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.

REPLY BRIEF OF APPELLANT

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ARGUMENT I

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

The State argues that the lower court's determination that Mr. Peede was competent to proceed is supported by the record (Answer Brief at 50). In making such an argument, the State maintains that Mr. Peede has the "ability to discuss the details of his case, but he chooses not to discuss them." (Answer Brief at 52). However, this was not the evidence presented to the circuit court.[2] Indeed, Dr. Teich, who was not a defense expert, testified that Mr. Peede was not competent because of his mental

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[1]Mr. Peede will not reply to every issue and argument, however he does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Mr. Peede stands on the arguments presented in his Initial Brief.

[2]Two competency hearings were held in the lower court. At the first hearing, Drs. Teich and Fischer testified that Mr. Peede was not competent to proceed. At the second competency hearing Dr. Frank testified that, while Mr. Peede likely would not communicate with his counsel about the crime, it was not because Mr. Peede lacked the ability to communicate. The State argues that Mr. Peede did not "establish that there were any factual issues which require his input in order to proceed with the evidentiary hearing." (Answer Brief at 54). However, the State misses the point of postconviction, where it is axiomatic that a client's input is necessary to the issues at hand, such as ineffective assistance of counsel. See Carter v. State, 706 So. 2d 873 (Fla. 1997).

state (PC-R2. 1488). Mr. Peede's delusional disorder as well as personality disorder rendered him unable to communicate with his counsel (PC-R2. 1504-1506). Dr. Fischer agreed (PC-R2. 1451-1452).[3]

Dr. Teich specifically explained that Mr. Peede's decision making is based on his distorted emotions which create a seemingly rational reason to support those decisions, but because his decision is irrational, the decisions that Mr. Peede claims caused his decision are not rational.[4] Likewise, Dr. Fischer testified that Mr. Peede's inability to discuss the

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[3]While Dr. Frank disagreed with the other experts, he admitted that to Mr. Peede: "[t]he thought of going over, you know, the events around the crime are greater than the thought of dying to him."

[4]The State also argues that Mr. Peede made decisions not to be interviewed by various experts and therefore he is capable of making rational decisions (Answer Brief at 51). But, Mr. Peede did in fact meet with Dr. Berns. It was only when Dr. Berns continued to ask Mr. Peede about his relationship with Darla that Mr. Peede terminated the interview (PC-R2. 1543). Mr. Peede reacted the same way when Dr. Fischer, the defense expert, questioned him about Darla (PC-R2. 1449). Thus, Mr. Peede did not make any rational choices about which experts he should speak to. And, while the State argues that Mr. Peede discussed the circumstances of the crime with Dr. Sultan, (Answer Brief at 52), Dr. Sultan made clear that Mr. Peede did not communicate any circumstances about the crime. She simply confirmed information that she had obtained for other sources and hypotheses she formed on her own (PC-R2. 614-615). Dr. Sultan did not believe that Mr. Peede had the ability to communicate relevant information about the crime to her (PC-R2. 616).

facts of the case was not based on a rational decision. Contrary to the lower court's order, Mr. Peede cannot assist counsel because he lacks the ability to communicate with counsel about the circumstances regarding the crime.

In addition, Dr. Teich testified that Mr. Peede did not have a rational understanding of the proceedings against him due to his underlying belief that the proceedings really don't matter anyway and that he is unable to testify relevantly, (PC-R2. 1515-1516) – facts which the lower court failed to consider, but which are critical to determine Mr. Peede's competency to proceed.[5]

All of the experts who rendered an opinion at the competency proceedings and in postconviction testified that Mr. Peede suffers from a mental illness (PC-R2.1453, 1495-1499, 639, 657, 967, 1008-1009, 784, 893). Mr. Peede's mental illness, be it delusional disorder, paranoid personality disorder, or both, is marked by severe paranoia. Thus, Mr. Peede's inability to

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[5]The State also failed to address the other factors in its Answer. And, while the State seemingly concedes that Mr. Peede is unable to manifest appropriate courtroom behavior by pointing out his reaction to John Bell's testimony (Answer Brief at 62, noting that Mr. Peede threatened to kill Mr. Bell because he believed that Mr. Bell had slept with Gerladine and fathered one of her children while she was married to Mr. Peede), the State ignores how the fact that Mr. Peede's delusions affect his

communicate with counsel is undoubtedly affected by his mental illness. Mr. Peede is incompetent to proceed.

The State also argues that postconviction counsel has not identified how the competency evaluations for the second competency hearing were flawed (Answer Brief at 52). However, in his initial brief, Mr. Peede set forth specific flaws in the competency evaluations (see Initial Brief at 39 - 47), which likewise render the lower court's determination equally flawed. For example, Dr. Calderon 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. Dr. Calderon appeared to have no background information about Mr. Peede. Had she had any background information she certainly would have realized the problem of relying on a mentally ill Mr. Peede to determine whether or not he was mentally ill and in need of psychological services.[6] Dr. Calderon's report fails to acknowledge the criterial for competency, let alone discuss the criteria in a meaningful way.

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courtroom behavior.

[6]Mr. Peede's background materials, show that he has been mentally ill for many years. While incarcerated in California, he was diagnosed as being schizophrenic. Likewise, even at trial, Dr. Kirkland diagnosed Mr. Peede with a major mental illness.

Also, Dr. Frank only monitored Mr. Peede during his stay at TCU; he did not perform any type of competency evaluation and his report fails to address any of the criteria for competency (PC-R2. 1566-1567). Dr. Frank, admittedly, did not evaluate or consider Mr. Peede for competency. He considered Mr. Peede's competence, after he had met with him (PC-R2. 1006, 1008) (emphasis added).

The "evaluations" upon which formed the basis for the lower court's second determination that Mr. Peede was competent were inadequate and failed to address the criteria for competency. The lower court's orders as to both competency determinations are not supported by the record. Mr. Peede is not competent to proceed and was not competent to proceed before the lower court.

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. Trial Counsel Inexplicably Failed in Their Obligation to Discover and Present Mitigation. Mr. Peede and His Family Provided Trial Counsel with Background Information.

The State asserts that the lower court's order finding trial counsel effective during the penalty phase was proper (Answer Brief at 58). Primarily, the State, like the lower court, blames Mr. Peede for his trial counsel's failures and characterizes him as unhelpful and uncooperative (Answer Brief at 60). Indeed, the State focuses on trial counsel Bronson's

testimony that Mr. Peede "did not intend to ever reveal information about his family or anything else that was helpful to the case." (PC-R2. 472).

However, the State, like the lower court, ignores the law which makes abundantly clear that even if a defendant, like Mr. Peede, were uncooperative, trial counsel has an independent obligation to fully investigate all aspects of a defendant's case regardless of whether that defendant provides assistance or not. See Rompilla v. Beard, 125 S.Ct. 2456, 2460 (2005); see also Wiggins v. Smith, 123 S.Ct. 2527, 2538 (2003).

In Rompilla, the United States Supreme Court pointed out that defense counsel has an absolute duty to investigate, even when the defendant and/or his family suggest that no mitigating evidence is available. 125 S.Ct. at 2460. The Rompilla Court found that trial counsel rendered prejudicially deficient performance as to the penalty phase despite the fact that Rompilla's "own contributions to any mitigation case were minimal." Rompilla, 125 S. Ct. at 2462. Counsel found that Rompilla was "uninterested in helping," minimized any problems he may have had in his childhood, and "was even actively obstructive by sending counsel off on false leads." Id. Despite this, the Supreme Court found that counsel rendered

prejudicially deficient performance.[7]

Likewise, in Deaton v. Dugger, this Court also made clear that trial counsel has an absolute duty to investigate mitigation even when a capital defendant requests that the mitigation not be presented. 635 So. 2d 4, 14 (Fla. 1993). Thus, the State's argument, which mirrors the lower court's order, is inconsistent with United States Supreme Court precedent.

Furthermore, and perhaps more importantly, the State's position, like the lower court's, is not supported by the evidence. The evidence shows that Mr. Peede did assist trial counsel in developing mitigation as well as providing much information about his own background. For example, shortly after trial counsel was appointed, a member of the defense team interviewed Mr. Peede and prepared an "Interview Sheet", dated

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[7]In light of the Supreme Court's opinion in Rompilla, the State's reliance cases like Rutherford v. State, 727 So. 2d 216 (Fla. 1998), and Hodges v. State, 885 So. 2d 338 (Fla. 2003), is misplaced. The Supreme Court made abundantly clear in Rompilla, that it makes little difference what assistance a client and/or his family may provide – it is trial counsel's obligation to pursue and develop mitigation. Furthermore, the cases cited by the State are distinct from Mr. Peede's case because he and his family did provide information about his background. Trial counsel simply failed to develop the mitigation or provide it to his mental health expert for consideration. In no way did Mr. Peede ever interfere or impede trial counsel's investigation.

May 31, 1983. The interview with Mr. Peede reflects that he was asked about his medical history to which Mr. Peede informed trial counsel of his "spine curvature" and "skin blistering" (S-Ex. 9). Also, interview notes reflect that Chief Investigator Bill McNeely met with Mr. Peede on July 7, 1983 and Mr. Peede provided extensive information about his background:

> The defendant started off by relating that his parents were dead and that he had three (3) children ages 21, 12, and 14 from his ex-wife Geraldine Peede.
>
> He related he had an Uncle Delmar Brown who lived at 221 Caine St., Hillsborough, N.C.
>
> The defendant began by relating he had served some prison time in California for 2nd degree murder. He was released in October of 1981. In Oct. 82 he left California and went to N.C. and stayed a couple of weeks with his Ex-wife Geraldine. (It should be added here, that the def. Was divorced from Geraldine while serving time in Cal. prison. He related he saw some nude photos of Geraldine in some girlie magazine.)

(S-Ex. 10 at p 157). A few weeks later, on July 26, 1983, trial counsel Bronson met with Mr. Peede. The interview notes from the meeting reflect that Mr. Peede provided trial counsel with information about Mr. Peede's ex-wives and children (See S-Ex. 11 at p. 179). During the interview, when trial counsel asked Mr. Peede if he suffered from any mental illness, Mr. Peede stated that he thought he had a "split personality." (See id. at p. 180). Mr. Peede also explained the circumstances surrounding his conviction for second degree murder in California. And,

most importantly, Mr. Peede candidly described the delusional thinking which caused him to kill his wife, Darla (See id. at p. 181) (noting that Mr. Peede described the perceived sexual promiscuity of his ex-wives with his friends and family members).[8]

Thus, Mr. Peede provided information about his relationship with his wife, including the delusions he was having about her infidelities; that he believed that he had a "split personality"; an explanation about his previous conviction; a medical history; and information about his family, including the location of some of his relatives. The State's argument that Mr. Peede was not cooperative is based on nothing more that trial counsel's recollection. But, the records from trial counsel's own file reflect that Mr. Peede did provide background information about himself.

Indeed, Investigator McNeely investigated some of the information provided by Mr. Peede and contacted Delmar Brown on July 19, 1983. Investigator McNeely's notes reflect that Mr. Brown related background information about Mr. Peede, his nephew:

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[8]After the interview, trial counsel learned from Mr. Peede's family members and friends that the alleged infidelities never

> Mr. Brown said he would not necessarily state that he thought the defendant to be insane but did state that he felt that def. had some mental problems. Apparently when the def. killed a man in California it seemed to start. Def. never treated for it. Just incarcerated and released. . . **the defendant lived in a fantasy world**.

S-Ex. 10 at p. 163-164 (emphasis added).

Additionally, other family members contacted trial counsel to assist in Mr. Peede's defense and provide background information. Nancy Wagoner, Mr. Peede's aunt, called trial counsel volunteering to come to the trial to assist her nephew (S-Ex. 6). Ms. Wagoner informed trial counsel about Mr. Peede's mother's suicide and the profound affect it had on her nephew's mental stability (See id.; see also PC-R2. 443, 473-4; S-Ex. 6). In fact, during her conversation with trial counsel, Ms. Wagoner specifically described Mr. Peede's bizarre behavior after his mother's suicide. Based upon her interaction with her nephew, Ms. Wagoner believed that Mr. Peede needed psychological help (S-Ex. 6).

The State's assertion that Mr. Peede is at fault for failing to provide background information is belied by the record. Mr. Peede provided information on his background, prior conviction, and family members.

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occurred (S-Ex. 10).

Despite Mr. Peede and his family's assistance, trial counsel made little attempt to develop the information and leads provided. And, while trial counsel did travel to North Carolina, he failed to devote a single minute of his trip to pursuing or developing mitigation and only spoke with witnesses listed by the State (PC-R2. 471). Even though much of Mr. Peede's family and friends lived within the vicinity of the State's witnesses, at no point did trial counsel arrange to meet with or speak with any of them (Id.).

What little trial counsel did do in developing mitigation cannot be considered "reasonable or adequate" as the State argues (see Answer Brief at 60-1). Indeed, trial counsel waited until **after** Mr. Peede's trial commenced to see if any family members would testify in his trial (S-Ex. 5). It is undisputed that trial counsel waited until shortly before the verdict was rendered in the guilt phase to make contact with Mr. Peede's family members (Id.). And, at a maximum trial counsel only had a few weeks to investigate and prepare for penalty phase in the short period of time between the guilt phase and penalty phase. Thus, while counsel obtained letters on behalf of Mr. Peede, he was unable to secure the attendance of live witnesses on such short notice. And, inexplicably, trial counsel failed to

present those witnesses who were willing to travel to Florida on Mr. Peede's behalf, like his aunt, Nancy Wagoner.[9]

It was also during this time frame, on February 24, 1984, that trial counsel sought a mental health mitigation evaluation of Mr. Peede (R. 1240).[10]

Also, during this intervening time frame, trial counsel contacted Mr. Parsons, Mr. Peede's attorney from his prior felony conviction in California (S-Ex. 3 p. 112-113). Mr. Parson's responded to trial counsel's inquiry and requested a specific release from Mr. Peede since his files and information learned from Mr. Peede were covered by the attorney/client privilege (Id.). And, Mr. Parsons provided trial counsel with a list of several agencies which he knew to possess medical and background records on Mr. Peede (Id.). Yet, trial counsel never

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[9]Trial counsel's testimony about the reasons for not presenting witnesses, only letters, was disingenuous, particularly in light of the fact that Nancy Wagoner, arguably the most important mitigation witness, offered to attend the trial and do whatever she could for her nephew (S-Ex. 6), yet trial counsel did not bother to secure her attendance. Ms. Wagoner knew much about Mr. Peede's family background and life as a child and young adult (See PC-R2. 232-269). In fact, Ms. Wagoner lived with Mr. Peede and his parents while he was a child.

[10]Under the ABA Standards in effect at the time of Mr. Peede's trial, trial counsel cannot be said to have conducted a prompt investigation into any source of mitigation, including

supplied the proper release to Mr. Parson's or contacted any of the other agencies to determine what information existed relating to Mr. Peede.

Mr. Peede's case is not a case where trial counsel was not provided with information or leads; it is a case where trial counsel simply failed to investigate or pursue the leads. It were as if trial counsel was paralyzed. Trial counsel's pattern of conduct continued throughout Mr. Peede's case. For example, trial counsel failed to obtain any records related to Mr. Peede's California murder conviction. Similar to the facts in Rompilla v. Beard, trial counsel had an obligation to obtain files in a prior conviction that he knew the State intended to use in aggravation in Mr. Peede's capital penalty phase.

In Rompilla v. Beard, Mr. Rompilla's counsel's efforts fell below an objective standard of reasonableness for failing to obtain records which would have provided significant "mitigation leads." Id. at 2468. The Supreme Court held:

> 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

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mental health mitigation.

> hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

Id. at 2465 (emphasis added). Re-emphasizing the importance of the ABA Standards for Criminal Justice as a model for reasonable conduct, the U.S. 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.[11] Id. at 2466.

Mr. Peede's counsel was ineffective for failing to seek any records pertaining to his prior conviction. Trial counsel was aware that the State was going to use the prior murder as an aggravator in his current case (PC-R2. 348-52). However, trial counsel did nothing to learn about the facts of that case or speak with any witnesses, even those the State intended to call

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[11]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 was held in 1984 while the 1982 standards were still in effect.

at Mr. Peede's penalty phase.[12] (PC-R2. 391-2, 394, 406).

Had trial counsel sought the records concerning Mr. Peede's prior conviction, counsel would have discovered the statements of John Logan Bell, Jr., Eleanor Bell, and Richard Bateman. These statements establish that Mr. Peede was suffering from severe mental illness at the time of the shooting in California and after he was released.

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 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

[12]While trial counsel did speak to Mr. Peede about his conviction, he did nothing to pursue any of the information provided by Mr. Peede (S-Exs. 9-10).

adolescence and adulthood.[13]

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 names of critical mitigation witnesses from the records. Had trial counsel contacted Nancy Wagner, 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

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[13]The State argues that Mr. Bell would not have been a witness trial counsel would have wanted to call at Mr. Peede's penalty phase because Mr. Peede reacted violently to Mr. Bell's presence at the postconviction evidentiary hearing (Answer Brief at 62). However, as the Supreme Court has stated, trial counsel is obligated to conduct an adequate investigation and if no adequate investigation in conducted, then trial counsel's performance is owed no deference. Strickland v. Washington, 466 U.S. 668, 690-1 (1984); Wiggins, 539 U.S. 510, 521-2 (2003). Furthermore, the State assumes that Mr. Peede would have made such an outburst at the time of trial. But, because Mr. Peede was absent for most of the proceedings in his case, at trial, such an assumption cannot be made. Finally, Mr. Peede's reaction to Mr. Bell demonstrates: 1) how severe and longstanding his mental illness is; and 2) that his mental illness seriously affected his courtroom behavior and would have supported his claim that he was not competent to be tried. Thus, Mr. Peede's reaction does not, as the State contends, "outweigh the value of any non-statutory mitigation presented by Mr. Bell", but provides even more evidence of Mr. Peede's severe

had a bath. He just didn't look like Robert at all." (PC-R2. 25-6). 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

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mental illness and delusions.

have had information about his mental state. Indeed, she did. Ms. Wagoner's assessment of Mr. Peede is extremely important because it coincides with the California DOC finding that Mr. Peede was schizophrenic at the time of his incarceration (PC-R2. 1221-8). This information would have been extremely helpful in supporting mitigation and in rebutting the strength of the prior violent felony aggravator.

The State's assertion that the lay witness testimony was not "truly compelling" is simply false. Mr. Peede presented the lower court with information that essentially showed the truth of Mr. Peede's life. A truth that was compelling. While Mr. Peede's family appeared to be stable and well-to-do, the reality was that the family suffered from severe dysfunction that was born out by testimony from the lay witnesses at Mr. Peede's evidentiary hearing. Mr. Peede suffered a difficult and lonely childhood. Mr. Peede's difficulties in his relationships with women were based on his growing up surrounded by his parents' infidelity to one-another and sexual improprieties (PC-R2 620-621). Robert's aunt Nancy, described the frequent beatings that Robert suffered at the hands of his mother, beatings that depended more on his mother's mood than Robert's behavior (PC-R2 239-241). Mr. Peede was alienated from other people from the

time that he was a young child due to his physical disabilities including a rare skin condition and scoliosis (PC-R2 243, 235-236, 290-291). Mr. Peede exhibited symptoms of mental illness from the time that he was a young child causing his mother to bring him to a psychiatrist (PC-R2. 627). Mr. Peede was devastated when his first wife left him and took their young child (PC-R2. 245). Mr. Peede's conflict with women and his mental illness led to his delusions that his second wife was unfaithful (PC-R2. 273-278). Mr. Peede then suffered overwhelming guilt when his mother committed suicide by shooting herself in the head (PC-R2. 249). This event preceded a dark time for Mr. Peede during which his already questionable mental health severely deteriorated (PC-R2. 252). The testimony from the lay witnesses at Mr. Peede's evidentiary hearing present a portrait of a desperate man who was never able to overcome his severe mental illness, the seeds of which was sown in his youth. See also Initial Brief at 12-31.

Likewise, the State's attempt to minimize Mr. Peede's dysfunctional and abusive childhood by arguing that Mr. Peede's age at the time of the crime was "far removed from that period of his life" ignores the caselaw which establishes that for a fact to be mitigating it does not have to be relevant to the

crime – any of "the diverse frailties of humankind," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), which might counsel in favor of a sentence less than death, Lockett v. Ohio, 438 U.S. 586 (1978), are mitigating. Williams, 120 S.Ct at 1495.

B. Trial Counsel's Failure to Provide Collateral Information to Dr. Kirkland Was Not Reasonable Because the Collateral Information was Critical in Developing Mr. Peede's Social History and to Explain His Mental Health Disorders to the Jury and the Trial Court.

> The State conceded that trial counsel failed to provide Dr. Kirkland with any collateral background information about Mr. Peede (State's Answer at 66). However, the State asserts that Dr. Kirkland's evaluation was reasonable even without the collateral information presented at the evidentiary hearing (Answer Brief at 66). The State's argument is flawed in several respects: First, Dr. Kirkland's testimony at Mr. Peede's capital penalty phase was sparse, at best. Dr. Kirkland's testimony about Mr. Peede's mental illness consisted only of the following:
>
> 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)(emphasis added). Dr. Kirkland provided no specific diagnosis of Mr. Peede's condition or explained that it was not simply a "character structure", but a serious mental illness. Dr. Kirkland never explained what he meant by "strong paranoid

elements” or how that symptom effected Mr. Peede or mitigated, in any way, why Mr. Peede killed his wife. Dr. Kirkland never explained how Mr. Peede’s mental illness effected his life. And, while Dr. Kirkland did opine that Mr. Peede committed the crime while under the influence of extreme mental and emotional disturbance (R. 950), he failed to explain the statutory mitigator to the jury.

The very purpose of mitigation “should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p. 93 (1989). Dr. Kirkland’s evaluation and testimony fell far short of this standard. It did not matter that Dr. Kirkland was extremely qualified or credible within the community, (Answer Brief at 66), because his testimony failed to explain how Mr. Peede’s behavior was mitigated due to his mental impairment.

Dr. Kirkland failed to illustrate how the early traumas in Mr. Peede’s life were the foundation upon which his delusional disorder and paranoid personality disorder were created and that Mr. Peede’s early experiences greatly contributed to his

psychotic break during the murder of his wife.[14] While his psychological reports went into a little more detail, **those reports were never shown to the jury.**

Dr. Kirkland's testimony and reports reflect that he had almost no knowledge about Mr. Peede's background.[15] While Dr. Kirkland identified that Mr. Peede's was afflicted with a serious mental illness he did not possess the background information to explain to the jury how Mr. Peede's mental illness affected him on a day to day level or contributed to the killing of Darla Peede. Trial counsel even failed to provide the letters written by Mr. Peede's family to Dr. Kirkland (R. 954-6).

At the evidentiary hearing, Drs. Sultan, Fisher and Frank explained the mental illness with which Mr. Peede suffered and how that psychosis developed. The doctors also described how Mr. Peede's mental illness and psychosis he experienced shortly

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[14]The testimony of Drs. Frank, Sultan, and Fisher are consistent in regard to the mental disorders that Mr. Peede suffered from at the time of the offense (PC-R2. 639-659, 967, 784-795).

[15]The State suggests that Mr. Peede could have provided background information to Dr. Kirkland (Answer Brief at 66). In the one hour and forty minutes Dr. Kirkland spent with Mr. Peede, Mr. Peede did in fact provide him with information about himself.

before killing Darla were present during the offense. And, while Dr. Kirkland's brief testimony may have been "favorable" to Mr. Peede as the State suggests, (Answer Brief at 67), the testimony from the doctors who testified at the evidentiary hearing was quantitatively and qualitatively different from the testimony of Dr. Kirkland. The difference was largely based on the complete mental health evaluations, testing and review of the voluminous background materials and collateral information concerning Mr. Peede.[16]

Secondly, any credibility Dr. Kirkland had regarding his

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[16]The State argues that the reference to Mr. Peede being diagnosed as a schizophrenic while incarcerated following the shooting in California was an "incorrect" diagnosis and "cannot form the basis for finding Dr. Kirkland's examination in the instant case was inadequate" (Answer Brief at 67). However, while the diagnosis may not have been correct, the diagnosis certainly provides critical information about Mr. Peede's past mental state. The most obvious information to be drawn from the diagnosis is that Mr. Peede was experiencing psychosis while in California. Thus, Mr. Peede had previously suffered from psychosis. Any mental health expert would and should want to know of any previous episodes of psychosis when diagnosing a patient and in Mr. Peede's case when explaining a client's mental state to a jury. Also, this psychosis was close in proximity to the time when the shooting occurred which resulted in his prior violent felony conviction which would have been relevant to explaining Mr. Peede's prior felony conviction and also suggested that he was in fact experiencing psychosis at the time when he killed Darla. The fact that Mr. Peede had been previously diagnosed with schizophrenia was critical in properly diagnosing Mr. Peede and explaining his mental health to the jury. Indeed, without this information Dr. Kirkland's

"diagnosis" or any "favorable" testimony was completely undone by the State's cross-examination. The State impeached and minimized Dr. Kirkland's testimony because his opinion was based solely on Mr. Peede's self-report and no medical or other background information (R. 954-6).

Because Dr. Kirkland could only rely on the information provided by Mr. Peede, he had no way of knowing whether that information was truthful, complete, or accurate. Also, Mr. Peede was suffering from the delusional disorder and paranoid personality disorder at the time of Dr. Kirkland's evaluation. Because of his psychosis, Mr. Peede was not a reliable source of information regarding his own mental and physical health and his background.

Trial counsel had an obligation to investigate and collect records and information from those who knew Mr. Peede and would have corroborated the information he provided to trial counsel and Dr. Kirkland. Such information was vital to any mental health evaluation because it would have provided a basis for a valid, credible diagnosis and explanation of Mr. Peede's mental health for Mr. Peede's jury and sentencing judge.

The State argues that a prior diagnosis of schizophrenia is

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evaluation was inadequate.

unimportant in showing that Dr. Kirkland's diagnosis is problematic (Answer Brief at 66-7). The fact that Mr. Peede was previously diagnosed with schizophrenia does not only show that diagnosis but establishes an extensive history of psychosis and mental deterioration. Also, it shows his impairment during the California conviction, which was used in aggravation. These mental health records are vital to understanding a client and the source of their impairment not only at the time of the offense but also during pretrial and trial proceedings.

Furthermore, the reference to Schizophrenia was contained in the very type of records that a mental health expert relies upon in conducting an adequate evaluation (PC-R2. 230-2).

C. Prejudice.

The State claims that Mr. Peede cannot establish prejudice (Answer Brief at 69). However, the State ignores the fact that this Court struck the cold, calculated and premeditated aggravator, leaving only a prior violent felony and committed in the course of a kidnapping. The State also ignores the evidence that trial counsel failed to obtain at the time of Mr. Peede's capital trial regarding the prior violent felony with which Mr. Peede was convicted in California. The records show that Mr. Peede's mental state was deteriorating and he was experiencing psychosis during this time frame.[17] The information that Mr. Peede was suffering from delusions, paranoia and experiencing active psychosis in California would have greatly reduced any weight that the jury or trial court may have assigned to the aggravator.

And, while the State presented the testimony of Dr. Sidney Merin in rebuttal to the other experts, even Dr. Merin testified that Mr. Peede suffered from serious mental health problems which affected Mr. Peede's behavior (PC-R2. 891-893).

Had trial counsel discovered and presented the substantial,

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[17]Nancy Wagoner's description of Mr. Peede while he was in California supports the conclusion that he was delusional and experiencing psychosis shortly after the shooting in California. See PC-R2. 252.

compelling mitigation about Mr. Peede's life, including the statutory mitigation, the evidence would have undoubtedly caused the jury to recommend life.

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 CONSTITUTION.

Like the lower court, the State argues that Dr. Kirkland's evaluation was appropriate and met the requirements of due process (Answer Brief at 75-6).

At the time of Mr. Peede's capital trial, it was standard practice for a mental health expert to review background materials, particularly other mental health records. It was not, nor has it ever been the standard practice to rely solely on self report in forming opinions about a capital defendant's mental health. Unfortunately, Dr. Kirkland in fact relied solely on Mr. Peede's self report in forming his opinions. Thus, Dr. Kirkland was unable to comprehensively articulate the severe mental illnesses that afflicted Mr. Peede or the affects those illnesses had on his functioning or at the time of the killing.

In fact, Dr. Kirkland failed to make any definitive medical

diagnosis. Because he did not have collateral information, his testimony regarding what he considered to be Mr. Peede's mental illness was substantially undermined.

While at the penalty phase, 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 delusional disorder and paranoid personality disorder impaired Mr. Peede's thinking at the time of the offense.[18] Contrary to the lower court's order, the only specific finding that Dr. Kirkland made was that Mr. Peede was paranoid (R. 952). Dr. Kirkland provided no insight to distinguish between a lay person's understanding of paranoia, and the actual psychological import of that diagnosis or symptom. Additionally, there was no testimony connecting the medical definition of paranoia to Mr. Peede's psychosis.

And, while the lower 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 (R. 953-5). While Dr.

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

Kirkland may have been highly respected in the community and his opinion valued, his testimony was severely undermined by the lack of any review of Mr. Peede's background or mental health.

Mr. Peede's case is not a case where he is complaining that the mental health evaluation conducted at trial was inadequate "simply because [he found] experts to testify favorably in his behalf." (Answer Brief at 76). In Mr. Peede's case, Dr. Kirkland's evaluation was inadequate for numerous reasons: Dr. Kirkland only spent an hour and forty minutes speaking to Mr. Peede; Dr. Kirkland conducted no psychological testing; Dr. Kirkland did not review any background or collateral information, including prior mental health reports; Dr. Kirkland relied entirely on self report; and Dr. Kirkland failed to support and explain his opinions to Mr. Peede's jury. The failure to conduct an adequate mental health evaluation and provide relevant, comprehensive testimony, deprived Mr. Peede of his due process rights to adequate mental health assistance.

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

As to the suppression of the diary, the State relies

entirely on the trial prosecutor's recollection that trial counsel "was aware of the diary" and had looked at it (Answer Brief at 81). According to the prosecutor, trial counsel simply did not want a copy of the diary (Id.). However, the prosecutor's testimony conflicted with trial counsel's recollection of his knowledge of the diary and the State's discovery responses (D-Ex. 1-5).

Contrary to the State's assertion, both of the defense attorneys testified that they had not seen the diary before the time of Mr. Peede's trial (PC-R2. 388, 455, 456). They testified that they would have wanted to see it, at a minimum for investigative purposes, and it fit in with the defense. Trial counsel Bronson did not testify that he had seen the diary or was aware of it, he testified that he may have had knowledge of information similar to that contained in the diary (PC-R2. 455). However, having "knowledge" is not the same as having access and being provided the diary by the State. The State suppressed the diary.

Likewise, as to the suppression of the records from Mr. Peede's prior conviction in California, the State relies on the testimony that the file was available to defense counsel, and discovery procedures were more flexible at the time of Mr.

Peede's prosecution (Answer Brief at 85). However, neither trial counsel had any recollection of the individuals listed in the reports or recalled seeing the reports before (PC-R2. 162, 457). And, the trial prosecutor admitted that the reports were contained in the State's file, and she had no particular memory of turning over any of them to the defense (PC-R2. 350-351). Indeed, the State's responses to discovery indicate that the statements were not disclosed (D-Ex. 1-5).

Because the reports concerned the prior violent felony that the State intended to present as an aggravating circumstance, the State was under an obligation to disclose the reports to defense counsel.

Furthermore, contrary to the State's contention, it matters little in terms of the suppression whether or not trial counsel possessed information similar to the information contained in the diary and records from Mr. Peede's California conviction. In failing to disclose the documents, the State withheld information from Mr. Peede – information that could have been used to make critical decisions about his defense, including whether or not to impeach witnesses, or call witnesses about the information contained in the documents. The body of Brady caselaw identifying the prosecutor's obligation to disclose

evidence makes no exceptions when the defense is "aware" of evidence related to, or even identical to evidence that is suppressed. See Cardona v. State, 826 So. 2d 968, 974 (2002)("[T]he fact that a witness is impeached on other matters does not necessarily render the additional impeachment cumulative."); Banks v. Dretke, 124 S.Ct. 1256, 1278 (2004); Kyles v. Whitley, 514 U.S. 419 (1995). Without the actual documents, Mr. Peede's defense was hampered and deprived of making fully informed decisions at both the guilt and penalty phases of Mr. Peede's capital trial.

The State also argues that Mr. Peede has not shown any prejudice from the suppressed documents (Answer Brief at 81-2, 85). However, the State's argument ignores the vital information contained in both the diary and the police reports that would have provided defense counsel with compelling evidence in defending Mr. Peede.

Evidence is material under Brady when it could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Strickler v. Greene, 527 U.S. 263, 290 (1999). Furthermore, for evidence to be considered material, it does not have to "reflec[t] upon the culpability of the defendant. Exculpatory evidence includes

evidence of an impeachment nature that is material to the case against the accused." Napue v. Illinois, 360 U.S. 264, 269 (1959). Impeachment evidence is evidence that can be used to challenge the credibility of a prosecution witness *or* that can be used to challenge the prosecution's case. United States v. Bagley, 473 U.S. 667, 676 (1985)(Brady's disclosure requirements apply to any materials that, whatever their other characteristics, can be used to develop impeachment of a prosecution witness).

Withheld evidence is material whenever it would have affected the course of the defense investigation or the strategy defense counsel would have employed at trial. Bagley 473 U.S. at 683; United States v. Perdomo, 929 F.2d 967, 972 (3d cir. 1991) "the Bagley inquiry requires consideration of the totality of the circumstances, *including possible effects of non-disclosure on the defense's trial preparation*."; United States v. Spagnoulo, 960 F.2d 990, 994 (11th Cir. 1992)(Brady violation found when withheld evidence "could have" affected defense strategy).

In determining the merits of Mr. Peede's claim under Brady, "[t]he question is not whether the [Petitioner] 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 (1995). The Court should not evaluate the evidence item-by-item, but in terms of its cumulative effect on the fairness of the trial. Id. at 436.

Significantly, Mr. Peede does *not* need to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles, 514 U.S. at 435. Relief must be granted if there is "any reasonable likelihood" that the non-disclosure could have "affected the judgment of the jury." Napue v. Illinois, 360 U.S. 264, 271 (1959); Giglio v. United States, 405 U.S. 150, 154 (1972). Thus, Mr. Peede does not have to present evidence that would exonerate him. He need only show that the evidence at issue would have "affected the judgment of the jury."

In this case, Brady materiality is satisfied in multiple respects because there is a reasonable likelihood that had trial counsel been provided the evidence of the diary and California records, the evidence would have affected the jury's findings at the guilt phase and of aggravating and mitigating circumstances at penalty phase.

The diary was important to refute the kidnapping prong of the felony murder charge. Because the State put forth testimony from Ms. Peede's daughters that she was afraid to see Mr. Peede. The statements in her diary refute that allegation. Trial counsel could have impeached the daughter's testimony with the diary had they had it.

Additionally, it provided evidentiary support for Mr. Peede's mental impairments prior to the murder. Darla Peede 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 (D-Ex. 7). 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. The fact that the diary may or may not be admissible in court is irrelevant as to whether it provided exculpatory evidence that the defense was entitled to. At a minimum, the diary was critical to provide to the mental health expert.

Additionally, the file concerning the California conviction

was critical to Mr. Peede's defense because they corroborated the defense theory of the case at the guilt phase that Mr. Peede had suffered from a psychotic break at the time he killed Darla. And, the file undoubtedly provided compelling mitigation about Mr. Peede. The reports establish 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 (D-Ex. 15-17). These reports gave insight into his physical illnesses, childhood, and the impact of his mother's death on his mental health. The State's suppression of these documents violated Mr. Peede's right to due process. Relief is required.

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.

The State argues that Mr. Peede is prohibited from raising his claim of ineffective assistance of counsel because it was pleaded and presented based on alternative theories, i.e., the evidence established a Brady claim or an ineffective assistance of counsel claim (Answer Brief at 86). The State's argument ignores the propriety of pleading claims in the alternative. See

State v. Gunsby, 670 So. 2d 920 (Fla. 1996);

Based upon the foregoing argument, reasoning, citation to legal authority, initial brief and the record, appellant, ROBERT IRA PEEDE, urges this Court to reverse the lower court's order and grant him Rule 3.850 relief 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 Reply Brief has been furnished by U.S. Mail, postage prepaid, to Scott A. Brown, Office Of The Attorney General, 3507

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[19]Indeed, the State's position ignores the realities of pleading claims for relief and then presenting evidence to support those claims. For example, in Mr. Peede's case, postconviction counsel certainly believed that the State suppressed Darla Peede's diary. There was no indication in the record or from either trial counsel that the diary had been disclosed. However, at the evidentiary hearing, the trial prosecutor suddenly recalled that she had discussed the diary with trial counsel and may have even shown him it. While Mr. Peede asserts that due to the conflicts between the trial prosecutor and defense counsel's recollections and the discovery responses, the trial prosecutor's testimony lacks credibility. And that even if the trial prosecutor's recollection were correct, the diary was still not disclosed as it should have been. However, should this Court credit the trial prosecutor's testimony or determine that the diary was properly disclosed, then it is clear that trial counsel simply failed to use the diary at trial for no strategic reason and was thus, ineffective. Because of the sequence of pleading a claim and then presenting evidence, contrary to the State's position, it is completely proper to plead a claim in the alternative, as Mr. Peede did in the lower court.

East Frontage Road, Suite 200, Tampa, FL 33607, this 15th day of March, 2006.

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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