems caused him to feel isolated. She knew that socially he felt inadequate. She knew that Mr. Peede's first wife had been unfaithful to him and left him for another man. She knew that Mr. Peede was upset and felt betrayed when his wife left him with their son. Ms. Wagoner knew about Mr. Peede's reactions to his mother's suicide. She knew about his delusions regarding his ex-wife and Darla Peede. She knew that he was extremely and irrationally paranoid when she visited him while he was incarcerated in California. And,

provided no collateral information about Mr. Peede (PC-R2. 402-404). Dr. Kirkland's opinions were based entirely on Mr. Peede's self-report. Trial counsel had information that could have assisted Dr. Kirkland and certainly could have discovered information about Mr. Peede's mental health, but he did not provide any information to his expert (PC-R2. 402-404, 469-474).

The circuit court excused trial counsel's inadequate investigation by believing that Mr. Peede "refused to cooperate with his counsel" by providing the names of potential mitigating witnesses and evidence (PC-R2. 1779).[18] However, in fact, Mr. Peede did provide trial counsel with mitigating evidence and names of witnesses (S-Ex. 9). Mr. Peede's "Interview Sheet", dated May 31, 1983, shortly after trial counsel was appointed, reflects that Mr. Peede informed trial counsel of his "spine curvature" and "skin blistering" as health problems (S-Ex. 9). He also told trial counsel about his convictions in California

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she knew that Mr. Peede loved his wife, Darla.

[18]The circuit court cites no part of the record, including the exhibits to substantiate such a conclusion. In fact, the transcript and record demonstrates that Mr. Peede did provide evidence of mitigation, including witnesses, names to his trial counsel and investigator (PC-R2. 482, S-Ex. 10). Likewise, the circuit court's order does not contain a single cite to any part of the record in denying Mr. Peede. A review of the record and transcripts demonstrates that the court's order is directly refuted by the record and thus, not supported by competent and

(Id.). During this same interview Mr. Peede informed trial counsel that he believed he had a "split personality" and that the crimes committed in California were in "self-defense" (S-Ex. 11). Mr. Peede also shared his belief that his wife had been involved with others in sexual activities, and he based this belief upon her photographs that appeared in swinger magazines (Id.).[19] Mr. Peede also signed releases for records and background materials for counsel.

On July 7, 1983, when Mr. Peede was interviewed by a defense investigator, he told him that his parents were deceased; that he had three children by Geraldine Peede; his uncle's name was Delmar Brown and he resided at "221 Cairne Streest, Hillsborough, N.C." (S-Ex. 10). He also provided more details about the convictions from California (Id.). And, again, Mr. Peede openly discussed his beliefs that Darla and his ex-wife Geraldine, had posed in pornographic photographs (Id.).

Because Mr. Peede provided information about his uncle, the defense investigator was able to contact him. Indeed, Mr.

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substantial evidence.

[19]In speaking to Mr. Peede, trial counsel had to realize that Mr. Peede's beliefs were not based on reality. There was no truth to Mr. Peede's statements. He based his beliefs on the number of bricks in the wall that were in both the photo an his house.

Peede's uncle told the investigator that Mr. Peede "had some mental problems" (S-Ex. 10).

Therefore, this is not a case where Mr. Peede thwarted or inhibited his trial counsel's efforts to obtain mitigating evidence. The record shows that Mr. Peede assisted trial counsel. Furthermore, even if Mr. Peede had been uncooperative, this does not relieve trial counsel of their obligation to investigate and prepare for penalty phase. Trial counsel had an absolute ethical obligation to fully prepare his defense in both the guilt and penalty phases:

> It is the duty of the lawyer to conduct a **prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.** The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. **The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty."** 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

Rompilla, 125 S.Ct. at 2466 (emphasis added). Indeed, as the Supreme Court recognized, in most instances, as is the case here, it is the defendant's own mental impairment which impacts on his ability to assist counsel in preparing the defense, and, thus, it is crucial to look beyond interviews to records which may contain mitigating evidence. See Id. at 2463.

And, in Mr. Peede's case, trial counsel did learn of mitigation; witnesses contacted trial counsel, like Nancy Wagoner, but trial counsel failed to pursue, develop or present any mitigation for penalty phase. Thus, the circuit court's order is not supported by the record.

Likewise, the circuit court's conclusion that trial counsel's investigation was adequate because none of the witnesses interviewed would travel to Florida is seriously flawed. See [1780].[20] Trial counsel's own notes reflect the willingness of Nancy Wagoner to travel to Florida and testify. And, a review of trial counsel's and the defense investigator's notes reflect: 1) that the defense investigator ceased conducting any investigation regarding mitigation after speaking to Mr. Peede and two potential mitigation witnesses in July, 1983; and 2) trial counsel spoke to more that seven witnesses, most of whom were contacted after the guilt phase of the trial. Furthermore, trial counsel failed to obtain any records concerning Mr. Peede. The circuit court's conclusion are in error.

The circuit court also suggests that calling witnesses to

[20]Again, the circuit court fails to cite to or attach portions of the record. In fact, the record refutes the court's

testify may have been "less than desirable – and potentially disastrous" for trial counsel. However, such a comment does not excuse trial counsel's failure to investigate. Trial counsel must thoroughly investigate his case and no strategic decision is possible unless a thorough investigation occurs. Wiggins v. Smith, 123 S. Ct. 2527, 2538 (2003).

Moreover, such a comment does not excuse trial counsel's failure to collect records and supply information to a mental health expert.[21] Indeed, trial counsel testified that he wanted to present a mental impairment defense at trial:

> Q: As part of your penalty phase presentation, were you not trying to show that – that in some ways, due to his emotional state, that – and a form of paranoia, that that was as a result – as a result of that, this homicide occurred?
>
> A: Yes, that's what we were trying to do.
>
> Q: Were you ever able to question these witnesses, or find witnesses that would suggest that, for whatever reason, Mr. Peede decompensated over the years or that his personality changed?
> A. **No. We – we may have concluded that comparing what we knew of him as that time, compared to what – the information that was given to us about his boyhood and youth, but – but we did not have witnesses available to connect those dots, if you**

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order.

[21]Indeed, trial counsel could have presented testimony through his investigator or a mitigation specialist, negating the need to call the lay witnesses. However, trial counsel never even considered such a strategy.

understand, to show a period of deteriorating mental status.

Q: **Would you agree that it would not have been inconsistent with your penalty phase presentation if such witnesses and testimony existed to be presented?**

A: **Yes. We – had we found such witnesses, it would have been highly relevant to show that.**

(PC-R2. 218)(emphasis added). Thus, had trial counsel had witnesses to provide mitigation, like those who testified at the evidentiary hearing, contrary to the circuit court's conclusion, trial counsel he would have presented their testimony.

Trial counsel failed to investigate Mr. Peede's background and mental health. A few phone calls does not equal an adequate and reasonable investigation.

C. PREJUDICE

Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the deficiencies substantially impair confidence in the outcome of the proceedings. Strickland, 466 U.S. at 695. "In assessing prejudice, [this Court] must reweigh the evidence in aggravation against the totality of mitigating evidence." Wiggins v. Smith, 539 U.S. 510 (2003).

At trial, the jury was instructed to consider three

aggravating circumstances: 1) Mr. Peede's prior violent felony convictions from California[22]; 2) that the murder was committed in the course of a kidnapping; and 3) that the murder was cold, calculated and premeditated. On direct appeal, this Court struck the cold, calculated and premeditated aggravator. Peede v. State, 474 So. 2d 808, 817 (1985). Thus, in reweighing, this Court must consider that a very strong aggaravator is no longer present. The mitigation presented at trial, consisted of Dr. Kirkland's imprecise and vague reference to Mr. Peede's paranoia. And, while Dr. Kirkland opined that the extreme mental or emotional disturbance mitigator was present at the time of the crime, the State discredited Dr. Kirkland's entire opinion during cross-examination. Likewise, the trial court referred to this mitigator as "marginal mitigation".

The only other evidence offered in mitigation at trial were several letters written by family and friends of Mr. Peede (S-Ex. 9). These letters were not read to the jury, but were merely introduced: "Your Honor, at this time we would tender into evidence Defense Composite Exhibit A marked for identification, which purports to be a series of writings, which we've already shown to the State Attorney." (R. 957). No other

[22]Both of the convictions arose from the same incident.

comments were made by trial counsel, but the State objected to the letters because of the inability to cross-examine (R. 957-8). The trial court found that the letters established no mitigation.

However, this Court must consider the plethora of mitigation presented during the evidentiary hearing. Mr. Peede identified several non-statutory mitigating factors, including, suffering from physical abuse as a child; witnessing his parents infidelities and inappropriate sexual behavior; suffering from serious physical ailments as a child which led to his being isolated from other children; having low self-esteem and difficulties socializing as an adolescent; his first wife leaving him for another man; his increasing paranoia, particularly with women with whom he was involved; the suicide of his mother and the resulting guilt that he experienced; his abuse of alcohol and drugs; the further deterioration of his mental state following his mother's death; the delusional system he had constructed about his ex-wife and Darla Peede; and his remorse for having killed his wife.

Also, the records of Mr. Peede's convictions in California demonstrate that Mr. Peede believed that he was acting in self-defense and that his mental state had become even more paranoid

and disturbed after his mother's suicide. The records could have mitigated the aggravator and explained the convictions to the jury.

As to statutory mental health mitigators, three of the four experts who testified at the evidentiary hearing, found that Mr. Peede qualified for the statutory mitigator that he was under the influence of an extreme mental or emotional impairment at the time of the offense.[23] Unlike, Dr. Kirkland's opinion at trial, the mental health experts who testified at the postconviction hearing based their opinions on a comprehensive evaluation of Mr. Peede, including interviewing him, testing, background materials and collateral information (PC-R2. 585-592, 628-634, 778-782).[24]

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[23]This was the opinion of Drs. Sultan, Fisher and Frank (PC-R2. 657-657, 793, 452, 958-959, 1011). Dr Frank was originally the State's expert.

[24]The circuit court suggests that Dr. Kirkland's testimony would not have been "enhanced or changed" due to the testing, background materials and collateral information the postconviction experts possessed. However, at trial the State impeached Dr. Kirkland because his opinion was based entirely on Mr. Peede's self report (R. 954). And, the trial court, considered the mitigator as "marginal mitigation" because it was based on Mr. Peede's self-report (R. 1264)("[G]iving the Defendant the benefit of the doubt" as to the information about his paranoia). Because the court found that the mitigator was so "marginal" the sentencing judge stated that it was outweighed by the single aggravator that Mr. Peede had been convicted of a

Additionally, both Drs. Fisher and Sultan opined that Mr. Peede also qualified for the statutory mitigating circumstance that due to his mental impairment, he was unable to conform his conduct to the law (PC-R2. 797, 658-659). They opined that the pervasiveness of his delusional disorder fully manifested itself during the time that Mr. Peede stabbed his wife (PC-R2. 650-796). Drs. Sultan and Fisher explained how Mr. Peede believed that Darla Peede and his ex-wife, Geraldine Peede, had been grossly unfaithful to him by not only having affairs with his family and friends, and also posing in "Swinger" magazines (PC-R2. 787, 789-790, 646-651). And, how Darla Peede's constant denials of such behavior enraged Mr. Peede to the point where he suffered a psychotic break (PC-R2. 648, 769-770). Both experts, reviewing the extensive documentary and testimonial evidence, found ample proof of Mr. Peede's delusional system which played a key part in his violent behavior (PC-R2. 787, 789-790, 646-651).

Had trial counsel presented all of this mitigation, not only to Dr. Kirkland in evaluating Mr. Peede, but also in the form of live testimony of his friends and family, the jury would

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prior violent felony. Thus, in and of itself, the experts' reliance on more than Mr. Peede's self-report, even if the experts came to similar opinions, would have had a significant

have had a better understanding as to why Mr. Peede killed his wife. His delusional system and serious mental problems would have been fully explained to the jury. Dr. Kirkland could have explained how Mr. Peede's development and delusional beliefs tied directly into his psychotic break resulting in his wife's murder. Also, it would have established that Mr. Peede had a longstanding history of mental illness that would have been strong mitigation during the penalty phase. It also would have explained his outbursts during the trial and his sudden departure from the rest of the proceedings. Neither the jury nor the judge had the benefit of the wealth of background information available when deciding Mr. Peede's fate.

The evidence presented at the evidentiary hearing explained the tragedies of Mr. Peede's life and the tragedy of Darla Peede's death. All of the mitigation, if presented, would have resulted in a sentence other than death. Mr. Peede is entitled to relief.

ARGUMENT III

MR. PEEDE WAS DENIED AN ADEQUATE MENTAL HEALTH EXAMINATION IN VIOLATION OF AKE v. OKLAHOMA, AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITION.

Due process has long required the State to provide an

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impact during the penalty phase.

indigent defendant "the 'basic tools of an adequate defense or appeal.'" Ake v. Oklahoma, 470 U.S. 68, 77 (1985), quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971). In Ake, the Supreme Court explained that:

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle [is] grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness . . . in a judicial proceeding in which his liberty is at stake.

Ake, 470 U.S. at 76-77 (footnote and parallel citations omitted). The Court has further explained that "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process . . . . [F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" Id. at 77 (citation omitted).

Furthermore, the United States Supreme Court recognized that indigent defendants are entitled to independent experts when the assistance of such experts "may well be crucial to the defendant's ability to marshall a defense." Ake, 470 U.S. at 80. The United States Supreme Court conducted a Fourteenth Amendment due process analysis, Id. at 87, and held that without

independent experts, defendants could be denied "meaningful access to justice." Id. at 76-77. The provision of expert mental

health professionals is required when a defendant's mental or psychological status is at issue to "assist lay jurors, who generally have no training in [mental health] matters, to make a sensible and educated determination" about the contested mental health issues. Id. at 81; see also Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1990), cert. denied, 474 U.S. 998 (1985).

At Mr. Peede's capital trial, the mitigation evidence presented by trial counsel consisted only of the testimony of Dr. Kirkland and letters sent by Mr. Peede's friends and family. In his testimony, Dr. Kirkland's failed to articulate the severe mental illnesses that afflicted Mr. Peede. In fact, Dr. Kirkland failed to make any definitive medical diagnosis:

> Q: Were you able to identify in Mr. Peede any, any recognizable mental illness?
>
> A: I felt, and I continue to feel, that Mr. Peede has certain, certain type of character structure that he is maybe, in lay terms, he's sort of a tough guy, macho, explosive at times. But I was most impressed with certain rather strong paranoid elements that developed into a scenario involving the two wives, and which I think played a large part in Darla's death.

(R. 951-2). Dr. Kirkland made no clinical diagnosis of Mr. Peede, but rather described some paranoid thinking on Mr. Peede's part.[25] This "explanation" in no way meets the standard of mental health assistance that was expected in Ake v. Oklahoma. And, while Dr. Kirkland briefly discussed the factors which may have contributed to Mr. Peede's paranoid behavior, no testimony was elicited to explain how Mr. Peede's specific

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[25]At the evidentiary hearing, Dr. Sultan testified that Dr. Kirkland's explanation of "paranoid elements" does not constitute a medical diagnosis:

> Q: Is that a diagnosis of paranoid disorder?
>
> A: It's a description. It's an acknowledgment that Mr. Peede has some paranoid thinking, but it doesn't describe the mental illness within which that paranoid thinking takes place.
>
> Q: What makes a Paranoid Personality Disorder is the fact that it's pervasive, correct?
>
> A: Yes.
>
> Q: Pervasive meaning it's present all the time?
>
> A: All the time, no matter what.
>
> Q: So when he's saying somebody is – it's highly suggestive of a paranoid disorder, it's not specifically making the finding that this is a pervasive problem like a Paranoid Personality Disorder does, correct?
>
> A: That's correct.

delusional disorder and paranoid personality disorder impaired Mr. Peede's thinking at the time of the offense.[26] Contrary to the circuit court's order, the only specific finding that Dr. Kirkland made was that Mr. Peede was paranoid. Dr. Kirkland provided no insight to distinguish between a lay person's understanding of paranoia, and the actual psychological import of that diagnosis. Additionally, there was no testimony connecting the medical definition of paranoia to Mr. Peede's psychosis.

And, while the circuit court seemingly ignores the State's impeachment of Dr. Kirkland, a review of the record demonstrates that Dr. Kirkland's testimony and opinion was greatly discredited due to his failure to review background records or speak to Mr. Peede's friends and family. The State demonstrated the inadequacy of Dr. Kirkland's evaluation:

> Q: How long were both of these interviews?
>
> A: The first one was about an hour and thirty minutes, and the second one less than that, perhaps forty minutes.
>
> Q: **Did you review any medical records of, Robert Peede has ever had?**

(PC-R2. 103-4).

[26]Dr. Kirkland believed that sleep deprivation constituted a major factor in Mr. Peede's behavior (R. 951).

A: **I think not. I don’t think I had any.**

Q: **Did you talk to any people, did you interview any people who had known Robert Peede for a long time that have had occasion to observe his behavior on a day-to-day basis?**

A: **No.**

Q: **Did you talk to any witnesses in this murder case who would have had an opportunity to see Robert Peede and the way he acted before and after the murder?**

A: **I don’t know who the witnesses were, Counselor.**

Q: **You didn’t talk to any?**

A: **So far as I know, no.**

Q: **So none of these factors would have influenced your decision as to his emotional state as to, as to his psychological state?**

A: **Once again, I have not seen any records, and I did not talk to any witnesses, so far as I know.**

Q: **Did you receive any information on the evidence presented in court as to how the murder occurred?**

A: **No. Only I, only information came from Mr. Peede.**

Q: **After you told him it was for the purposes of his sentencing?**

A: **Yes, on both interviews.**

Q: How long, in your professional opinion, has Robert Peede been in this state of severe emotional disturbance?

A: I think it waxes and wanes. I think that when, I'm sure there are times when Mr. Peede has been getting along well enough, if you will, that he would not have been noticeably different from members of general society. I think he's very vulnerable to having rather severe emotion outbursts.

(R. 953-5)(emphasis added). Additionally, Dr. Kirkland was unaware of what occurred during the guilt phase of the trial. He knew nothing of Mr. Peede's outbursts or his refusal to attend much of the trial.[27] Dr. Kirkland was ill prepared not only to testify but to evaluate Mr. Peede's paranoia and delusional thinking and the impact of those upon the crime.

Dr. Kirkland should have requested information on Mr. Peede. There was little communication between trial counsel and Dr. Kirkland (PC-R2. 469-471). If they had communicated, Dr. Kirkland would have learned that Mr. Peede's family members and friends described him as having mental problems. Additionally, Dr. Kirkland failed to conduct any psychological testing to determine specifically what mental health diagnosis most

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[27]Mr. Peede informed the trial court and postconviction court that he did not want to be present because the subject matter being discussed caused him too much pain (R.662, PC-R2. 273-278).

appropriately described Mr. Peede's illness.[28]

Dr. Fisher described an adequate mental health evaluation:

> . . .the norm, would be to look – as a general rule, to look beyond just self-report, especially in these forensic cases where the possibility of malingering is there. And this is almost always done through records that are here. This becomes especially important, and mandatory, in a case where paranoia is involved because these people, by definition of their medical condition, are particularly guarded and suspicious and aren't giving out information. So you have to go elsewhere to find it.

(PC-R2. 792). The "norm" was not what occurred in Mr. Peede's case.

The only testimony that the **jury** heard about Mr. Peede's delusional thinking came during Dr. Kirkland's cross-examination. But, even then, Dr. Kirkland denied that Mr. Peede's delusional thinking impacted his mental state at the time of the crime:

> Q: You mentioned either in your reports or in your testimony, I can't remember, that the thing about **Robert Peede's paranoia is in relationship to his idea that Darla Peede was posing in these magazines?**
>
> A: Yes.
>
> Q: Based upon your interviews with Mr. Peede, did he have any, any paranoia he needed to defend himself against someone?

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[28]Dr. Sultan conducted a full battery of psychological testing during her evaluation of Mr. Peede. The results of this testing support her findings (PC-R2. 628-633).

> A: Not in relationship to specifically Darla's death, I do not feel that he felt that anything that Darla was doing or he believed her to be doing was a direct threat to his life.
>
> Q: Did you reach an opinion as to whether or not Robert Peede was, at the time of the murder, was able to know what he was doing?
>
> A: It's my opinion that he knew what he was doing at that time.
>
> Q: Did you reach an opinion as to whether at the time of the murder he was able to appreciate the consequences of committing murder?
>
> A: It's my opinion that he knew those consequences.
>
> Q: Did you reach an opinion whether at the time of the murder he was, he had sufficient mental capacity to act within the law?
>
> A: I believe that he should have been able to act within the law.

(R. 955-6)(emphasis added). In Dr. Kirkland's report, he identified Mr. Peede's delusional system, but this report and the information contained within was never provided to the judge or jury.[29] Trial counsel failed to elicit the testimony (R. 958-

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[29]Dr. Kirkland's testimony appears to be inconsistent with his second report which states that Mr. Peede's delusional system is based upon his wives' believed infidelity:

> Several years ago while in prison, he saw what he believed to be a picture of his second wife in

9). But, the information was critical in proving that Mr. Peede suffered a break with reality causing him to kill his wife.

During trial counsel's closing argument, very little was argued about Dr. Kirkland's testimony or the letters from North Carolina (R. 965). However, trial counsel incorrectly told the jury that Dr. Kirkland could not find medical records regarding Mr. Peede because: "**No, he wasn't there and no, he didn't, couldn't go find records from mental hospitals and things, they don't exist.** He knows what he's talking about." (R. 965-6) (emphasis added). Thus, trial counsel's only rebuttal to the State's cross-examination which discredited Dr. Kirkland was to say: "he knows what he's doing".

However, a plethora of background materials existed to establish that Mr. Peede did in fact suffer from mental illness

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"swinger's" magazine. The photo was of a female body, in a "sexy" pose, with the face covered. He brooded about this, and became obsessed with it. After his release from prison, he apparently confronted her about it; she denied being the female in the picture, and bitter recrimination ensued. Later, he saw a similar picture in another magazine, and "realized" that it depicted Darla. I believe that this was delusional thinking on his part. He then developed a scenario, in his mind, that his second wife (Geraldine) and third wife (Darla) were involved heavily in a nation-wide group of "swingers, wife-swappers," etc. He was extremely angry, and jealous, about this matter.

and had prior to the crime. These materials included Mr. Peede's California Department of Corrections records, including his medical records, Orange County Jail records, Durham County, North Carolina Hospital Records, and Watts Hospital Records (S-Ex. 17). Within these records are reference to Mr. Peede's prior diagnosis of schizophrenia and his attempted suicide.

Had Dr. Kirkland conducted an adequate and comprehensive examine, he likely would have concluded what the Drs. Sultan, Fisher and Frank did – Mr. Peede suffered from an Axis I, delusional disorder (PC-R2. 639-640, 784, 967). And, his disorder caused him to have "a break from reality" in his thinking (PC-R2. 641). In Mr. Peede's case, his psychotic break focused on his belief that his ex-wife, Geraldine Peede, and Darla Peede were unfaithful to him:

> Over the years of his adulthood, Robert Peede has come to believe that every woman with whom he is physically involved, sexually involved, will become unfaithful to him. It is his firm belief to this day that that [sic] is true and that the reason for the infidelity of those women is directly a response to his sexual inadequacy.
>
> * * *
>
> [S]everal of the individuals who have been accused of having sex with Robert Peede's wives have denied it. The sheer number of people with whom Mr. Peede thinks Geraldine, for example, has been involved

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(S-Ex. 8).

> with, is impractical.
>
> The photographic evidence that Mr. Peede uses, the pictures that are supposedly of Geraldine and Darla posing, to the people who've seen those photos, bear no likeness to Geraldine or to Darla.

(PC-R2. 81-3). This delusional system is very circumscribed, in that it focuses on this perceived infidelity. When Darla denied the affairs to Mr. Peede, it caused him to "snap" and stab his wife, killing her (PC-R2. 96-100, 230).

In contrast to Dr. Kirkland, Mr. Peede's experts at the evidentiary hearing provided a vital explanation not only of the disorders that Mr. Peede suffered, but also the interpretation of how his background and experiences mitigated his crime. At trial there was only a brief discussion of the statutory mitigating circumstance that Mr. Peede was under an extreme emotional impairment at the time of the offense. Had the remainder of this evidence been provided to Dr. Kirkland, he could have provided testimony, like the experts at the evidentiary hearing, fully explaining not only that statutory mitigator but the fact that Mr. Peede could not conform his conduct to the requirements of law (PC-R2. 657-661, 797-799). Mr. Peede is entitled to relief.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING MR. PEEDE'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS WHEN

THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE. MR. PEEDE WAS DENIED HIS FIFTH SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

During the evidentiary hearing, Mr. Peede demonstrated that State suppressed material, exculpatory evidence.

A. THE LEGAL STANDARD

In order to insure that a constitutionally sufficient adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. See Strickler v. Greene, 527 U.S. 263, 281 (1999). It is reasonable for defense counsel to rely on the "presumption that the prosecutor would fully perform his duty to disclose all exculpatory evidence." Id. at 284.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase

of the trial would have been different. See Garcia v. State, 622 So. 2d 1325, 1330-1 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a
trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995).

This Court has indicated that the question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. See Young v. State, 739 So. 2d 553 (Fla. 1999). If it did, and it did not disclose this information, a new trial is warranted where confidence is undermined in the outcome of the trial.[30] In making this determination, "courts

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[30]This Court has not hesitated to order new trials in capital cases wherein confidence has undermined the reliability of the conviction as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. Cardona v. State, 826 So.2d 968 (Fla. 2002)Cardona v. State, 826 So. 2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001)Hoffman v. State, 800 So. 2d 174 (Fla. 2001); State v. Huggins, 788 So.2d 238 (Fla.

should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So. 2d at 385. This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles, 514 U.S. at 446.

B. THE DIARY

Darla Peede's diary constitutes Brady evidence. It presents favorable evidence to support Mr. Peede's defense in the guilt phase and mitigation in the penalty phase. On December 6, 1982, Darla Peede wrote a journal entry in her diary which expressed her hopes for the coming year.[31] She wrote at length about her goal of reuniting with her husband, Robert Peede, and about her desire to help him cope with his mental health problems:

2001)State v. Huggins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001)Rogers v. State, 782 So. 2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996)State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

[31]Mrs. Peede was about to travel to Florida to visit with her children after spending time in North Carolina. It is clear that at the time of the entry, Mr. Peede was not in North Carolina. However, she stated that she hoped to see Mr. Peede

> How I hope the man who came out of the Greyhound Bus Depot surges through the doubts and fears and makes a complete commitment to life again as he did that day. Only this time quietly and determinedly. I could be such a good co-pilot if only he would let me. But he may never make that choice, I well realize. If not, I shall go on much happier having met and loved him. **My greatest prayer is that he will be guided to someone who can truly help him erase his thoughts and feelings from the past and get his system finely tuned.**

(D-Ex. 7)(emphasis added). Mrs. Peede's journal entry also reflected her strong feelings for her husband. She stated: "Over and over all I can put into words is the complete thankfulness for having met + loved and married + shared with Robert . . . I know that the Lord brought Robert + I together and if I but trust and keep on plugging everything will be fine." (D-Ex. 7).

The thoughts expressed by Darla Peede's were undoubtedly helpful to Mr. Peede's defense. Initially, Mrs. Peede's statements reflect an understanding that Mr. Peede suffered from mental impairments. Mrs. Peede had only known Mr. Peede for a short period of time, yet, in that time she had determined that he needed professional help to cope with his mental problems. Thus, his mental illness was clearly manifesting itself – a fact that would have helped establish the severity of Mr. Peede's mental impairments, at the competency proceeding, guilt phase

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in Florida. (D-Ex. 7).

and penalty phase. At a minimum, it would have supported non-statutory mitigation in that Mr. Peede was mentally ill.

Additionally, this evidence would have assisted trial counsel in rebutting the State's theory that Mr. Peede premeditated the murder of his wife or kidnapped her.[32] At trial, trial counsel wanted to show that Mrs. Peede was not kidnapped or sexually battered, but that she voluntarily accompanied Mr. Peede to North Carolina and consented to sexual relations with him (PC-R2. 422-425). Indeed, Darla Peede's diary demonstrates her strong feelings for Mr. Peede and desire to reunite with him. She specifically stated that she hoped that she would see him in Florida (D-Ex. 7). Mrs. Peede's diary could have been used to rebut and impeach the testimony of her daughters who testified that Mrs. Peede was fearful about seeing her husband (R. 679-680, 614).

As to penalty phase, the evidence would have been valuable to the mental health expert in evaluating Mr. Peede. Dr. Kirkland was unaware that Mr. Peede suffered from mental health problems, other than what Mr. Peede told him. Dr. Kirkland reviewed no collateral material or knew of other's impressions

[32]Mr. Peede was charged with first degree murder and felony murder.

of Mr. Peede's mental illness and how it affected his behavior. Mrs. Peede's diary provided insight into the severity of Mr. Peede's mental problems. Mrs. Peede, who had no mental health training and knew Mr. Peede for a short period of time, realized that he needed psychological help. It is evident that Mr. Peede's delusional system and psychosis was manifesting itself, or she would not have made statements she did.

In addition, the diary would have corroborated and supported Dr. Kirkland's opinions, thus, gaining credibility. At the penalty phase, the State discredited Dr. Kirkland's testimony because he had no evidence to support his assessment other than Mr. Peede's self-reporting (R. 953-5). The State did so, while possessing Mrs. Peede's diary and having read the statements therein. The diary comprises collateral evidence of a lay person's mental impressions and descriptions of another that mental health professionals rely upon to form opinions (PC-R2. 925-926).

At the evidentiary hearing, the circuit court relied on the prosecutor's testimony that she showed the diary to trial counsel, but he did not want a copy (PC-R2. 1783). However, both of the defense attorney testified that they had not seen the diary before the time of Mr. Peede's trial (PC-R2. 388, 455,

456).[33] Thus, there is a conflict in the evidence.

As to the issue of whether trial counsel knew of the diary, both attorneys testified that they had not seen it prior to Mr. Peede's trial. And, the State's responses to Mr. Peede's demand for discovery do not reflect that the diary was disclosed (D-Ex. 1-5).

However, it should make no difference whether the State discussed the diary with trial counsel, but failed to turn it over, because the State had an absolute obligation to provide a copy of the diary to trial counsel. It was the prosecutor's responsibility to provide the diary to trial counsel so that he could make a determination of whether the diary was useful to his defense. Indeed, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Banks v. Dretke, 540 U.S. 668, 696 (2004). Moreover, here the State was well aware that the felony murder theory depended on whether or not Mr. Peede kidnapped his wife, as well as the aggravator committed in the course of a felony. And, the State was well

[33]If trial counsel did see the diary, but inform the State that he did not want a copy of the diary, then he was ineffective. The diary was consistent with trial counsel's defense and helpful at both phases of Mr. Peede's trial.

aware that the defense intended to argue that Darla willingly left Miami with her husband. Therefore, there is no question that the diary was material and exculpatory and the State was required to turn it over.

Indeed, both trial attorneys testified that the diary would have been helpful to Mr. Peede's defense. The diary rebutted the theory of felony murder and aggravation. Independently, the diary "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435 (1995). But, in addition, when analyzing the materiality of the diary, this Court must consider the diary "collectively, not item-by-item." Id. at 436; Young v. State, 739 So. 2d 553, 559 (Fla. 1999).

Trial counsel testified:

> Q: Would the thoughts expressed in the diary be consistent with the defense that you used?
>
> A: I would rather have these thoughts than not have them.

(PC-R2. 390). Furthermore, trial counsel testified:

> Q: Would – the fact that Darla Peede was indicating that she had some plans for reconciliation and a life with Mr. Peede, would that have been consistent with the defense that you offered at trial?
>
> A: Certainly. The defense in the case was that there was not – it was not premeditated murder and, also, that Darla Peede voluntarily went to the airport

> to pick up Robert. And all that information would go to negate the fact that a kidnaping charge had occurred. And, certainly, this information would have been helpful.

(PC-R2. 456-457).

By suppressing the diary, Mr. Peede was unable to demonstrate his wife's desire to reunite with him, in her very own words. Trial counsel would have used had it not been suppressed. Indeed, trial counsel argued in their opening statement that Mrs. Peede wanted to reconcile with her husband, so the proof of her own thoughts expressing this desire who have been beneficial to the defense (See R. 510-1).

This evidence, in addition to other witness statements, would have added substantial weight to the defense's theory that Mrs. Peede willingly accompanied her husband to North Carolina.[34]

Additionally, the comments Mrs. Peede made about her husband's mental state would have made an impact on Dr. Kirkland's diagnosis and explanation of Mr. Peede's behavior. At the very least, it would have supported non-statutory mitigation.

C. The Undisclosed California Police Reports and Statements

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[34] The statements of Russell and Rebecca Keniston were not introduced at trial due to trial counsel's ineffectiveness. Mr. Keniston told law enforcement that Darla Peede was looking forward to seeing her husband.

The State also failed to disclose police reports from law enforcement in Eureka County, California. The police reports detail interviews with friends of Mr. Peede.

The circuit court incorrectly asserted that the only police report at issue concerned Austin Backus' interview (PC-R2. 1774-86). However, the Austin Backus report was the only report that was disclosed to defense counsel. Thus, the circuit court's analysis is entirely flawed due to the court's misapprehension of the facts.

The reports that were suppressed contained the interviews of Richard Bateman, John Logan Bell, Jr., and Eleanor Bell (D-Ex. 15-17). While the reports were taken in reference to the charges Mr. Peede was facing in California, law enforcement also inquired about Mr. Peede's history. Thus, the reports provide great insight into Mr. Peede's childhood and bizarre behavior shortly before leaving for California (D-Ex. 15-17).

At the evidentiary hearing, the trial prosecutor admitted that the reports were contained in the State's file, and she had no particular memory of turning over any California police reports (PC-R2. 350-351). Likewise, trial counsel testified that they had never seen the reports at issue prior to Mr. Peede's trial (PC-R2. 162, 457). And, the State's responses to discovery indicate that the statements were not disclosed (D-Ex. 1-5).

The reports contain a wealth of information about Mr. Peede's background which would have supported mitigating circumstances. In fact, the reports evidenced that Mr. Peede's mental illness was longstanding and quite severe. The statements reflect that Mr. Peede exhibited paranoid behavior and explained some of the traumatic events in his life, which likely gave rise to his delusional thinking (See D-Ex. 15-17).

John Logan Bell, Jr. told law enforcement about Mr. Peede's behavior after his mother's suicide:

> After his mother committed suicide, Robert took it very hard, due to the fact that they were very close. **And he blamed himself I think for it, and . . . got extremely paranoid. And blamed himself for the . . . thought that he was directly responsible for her shooting herself. And took it very hard.**
>
> * * *
>
> . . . He said that his mother . . . he felt that he was enough responsible for his mother shooting herself, as if

> he had taken the gun and done it himself.

(D-Ex. 15).

The statement of John Logan Bell, Jr., also included information about Mr. Peede's several medical illnesses while growing up. This information was significant because it explained why Mr. Peede was such a loner and the impact that this loneliness had on his early adolescence and adulthood.

> And Robert had . . . had this skin problem, which you know, kept him apart from other children, as much as, you know, outside activities and playing and whathaveyou, [sic] **and then he got this scoliosis, and that sort of withdrew him further. He couldn't participate in sports or anything like that** . . .

(D-Ex. 15)(emphasis added).

The statement of Eleanor P. Bell also related information about Mr. Peede's background and mental state (See D-Ex. 16). Ms. Bell discussed Mr. Peede's relationship with his mother and Mr. Peede's childhood, physical ailments (Id.). And, the most insightful information concerned Mr. Peede's exhibition of paranoid behavior during his adolescence:

> And he'd go into class, and you know how kids would get in a bunch, or people get in a bunch and talk and laugh. And he [Mr. Peede] was alone, he was a loner, as I said, and he **felt that they were laughing and talking about him, and he felt that they were out to get him. But I don't know why he felt that way, except that he was blaming himself.**

(D-Ex. 16)(emphasis added).

Similarly, the undisclosed statement of Richard Bateman provided further insight into Mr. Peede’s bizarre behavior:

> Q: Okay, now in uh . . . you mentioned last night that on one occasion while Robert was in the bar, he was playing pool uh. . .he had missed a shot, and he became very angry at that time, is that correct?
>
> A: That’s right.
>
> Q: Okay. Would you comment a little on that?
>
> A: Well, he went so far as to beat hisself [sic] in the face. He . . . busted his mouth and bruised his eye up. I mean . . . uh . . . it’s like he might have got hit by somebody else quite hard. He did it to hisself [sic].

D-Ex. 17. Mr. Bateman characterized Mr. Peede as being “mentally disturbed” and because of this, he was mostly a loner (D-Ex. 17). The statements undeniably contained information regarding Mr. Peede’s mental state and mitigation. Had trial counsel been provided with the statements, they could have presented the evidence to the jury, and provided the statements to a mental health expert.

Had the jury known of Mr. Peede’s traumatic childhood, and long-standing mental problems it would made a difference. Mr. Peede is entitled to relief.

ARGUMENT V

THE TRIAL COURT ERRED IN DENYING MR. PEEDE'S CLAIM THAT HE WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court explained that under the Sixth Amendment:

> . . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

466 U.S. 668, 685 (1984). In order to insure that a constitutionally adequate adversarial testing, and hence a fair trial, occur, defense counsel must provide the accused with effective assistance. Accordingly, defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where defense counsel fails in his obligations and renders deficient performance, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).[35]

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[35] Various types of state interference with counsel's performance may also violate the Sixth Amendment and give rise to a presumption of prejudice. Strickland, 466 U.S. at 686, 692. See United States v. Cronic, 466 U.S. 648, 659-660 (1984)United

To the extent that this Court finds that any or all of the information in the State's possession and discussed in Argument II, were disclosed or available to Mr. Peede's trial counsel, trial counsel's performance was deficient. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Although the facts underlying Mr. Peede's claims are raised under alternative legal theories -- i.e., Brady, and ineffective assistance of counsel -- the cumulative effect of those facts in light of the record as a whole must be nevertheless be assessed. As with Brady error, the effects of the deficient performance must be evaluated cumulatively to determine whether the result of the trial produced a reliable outcome. When such consideration is given to the wealth of exculpatory evidence that did not reach Mr. Peede's jury, either because the State failed to disclose or because trial counsel failed to discover, confidence in the reliability of the outcome is undermined.

ARGUMENT VI

MR. PEEDE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A COMPETENCY HEARING BASED ON MR. PEEDE'S BIZARRE BEHAVIORS, AND DISCOVER THE EVIDENCE OF MR. PEEDE'S SERIOUS MENTAL HEALTH DISORDERS.

States v. Cronic, 466 U.S. 648, 659-660 (1984).

Mr. Peede was not competent when he was tried in 1984. Substantial evidence was presented at the evidentiary hearing that showed the severe mental illnesses that Mr. Peede suffered throughout the commission of the crime and around the time of his trial. Establishing competency in postconviction requires a showing that, "the state trial judge ignored facts raising 'bona fide doubt' regarding the petitioner's competency to stand trial." Medina v. Singletary, 59 F.3d 1095,1106 (11th Cir. 1995) quoting James v. Singletary, 957 F.2d 1562, 1572 n. 15 (11th Cir. 1992).

There were several instances before and during trial which raised doubts as to Mr. Peede's competence to stand trial. Mr. Peede was plagued by delusions, paranoia, severe depression, and diminished emotional functioning. He was medicated before trial and taken off that medication the day his trial commenced (Tr.1 172). Trial counsel never discovered or made the Court aware of the fact that Mr. Peede had been medicated up until the time of trial. Also, trial counsel failed to inform the court of the statements Mr. Peede made about his mental health (Tr.1 278-279). Mr. Peede's behavior at trial was bizarre and inappropriate (R. 605-6, 632-3, 662, 670-1). Indeed, his behavior during the trial shows the level of which his mental

illness affected his thinking (R. 605-6, 632-3, 662, 670-1).

Perhaps most prejudicially, Mr. Peede instructed his trial counsel not to cross-examine critical witnesses, like his step-daughter, Tanya Bullis. Had trial counsel discovered the fact that Mr. Peede had stopped taking Elavil, the day trial began, they would have realized that his decision was not rational and Mr. Peede was incapable of making rational choices.

Competency is fluid. It can change at any time. "Even if a defendant is mentally competent at the beginning of trial, the trial court must continually be alert for changes which would suggest that he is no longer competent." Medina, 59 F.3d at 1106 quoting Drope v. Missouri, 420 U.S. 162, 180 (1975).

When the trial court observed Mr. Peede's bizarre behavior during trial, the court was under obligation to conduct another competency evaluation to see if Mr. Peede remained competent to stand trial. See Medina, 59 F.3d at 1106. This was not done. And trial counsel was obligated to bring Mr. Peede's bizarre behavior to the court's attention. "There existed a reasonable probability that a psychological evaluation would have revealed that [Mr. Peede] was incompetent to stand trial." Blaco v. Singletary, 943 So.2d 1477, 1506.

Mr. Peede was entitled to a viable competency evaluation

after he began exhibiting bizarre behavior shortly before and during the trial.

Trial counsel was ineffective in failing to discover the abundant evidence of Mr. Peede's mental illness and perhaps most importantly that he had been prescribed and was taking a powerful anti-psychotropic medication, called Elavil, while incarcerated at the jail pretrial. However, Mr. Peede ceased taking his medication on the day the trial began. Additionally, trial counsel failed to discover that Mr. Peede had been diagnosed as schizophrenic while incarcerated in California. Trial counsel had an obligation to ensure that their client was competent to proceed and provide the trial court with all of the relevant information about Mr. Peede's competency.

The only way trial counsel could ensure that a proper competency examine occurred was to provide the plethora of information about Mr. Peede's mental illness to an expert. Trial counsel failed to discover much of the evidence of Mr. Peede's history of mental illness and provided no information to an expert.

Mr. Peede was not competent to proceed at the time of his capital trial. Trial counsel was ineffective in failing to adequately discover and show that Mr. Peede suffered from

longstanding mental illnesses and had recently stopped taking medication at the jail. Mr. Peede is entitled to relief.

ARGUMENT VI

MR. PEEDE'S CONVICTION AND SENTENCE ARE UNCONSTITUTIONAL UNDER RING V. ARIZONA.

In

Mr. Peede submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail, postage prepaid, to Scott A. Browne, Office Of The Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607, this 6th day of October, 2005.

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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