IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-201

Faunce Pearce

Appellee,

v.

STATE OF FLORIDA

Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT FOR PASCO COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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Request for Oral Argument

The resolution of the issues in this action will determine whether Mr. Pearce lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Pearce accordingly requests that this Court permit oral argument.

(A) Procedural History

On September 17, 1999, an indictment was filed in the Circuit Court of the Sixth Judicial Circuit charging Mr. Pearce and his co-defendant, Lawrence Joey Smith, with murder in the first degree and attempted murder in the first degree. Trial was held on July 16, 2001. On July 19, 2001, Mr. Pearce was found guilty as charged in Count I, and guilty of the lesser included crime of attempted murder in the second degree, Count II, with a firearm. On July 20, 2001, the jury returned a recommendation for death by a vote of 10 to 2. On February 14, 2002, the trial court entered its sentencing order and sentenced Mr. Pearce to death for Count I. A timely notice of appeal was filed. The Mandate affirming the judgment and sentence was returned on July 22, 2004. Capital Collateral Regional Counsel - Middle was appointed that same day to represent Mr. Pearce in any and all post

conviction actions. The Appellee filed a Motion for Post-Conviction Relief on September 1, 2005. A post conviction hearing was held over several days before the Honorable Judge Lynn Tepper between July and December of 2006. On December 1, 2006 Judge Tepper found that trial counsel provided ineffective assistance in both the guilt and penalty phases and reversed Mr. Pearce=s convictions. The State filed a timely notice of appeal, and a subsequent initial brief which was filed on September 5, 2007. This answer brief follows.

(B) Standard of Review.

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference to the factual findings by the lower court. This Court further summarizes the appropriate standard of review in State v. Riechmann, 777 So.2d 342, 350 (Fla. 2000):

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

This Court has stated that A[we] recognize and honor the trial court=s superior vantage point in assessing the credibility of witnesses and in making findings of

fact.@ Porter v. State, 788 So.2d 917, 923 (Fla. 2001). Consequently, this Court will not Asubstitute its judgement for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court.@ Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984) (citing Goldfarb v. Robertson, 82 So.2d 504, 506 (Fla. 1955).

Generally the Court=s standard of review following a denial of a postconviction claim where the trial court has conducted an evidentiary hearing affords deference to the trial court=s findings. See Mclin v. State, 827 So.2d 948, 954 n.4 (Fla. 2002). AAs long as the trial court=s findings are supported by competent substantial evidence, >this Court will not substitute its judgement for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.@= See Barnhill v. State, 2007 WL 3101754 (Fla. October 25, 2007) (citing, Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997) (quoting Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984).

EVIDENTIARY HEARING FACTS

A. TESTIMONY OF A.J. IVIE.

A.J. Ivie represented Faunce Pearce at his trial. (PCR Vol. I p. 24). Ivie was

not the original trial attorney on the case. (PCR Vol. I p. 24). When Ivie assumed representation of Mr. Pearce, he knew from police reports and depositions previously done or just by the general fact of the case, that Faunce Pearce did not shoot either of the victims. Furthermore, Ivie testified that his objective would be to minimize Pearce=s total involvement in the crime. (PCR Vol. I p. 28-29). In his opening statement, (FSC ROA Vol. VII p. 400-402). He summed up Pearce=s involvement:

> Faunce Pearce, his reaction from the witnesses was that he was in shock, as they were, when Joey Smith killed those boys. He did not plan it. He did not order Lawrence BA @ B Joey Lawrence Smith to shoot these boys, and he should be found not guilty.

Ivie did not depose Steven Tuttle, rather Mr. Phil Cohen and Mr. Sam Williams took the deposition before Ivie began representation of Mr. Pearce. Ivie did not recall if he had read the deposition of Tuttle before Mr. Pearce=s trial. (PCR Vol. I p. 33). Ivie acknowledged that the record on appeal is absent of any Motion in Limine with his name on it. (PCR Vol. I p. 33). In his deposition of August 17, 2005, regarding the sexual battery of Tuttle, Ivie testified that he remembered some discussion about the sexual battery but did not have any independent recollection of the sexual battery being brought up at trial. (PCR Vol. I p. 34-5). The opening statement of the State (FSC ROA Vol. VII p. 379-80) was read to Ivie

at the evidentiary hearing:

> Faunce Pearce, enraged as he is, calls for Teddy Butterfield and Lawrence Joey Smith and Keith Brittingham. But you=re also going to hear that prior to calling for them, he can=t control his anger. He puts that .40 caliber pistol up to Steve Tuttle=s head and takes him outside and tells him quote, AGet down on your knees.@ Steve Tuttle is telling him, APlease don=t do this to me. Please don=t .@ And you=re going to hear from the testimony of Steven Tuttle that he takes the .40 caliber pistol, puts it up to his temple as he=s down on his knees and tells him, AYou=re either going to suck my fucking dick or I=m going to blow your fucking head off.@ And you=re going to hear that as Steven Tuttle was down on his knees terrified for his life, he knew there was nothing he could do with this .40 caliber pistol to the side of his head, and he did exactly what Faunce Pearce asked him to do in fear of losing his life.@(PCR Vol.I p. 35-36). Ivie did not dispute the accuracy of the trial record.

At the evidentiary hearing the following questions were asked and answered regarding the direct examination of Steven Tuttle. (FSC ROA Vol. VIII p. 561)

> Q. And, sir, in FSC ROA Volume VIII, page 561, do you recall the direct examination of Steven Tuttle by a Mr. Garcia, Lines 1 through 16:
> Question by Mr. Garcia: And did he take you out at gunpoint?
> Answer: Yes, sir.
> Question: Did he put a gun to your head?
> Answer: Yes, sir.
> Question: Tell the members of the jury what he told you to do, and I want you to use his exact words.

> Answer: He told me to get down on my knees and he made me lay face down on the ground. And then he made me get back on my knees. With a gun to my head, he told me I got to suck his fucking dick if I wanted to live.
> Question: And you did.
> Answer: Yes, sir.
> Question: You had no choice in this matter.
> Answer: No, sir.@
> Would you dispute the accuracy of the
> A. No.
> Q. Sir B again, sir, if the trial record reflects that no objection was made, no Motion for Mistrial was make, no sidebar was B conference was requested before these questions were asked and answered in front of the jury, would you have any reason to dispute the accuracy of the trial record?
> A. No. (PCR Vol. I p.37-38)

Ivie was then shown the indictment and supporting affidavit and the documents were then entered into evidence. (PCR Vol. I p. 38-40). The State then stipulated that neither of the exhibits reveal that an offense of sexual battery was charged or referenced within the affidavit. (PCR Vol. I p. 40).

The guilt phase charge conference (FSC ROA Vol. X p. 865-885) made no mention of the uncharged crime of sexual battery. The formal instructions given to the guilt phase jury, (FSC ROA Vol. XI p. 968-1002) made no mention of the uncharged crime of sexual battery.

At the evidentiary hearing, Ivie testified that if the State had not mentioned

the uncharged crime of sexual battery, the pistol, the victim, the fellatio, he would not have mentioned the uncharged sexual battery because it would not have helped his client. (PCR Vol. I p. 42-43)

Regarding the penalty phase of the trial, Ivie filed a Motion for Appointment of Additional Attorney. (PCR Vol. I p.43). After his Motion was granted, Ivie assigned the additional attorney (Mr. Mark Ware) guilt phase witnesses to prepare for cross-examination. (PCR Vol. I p.44).

Ivie admitted that he was aware that Mark Ware had never tried a capital case before and Ivie was trying to help Ware get some experience so he could be certified to try capital cases on his own. (PCR Vol. I p. 45). Ivie testified that he employed a private investigator to aid him in the guilt phase of the trial. (PCR Vol. I p. 48-9). Ivie was unaware that Mr. Daniel Pearce was contacted by Mr. Van Allen rather than someone from the defense. (PCR Vol. I p. 50).

Ivie did not order probation files, school histories, talk to relatives, or have Mr. Pearce examined by a qualified mental health professional. (PCR Vol. I p. 53).

Ivie testified that had he been aware that Mr. Pearce suffered from a bipolar disorder or mood swings, and so did his siblings, and from the testimony of the trial that he was suffering from mood swings at the time of the crime, he would

have advised Mr. Pearce that his mental condition would have been used as mitigation. (PCR Vol. I p. 55). Furthermore, Ivie testified that had he been aware that Mr. Pearce had suffered a head injury and by employing a mental-health professional he could establish that Pearce had brain damage and that factor in his background would mitigate against the imposition of the death penalty, he would have advised Mr. Pearce of that fact and that he would use that fact to try and save Mr. Pearce=s life. (PCR Vol. I p. 56). Ivie also testified that had he been aware that Ms. Kathryn Burford was available to testify that Faunce Pearce was a loving husband and father and that factor in his background would mitigate against the imposition of the death penalty he would have advised Mr. Pearce that Ivie could use that in order to try and save Pearce=s life. (PCR Vol. I p. 56-7). Ivie personally considered the fact that Faunce Pearce did not shoot anybody as an important mitigating factor. (PCR Vol. I p.57).

Ivie also testified that his files were submitted to CCRC-M, copied, and then returned to him; and those files were devoid of any hospital records, probation file records from previous offenses, mental health evaluations, and reports from the Department of Children and Families, he simply did not compile them in his case files. (PCR Vol. I p. 66-67). Ivie conceded that a strategic decision cannot be based on ignorance; he would have to investigate all possibilities. (PCR Vol. I

p.68,70).

Ivie also testified that the crime of sexual battery may be particularly repugnant to the jurors and that he would not have brought it up if the State did not. (PCR Vol. I p. 70-1).

B. TESTIMONY OF DR. RICHARD CARPENTER

Doctor Richard Carpenter was called by the defendant and testified at the evidentiary hearing after first being qualified as an expert. (PCR Vol. I p. 80). Among other material, Dr. Carpenter was provided the direct appeal opinion and the factual finding by the Florida Supreme Court that Mr. Pearce was agitated at one point, then calm, then agitated again. (PCR Vol. I p. 81). Dr Carpenter also was provided with trial transcripts, pre-trial depositions and taped police interrogations of some of the witnesses. All of these documents alerted Dr. Carpenter to the possibility that Mr. Pearce may have been suffering from some defect or disease of the mind. (PCR Vol. I p. 81-82). Dr. Carpenter also was provided some of Mr. Pearce=s letters which indicated he had a grandiose cognitive style. (PCR Vol. I p. 82-83). Dr. Carpenter also reviewed an old probation report from the early nineties which ordered Mr. Pearce to receive drug counseling. He further reviewed DCF reports with numerous recommendations from various social workers that Mr. Pearce needed a psychological evaluation.

(PCR Vol. I P. 84).

At his first meeting with Mr. Pearce, Dr. Carpenter focused in on Mr. Pearce=s drug use. Dr. Carpenter also was trying to get a feel for whether or not Pearce had any sort of precursor to bipolar disorder, and was asking Mr. Pearce about ADHD (Attention Deficit Hyperactivity Disorder) (PCR Vol. I p. 85).

Dr. Carpenter opined at the interview, that Mr. Pearce was not malingering. (PCR Vol. I p. 86).

Dr. Carpenter also interviewed Mr. Pearce=s mother and Kathryn Burford. He did this because he was interested in Mr. Pearce=s children to see if they had any mood disorders. Dr. Carpenter testified that the current thinking is that bipolar disorder is inheritable and therefore, genetic factors play a role. Carpenter also found out that Daniel Pearce, brother of Faunce Pearce, was also bipolar. (PCR Vol. I p. 89). Dr. Carpenter also investigated Mr. Pearce=s drug use and found it to be extensive with Pearce starting using LSD in his mid-teens. (PCR Vol. I p. 90).

Dr. Carpenter opined that LSD is a powerful mind-altering drug and is used to mimic psychosis; a complete break with reality. (PCR Vol. I p.90-91).

Dr. Carpenter=s diagnosis was bipolar disorder, Roman numeral 2, mixed type, predominantly manic type, as well as a rule out or consider cognitive

disorder, secondary to head injury, and polysubstance abuse. (PCR Vol. I p. 92).

By talking to Daniel Pearce, Dr. Carpenter discovered that Faunce Pearce was the victim of child abuse as he was beaten preemptively by his parents. (PCR Vol. I p. 97-98). Daniel Pearce also told Dr. Carpenter about three head injuries that Faunce Pearce suffered and due to that information, Dr. Carpenter recommended that a neuropsychologist be consulted. (PCR Vol. I p. 98-99).

Dr. Carpenter corroborated what Mr. Pearce said with interviews from Mr. Pearce=s family in order to eliminate the danger of self reporting. (PCR Vol. I p.103-104).

Dr. Carpenter opined that at the time of the offense, Faunce Pearce was operating under extreme emotional or psychological distress. (PCR Vol. I p. 105).

Dr. Carpenter testified that although bipolar disorder is an extreme mental disorder, Pearce=s LSD use, and his head injury would make an already serious mental condition worse. (PCR Vol. I p. 106-107).

Dr. Carpenter also found the existence of other factors in Mr. Pearce=s background that would mitigate against imposition of the death penalty; that being the fact that Mr. Pearce was raised in an almost fanatical religious home where he was severely beaten for things that he hadn=t even done. (PCR Vol. I p. 109).

Dr. Carpenter testified on cross-examination, that he was called by the

State so many times in dependency cases, he began to be identified as Athe State=s witness@. (PCR Vol. I p. 125) and that he had been called by the court to evaluate people for competency, and insanity Anumerous times@. (PCR Vol. I p. 127).

Dr. Carpenter testified that it is extremely rare for a mother of an abused child to admit that child abuse existed in her home. (PCR Vol. I p. 129).

C. TESTIMONY OF DOCTOR HENRY DEE

Dr. Henry Dee is an expert in the field of forensic psychology and neuropsychology and was so deemed by the post conviction court. (PCR Vol. II p.154). Dr. Dee had evaluated Mr. Pearce on July 22 , 2005. (PCR Vol. II p. 155). Before meeting Mr. Pearce, Dr. Dee had reviewed reports from DCF, probation reports and excerpts from trial testimony. (PCR Vol. II p. 155). Dr. Dee was also provided with a profile sheet of the MMPI-II, which was administered by Dr. Robert Berland; said profile sheet indicated a very serious emotional disturbance, either a bipolar disorder or a major depression and everything Pearce told Dee was consistent with that. (PCR Vol. II p. 156-57). Dr. Dee also talked to Patricia Pearce (mother) and Dan Pearce (brother). (PCR Vol. II p. 157). He did this in order to obtain a birth and developmental history of Mr. Pearce. (PCR Vol. II p. 157). Around the sixth grade, it was determined that Faunce

Pearce had the learning disability of dyslexia. (PCR Vol. II p. 159). Faunce Pearce was also diagnosed with attention deficit disorder. (PCR Vol. II p. 160). Because of his dyslexia, and ADD, Faunce Pearce dropped out of school at the end of eighth grade and eventually learned to read and acquired a GED later in his life. (PCR Vol. II p. 161). Faunce=s natural father was an abusive man named Eddie Shiver who abandoned the family before Faunce was born. (PCR Vol. II p. 163).

Ms. Pearce and Daniel Pearce recalled that Faunce had two motor vehicle accidents. (PCR Vol. II P. 165). Ms. Pearce noticed that Faunce had a change in behavior as he threw temper tantrums which upset everyone in the family. (PCR Vol. II p. 166-67).

Dr. Dee testified that if he found out that some of the children that Faunce Pearce=s fathered had some kind of attention deficit disorder, possibly bipolar disorder, that alone might alert a trained mental health professional that Mr. Pearce

might have a disease or defect of the mind. (PCR Vol. II p. 172-73). Dr. Dee also testified that the other factors in Pearce=s life; the running away from home, the temper tantrums, and the children that are diagnosed with mental problems at an early age, would be easily discernible to any trained clinician who would find that

there was something wrong with Mr. Pearce, mentally and emotionally. (PCR Vol. II p. 173).

Dr. Dee also considered that Faunce=s running away from home without any clear reason for doing so would have alerted Dee that there could be two causes for this behavior, bipolar disorder with a manic episode or it is often seen in children with frontal brain injuries. (PCR Vol. II p. 174-75). Dr. Dee also opined that it is common for people with mood disturbance to medicate themselves either through the use of alcohol or through the use of illegal drugs. (PCR Vol. II p. 178).

Dr. Dee opined that the siblings of Faunce Pearce would be more adequate reporters of the parents= conduct and treatment of their children than the parents themselves. (PCR Vol. II p. 180). Dee testified that Daniel Pearce reported to him that after Faunce=s second accident, Faunce=s sleep disturbance became even worse and he became quite irritable and quick to anger; his behavior seemed poorly controlled and his memory grew sharply worse. (PCR Vol. II p. 183). Dr. Dee also opined that the two most common sequela of any cerebral injury, no matter what location, are impaired memory and increased impulsivity and irritability. This is usually permanent. (PCR Vol. II p. 183-184). Dr. Dee testified that from talking to the family members and reviewing the documents that

he was provided by CCRC-M, the reports and the trial testimony he was able to detect signs of an organic effect or disorder that is the result of some sort of brain difficulty. (PCR Vol. II p. 187).

In reviewing the facts of the crime itself, Dr. Dee found it mitigating that although Faunce Pearce was displaying changes in mood on the night of the crime, volatile, passive, volatile and then passive, he never actually shot either of the victims; his mood swings were very strong and consistent with what we knew about him, but no actual acting out towards anyone, the same pattern he showed in adolescence. (PCR Vol. II p. 188).

During the interview at UCI, Faunce Pearce told Dr. Dee that he had been beaten preemptively. (PCR Vol. II p. 189). Furthermore, Pearce had never been treated by a psychologist or a psychiatrist. (PCR Vol. II p. 190).

Dr. Dee gave Mr. Pearce several tests during his evaluation of Mr. Pearce. (PCR Vol. II p.195-96). On the Wechsler Adult Intelligence Scale his full scale IQ was 111; with a verbal IQ of 124. This is associated with brain damage. (PCR Vol. II p. 204). Dr Dee also used the Denman Neuropsychology Memory Scale. This indicated impairment in memory functioning. (PCR Vol. II p. 209).

Mr. Pearce also showed impairment on the facial recognition test which indicated that his right hemisphere is damaged. (PCR Vol. II p. 212). From the

battery of tests given him, Mr. Pearce showed clear evidence of brain damage, and more involved with the right hemisphere than the left in that brain damage. (PCR Vol. II p. 217). Dr. Dee testified that a mood disturbance, and a brain injury would exacerbate his condition through the use of LSD. (PCR Vol. II p. 219).

Dr. Dee opined that Pearce was under extreme mental or emotional disturbance at the time of the crime.(PCR Vol. II p. 221). The child abuse was non-statutory mitigation. (PCR Vol. II p. 221).

Dr. Dee also testified that individuals with mood disturbances or even psychotic disturbances typically behave much better in highly-structured situations, like on death row or a mental hospital than they do in a regular environment. (PCR Vol. II p. 268).

D. TESTIMONY OF DOCTOR ROBERT BERLAND

Dr. Robert Berland testified at the post-conviction hearing and was qualified as an expert in the field of forensic psychology. (PCR Vol. III p. 289).

Regarding his initial duties in the case, Berland testified as follows:

> Q. What were you asked to do?
> A. Well, the initial discussion particularly focused on administration of the MMPI, which is something I put a lot of stock in, to Mr. Pearce. In subsequent discussion, the request expanded to include in general an exploration of mental-health mitigation issues, to see whether there were any that were present.

> My understanding has been that my role in this particular case was not to finalize the investigation as if I were preparing for a penalty phase, but rather just to see if there were things present that could have been readily discovered and subsequently investigated at the time of trial that were not investigated. (PCR Vol. III p. 290).

Berland also testified that his usual practice was *not* to rely just on information that he obtained from the defendant; that is just a starting point, he looks for corroboration through documentation and lay-witness interviews and so forth. (PCR Vol. III p. 291). Dr. Berland opined that Mr. Pearce was under the influence of extreme mental or emotional disturbance without the benefit of his additional external follow-up. (PCR Vol. III p. 291). Dr. Berland had two sources, a psychological test (the MMPI-II) and a detailed interview with Mr. Pearce which included an inquiry on symptoms of mental illness. (PCR Vol. III p. 292).

After administering the MMPI-II to Mr. Pearce, Dr. Berland opined that Mr. Pearce was attempting to hide his mental illness rather than Afake@ mental illness. (PCR Vol. III p. 300-01). In spite of Mr. Pearce=s efforts to hide his mental illness, he was feeling so much pressure from it that it leaked out anyway. (PCR Vol. III p. 301). Dr. Berland also testified that he had no evidence that Mr. Pearce had ever been medicated for mental illness. (PCR Vol. III p. 303). Mr. Pearce=s AF@ score indicated a biologically-caused mental illness, a psychotic disturbance.

(PCR Vol. III p. 303). Dr. Berland testified that there is an indication in Pearce=s MMPI-II profile of psychotic symptoms in general, scale 8, the schizophrenia scale, which measures symptoms of psychosis in general. (PCR Vol. III p. 304-05). Dr. Berland opined that Pearce=s depression is a little higher than what he would normally get for a situational depression. (PCR Vol. III p.310). Dr. Berland noted that scale one on the MMPI was elevated. Although the MMPI doesn=t measure brain injury, there are certain profiles on the MMPI that are more typical of someone where brain injury has contributed to their mental illness. Although the test does not measure brain injury, it reflects mental illness, which at least in part has been caused by brain injury. (PCR Vol. III p. 312).

Dr. Berland=s conclusion regarding the MMPI testing given to Pearce was there was evidence of a chronic or long-standing psychotic disturbance. There was no evidence of any attempt to fake or exaggerate his symptoms. On the contrary, Mr. Pearce was trying to hide them and they made themselves evident in spite of that because of the pressure that Mr. Pearce feels from his mental illness. (PCR Vol. III p. 312-13). Dr. Berland testified that Mr. Pearce admitted to auditory hallucinations. (PCR Vol. III p. 316). Dr. Berland opined that Mr. Pearce was under extreme mental or emotional disturbance at the time of the offense. (PCR Vol. III p. 321). According to Dr. Berland, Mr. Pearce=s drug usage inflames

or intensifies the existing symptoms of psychosis. (PCR Vol. III p. 328). Dr. Berland opined that Pearce=s drug use was extremely relevant in that someone with Pearce=s already existing mental problems when drugs are used, experiences something called Kindling. Kindling enhances psychotic symptoms for a period of time beyond the period of normal intoxication. Kindling can last anywhere from hours to days to weeks beyond the period of intoxication. Depending on the nature of the patient=s brain and the nature of the substance. (PCR Vol. III p. 333-34).

Dr. Berland understood that his assigned task in this case was to just give Mr. Pearce the MMPI-II and evaluate the results. (PCR Vol. III p. 339- 341).

During cross-examination, Dr. Berland testified that even people who are under the complete influence of mental illness can engage in purposeful behavior and gave examples of this. (PCR Vol. III p. 376-378).

When cross-examined on his lack of research Berland testified that his job was to see if there was evidence that would have provided a starting point that someone should have gone out and investigated. (PCR Vol. III p. 388).

E. TESTIMONY OF KATHRYN BURFORD

Kathryn Burford testified at the evidentiary hearing. Ms. Burford testified that Faunce Pearce was married to her step-daughter, Lisa Dawson. (PCR Vol.

IV p. 406). Ms. Burford testified that there were four biological children as a result of the union of Faunce Pearce and Lisa Dawson; Andrew, Justin, Brandon, and Jessica. (PCR Vol. IV p. 408). Ms. Burford testified that Andrew grew up with behavioral problems. (PCR Vol. IV p. 409). His problems consisted of fetal alcohol syndrome and bipolar disorder. (PCR Vol. IV p. 411). Lisa Dawson also had bipolar disorder. (PCR Vol. IV p. 413). Ms. Burford would have testified at Mr. Pearce=s trial if only she had been notified. (PCR Vol. IV p. 414).

F. TESTIMONY OF DANIEL PEARCE.

Daniel Pearce is the older brother of Faunce Pearce. (PCR Vol. IV p. 422). Daniel Pearce was contacted by the State, but never contacted by the defense prior to trial, had he been contacted by the defense he would have testified in his brother=s behalf. (PCR Vol. IV 422-23). Daniel Pearce had contacted post-conviction counsel and advised them that he had been diagnosed as bipolar and possibly Faunce Pearce was bipolar. He spoke to Dr. Henry Dee regarding Faunce=s head injuries and to Dr. Richard Carpenter about growing up with Faunce Pearce. (PCR Vol. IV 423-24). Daniel Pearce testified about the preemptive beatings which Faunce Pearce suffered as a child. (PCR Vol. IV p. 427). He also testified that about the age of 12, Faunce Pearce would run away from home and go camping. (PCR Vol. IV p. 427-28). Daniel Pearce testified as

to Faunce Pearce=s mood swings. (PCR Vol. IV p. 431). Daniel Pearce testified that in light of him being diagnosed bipolar, he suspected that his brother Faunce was also bipolar. (PCR Vol. IV p. 432). Daniel Pearce also testified about his brother=s drug use. (PCR Vol. IV p. 433-34). Daniel testified as to the car accident which Daniel witnessed, the end result was him seeing his brother, Faunce, with a gash in his head wandering around the scene aimlessly. (PCR Vol. IV p. 436-438).

Daniel Pearce testified about the mood swings which every bipolar suffers . (PCR Vol. IV p. 439-443).

Daniel Pearce detailed the personality change which affected Faunce Pearce after his head injury. (PCR Vol. IV p. 444-45).

G. TESTIMONY OF MARK WARE

Mark Ware represented Faunce Pearce at his original trial. (PCR Vol. V p. 479). When asked about his actual capacity of representation, the following testimony occurred:

> Q. And in what capacity did you represent Mr. Pearce?
> A. I was assisting Mr. Ivie. He had asked that I second chair in his case. I was trying to seek a certification and that was my first case in that area.
> Q. Now, for clarification purposes, you stated second chair. Were you second chair in the sense that you were assisting Mr. Ivie, or were you second chair in a

> sense that Mr. Ivie represented Mr. Pearce in guilt phase and that you represented Mr. Pearce in penalty phase? Was it more like that or was it the first scenario whereby you were there to assist Mr. Ivie?
> A. My understanding was that Mr. Ivie was the lead and I was assigned, I think, three or four witnesses and that I would be performing the penalty phase, but with his help.
> Q. Under his direction.
> A. Under his **B** right.
> Q. And you were seeking certification?
> A. Yes, for purposes of **B**
> Q. Can you explain that?
> A. Yes, for purposes of court appointed. I believe you had to sit at second chair on two death cases.
> Q. And this was your first of those two?
> A. That was my first, yes.
> Q. What was your experience level at the time you were appointed to assist Mr. Ivie?
> A. I=d handled all cases from misdemeanor through felony. I had sexual battery cases, but I=d never done a death case. (PCR Vol. V p. 479-480).

Mr. Ware testified that he had not attended any seminars as to death cases before he represented Mr. Pearce. (PCR Vol. V p. 480).

Mr. Ware had no authority to do anything. Mr. Ivie assigned all of the duties. Mr. Ware was given a ALife over Death@ book to familiarize himself with penalty phase representation, but it was Ware=s understanding that Ivie would get with Ware at the time when the penalty phase was ready to go and Ivie would help him (Ware) through the penalty phase, but Ware would actually do the

penalty phase. (PCR Vol. V p. 482). Mr. Ware also testified that he believed that all the depositions were done before he got on the case. Ware was certain that he did not depose Tuttle. Furthermore, Mr. Ivie was responsible for filing pre-trial motions. (PCR Vol. V p. 483). Mr. Ivie was also responsible for objections during opening statement as well as for objections during the testimony of Tuttle. (PCR Vol. V p. 484). Mr. Ware also explained why, as a criminal defense attorney, would he not want the jury to hear evidence of an uncharged collateral crime. The reason being that there is a danger of conviction of the crime charged based upon the testimony of the uncharged collateral crime. (PCR Vol. V p. 487-88). Ware did no preparation for the penalty phase. (PCR Vol. V p.489). Mr. Ware testified that Mr. Pearce was never evaluated by any mental health professional; nor were any records of Mr. Pearce obtained by the defense. (PCR Vol. V p. 490).

Regarding the proposed mitigation at trial, the following questions were asked and answered at the evidentiary hearing:

> Q. (By Mr. Viggiano) During the trial **B** or after Mr. Pearce was convicted in the guilt phase but prior to proceeding with any penalty phase, there was a colloquy in court whereby the Court stated: **A** During the course of your investigation, have you reasonably come to the conclusion that there are any mitigating factors or mitigation evidence that could be presented on behalf of

> the defendant?@
> Mr. Ware: AI have, Your Honor.@
> THE COURT: A And what are those mitigating factors?@
> Mr. Ware: A First, Your Honor, on that evening cocaine was used by Mr. Pearce. Secondly, that Amanda Havner was let go. Thirdly, that he turned himself in voluntarily. And fourth, that he gave a voluntary statement to the Pasco County Sheriff=s Department.@
> (PCR Vol. V p. 491-2).

Regarding the issue of psychiatric evaluation before the penalty phase had begun, the following questions were asked and answered at the evidentiary hearing:

> Q. Yes. Another part of the record, the Court states to Mr. Pearce: ADo you wish to be examined by a psychiatrist or psychologist?@
> The defendant: ANot particularly.@
> Mr. Pearce stated that he didn=t really want to be examined.
> A. Yeah, I believe I told the Court it was against my advice not to put mitigating B
> Q. Do you recall, prior to any potential penalty phase going on, a discussion between the Court, Mr. Van Allen and you regarding the possibility of appointing a court attorney to oversee the preparation of any penalty phase; do you recall that?
> A. I don=t recall, but if it=s in the record, then certainly we did.
> Q. Okay. And assuming that there was such a discussion, do you recall stating B with regard to the appointment of an attorney to oversee whether or not the penalty phase was properly prepared, do you recall saying, AMr. Van Allen is correct in indicating the issue of independent counsel. They would be acting as a

court witness and, therefore, there would be no issue of ineffective assistance of counsel of that independent counsel appointed by the Court.@
A. If it=s in the record, then I said it.
Q. Okay so you were more or less in agreement with Mr. Van Allen=s suggestion?
A. If that=s what the record reflects.
MR.VIGGIANO: No further questions, Your Honor.
(PCR Vol. V p. 492-493)

During re-direct examination, Mr. Ware admitted that at the time of trial he was unfamiliar with the ABA guidelines, specifically Guideline 11.4.1 which stated in part that: The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. (PCR Vol. V p. 507-08).

Mr. Ware testified that he was not familiar with clients or people who were trying to hide the fact that they=re mentally ill. (PCR Vol. V p. 509).

The Court then had questions of its own. (PCR Vol. V p. 511- 519).

Regarding Ware=s preparation and interaction with Mr. Pearce the following questions were asked by the Court and answered by Mr. Ware during the evidentiary hearing:

THE COURT: Now, did you **B** did you consider having

the Court B you were doing penalty?
THE WITNESS: Yes, ma=am.
THE COURT: B have the Court appoint a confidential expert nonetheless to try to go out and see if Mr. Pearce would submit to an exam?
THE WITNESS: No, ma=am, I did not. I raised it in court about the psychiatrist.
THE COURT: But you didn=t do any formal motion?
THE WITNESS: No, ma=am.
THE COURT: And when B did you ever inquire of him what his family history was?
THE WITNESS: We talked about family before, early on in the case. I don=t remember specifically the specifics about it, but I know that we talked about those types of things.
THE COURT: Did you inquire as to whether B ask questions that might lead you to believe whether or not he had been physically or emotionally abused or neglected?
THE WITNESS: Judge, I don=t remember. I know that we talked about family. I know we talked about some school. I know we talked about different things, but I don=t remember specifically. Anything that we talked about didn=t give me any indication that I should goB
THE COURT: Well, I=m trying to understand who was running the conversation, you or him. Did you ask him about his upbringing, about how he was disciplined, for instance?
THE WITNESS: I don=t know if I asked him how he was disciplined.
THE COURT: Did you ask him if anybody in the family had mental-health problems?
THE WITNESS: Judge, I don=t remember. I don=t.
THE COURT: Did you ask him if he ever hit his head, hurt himself?
THE WITNESS: No, ma=am, I don=t think I asked that, if he ever hit his head.

THE COURT: Did you ask him about school?
THE WITNESS: We talked about school.
THE COURT: Did you know he was 16 in the eighth grade?
THE WITNESS: No, I didn=t, Judge. I didn=t **B** I don=t remember, Judge. And I don=t remember the things**B**
THE COURT: When he said he didn=t want you to present any penalty phase, did you ask him **B** any mitigation at the penalty phase, did you ask him why?
THE WITNESS: Why he didn=t want to go forward?
THE COURT: Yes.
THE WITNESS: Yes, ma=am, I did.
THE COURT: And what was his answer?
THE WITNESS: His response was that because he was not the shooter, that he felt that the Supreme Court of Florida was more lenient towards non-shooters and would probably overturn the case to life as opposed to death is what I remember.
THE COURT: And what was your response to that?
THE WITNESS: I told him that was incredibly risky and shouldn=t be done, that we should put mitigation evidence on.
THE COURT: And then his response?
THE WITNESS: He did not want to put any mitigating evidence on.
THE COURT: Did it appear to you that he was doing his own research?
THE WITNESS: It appeared to me that he had looked into it, yes, ma=am.
THE COURT: Did he cite cases to you **B**
THE WITNESS: He did not.
THE COURT: **B** on this issue?
THE WITNESS: No, ma=am.
THE COURT: Were you real plain with him, saying, look, you=re nuts, you=re crazy, this is **B** you=ve got to do everything you can or anything like that?
THE WITNESS: I told him that it was absolutely against

my advice, that he needed to do this, otherwise, he was looking at death.
THE COURT: I'm not asking did you do it nicely. Did you do it plainly?
THE WITNESS: Yes, ma'am.
THE COURT: How plainly did you say to him, this is a bad idea, if you said that?
THE WITNESS: I told him this was completely against my advice, that you shouldn't do this in a tone that I would normally take.
THE COURT: Did you ever consider withdrawing from the case because you didn't get cooperation from your client?
THE WITNESS: Did I no, ma'am. I never thought about withdrawing from the case, no, ma'am.
THE COURT: So you never presented to him, hey, look, I know you don't want to present this, but let me just have a doctor examine you just to see what they say so we know what we're talking about, what you're giving up?
THE WITNESS: I did discuss with him about having a psychiatrist appointed, yes, and he said he would not cooperate.
THE COURT: But did you tell him that you really felt he needed one to help him make that decision, as to whether to present it to a jury as opposed to simply doing it?
THE WITNESS: I told him he needed a psychiatrist/psychologist to help him get through the penalty phase, yes, to assist him. And whatever the psychologist or psychiatrist came up with would be a mitigating factor.
THE COURT: Did you ever consult with any experienced lawyers, other than Mr. Ivie, that had handled death-penalty cases before on how to deal with this issue of a defendant who doesn't want to present mitigation?

THE WITNESS: No, ma=am.
THE COURT: Did you ever do any **B** and you didn=t completely read the text on Life over Death?
THE WITNESS: No, ma=am.
THE COURT: And, therefore, can I assume that you didn=t read any other text on the penalty phase?
THE WITNESS: That=s correct, Judge.
THE COURT: All right. Any questions based on my questions?
MR. VIGGIANO: No, Your Honor.
THE COURT: State?
MR. VAN ALLEN: No, ma=am.
(PCR Vol. V p. 514-518).

H. TESTIMONY OF FAUNCE PEARCE

Faunce Pearce testified at the evidentiary hearing (PCR Vol. V p. 522-563). Mr. Pearce testified that he did not often meet with A.J. Ivie prior to trial. (PCR Vol. V p. 522). Regarding the meetings with Ivie, Pearce testified that Ivie was confident that the State could not convict him on the evidence they had. (PCR Vol. V p. 523).

Regarding penalty phase, Pearce testified that Ivie was confident there would be no need for a penalty phase. (PCR Vol. V p. 523-24). Regarding his discussions with Mark Ware, Mr. Pearce testified that Ware never really explained things really well; but he liked Mr. Ware and enjoyed his visits. (PCR Vol. V p.524). When Ware offered to bring Mr. Pearce=s family down for the trial, Mr. Pearce thought that they would be out in the audience for general support

and not as part of the case. (PCR Vol. V p. 524-25). Mr. Pearce also testified that he believed that the trial court would provide a mental health professional if he needed to speak to one; however, Pearce was under the impression that the mental health professional would be there to help Pearce deal with the strain of incarceration and trial. (PCR Vol. V p. 525). There was no in-depth questioning of Mr. Pearce by either Ivie or Ware regarding his schooling or family life, rather Pearce took these limited conversations to be a friendly interest in his life. (PCR Vol. V p. 526-27). There were no questions about Mr. Pearce=s mental health, nor were there questions about drug history. (PCR Vol. V p. 528-29). Based on Ivie=s representations that the State lacked sufficient evidence to sustain a conviction, Pearce relied on the appeal process to right any wrongs if he were convicted of first degree murder. (PCR Vol. V p. 529-531). Upon conviction, Mr. Pearce saw no reason to speak to a psychiatrist in that he thought that he had been dealing with the stress Afairly well@. (PCR Vol. V p. 532-33).

Mr. Pearce testified that had he known about all the information that was out there at the time of his trial and presented at the evidentiary hearing, and had it been explained that these options would have been used to avoid the death penalty, he would have considered them and would not have refused to present them. (PCR Vol. V p. 533-535). It was Mr. Pearce=s understanding that a mental

health professional was to be brought in only to help him deal with his incarceration. (PCR Vol. V p. 544). Mr. Pearce believed that if something went wrong with the trial he would place his faith in the appeal process. (PCR Vol. V p.546-47).

At the conclusion of re-direct examination, the court had some questions of its own:

> THE COURT: I know you're surprised. Mr. Pearce, you commented something about that you – some things were beyond your understanding when things were being explained to you by lawyers; is that a fair representation of what you said?
> THE DEFENDANT: Yes, ma'am, at that –
> THE COURT: Okay. Did you ever say, wait, I don't know what you're talking about. Could you speak so I could understand it?
> THE DEFENDANT: Between Mr. Williams and Mr. Ivie, they pretty much broke me of that.
> THE COURT: What do you mean they broke you of that?
> THE DEFENDANT: When I would inquire into things, you know, they would just tell me that it was nothing that I needed to know. Even like I asked for my discovery so that I could be an active part of my case. I was denied that. I was constantly pushed aside. So, I mean, after a while, you get to the point where you're just, like, okay, well, I have no right to ask questions.
> THE COURT: Well, would they tell you that you didn't have a right or how would they phrase it?
> THE DEFENDANT: They would say that – well, like I don't need to know that, that's their problem, that's their issue to deal with, whatever, you know. There was

even the time that one of the judges threatened to send the officers to my jail cell and take away what part of the discovery that I had. So, I mean, I=m left with the understanding that **B** what rights do I have? I mean, these people call the shots, the judge, the lawyers. Obviously, I=m just a pawn sitting there. I mean, that=s the way I felt.

THE COURT: Did **B** have you ever **B** did either Mr. Williams or the other attorney that you didn=t name **B** I think it might have been a Public Defender or something **B** or Mr. Ivie or Mr. Ware use the term to you there are certain statutory mitigators we can present? Did they say something along those lines?

THE DEFENDANT: Not that I can remember, Your Honor.

THE COURT: Okay. Apparently, you had access to some legal research; is that correct?

THE DEFENDANT: We had limited access at the jail.

THE COURT: They don=t allow that anymore.

THE DEFENDANT: Right.

THE COURT: Back then you were allowed to use the library?

THE DEFENDANT: We weren=t allowed to use the library. We were allowed to request specific cases and they would copy them and bring them to us.

THE COURT: Hou would you know what cases to request?

THE DEFENDANT: I believe that I started by something that was given to me by another inmate, **Strickland B Strickland** case. Like I said, my issue was specifically targeted towards the effective assistance of counsel, more to the fact that they had denied me. When Mr. Williams was discharged from my case and I told the judge well, I need an attorney, I can=t do a first-degree murder case on my own, his words were something to the effect of, you know, oh, well, you=re on your own. And I was left that way for six months. And I believe that

the majority of my writings were during that time period, basically trying to get another lawyer assigned to my case.
THE COURT: And did any of your lawyers either give you or did you ask them or the jail for a copy of this statute, the law on death-penalty cases?
THE DEFENDANT: I don=t believe so.
THE COURT: Did Mr. Ivie or Mr. Ware ask you about the extent and length of time of your use of LSD besides that night? Did they ask you about using before?
THE DEFENDANT: No, ma=am, none of my attorneys asked me about any drug history other than, you know, that night.
THE COURT: I believe you said that when you initially met **B** when Mr. Ware came on board, Mr. Ivie and he came together to meet **B** for Mr. Ware to be introduced to you; is that correct?
THE DEFENDANT: I believe that was the way that it happened, yes.
THE COURT: and I believe you said that Mr. Ware said **B** I mean Mr. Ivie said, AWell, Mr. Ware is going to handle the penalty phase of the case;@ is that approximately what was said?
THE DEFENDANT: Actually, I believe what was actually said was that Mr. Ware was being brought in as second chair in the case. And I think at some point then it was explained to me that first chair was supposed to take care of the guilt phase and second chair the penalty phase.
THE COURT: Did you ask: Excuse me, what is the penalty phase?
THE DEFENDANT: No, ma=am.
THE COURT: You didn=t ask at all?
THE DEFENDANT: Like I said, I just assumed that, you know, if I got found guilty, the penalty phase was when the judge was going to tell me what I got for being guilty. So I didn=t think that I needed more of an

understanding.
THE COURT: Are you saying that neither Ware nor Ivie explained to you that a jury hears evidence from both the State and the Defense and they recommend to the judge whether you should be put to death or not?
THE DEFENDANT: Neither B no attorney prior to that time explained to me that that would be going in front of the jury for a decision, no, ma=am.
THE COURT: And you didn=t hear that explanation by the judge to the jury?
THE DEFENDANT: Your Honor, I don=t always understand everything. You know what I=m saying? Especially in stressful situations and B I don=t know. Sometimes my mind wanders. Especially if someone is, like, repetitive speaking, like when the judge was giving -
THE COURT: Drones on and on? You know what I mean by drones on and on?
THE DEFENDANT: Right. It has a tendency to blur in my head. And not only do I not accept it when it=s there, but, I mean, I certainly don=t remember it afterwards either.
THE COURT: Even though whether you live or die, spend the rest of your life in prison is on the line?
THE DEFENDANT: As pathetic as that may sound, Your Honor, I=m sorry, but that is correct. It=s not -- it=s not something that I have control over. I mean, it=s not something where I=d say okay, well, I=m going to absorb everything about this because it=s important to me. You know, it happens or it doesn=t.
THE COURT: I don=t have any other questions. (PCR Vol. V p. 555-560).

I. TESTIMONY OF DR. MICHAEL GAMACHE

Michael Gamache, a licensed psychologist, testified on behalf of the State.

(PCR. Vol. VI, p. 578-581). Dr. Gamache testified that a small portion of his practice is counseling or therapy. (PCR. Vol. VI, p. 647).

Dr. Gamache reviewed depositions of Dr. Carpenter, Dr. Dee, and Dr. Berland, records, and testing data. (PCR. Vol. VI, p. 581-2). Dr. Gamache met with Faunce Pearce to do a forensic evaluation regarding possible mitigation. (PCR. Vol. VI, p. 583). Two psychological tests were performed, the TOMM and the PAI. (PCR. Vol. VI, p. 585-6). The TOMM is a test of memory malingering. (PCR. Vol. VI, p. 586). The PAI is the Personality Assessment Inventory, is similar to the MMPI, and is used to evaluate level of psychological adjustment and the presence or absence of mental illness or pathology. (PCR. Vol. VI, p. 587).

Regarding administration of the TOMM test, Dr. Gamache testified that the test taker had two to three seconds for each stimulus item. (PCR. Vol. VI, p. 650). At the end of the stimulus items, the test taker gets the forced choices. (PCR. Vol. VI, p. 652). Dr. Gamache testified that a random score on the TOMM test would be roughly twenty-five plus or minus five - a score of 20 to 30. (PCR. Vol. VI, p. 659).

On the TOMM test, Mr. Pearce got correct 29 out of 50 forced choice items. (PCR. Vol. VI, p. 590). Dr. Gamache testified that patients with known, documented, radiologically, visible brain damage did perform worse than the

healthy controls did and on average they would miss about six or seven items out of 50 choices. (PCR. Vol. VI, p. 594). Dr. Gamache did not administer to Mr. Pearce any of the rest of the neuropsychological measures because he had no faith that Mr. Pearce would put forth a reasonable effort. (PCR. Vol. VI, p. 596).

Regarding the PAI test, Dr. Gamache opined that the results showed that Mr. Pearce was an antisocial drug abuser. (PCR. Vol. VI, p. 625).

Dr. Gamache reviewed the depositions given by Dr. Richard Carpenter and Dr. Henry Dee and disagreed with their conclusions and opinions that Mr. Pearce has a bipolar mood disorder. (PCR. Vol. VI, p. 597- 613). Dr. Gamache also took issue with the administration by Dr. Berland of the MMPI. (PCR. Vol. VI, p. 619).

Dr. Gamache spoke with no family members of Mr. Pearce. (PCR. Vol. VI, p. 663). Dr. Gamache did not recall reviewing history that Mr. Pearce=s father was diagnosed with bipolar disorder. (PCR. Vol. VI, p. 663). He did not recall learning that Mr. Pearce=s child was diagnosed ADHD. (PCR. Vol. VI, p. 663). He found that the schizophrenic scale was elevated on the PAI test. (PCR. Vol. VI, p. 664). He noted that Mr. Pearce was an avid drug user. (PCR. Vol. VI, p. 665).

Dr. Gamache agreed that it would have been prudent that a psychological

consultation or evaluation be done with someone charged with murder. (PCR. Vol. VI, p. 667).

J. REBUTTAL TESTIMONY

Faunce Pearce

Faunce Pearce testified that Dr. Gamache set up the screen so that he couldn=t see what was supposed to be filmed. (PCR. Vol. VII, p. 703). Mr. Pearce testified that the TOMM test was done pretty fast and that he told Dr. Gamache that he thought he did pretty good , but he was guessing. (PCR. Vol. VII, p. 704). Mr. Pearce was guessing because the images went too fast. (PCR. Vol. VII, p. 705). If Dr. Gamache asked Mr. Pearce anything about his appetite or sleeping habit, he believed he was being asked about the present time and not about during the time of the crime. (PCR. Vol. VII, p. 707). Mr. Pearce testified that he was not faking on the TOMM test and was not malingering. (PCR. Vol. VII, p. 708).

Dr. Robert Berland

Dr. Berland testified that Mr. Pearce=s MMPI-2 profile does not represent faked responses. (PCR. Vol. VII, p. 710). There was no evidence that Mr. Pearce faked on the PAI test so it would be illogical why someone would choose to fake on some measures and not on others. (PCR. Vol. VII, p. 711).

Dr. Berland testified that Mr. Pearce=s score on the Scale F, which was called the infrequency score, is at a level consistent with someone who is chronically psychotic. (PCR. Vol. VII, p. 712). Through examples and demonstrative profiles of test takers that were either faking or not faking on the MMPI, Dr. Berland explained why Mr. Pearce was not faking when he took the MMPI. (PCR. Vol. VII, p. 711- 18). In fact, on the MMPI, Scale L and Scale K both show a mind set by Mr. Pearce to want to deny mental illness. Mr. Pearce did not want to admit he is crazy, even though it might help him. (PCR. Vol. VII, p. 726).

Dr. Berland also explained the validity of the MMPI administered to Mr. Pearce. (PCR. Vol. VII, p. 718-721, 723-25). Dr. Berland also explained why it is not necessary to administer items after question 370 in order to complete a valid test. (PCR. Vol., p. 732-43). Dr. Berland opined that Mr. Pearce was a schizoaffective, not a bipolar, although the symptoms are similar. (PCR. Vol. VII, p. 721). The PAI results showed an elevated schizophrenia scale. (PCR. Vol. VII, p. 722). Mr. Pearce may be antisocial but he is also psychotic. (PCR. Vol. VII, p. 722).

Dr. Berland agreed with Dr. Gamache that there is some literature raising questions about whether verbal IQ differences indicate brain injury. The problem with the research as Dr. Gamache described it is that reliance on medical

measures that look at the physical shape or structure of the brain, many brain injuries, even traumatic injuries, do not result in a change in the physical shape or structure of the brain. Many brain injuries will not show up on a CT or an MRI. (PCR. Vol. VII, p. 729).

Dr. Henry Dee

Dr. Dee testified that he performed a neuropsychological evaluation using the Wechsler battery of intelligence test. (PCR. Vol VII, p. 751). Dr. Dee did not agree with comments that Dr. Gamache had regarding the way the WAIS was scored.

(PCR. Vol VII, p. 756). Dr. Dee opined that based on Mr. Pearce=s performance on the Wechsler scales with the Denman scales, and comparison of verbal IQ and performance IQ, Mr. Pearce showed evidence of cerebral damage. His impairment of cognitive functioning is a result of brain damage. (PCR. Vol VII, p. 756). Dr. Dee reviewed Dr. Gamache=s opinions regarding the performance IQ and the verbal IQ. (PCR. Vol VII, p. 756). Dr. Dee testified that the unreliability in comparing verbal IQ with performance IQ occurs when there is a minimal difference, from five to ten points. (PCR. Vol VII, p. 756). In Mr. Pearce=s case, there is a 30 point difference between verbal and performance IQ which is two standard deviations and which is significant. (PCR. Vol VII, p. 756). Mr. Pearce is

suffering from brain damage, it is chronic and static, and it is not changing.(PCR. Vol VII, p. 764). He also suffers from memory impairment. (PCR. Vol VII, p. 765). The two most common sequelae of any kind of cerebral injury, insult or disease, are memory impairment and increased impulsivity. (PCR. Vol VII, p. 766).

THE LOWER COURT=S ORDER

In its ORDER GRANTING DEFENDANT A NEW TRIAL AND FINDING OF FACT dated January 12, 2007, the post-conviction court granted a new guilt and penalty phase trial after the evidentiary hearing. In the Order the court stated that it will address the claims in the order presented at the evidentiary hearing.

The Court finds and determines as follows:

THE EVIDENTIARY HEARING

The evidentiary hearing took place on July 27, 2006, July 28, 2006, July 31, 2006. August 1, 2006, after which the Defense rested. On November 30, 2006, the State put on its case, followed by rebuttal by the Defense. On December 1, 2006, closing arguments were held and after a recess, this Court ordered that the judgments and sentence be vacated and a new trial was ordered for the Defendant.

THE STANDARD OF REVIEW

A defendant alleging ineffective assistance of counsel must satisfy the two-pronged standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984). First, the defendant must demonstrate that his attorney=s performance was so deficient that his attorney was not functioning as the Acounsel@ guaranteed by the Sixth Amendment of the United States Constitution. Id., 466 U.S. at 687. Second, the defendant must establish that there is a reasonable probability but for counsel=s deficient performance the outcome of the proceedings would have been different. A Areasonable probability@ has been defined as a probability sufficient to undermine confidence in the outcome of the proceedings. Id,, 466 U.S. at 694. In the context of ineffectiveness during the penalty phase of a trial, the defendant must establish that there is a reasonable

probability that but for counsel=s errors the defendant would have probably received a life sentence. Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995).

The Court finds that the defendant has satisfied the Strickland standard in both the guilt and the penalty phase of his trial.

IA. Trial counsel was ineffective for failing to object to the introduction of evidence of an uncharged offense. The probative value of said evidence was far outweighed by the prejudicial effect and deprived Mr. Pearce of a fair trial under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

The State, citing Pearce v. State, 880 So.2d 561 (Fla. 2001) the direct appeal opinion, inferred that there was reference to the kidnapping and violence against the victims which supported the prosecution theory of felony murder and lack of an independent, unrelated act of sexual battery.

Upon reading the direct appeal opinion, this Court did not see anything in the opinion that dealt with the question of the sexual battery; it wasn=t presented for the Supreme Court to consider because it was never raised by the Defense at trial. No motion in limine was filed to preserve the issue for appellate review, there was no simultaneous objection, either during any of the opening, closings, or during the testimony of Mr. Tuttle about this uncharged sexual battery.

The Court is ever mindful that it is but a two-count Indictment against Mr.

Pearce: Murder one, as to Mr. Crawford, and attempted murder in the first degree, as to Mr. Tuttle, who was alive. (See Defense exhibit 3 (Indictment) and Defense exhibit 4 (supporting affidavit)).

The State, in its closing argument cited Smith v. State, 699 So.2d 629 (Fla. 1997) as controlling authority in the case at bar because there was a reference to a sexual battery although it was not charged.

The Court finds Smith to be distinguishable and therefore inapplicable to Defendant=s case for the following reason:

In Smith, the defendant was charged and convicted of first- degree murder, attempted first-degree murder, robbery, kidnapping, burglary, arson, and conspiracy to commit a felony. Many more offenses than in this case. Mr. Pearce was not prosecuted, though he could have been, for kidnapping. He was not prosecuted for sexual battery on Mr. Tuttle, but he could have been. The State chose not to prosecute him. The State also chose to introduce evidence at this trial of the sexual battery on Mr. Tuttle, allegedly to establish that Mr. Pearce was running the show, his domination of Tuttle, and therefore, all this connected with the felony murder.

The gist of the State=s argument was that the sexual battery came in and should have come in. An objection would have made no difference.

The Court finds that although the State chose not to prosecute Mr. Pearce for the sexual battery on Mr. Tuttle, there was no notice filed of intent to rely upon a collateral crime by the State.

Mr. Ware testified that it was not his job to either file motions in limine, object to comments in opening, closing or object during the testimony of Tuttle as that was not one of the witnesses he was instructed to handle by Ivie. (See PCR ROA Vol. V p.483-486). Mr. Ware further testified that he did not depose Tuttle and was not the attorney of record when the deposition was taken. (See PCR ROA Vol. V p.483).

Mr. Ivie had no recollection and relied on the trial record without dispute. He acknowledged that the trial record was devoid of motions in limine, objections at opening statement, objections at the testimony of Tuttle, cautionary instructions to disregard, instructions to the jury regarding this uncharged crime of sexual battery and also that no motions to strike or to declare a mistrial were made at any time during the trial. (See PCR ROA Vol. I p.33-43).

The Court finds that the introduction of the uncharged sexual battery was a surprise, but one that was so clear to counsel as to be objectionable.

The Court has reviewed the motion for appointment of additional attorney, (See Exhibit 5); since the motion does not specify that an additional attorney was

to be used for penalty phase representation only, both attorneys had a duty to stop the collateral crime evidence from being heard by the jury, either by motion or objection.

This Court finds deficient performance on the part of both Mr. Ivie and Mr. Ware. Said deficient performance prejudiced Mr. Pearce in that the uncharged collateral crime improperly influenced the jury to return a verdict of guilt for the murder of Mr. Crawford and attempted murder of Mr. Tuttle.

II. Mr. Pearce was denied the effective assistance of counsel at the sentencing phase of his capital trial, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution. Trial counsel failed to adequately investigate and prepare the penalty phase of the trial. Trial counsel failed to adequately challenge the State=s case, counsel=s performance was deficient, and as a result the death sentence is unreliable.

Regarding the failure of trial counsel to investigate and prepare for penalty phase, the Court finds that Mr. Ware had never done any death cases and had never attended any death seminars. Mr. [Ivie] and Mr. Ware had agreed between themselves that Mr. Ware would be responsible for the penalty phase. Mr. Ware had done nothing to prepare for the penalty phase.

Mr. Ware was appointed on October 12th of 2000 for a trial that began on July 16, 2001. Mr. Ware testified that during that time he did nothing to prepare.

Mr. Ware had no time sheets and further had done nothing to prepare for even the evidentiary hearing.

During the evidentiary hearing, when asked about who was responsible for objecting during the inquiry of Tuttle, and asked if he remembered anything about the oral sex, Mr. Ware testified that he had a vague recollection about oral sex. When asked if he, as a criminal defense attorney, would not have wanted the jury to hear such testimony of an uncharged collateral crime, Mr. Ware was unable to articulate reasons why such testimony would be devastating to the defense. He said only that he would be concerned about such testimony. Mr. Ware could not legally articulate what it was he should have done during the trial in July of 2001, and ironically, during the evidentiary hearing, he was still incompetent on this issue.

Mr. Ware testified that he had reviewed some of the life over death books. He testified that he was supposed to do the penalty phase and that he would have done what Mr. [Ivie] asked him to do. Mr. Ware had no legal authority to delegate anything and did not delegate anything. Mr. Ware testified that Mr. Ivie gave him Life Over Death books and that Mr. Ivie would get with him to get ready for trial. However, the Court reviewed the time that Mr. Ivie and Mr. Ware spent together and noted that Mr. Ivie spent more time with the investigator, Margaret

Angell, (four and a half hours in conference with her). Mr. Ivie's records reflect that he spent 3.2 hours with Mr. Ware.

Mr. Ware testified that he was not aware of the ABA guidelines. Mr. Ivie, in asking the judge for a second attorney, cited in his motion, to the ABA guideline 2.1 and the National Legal Aid and Defender Association standards 2.1. Each of the standards requires the assignment of at least two qualified trial attorneys to represent the defendant in a death-penalty case.

Apparently, Mr. Ivie did not share those standards with Mr. Ware and Mr. Ware did not bother to read what was given to him by Mr. Ivie. The failure of Mr. Ware to read and become familiar with the standards was incompetence. The failure of Mr. Ivie to share with the second attorney that had no experience in death penalty defense work was also incompetent.

This Court finds that Mr. Ware and Mr. Ivie did not adequately investigate potential mitigating factors. This case went from guilt phase directly to penalty phase. There was never a request by defense counsel to delay the case to prepare before the penalty phase began. Even when the State suggested to the Court that a mental health expert be appointed, there was no request by counsel to delay. Furthermore, this Court finds that what Mr. Ware stated to Judge Swanson was not the only mitigation that should have been investigated and

which could have been presented. Mr. Pearce=s waiver of mitigation was not a knowing and intelligent waiver.

Mr. Ware testified that in court when asked what mitigating factors he would have presented, he would have shown that on the evening of the shootings, Defendant used cocaine. He did not mention that the Defendant had a long history of drug usage including LSD, all of which could have been discovered from the Defendant had Mr. Ware bothered to ask. Had counsel investigated the drug history, counsel would have discovered Defendant=s mental health history noting that Defendant had been self medicating.

The only mitigation Mr. Ware would have presented was that the Defendant let Amanda Havner go, that Defendant voluntarily turned himself in, and that he made a voluntarily statement to the sheriff=s office.

The defense could have asked the Court for funds to retain an expert who could have made at least a showing of a brain injury. Just talking to the Defendant=s brother would have uncovered one car crash and one fall which may have resulted in an a brain injury. Had Mr. Ware talked to the Defendant=s mother, the mother would have revealed that the Defendant had been examined at the University of Florida which would have alerted him that, perhaps there was a mental mitigator which could have been presented at trial. The mitigators that

could have been investigated include the Defendant=s capacity to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of the law being substantially impaired.

Based upon the brief presentation that Mr. Ware made to the Court and based upon the authority in State v. Lamarca, 931 So.2d 838 (Fla. 2006); Koon v. Dugger, 619 So.2d 246 (Fla. 1993); Lewis v. State, 838 So.2d 1102 (Fla. 2002), Rose v. State, 675 So.2d 567 (Fla. 1996); State v. Lara, 581 So.2d 1288 (Fla. 1991); and Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), this Court finds that there was inadequate preparation because there was no preparation. This Court finds that there was no knowing and voluntary waiver of mitigation by the Defendant because the Defendant did not know what he was waiving. Defense counsel did not know what they were supposed to be looking for because they were so poorly prepared.

This Court finds that defense counsel was deficient and that the Defendant was denied the effective assistance of counsel.

Regarding prejudice and whether the performance of defense counsel prejudiced the Defendant so that there is a reasonable probability that the result of the proceedings would have been different, this Court obviously cannot say definitively that there would have been a difference. But there is a reasonable

probability that a jury, who having heard no mitigation, returned a 10-2 verdict for death, would have been persuaded by the child abuse - despite the arguments by the State that this was just what it was back then- spare the rod, spoil the child. There were at least two witnesses that could have testified that these were preemptive beatings - - and that is not discipline; that=s child abuse.

Although different diagnoses of mental illness were presented at the evidentiary hearing, a diagnosis of mental illness impairing the Defendant=s ability to conform his conduct to the requirements of the law would have been a mitigator that a jury should have heard.

The mitigation which could have been presented, coupled with the fact that the Defendant was not the shooter, and inasmuch as mitigating circumstances need not be proved beyond a reasonable doubt, this Court must find that there is a reasonable probability that, in weighing the aggravating circumstances that the State had to establish beyond a reasonable doubt against the evidence tending to establish one or more mitigating circumstances and the weight that they could have chosen to give it, the result of these proceedings would have been different, that is, that the jury, in all probability, may have come back tied or other than tied, in the Defendant=s favor of life versus death.

It is therefore, **ORDERED AND ADJUDGED** that the Defendant=s motion

for post conviction relief is granted. The state has thirty days from the date of this Order within which to seek appellate review.

SUMMARY OF THE ARGUMENTS

(1) The post-conviction court did not err in holding that the sexual battery

of Mr. Tuttle was an un-noticed collateral crime. The collateral crime was objectionable; trial counsels should have filed a motion in limine, objected at trial or otherwise preserved the issue for appellate review. Due to trial counsels= ineffectiveness and deficient performance, the uncharged collateral crime improperly influenced the jury to return a verdict of guilt for the murder of Mr. Crawford and the attempted murder of Mr. Tuttle.

(2) The post-conviction court did not err in finding that trial counsel was ineffective for failing to investigate potential penalty phase mitigation. The post-conviction court found that there was inadequate preparation because there was no preparation. The post-conviction court found that there was no knowing and voluntary waiver of mitigation by Mr. Pearce because Mr. Pearce did not know what he was waiving. Defense counsel did not know what they were supposed to be looking for because they were so poorly prepared.

ISSUE I

THE POST-CONVICTION COURT DID NOT ERR IN FINDING DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO FILE A MOTION IN LIMINE OR OTHERWISE ATTEMPT TO EXCLUDE EVIDENCE THAT PEARCE FORCED THE ATTEMPTED MURDER VICTIM TO PERFORM A SEX ACT UPON HIM UNDER THREAT OF DEATH. SAID EVIDENCE IMPROPERLY INFLUENCED THE JURY TO RETURN A VERDICT OF GUILT.

The post-conviction court correctly found that defense counsel rendered constitutionally inadequate assistance in failing to file a motion in limine or otherwise object to attempted murder victim Tuttle=s testimony that he was forced to perform oral sex upon Mr. Pearce. The uncharged sexual battery was remote in time from the charged crimes of murder and attempted murder. Defense counsel failed to object to irrelevant and prejudicial testimony designed to inflame and disgust the jury.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a Aduty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.@ Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice. The question of prejudice is tied to a reasonable probability that Abut for counsel=s unprofessional errors, the result of

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.@ Strickland at 688.

FACTS PERTINENT TO CLAIM

On September 17, 1999, a two count, two page indictment was filed charging Faunce Pearce and Lawrence Joey Smith with the shooting death of Robert Crawford and the attempted murder of Stephen Tuttle. (FSC ROA Vol. I 001-02). Pearce was never charged with a sexual battery.

During the prosecutor=s opening statement, the State made mention of an uncharged sexual battery involving Tuttle and Pearce. The prosecutor said:

> You=re going to hear that the saga continues. Faunce Pearce, enraged as he is, calls for Teddy Butterfield and Lawrence Joey Smith and Heath Brittingham. But you=re also going to hear that prior to him calling for them, he can=t control his anger. He puts that .40-caliber pistol up to Steve Tuttle=s head and takes him outside, tells him, AGet down on your knees.@ Steve Tuttle is telling him, APlease, don=t do this to me. Please don=t.@ And you=re going to hear from the testimony of Stephen Tuttle that Faunce Pearce takes this .40-caliber pistol, puts it up to his temple, as he=s down on his knees, and tells him, AYou=re either going to suck my fucking dick or I=m going to blow your fucking head off.@ And your going to hear that as Stephen Tuttle was down on his knees, terrified for his life, he knew there was nothing he could do with this .40-caliber pistol to the side of his head, he did exactly what Faunce Pearce asked him to do, in fear of losing his life.

The only witness to this alleged uncharged crime was Tuttle. (FSC ROA Vol. VII-379-80). No objection was made, no motion in limine was filed, no motion to strike was made, nor was a motion for mistrial raised by trial counsel.

During the direct examination of Tuttle, Tuttle testified that he was taken outside by Pearce, made to lie on the ground, made to get on his knees, and perform oral sex upon Pearce. (FSC ROA Vol. VIII-560-61). Tuttle testified:

> Q At some point in time during this ordeal, Faunce Pearce takes you outside?
> A Yes, sir.
> Q And did he take you out at gunpoint?
> A Yes, sir.
> Q Did he make you get down on your knees?
> A Yes, sir.
> Q Did he put a gun to your head?
> A Yes, sir.
> Q Tell the members of this jury what he told you to do, and I want you to use his exact words.
> A He told me to get down on my knees. And he made me lay face down on the ground. And then he made me get on my knees, and with a gun to my head, told me I got to suck his fucking dick if I wanted to live.
> Q And you did?
> A Yes, sir.
> Q You had no choice in the matter?
> A No sir.
> Q After that happened, did you go back inside We Shelter America?
> A Yes, sir.

There were no other witnesses to this act, nor was there any physical evidence that this act took place. No objection was made nor was a motion for mistrial raised by defense counsel.

During the closing arguments at the conclusion of guilt phase, the State again made mention of the uncharged sexual battery of Tuttle. (FSC ROA Vol.XI-952). The prosecutor said:

> The testimony from Steven Tuttle was that he couldn=t go anywhere.
> Why not?
> Well, I wonder if it has anything to do with the fact that after she confronted him, Amanda had a cocked .40-caliber handgun put in her face. Apparently, that threat was believable enough to Mr. Loucks because he tried to break it up - - did break it up. Told everybody to calm down.
> How serious was the threat? How threatened did these folks feel? How threatened was Steve Tuttle? How afraid was he?
> I=m going to say it once and I am not going back to it again. Steve Tuttle put the penis of Faunce Pearce in his mouth because he thought if he didn=t, he would die.
> Were they confined? Did they have a choice?
> How serious was the threat, and how deeply - - how deeply - - did they believe it?

No objection was made nor was any motion for mistrial raised by trial counsel. The issue had not been preserved due to counsel=s ineffectiveness.

The facts pertinent to this claim and as characterized by this Court in the direct appeal are as follows:

> On the evening of September 13, 1999, Pearce visited Bryon Loucks at Loucks= home, which was also Loucks= place of business, a mobile home dealership known as We Shelter America. Pearce worked for the business by setting up mobile homes. Pearce was looking for Loucks= teenage stepson, Ken Shook, in order to obtain LSD (lysergic acid diethylamide) geltabs. Shook called two friends, Stephen Tuttle and Robert Crawford, who in turn called another friend, Amanda Havner. Havner contacted her source for drugs, Tanya Barcomb, who said she could obtain the geltabs. Tuttle, Crawford, and Havner then went to Louchs= business, where Pearce gave them $1200 to obtain the drugs from a supplier while the three boys remained behind. After arriving at an apartment complex, Barcomb told Havner to stay in the car. Barcomb and her boyfriend entered a friend=s apartment. The boyfiend hid the money in his own shoe and punched himself in the face. When Barcomb and her boyfriend returned to the car, they told Havner that their drug supplier stole the money. Because of Barcomb=s deception, Shook, Tuttle, Crawford, and Havner eventually were forced to return to Loucks= business without the money or the drugs.
>
> While the teenagers were gone, Pearce and Loucks received a telephone call from Barcomb explaining that Pearce=s money had been stolen. Pearce became very angry and was standing outside with a gun visibly tucked in his pants when the four teenagers returned shortly thereafter. As Shook, Tuttle, Crawford, and Havner exited the car, Pearce waved the gun and ordered them inside Loucks= business office. This

business location was surrounded by a twelve-foot fence, topped with barbed wire. The fence also had a locked gate. Pearce confined Loucks and the four teenagers at this location for an unknown period of time. During this confinement, the witnesses described Pearce=s mood as swinging between calm and threatening. Pearce refused to allow anyone to leave and, at various times, waved his gun at the confined individuals. Havner made some phone calls in a futile attempt to recover Pearce=s money. At one point, Pearce grabbed Havner by the throat and slammed her head against the wall. He also pointed the gun at Havner and threatened to shoot her in the head. Pearce eventually allowed Havner to leave when her brother arrived at the business location. At another point, Pearce took Tuttle outside and forced him at gunpoint to perform oral sex upon him.

At some point, Pearce called his friend Theodore Butterfield, and requested that Butterfield come armed to Loucks= business. Pearce also requested that Butterfield bring Lawrence Joey Smith with him. Heath Brittingham, who was at the house with Butterfield, accompanied Butterfield and Smith. When Butterfield, Smith, and Brittingham arrived at Loucks= business, they were visibly armed. Smith stated AWe=re here to do business.@ According to Tuttle, Pearce spoke with these three men outside. Brittingham also testified that Pearce and Smith spoke to each other, but he was not able to hear their conversation. Pearce told the three men that Tuttle and Crawford were going to show them where to find the people who had stolen Pearce=s money. While still holding his gun, Pearce told Tuttle and Crawford to get in his car. Loucks refused to allow Pearce to take his stepson, Shook. Loucks also offered to drive Tuttle and Crawford to their homes and to get Pearce his money in the morning. Pearce refused, but told Loucks he was not

going to hurt the boys - only take them down the road, punch them in the mouth, and make them walk home. Pearce instructed Loucks to wait by the phone to hear from the boys.

Pearce, Smith, Butterfield, Brittingham, Tuttle, and Crawford left in Pearce=s car, a two-door Trans Am with a T-top.Pearce drove the car and Smith sat in the front passenger seat. Tuttle sat on Crawford=s lap in the middle of the backseat, with Butterfield and Brittingham seated on both sides of the boys. After driving south on Highway 41 in Pasco County, Pearce turned right on State Road 54 and drove to a dark, desolate area. According to Butterfield=s testimony, sometime during this drive Smith told Pearce that his 9 mm pistol was jammed and the two men exchanged guns, with Smith receiving Pearce=s functional .40 caliber pistol. Brittingham also testified that Pearce and Smith exchanged guns during the drive.

Pearce stopped the car along the side of the road and told Tuttle to get out of the car. Smith first exited from the passenger=s side and stood between the door and the car while Tuttle exited the backseat on the passenger=s side. Pearce told Smith either to Abreak [Tuttle=s] jaw@ or Apop him in the jaw for stealing my shit,@ to which Smith replied, AFuck that.@ Smith then turned around and shot Tuttle once in the back of the head. When Smith got back in the car, Pearce asked, AIs he dead?,@ and Smith replied, AYeah, he=s dead. I shot him in the head with a fucking .40.@ Pearce then drove approximately two hundred yards down the road, stopped the car, and Smith exited the vehicle again. Pearce ordered Crawford out. Crawford complied while pleading, ANo, Please no.@ Smith shot Crawford twice: in the head and in the arm.

After leaving the scene, Smith threatened to kill Butterfield and Brittingham if they Asnitched@ on him.

Pearce drove to a restaurant where he and Smith ate breakfast. Pearce and Smith left Butterfield and Brittingham at a grocery store, telling them not to leave, and returned for them within an hour. Pearce then drove to the Howard Franklin Bridge over Tampa Bay, where Smith wrapped the .40 caliber pistol in newspaper and threw it in the water. Shortly thereafter, the four men split up. Smith attempted to leave town by bus but was unable to do so because of an approaching hurricane.

Tuttle survived the gunshot to his head. At trial, he testified that he remembered getting out of the car and then everything went black. His next memory was waking up on the side of the road. He felt the hole in his head, but did not remember being shot or who shot him. He eventually flagged down a passing motorist for assistance. Crawford, however died at the scene. The medical examiner testified that Crawford=s injuries suggested that he was shot first in the arm, with the bullet traveling through his body and lodging in his throat; that the gunshot wound to Crawford=s head, which was fatal, entered the right side of Crawford=s head about four inches above his ear and exited the left side; and that Crawford would have lost consciousness fifteen to twenty seconds after the shot to his head and died within two to five minutes.

The entire course of these events occurred during the evening of September 13, and into the morning of September 14, 1999. That morning, Butterfield and Brittingham were located and interviewed by police. Smith was arrested on the same day, and Pearce was located and arrested a few weeks later. The murder weapon, Pearce=s .40 caliber pistol, was recovered from the location in Tampa bay where Butterfield stated that Smith had thrown it. The bullets removed from Tuttle and Crawford were matched to the same pistol.

DEFICIENT PERFORMANCE BY TRIAL COUNSEL

Appellant incorrectly cast this claim as one which is purely legal which did not warrant an evidentiary hearing. However, an evidentiary hearing was required to determine what reason, if any, trial counsel did not object to evidence of an uncharged sexual battery coming before Mr. Pearce=s jury.

At the evidentiary hearing, Attorney Ivie testified that he had no recollection of the prosecutor mentioning the uncharged sexual battery in opening statement. (ROA. Vol. I - p. 35-6). Attorney Ware testified at the evidentiary hearing that he vaguely remembered the prosecutor, in opening statement, telling the jury about the sexual battery. (ROA. Vol. IV - p.485). No tactical reason was given by either attorney for failure to object to the introduction of the uncharged sexual battery. This could only have been established at an evidentiary hearing, thus, the evidentiary hearing was clearly necessary.

Appellant incorrectly suggests that the trial attorneys had no legal basis to make an objection to the uncharged crime. Appellant cites Raleigh v. State, 932 So.2d 1054 (Fla. 2006), a case where defense counsel failed to object to the State=s introduction of the coperpetrator=s taped statement. Defense counsel opened the door by introducing portions of the statement on direct examination. In Raleigh, the doctrine of completeness permitted the State to introduce the

remainder of the statement. The record in that case Aestablishe[d] that defense counsel made an informed and reasoned, strategic decision to introduce Figueroa=s taped statement after considering the alternatives.@ Raleigh at 1064.

Unlike in Raleigh, in Mr. Pearce=s case, no informed, strategic reason was given by either trial attorney for failing to object to the uncharged crime. Attorney Ivie did not remember the uncharged crime being mentioned during the trial. Attorney Ware had only a vague recollection of the uncharged crime.

Appellant=s assertion that any objection would have no legal merit is incorrect. The legal basis for an objection would have been Florida Evidence Code 90.403 - Exclusion on grounds of prejudice or confusion. The trial attorneys were ineffective in failing to make an objection or filing a motion in limine to exclude the prejudicial testimony.

The uncharged crime of sexual battery was not inextricably intertwined with the murder and attempted murder. The uncharged sexual battery did not occur during the same criminal episode and was not relevant to the crimes as charged.

A chronology of events shows that introduction of the uncharged sexual battery was not inextricably intertwined with the charged crimes. A drug deal took place at 8:30 p.m. on September 13, 1999. (FSC ROA Vol VII - 421-22). Joe Havner, the brother of Amanda Havner, who was involved in the drug deal,

arrived at We Shelter America to retrieve Amanda and take her home. Brian Loucks, who managed We Shelter America, met with Joe Havner at the front gate, and Mr. Pearce remained with Tuttle at the back area of the property for an unknown length of time. (FSC ROA Vol. VII-429). While alone with Tuttle in the back area of the property, Mr. Pearce allegedly forced Tuttle to perform oral sex. There was no indication to the other witnesses that a sexual battery took place and no statements were made by either Tuttle or Mr. Pearce. (FSC ROA Vol. VII-432). After Mr. Pearce made a brief phone call, Smith, Butterfield, and Brittingham arrived at We Shelter America. (FSC ROA Vol. VII-431).

When Smith, Butterfield, and Brittingham arrived at We Shelter America, Mr. Pearce, Loucks, Shook, Tuttle, and Crawford were in the office of We Shelter America. (FSC ROA Vol. VIII -594-95). There was conversation between the group. (FSC ROA Vol. VIII -594-95). Mr. Pearce did not threaten anyone. (FSC ROA Vol. VIII -594-95). After discussion, Mr. Pearce said that the group was going to retrieve the money. (FSC ROA Vol. VIII -597). The group then got into the car and drove south on US 41 to State Road 54. Mr. Pearce, who was driving, stopped the car and told Smith to Abreak his fucking jaw. Teach him a lesson@. Tuttle got out of the car and Smith shot him. (FSC ROA Vol. VIII -599).

The cases cited by Appellant do not support the contention that the sexual

battery committed by Mr. Pearce was inextricably intertwined with the murder and attempted murder.

In Remeta v. State, 522 So.2d 825 (Fla. 1988) offenses committed in Texas and Kansas were properly admitted to establish identity and the extent of participation in the Florida murder where defendant asserted that his accomplice was the primary perpetrator in the killing. In Mr. Pearce=s case, neither was his identity at issue nor was the triggerman (Smith) at issue.

In Hunter v. State, 660 So.2d 244 (Fla. 1995) the crime in question was one robbery among several robberies committed by the defendant during what was essentially a robbery spree which included murder and attempted murder. In Mr. Pearce=s case, the introduction of the sexual battery was not necessary to establish Acontext, motive, and set-up of the crime@ and was not Alinked in time and circumstances with the charged crime.@ U.S. v. Canelliere, 69 F.3d 1116 (11th Cir. 1995).

Appellant cited Griffin v. State, 639 So.2d 966 (Fla. 1994) for an exposition of the differences between similar fact evidence and uncharged crimes. Clearly, Tuttles=s testimony of the alleged sexual battery was not similar fact evidence to the charged crimes of murder and attempted murder. t was not Williams rule evidence. Williams v. State, 110 So.2d 654 (Fla. 1959). It was an uncharged

crime.

Appellant argues that Smith v. State, 699 So.2d 629 (Fla. 1997) supports the contention that the uncharged sexual battery in Mr. Pearce=s case was a part of the same criminal episode. However, as the circuit court stated in the order granting a new trial, in Smith, the defendant was charged and convicted of first-degree murder, attempted first-degree murder, robbery, kidnapping, burglary, arson, and conspiracy to commit a felony which were many more offenses than in Mr. Pearce=s case. The State could have prosecuted Mr. Pearce for sexual battery on Mr. Tuttle but the State chose not to prosecute him.

Appellant suggests that the introduction of the uncharged crime was necessary to establish threats, domination, and malice toward Tuttle. However, if this were the legitimate reason for introduction of the testimony, the State could have properly filed a Williams rule notice. The State did not file such a notice.

In Thomas v. State, 885 So.2d 968 (Fla. 4th DCA 2004), during the presentation of its case-in-chief, the prosecution sought to admit and introduce evidence of six separate, unrelated and uncharged armed robberies allegedly committed by the defendant three hours before the commission of the instant offense. The Thomas court held:

Our court=s decision in *Griner v. State,* 662 So.2d 758

(Fla. 4th DCA 1995), supports the exclusion of the six Dade County crimes and requires a reversal and new trial. In *Griner,* two robberies were committed within a distance of approximately two blocks and occurred within a period of approximately twenty-two minutes. After the evidence was admitted at trial as *Williams* rule evidence, the state on appeal recognized that the evidence did not constitute similar fact evidence and argued to this Court that it was properly admissible as Ainextricably intertwined@ and/or Ainseparable crime@ evidence under
Griffin v. State, supra.
In rejecting the state=s contention on appeal and finding that the admission of this evidence could not be excused or condoned as harmless error, we held: In the present case the facts of the first event were not Ainextricably intertwined@ with, or Anecessary to adequately describe@ the second event. The most we can say about the relationship between these two events is that one occurred very soon after the other, which is not sufficient to make the evidence regarding the first incident admissible under *Griffin,* particularly when we weigh the danger of unfair prejudice to defendant against the relevancy of the evidence (citations omitted). Nor can we say that the admission of this evidence was harmless beyond a reasonable doubt under *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986) *Griner,* 662 So.2d at 759.
Likewise, the admission of six unrelated robberies in Dade County three hours prior to the crime at issue here can hardly be considered harmless beyond a reasonable doubt. REVERSED AND REMANDED FOR A NEW TRIAL. Id. at 976.

In Mr. Pearce=s case, the uncharged sexual battery was not Ainextricably intertwined@ and Anecessary to adequately describe@ the second event (the

second event in this case being the kidnapping and subsequent murder of Crawford). The actual murderer of Crawford and the attempted murderer of Tuttle had not arrived at We Shelter America at the time of the alleged uncharged sexual battery. The uncharged crime was irrelevant to the kidnapping and murder of Crawford.

In Griner v. State, 662 So.2d 758 (Fla. 4th DCA 1995), the Griner court held that two robberies twenty two minutes apart were not intertwined. The court held:

> We would also note that in the present case, the trial court severed the two incidents, which were charged in the same information, for purposes of trial, which appears to be consistent with *Crossley v. State,* 596 So.2d 447, 450 (FLA. 1992). In *Crossley* the defendant, who was armed, kidnapped a woman, then stole her vehicle and her purse. About two hours later he committed an armed robbery in a store which was approximately two miles from where the first incident occurred. The Florida Supreme Court held that the trial court abused its discretion in failing to sever: AThe danger in improper consolidation lies in the fact that the evidence relating to each of the crimes may have the effect of bolstering the proof of the other. While the testimony in one case standing alone may be insufficient to convince a jury of the defendant=s guilt, evidence that the defendant may also have committed another crime can have the effect of tipping the scales. Therefore, the court must be careful that there is a meaningful relationship between the charges of two separate crimes before permitting them to be tried together.@ Although

> the propriety of the severance in this case is not before us, the fact that the trial court concluded that the cases should be severed supports our conclusion that the two cases were not so intertwined as to make the evidence of the first incident admissible in the trial involving the second incident. The state=s reliance on *Erickson v. State*, 565 So.2d 328 (Fla. 4th DCA 1990), is misplaced because in *Erickson* this court found that the fondling of the victim and another child were Ainseparably linked in time.@ In the present case the crimes, as the facts reflect, were separated in time. Id. at 760.

In Mr. Pearce=s case, evidence of sexual battery was not even charged, nor was Mr. Pearce convicted of that charge. It was irrelevant to the underlying felony of kidnapping in that the asportation of Tuttle and Crawford took place from the office of We Shelter America when Smith, Butterfield, and Brittingham arrived. The uncharged evidence was introduced solely to inflame the passions of the jury and to bolster the evidence in the kidnapping/murder of Crawford.

Appellant is incorrect contending that an objection or motion in limine had little chance of success at trial. First, the collateral crime evidence was not necessary to describe the manner in which the murder and attempted murder took place. See McCall v. State, 941 So.2d 1280 (Fla. 4th DCA, 2006). Second, Appellee fails to acknowledge the standard of review applicable in this circumstance. AThere is, of course, no bright line between the admissible and inadmissible facts of inextricably intertwined collateral crimes. The

drawing of that line is within the discretion of the trial court.@ Conde v. State, 860 So.2d 930, 948 (Fla., 2003). The judgment of the circuit court should not be disturbed.

THE UNFAIR AND UNRELIABLE OUTCOME

The introduction of the prejudicial, uncharged, and disgusting act can in no way ever be deemed harmless. It was undisputed at trial that Faunce Pearce neither fired the weapon used in the attempted second degree murder of Tuttle nor the murder of Crawford. In fact, there was testimony that Mr. Pearce made statements to Loucks that Mr. Pearce was going to take Tuttle and Crawford down the road, rough them up and make them walk home. (FSC ROA Vol. VIII-416-417).

The uncharged evidence of sexual battery prejudiced Faunce Pearce to the extent that the jury was so offended, conviction of a lesser charge was vitiated. The introduction of the uncharged crime had the effect of a non-statutory aggravator strictly prohibited by established case law. The verdict of guilt was the prejudice.

Trial counsel was ineffective in allowing the admission of the alleged sexual battery of Tuttle. Trial counsel should have filed a motion in limine, objected at

trial, moved for a mistrial and preserved the error for appellate review. Trial counsel=s performance was deficient and prejudiced the defense. Strickland v. Washington, 466 U.S. 668 (1984).

In Capehart v. State, 583 So.2d 1009 (Fla. 1991), this Court discussed the failure to object by the very same trial counsel in Mr. Pearce=s trial in the following manner:

> The law is clear that error predicated on the admission of such evidence must be preserved for review by appropriate objection at trial. *Grossman v. State*, 525 So.2d 833 (Fla. 1988), *cert denied,* 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). Accordingly, we do not address the merits of Capehart=s claim. The defense counsel=s failure to object to the admission of this evidence and the resulting prejudice, if any, is a question appropriately decided in a proceeding for post-conviction relief. *See* Fla .R. Crim. P. 3.850; *see also, e.g., Kelly v. State,* 486 So.2d 578 (Fla.), *cert. denied,* 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986). Id. at 1014.

In Mr. Pearce=s case the prejudice was inflammatory and blatant. Mentioning the uncharged crime in opening statement by the prosecutor, in the direct examination of Tuttle, and in closing argument, all without challenge by defense counsel, poisoned the jury against Mr. Pearce and distracted them from considering the evidence concerning the murder of Crawford.

The uncharged collateral crime had nothing to do with the kidnapping and

murder of Crawford. The alleged forced oral sex is of such a nature as to be reprehensible to juries. One cannot say with any certainty that the jury was not influenced by the act. The uncharged crime was introduced solely to prejudice the jury against Mr. Pearce.

The trial court was correct in reversing Mr. Pearce=s first degree murder and attempted second degree murder convictions and was supported by the evidence and law.

ISSUE II

THE POST-CONVICTION COURT DID NOT ERR IN FINDING COUNSEL INEFFECTIVE FOR FAILING TO INVESTIGATE POTENTIAL PENALTY PHASE MITIGATION. DUE TO COUNSEL=S INEFFECTIVENESS, MR. PEARCE=S WAIVER OF MITIGATION WAS NOT A KNOWING AND INTELLIGENT WAIVER.

Penalty phase preparation

Regarding the pitiful investigation of possible mitigation, the following colloquy took place at trial:

> THE COURT: Before we bring in the jury, the Court had inquired yesterday, and I think, Mr. Ivie, you indicated the defendant did not intend to present any evidence on mitigation, is that correct?
> MR. IVIE: That=s correct, Your Honor.
> THE COURT: Does that remain the decision of the defendant?

> MR.IVIE: That is my understanding. Mr. Ware is counsel for the penalty proceedings.
> THE COURT: Mr. Ware, is that still the decision of the defendant?
> MR. WARE: It is, Your Honor.
> THE COURT: All right. As requested **B** as required by the Supreme Court, therefore, before we proceed, I have some questions to ask. Mr. Ware, have you and Mr. Ivie fully discussed with the defendant all of his rights and things he can do during the penalty phase?
> MR. WARE: Yes, Your Honor.
> THE COURT: Have you fully discussed with him what you feel all of the mitigation factors are that he could present, or that perhaps could be available to him that could be presented?
> MR. WARE: Yes, sir, Your Honor.
> THE COURT: During the course of your investigation, have you reasonably come to the conclusion that there are any mitigating factors or mitigation evidence that could be presented on behalf of the defendant?
> MR. WARE: I have, Your honor
> THE COURT: And what are those mitigating factors?
> MR. WARE: First, Your Honor, on that evening cocaine was used by Mr. Pearce. Secondly, that Amanda Havner was let go. Thirdly, that he turned himself in voluntarily. And fourth, that he gave a voluntary statement to the Pasco County Sheriff=s Department. (FSC ROA Vol. XI p. 1027-29).

Clearly, this mitigation was only mitigation which was obtained from the guilt phase of the trial. Mr. Ware admitted that at the time of trial he was unfamiliar with the ABA guidelines, specifically Guideline 11.4.1 which states in part that: The investigation for preparation of the sentencing phase should be

conducted *regardless of any initial assertion by the client that mitigation is not to be offered.* (emphasis added). This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. (PCR Vol. V p. 507-08). Mr. Ware did no preparation for the penalty phase. (PCR Vol. V p. 489). Mr. Ware testified that Mr. Pearce was never evaluated by any mental health professional; nor were any records of Mr. Pearce obtained by the defense. (PCR Vol. V p. 490). Mr. Ivie did not order probation files, school histories, talk to relatives, or have Mr. Pearce examined by a qualified mental health professional. (PCR Vol. I p. 53). At the evidentiary hearing, even Dr. Gamache, the State=s expert, opined that it would have been prudent that a psychological consultation or evaluation be done with someone charged with murder. (PCR Vol. VI p. 667). The post-conviction court, in its order, found as a matter of fact, that there was inadequate preparation because there was no preparation.

Regarding the appointment of a psychologist/psychiatrist to examine Mr. Pearce before the penalty phase, the following exchange between the State, Defense and the trial court took place:

> MR. VAN ALLEN: Judge, a couple of things. I know the Court **B** we went through this procedure in the not too distant past with Mr. Fitzpatrick and his desire to waive

mental mitigators, and we addressed some of the same issues at that time.

There are a couple of things I would advise the Court. First of all, Rule 4.4-3.8 of the Code of Professional Conduct requires that the prosecutor, in his position as administrator of justice, has the responsibility to divulge to the tribunal all unpublished mitigating information known to the prosecutor except when the prosecutor is relieved of this responsibility by protective order of the tribunal. I have not been relieved of that responsibility. And it would be my intention to suggest to the jury those items of mitigation in B which Mr. Ware has referred to this morning.

And obviously Mr. Ware inadvertently left out the one where I'm sure they would argue that Mr. Pearce did not shoot anybody, which I think is something the jury may consider in mitigation, even though they found him guilty of first-degree murder.

Muhammad B there's some language in Muhammad that is disturbing to me, because in its discussions the Supreme Court talks about proportionality testing that it is required to go through in its consideration of death penalty cases. And they make reference, kind of as an aside, maybe as dicta, that without full input to the jury and to the Court concerning mental mitigation, or mitigation in general, that it's difficult to measure or to determine the proportionality of a death sentence.

Having that in mind, they go forward and talk about the necessity of appointing independent counsel for the Court to make a determination or make inquiry into the existence of mitigation and present mitigating evidence to the tribunal. There are three ways that I have figured out that that could be accomplished, assuming the Court wanted to appoint independent counsel.

The first way is to appoint independent counsel

now and despite the protestations of the defendant, allow the attorney an opportunity to investigate and put together and report to the tribunal whatever mitigation could be found and presented for Mr. Pearce, even though he doesn=t want it done.

That can be done in one of two ways. A, recessing this jury for a period of whatever time it takes. And I would imagine it can be no less than 30 days and probably more in the area of 60, because whoever came on board would have absolutely no familiarity with this case.

My understanding is Mr. Pearce=s family are not residents of the State of Florida, which further complicates the issue. I have concerns about doing that, because that would obviously subject this jury to a possibility of severe contamination.

The other alternative is to discharge this jury now, appoint independent counsel to investigate and present to a new jury potential mitigation if it=s there. That obviously is out there.

The third alternative, and I don=t know that it=s any less desirable, is to proceed this morning and present B I understand that counsel will not present argument. I would present argument to the jury pursuant to my ethical obligations, divulge to them what I believe to be mitigation, because I am firmly of the opinion, and have been since we filed the notice, that Mr. Pearce, if he were to be convicted, is one of the types of cases that would withstand the test of the Supreme Court if he were to be sentenced to death.

If we go ahead this morning, whether or not the Court appoints independent counsel to determine mitigation at a Spencer hearing, I would nonetheless ask the Court on its own motion to have a qualified psychiatrist/psychologist appointed to at least attempt an interview and evaluation of Mr. Pearce to have that evidence available to the Court.

Obviously, this would be a factor or a task more easily accomplished if there was a lawyer to act as a go-between. But still, even in a refusal to cooperate, I am aware that there are some professionals out there that could render some opinion.

I don=t want the efforts of the State of Florida to be thwarted in its attempt to secure a conviction and a sentence of death simply by the refusal of the defendant to present mitigation.

So that=s where we stand. I believe those to be the options that are available to the Court, if counsel can assist or have any other observations to make.

THE COURT: The Court B this Court has been confronted obviously with this quandary before.

MR. WARE: Your Honor, may I respond briefly?

THE COURT: I think so. Go ahead, please.

MR. WARE: Thank you, Judge.

I believe under the rule indicated, the rule of ethics that the State Attorney has indicated to the Court, they do have a duty in this circumstance in reference to the aggravating circumstances.

Mr. Pearce does not wish, as the Court has inquired, to provide any mitigating circumstances to the jury. I believe that in the State=s Bif the State presents these mitigating circumstances, understanding there=s not going to be any argument by the defense, I think that the spirit of the Koon and Muhammad cases are that the jury=s advisory sentence must be based on whether sufficient aggravating circumstances exist, and whether sufficient mitigating circumstance exist which outweigh the aggravating circumstances found to exist.

If the State Attorney is telling the Court that they=re going to be presenting the mitigating circumstances, and the jury will have that to weigh B I think one of the concerns of the Muhammad case was that they did not have the mitigating circumstances to weigh, and that the Court gave great weight.

> Mr. Van Allen is correct in indicating the issue of independent counsel. It would be acting as a Court witness, and therefore there would be no issue of ineffective assistance of counsel of that independent counsel appointed by the Court. (FSC ROA Vol. XI p. 1032-38).

The post-conviction court found that Mr. Ware and Mr. Ivie did not adequately investigate potential mitigating factors. The contention by Appellant that a Atactical decision@ was made by trial counsel not to present any mitigation in the penalty phase of Mr. Pearce=s trial must fail. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare.

Mr. Ware was not only unprepared to represent Mr. Pearce in the penalty phase of the trial, he was clearly unqualified to do so. Mr. Ware was seeking certification and had never done a death case either as a guilt phase counsel or penalty phase counsel. (PCR Vol. V p. 479-480). He had never attended any seminars as to death cases before he assumed representation of Mr. Pearce. (PCR Vol. V p. 480). The post-conviction court found that the failure of Mr. Ware to read and become familiar with the standards was incompetence; also the failure of Mr. Ivie to share with the second attorney that had no experience in death penalty defense work was also incompetence.

Mr. Ware=s statement that there would be Ano issue of ineffective assistance of counsel of that independent counsel appointed by the Court@ is a blatant admission of his own ineffectiveness. Trial counsel failed Mr. Pearce in their failure to investigate and prepare.

Defense counsel must discharge significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, Aaccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.@ Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer=s attention on Athe particularized characteristics of the individual defendant.@ Id. At 206. In Mr. Pearce=s case, the jury knew nothing about Mr. Pearce=s Aparticularized characteristics@ because his attorneys did not investigate or prepare for the penalty phase of his trial.

Prejudice

The post-conviction court, in its order, addressed the lack of preparation and the resulting prejudice in this manner: ARegarding prejudice and whether the performance of defense counsel prejudiced the Defendant so that there is a

reasonable probability that the result of the proceedings would have been different, this Court obviously cannot say definitively that there would have been a difference. But there is a reasonable probability that a jury, who having heard no mitigation, returned a 10-2 verdict for death, would have been persuaded by the child abuse - despite the arguments by the State that this was just what it was back then-spare the rod, spoil the child. There were at least two witnesses that could have testified that these were preemptive beatings B and that is not discipline; that=s child abuse.@

Although different diagnoses of mental illness were presented at the evidentiary hearing, a diagnosis of mental illness impairing the Defendant=s ability to conform his conduct to the requirements of the law would have been a mitigator that a jury should have heard.

The mitigation which could have been presented, coupled with the fact that the Defendant was not the shooter, and inasmuch as mitigating circumstances need not be proved beyond a reasonable doubt, this Court must find that there is a reasonable probability that, in weighing the aggravating circumstances that the State had to establish beyond a reasonable doubt against the evidence tending to establish one or more mitigating circumstances and the weight that they could have chosen to give it, the result of these proceedings would have been different,

that is, that the jury, in all probability, may have come back tied or other than tied, in the Defendant=s favor of life versus death.@

Waiver

Regarding the issue of waiver of mitigation, the post-conviction court held: A Based upon the brief presentation that Mr. Ware made to the Court and based upon the authority in State v. Lamarca, 931 So.2d 838 (Fla. 2006); Koon v. Dugger, 619 So.2d 246 (Fla. 1993); Lewis v. State, 838 So.2d 1102 (Fla. 2002), Rose v. State, 675 So.2d 567 (Fla. 1996); State v. Lara, 581 So.2d 1288 (Fla. 1991); and Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), this Court finds that there was inadequate preparation because there was no preparation. This Court finds that there was no knowing and voluntary waiver of mitigation by the Defendant because the Defendant did not know what he was waiving. Defense counsel did not know what they were supposed to be looking for because they were so poorly prepared.@

Legal argument

Appellant=s reliance on Downs v. State, 740 So.2d 506 (Fla. 1999) is misplaced and can be distinguished from Mr. Pearce=s case on two points. First, Downs had waived his right to representation during the resentencing proceeding and counsel was appointed as Astand by@ counsel only. Id. At 516.

At no time did Mr. Pearce waive his right to counsel.

Second, mitigation evidence was presented by the defendant in Downs regarding his childhood and mental state at his original trial and the Florida Supreme Court held that the additional facts not previously presented at the resentencing hearing were cumulative to the evidence presented by Downs during the resentencing proceeding. Id. At 516. In Mr. Pearce=s trial, nothing was presented because trial counsel did not investigate or prepare for penalty phase.

Appellant=s reliance on Goode v. State, 403 So.2d 931 (Fla. 1981), is also equally misplaced. In Goode, this Court held:

> Appellant was the architect of his defense at trial. The record demonstrates that he knowingly waived his right to counsel, and was made fully aware of the perils of self-representation. The trial court appointed an attorney for the purpose of giving legal advice when needed, and appellant did not object to the arrangement. Clearly, appellant acted as his own attorney, and we do not believe that he may now complain that his Aco-counsel,@ provided for the purpose of giving him advice upon request, ineffectively Aco-represented A him and denied him a fair trial. Id. At 933.

In Mr. Pearce=s case, there is no question that he was being represented by Ivie and Ware. Mr. Pearce relied on what Ivie told him regarding his chances that he would receive the death penalty were slim; and Ware had never done a penalty phase and was unqualified to do so. Appellant=s contention on page 70 of the

initial brief that AThe post-conviction court=s order ignored testimony of the two trial attorneys that they urged Pearce to allow them to investigate and present mitigation on his behalf.@ is a smokescreen. Pursuant to the ABA standards cited elsewhere in this pleading, trial counsel was obligated to investigate and prepare whether Pearce initially declined to present mitigation or not. Trial counsel did not need Pearce=s approval to do their jobs. No authorization was needed to investigate mitigation.

Regarding the possible examination of Mr. Pearce by a psychologist/psychiatrist at the urging of the State before the penalty phase, Pearce=s answer of Anot particularly@ does not indicate that he would not cooperate. (FSC ROA Vol. XI p. 1032).

On page 73 of Appellant=s brief, Appellant questions the post-conviction court=s finding of fact as well as its determination of the credibility of witnesses. This is improper and flies in the face of established case law. This Court has stated that A[we] recognize and honor the trial court=s superior vantage point in assessing the credibility of witnesses and in making findings of fact.@ Porter v. State, 788 So.2d 917, 923 (Fla. 2001). Consequently, this Court will not Asubstitute its judgement for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by

the trial court.@ Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984) (citing Goldfarb v. Robertson, 82 So.2d 504, 506 (Fla. 1955). See also, Mclin v. State, 827 So.2d 948, 954 n.4 (Fla. 2002) AAs long as the trial court=s findings are supported by competent substantial evidence, >this Court will not substitute its judgement for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.=@ Even a cursory reading of the evidentiary hearing record will reveal that after the direct and cross-examination of nearly every witness, (doctors, lay witnesses, and Pearce himself) the post-conviction court asked its own questions to clarify and fully develop the testimony of the witnesses.

Appellant=s reliance on Schriro v. Landrigan, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) is also misplaced. First, the Supreme Court of the United States held that A[T]here was no reasonable probability that presentation of the additional evidence would have changed the outcome at sentencing.@ Id. At 1933. In Mr. Pearce=s case, the post-conviction court found as a matter of fact that coupled with the fact that Pearce was not the shooter, had the mitigation evidence presented at the evidentiary hearing been presented at the penalty phase, the result of these proceedings would have been different. In all probability, the jury would have come back tied or in the Defendant=s favor of life versus death.

Second, the defendant in Landrigan was aware of the proffered testimony of his ex-wife and birth mother. Id. at 1934. Pearce was not aware of what Daniel Pearce would have testified to if called by the defense at the trial. Third, at no time did Mr. Pearce advise the trial court to Abring on@ the death penalty. In fact he was not adamant about being examined by a mental health professional. As cited elsewhere in this pleading, Mr. Pearce, when asked, answered Anot particularly.@ (FSC ROA Vol. XI p. 1032).

The United States Supreme Court clearly enunciated the duty of a lawyer to investigate when it cited ABA standards in Rompilla v. Beard, 125 S.Ct 2456, 2466 (U.S., 2005) stating A[i]t 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.@ Trial counsel did not comply with his basic duty to the detriment of Faunce Pearce.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003) the Supreme Court of the United States ultimately held that AThe performance of Wiggins= attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel.@ Id. at 2529. Justice O=Connor, in delivering the opinion of the Court, stated:

We established the legal principles that govern claims of

> ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel=s performance was deficient, and that the deficiency prejudiced the defense. *Id.,* at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel=s representation Afell below an objective standard of reasonableness.@ *Id.,* at 688, 104 S.Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that A[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.@ *Ibid.*

The performance of trial counsel in Mr. Pearce=s case fell below prevailing professional norms. The deficiencies of counsel extended to the investigative and preparation aspect of the case. Mr. Pearce is entitled to relief under Wiggins. In Wiggins, the investigation regarding mitigation was abandoned, leads were not pursued. In Mr. Pearce=s case, trial counsel failed to do any investigation at all. The Supreme Court of the United states further held in Wiggins:

> Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social

> history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report. Their conduct similarly fell short of the American Bar Association=s capital defense work standards. Moreover, in light of the facts counsel discovered in the DSS records concerning Wiggins= alcoholic mother and his problems in foster care, counsel=s decision to cease investigation when they did was unreasonable. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of aggravating factors from Wiggins= background. Indeed, counsel discovered no evidence to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, thus distinguishing this case from precedents in which this Court has found limited investigations into mitigating evidence to be reasonable. Id. at 2530.

Due to trial counsel=s ineffectiveness, he was unable to make an informed choice among possible defenses. The mitigating evidence which counsel failed to discover and which was presented at the 3.851 was powerful. In assessing the reasonableness of an investigation and the Atactical decisions@ resulting from that investigation, the Wiggins Court further held:

> In assessing the reasonableness of an attorney=s investigation, however, 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 Schiaich and Nethercott 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. Id. at 2538.

In Mr. Pearce=s case, the facts elicited at the evidentiary hearing demonstrate a complete lack of investigation rather than an abandonment of an investigation. The lack of investigation resulted in trial counsels= ignorance of his client=s head injury, the emotional problems and anger issues which plagued Mr. Pearce as indicated by the testimony of Daniel Pearce and Kathryn Burford, and Mr. Pearce=s DCF records and probation records which indicated a psychological evaluation and drug treatment was necessary and proper.

The United States Supreme Court also addressed lack of investigation in Williams v. Taylor, 529 U.S. 362 (U.S. Va., 2000) stating that Athe graphic description of Williams= childhood, filled with abuse and privation, or the realty that he was Aborderline mentally retarded,@ might well have influenced the jury=s appraisal of his moral culpability.@ In Williams the Court recognized the influence that mitigation evidence could have on a jury. In Faunce Pearce=s case, the post-conviction court correctly detailed the impact that the evidence might have on the jury.

In Collier v. Turpin, 177 F.3d 1184, 1199 (11th Cir. 1999) the Collier court stated:

> With regard to Collier=s claim that counsel failed to interview a number of close relatives and friends of Collier that could have provided additional evidence to be used in the sentencing phase of his trial, the district court found that counsels= failure to pursue those witnesses= testimony was the direct result of a conscious tactical decision. AThe question of whether a decision by counsel was a tactical one is a question of fact.@ *Bolender,* 16 F.3d at 1558 n. 12 (citing *Horton,* 941 F.2d at 1462). Whether the tactic was reasonable, however, is a question of law and is reviewed *de novo. See Horton,* 941 F.2d at 1462. In assessing the reasonableness of the tactic, we consider Aall the circumstances, applying a heavy measure of deference to counsel=s judgments.@ *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066. Id. at 1199.

In Mr. Pearce=s case, the DCF and probation histories could have been discovered by trial counsel. They were not. Trial counsel knew very little about his client=s background.

The Collier court further held:

> Although Collier=s attorneys concede that their performance was deficient, they blame the trial judge rather than themselves for their poor display. We find that the trial judge was not to blame for counsels= ineffectiveness; rather, they were. In sum, counsel did not perform as objectively reasonable attorneys would have; their performance fell below the standards of the

> profession and therefore their assistance at the sentencing phase of the trial was ineffective. Id. at 1202.

The post-conviction court found that there was inadequate preparation because there was no preparation.

This Court in Orme v. State, 896 So.2d 725, 732 (Fla., 2005) held that:

> The trial court concluded in its order denying postconviction relief that Orme=s defense counsel acted reasonably by not presenting bipolar disorder as a defense during the guilt phase and as a mitigator during the penalty phase, stating that there was some disagreement on how to diagnose Orme at the time of trial and at the postconviction proceeding, even with the additional information presented. The court noted that because the experts agreed that Orme was addicted to cocaine, and the drug addiction was a factor in his murder trial, it was reasonable for trial counsel to present only this evidence. We disagree and find that counsel=s performance was deficient in both the investigation of Orme=s mental health and the presentation of evidence of Orme=s mental illness to the jury.

Notably, some mental mitigation evidence in Orme was known to counsel before trial, whereas Ivie and Ware had no knowledge of Mr. Pearce=s mental history. In Faunce Pearce=s case the errors of trial counsel are even more egregious than those in Orme because trial counsel did not even begin a reasonable investigation.

In Ake v. Oklahoma, 470 U.S. 68 80-1, 105 S.Ct. 1087, 1095 (1985) the Supreme Court of the United States held:

> [T]hat when the State has make the defendant=s mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant=s ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant=s mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant=s mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party=s psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant=s mental state, psychiatrists can identify the Aelusive and often deceptive@ symptoms of insanity *Solesbee v. Balkcom,* 339 U.S. 9, 12, 70 S.CT. 457, 458, 94 L. Ed. 604 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefor offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense. Id. at 80-1 ** 1095.

In Mr. Pearce=s case the Aelusive and often deceptive A symptoms of insanity

were neither elusive nor were they deceptive. Mr. Pearce=s mood swings were obvious to the witnesses at the offense. Trial counsel was ineffective in not getting Mr. Pearce evaluated by a mental health professional.

The jury knew nothing about Mr. Pearce=s mental state and *neither did his own defense team.*

In Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) this Court held that trial counsel=s performance at sentencing was deficient and woefully inadequate where trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. Counsel presented limited testimony of lay witnesses. Hildwin at 110 fn. 7. In Hildwin, at the 3.850 hearing, experts testified that the defendant was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Hildwin=s sentence was vacated. In Mr. Pearce=s case, the State ascertained that Mr. Pearce had never been examined by a psychologist or psychiatrist was ineffectively assisted of counsel and moved the trial court to have Pearce examined. Trial counsel joined in the motion to cover up the fact that by not having Mr. Pearce examined, trial counsel was unaware that mitigation could have been presented. Pursuant to established case law

cited, Mr. Pearce=s trial counsel=s performance clearly fell far below established professional norms. The post-conviction court did not err granting relief on this issue.

In State v. Lara, 581 So.2d 1288 (Fla. 1991), this Court was confronted with the exact contention that the defendant prevented the presentation of mitigation and held that:

> The state concedes that the background and mental health testimony presented at the 3.850 hearing was quantitatively superior to that presented by defense counsel at the penalty phase. The state also concedes that had this evidence been presented, Lara=s sentence may have been affected. The state argues, however, that it was Lara and his family who prevented counsel from developing and presenting this mitigating evidence is based on the defendant=s lack of cooperation and witnesses= reluctance to cooperate, the state concludes that counsel should not be held to be ineffective. That argument conflicts directly with the trial court=s express findings that defense counsel Adid not investigate in any detail the defendant=s background and did not properly utilize expert witnesses regarding defendant=s psychological state@ and that A Mr. Adelstein virtually ignored the penalty phase of the trial.@ We reject the state=s argument and find that this record clearly supports the trial court=s order. Id. At 1290.

Mr. Pearce=s case falls squarely on point with the facts of Lewis v. State, 838 So.2d 1102 (Fla. 2002). In Lewis, the trial court ordered a new penalty phase in a post conviction action and that order was affirmed by this Court. The facts in

Lewis were more onerous than the facts in the Pearce case; Lewis was clearly the murderer of Gordon and Pearce clearly was not the murderer of Crawford. Lewis= counsels had the same level of experience as did Pearce=s counsels. The level of preparation regarding guilt and penalty phase were similar. This Court held:

> Counsel never contacted any of Lewis=s other family members in an attempt to discover potential mitigation, nor did counsel attempt to obtain mitigating evidence that was contained in Lewis=s background records, including Lewis=s hospitalization records, school records, and foster care information.
>
> Kirsch focused on mental health evidence in preparing for the penalty phase but waited more than two weeks after the guilty verdict was returned before he requested the trial court to appoint Dr. Joel Klass as the mental health expert. When Dr. Klass first met with Lewis, he described Lewis as being uncooperative, very suspicious, and confused about Dr. Klass=s role in the proceedings. Lewis was willing to cooperate during a second interview, however, and provided Dr. Klass with general background information that he had a Arough@ childhood, was a loner, abused various drugs and alcohol, had poor grades in school because of his substance abuse problems, and had some form of a psychological evaluation when he was a child. Dr. Klass asserted that he needed documentated corroboration before he could render a professional opinion or conclusion. He remembered discussing *possible* theories with defense counsel and pointing out what information he needed before he could reach a conclusionB information which he did not receive prior to trial. Id. At 1109.

It is clear from the testimony of A.J. Ivie and the on the record comments from both Mr. Van Allen and Mr. Ware that no investigation of any kind regarding mitigation was undertaken by the defense at the time of the penalty phase trial. No expert had evaluated Mr. Pearce, no records of any kind had been obtained, no family members had been interviewed.

In Lewis this Court further held:

> In reviewing the current case, we find there is competent, substantial evidence to support the trial court=s finding that counsel did not spend sufficient time to prepare for mitigation prior to Lewis=s waiver. Kirch never sought out Lewis=s background information and never interviewed other members of Lewis=s family; therefore, he was unable to advise Lewis as to potential mitigation which these witnesses and records could have offered. The only witness who was available and willing to testify in favor of the defendant was a mental health expert who had merely talked with Lewis and had not yet reached a diagnosis because he did not have sufficient information. There is also competent, substantial evidence to support the trial court=s finding that Lewis=s waiver of the presentation of mitigating evidence was not knowingly, voluntarily, and intelligently made. Based on this lack of a knowing waiver and the substantial mitigating evidence which was available but undiscovered, we hold that Lewis did suffer prejudice. Accordingly, we find that there is competent, substantial evidence to support the trial court=s factual determinations and approve the legal conclusion that Lewis established a claim for ineffective assistance of counsel in the penalty phase of the trial. Id. At 1113-

1114.

In Mr. Pearce=s case, he was unable to waive the presentation of mitigating evidence because he was unaware of the substantial mitigation which would have been available to him had *any* investigation been done. This is a far worse situation than faced by Lewis, Lewis had at least a partial investigation and a partial mental health evaluation. Pearce had none. The post-conviction court did not err when it found as a matter of fact that: AThis Court finds that there was no knowing and voluntary waiver of mitigation by the Defendant because the Defendant did not know what he was waiving. Defense counsel did not know what they were supposed to be looking for because they were so poorly prepared.@

CONCLUSION

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

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 29th, day of November, 2007.

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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that a true copy of the foregoing, Reply Brief of Appellant was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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