IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. SC07-201

FAUNCE LEVON PEARCE,

Appellee.
_____/

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

_____

INITIAL BRIEF OF APPELLANT

_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO.

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

THE PROCEDURAL POSTURE

Following his unsuccessful direct appeal in Pearce v. State, 880 So. 2d 561 (Fla. 2004), Pearce 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. During this hearing, the defense attorneys, three lay witnesses and four mental health experts testified. At the conclusion of the hearing, Judge Tepper found trial counsel rendered ineffective assistance in both the guilt and penalty phases and reversed Pearce's convictions. (V,771). The State filed a timely notice of appeal.

RELEVANT FACTS

A. Trial

In its direct his conviction on direct appeal, this Court provided the following summary of the facts:

> 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 Loucks'

business, where Pearce gave them $1200 to obtain a book of 1000 geltabs. Pearce indicated that they should not return without either the money or the drugs. Shook, Tuttle, Crawford, and Havner went to Barcomb's house, where Barcomb indicated that she, her boyfriend, and Havner would 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 boyfriend 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 a 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, "We'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 "break [Tuttle's] jaw" or "pop him in the jaw for stealing my shit," to which Smith replied, "Fuck that." Smith then turned around and shot Tuttle once in the back of the head. When Smith got back in the car, Pearce asked, "Is he dead?," and Smith replied, "Yeah, 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, "No. 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 "snitched" 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 Frankland 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 that 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.

Butterfield and Brittingham agreed to cooperate

with the State in exchange for not being charged with any crimes related to these offenses. Both testified at trial. During the cross-examination of Brittingham, Pearce's counsel attempted to offer a videotape of a prior statement that Brittingham made to an investigating officer. This prior statement was offered as impeachment evidence, but the court denied its introduction. A transcript of the videotape was proffered by the defense. In this videotaped statement, Brittingham stated that Pearce had no knowledge of Smith's intention to shoot the victims and that Pearce had asked Smith what he was doing when he shot the victims.

Pearce did not testify or present any evidence during the guilt phase. Pearce was convicted of first-degree murder with a firearm for Crawford's death and attempted second-degree murder with a firearm for the shooting of Tuttle. During the penalty phase, the State relied upon the evidence presented in its case in chief. Pearce chose not to testify or present penalty phase argument. The jury recommended death by a vote of ten to two.

During the Spencer n2 hearing, Pearce declined to present evidence or argument and forbade his attorneys to do so. In imposing sentence, the trial court considered a handwritten letter from Pearce, letters from family members of Crawford, a comprehensive presentence investigation, and several hundred pages of court, criminal, school, and other records pertaining to Pearce. The trial court found three aggravating factors: a previous conviction of a violent felony, based on the attempted murder of Tuttle (given great weight); that the murder was committed while engaged in kidnapping (given great weight); and that the murder was cold, calculated, and premeditated without any pretense of moral or legal justification (given great weight). See §921.141(5)(b), (d), (i), Fla. Stat. (2001). The trial court found no statutory mitigating factors. While Pearce requested no nonstatutory factors, the trial court considered a number of factors based on claims in Pearce's correspondence to the court. The trial court concluded that two of Pearce's claims (that he was afraid of Smith and only participated in the murder because of this fear, and that the State witnesses lied) were actually claims of lingering

> doubt and would not be considered as mitigating factors. The trial court also discounted Pearce's claim that Crawford was killed because of his involvement in an illicit drug deal and Pearce's complaints about the conduct of his trial. The trial court noted that a teenager's foolish involvement with the illicit drug culture did not warrant his death and that any complaints about the trial proceedings could be raised during appellate review. The trial court did find Pearce's good conduct in jail to be a mitigating factor, but only entitled to little weight. The trial court concluded that the aggravating factors far outweighed the mitigating factors and imposed a death sentence.

Pearce v. State, 880 So. 2d 561, 565-568 (Fla. 2004).

After being convicted, Pearce indicated it was his desire to waive the presentation of mitigating evidence. (T11,1027). Upon inquiry of the trial court, defense counsel Mark Ware advised the court that he had fully discussed with Pearce the mitigating factors which he thought were available to Pearce. Ware advised the court that he believed Pearce's drug use at the time of the offense, that Amanda Havner was let go, that he turned himself in, that he gave a voluntary statement to the Pasco County Sheriff's Office, could be presented in mitigation. (T11,1028-29). Ware also advised the court that it was his belief Pearce understood the mitigating factors, and that he understood his right to present mitigating evidence. (T11,1029). In a colloquy with the court, Pearce confirmed that he had discussed this issue with his attorneys and the specific mitigating circumstances which could be presented on his behalf. Pearce stated that he understood those circumstances: "Yes,

sir, I do." (T11,1030).

Pearce stated that it was his desire to waive the presentation of any mitigating evidence to the jury. (T11,1030). Pearce told the court that no one forced, compelled, or threatened him to waive mitigating evidence. (T11,1030). He again told the court that he was freely and voluntarily waiving the presentation of mitigating evidence. (T11,1030).

After the colloquy with Pearce, the prosecutor raised the concern that Pearce had not been examined by a mental health professional. The court advised Pearce that he had a "right to have a psychiatrist or psychologist" examine him." (T11,1031-32). Pearce stated that he did "[n]ot particularly" care to be examined. (T11,1032). When the prosecutor raised the possibility of having Pearce examined now, Ware responded, in part: "Mr. Pearce has indicated he does not wish to have any psychological/psychiatric report; he would not cooperate. He has indicated he has no mental history, mental health problems in the past." (T11,1038).

The trial court recognized the evolving nature of case law in the area of waving mitigating evidence. The court noted that Pearce had two "very competent" attorneys to represent him and did not see a need to add a third lawyer to represent the defendant. The trial court stated he thought that Pearce freely

and voluntarily waived his right to present mitigating evidence. (T11,1041). The court stated:

> The Court has determined that there is no evidence in this case, and I do so find, that Mr. Pearce suffered from such mental defect as to be incompetent to make the plea which he's making. There's no evidence in either the nature of the offense, the circumstances of the offense, or his conduct in court that would suggest that Mr. Pearce is not fully cognizant of what's going on and fully capable of making these decisions.
>
> . . .
>
> The Court likewise has, if I have not already, but I am certain I believe I've already ordered a comprehensive PSI for Mr. Pearce as well. So regardless of what happens today, the Court will have the benefit of a very comprehensive PSI, which I assume also will include every mitigating factor we can come up with.
>
> The Court does not find that either of the cases mentioned require appointment of a psychiatrist and psychologist. And in light thereof from the circumstances, and in light of what the defendant himself has indicated today from counsel, the Court finds it would be not productive to the Court to make such appointment.

(T11,1043).

At the close of the prosecutor's penalty phase argument, defense counsel Ware asked to approach the bench. He stated for the record, the following:

> Judge, for the record I want it to be clear that Mr. Pearce had asked me to argue, number one, that he did not want independent counsel, he did not want psychological or psychiatric doctors appointed, he did not want this proceeding continued. He wanted to proceed. He did not wish for me to produce any mitigating evidence, testimony, or argument. All this was against my legal advice as well as against Mr.

Ivie's legal advice.

(T11,1072).

During the Spencer hearing Pearce again affirmed that it was his desire not to present any evidence or testimony. When advised by the court about defense counsel's ability to address the court in an effort to assist the court in sentencing, Mr. Ware stated: "Your Honor, for purposes of my representation of Mr. Pearce, I've been informed emphatically not to present any mitigating circumstances, Your Honor. I don't want to violate any ethical considerations." (T-8). Pearce confirmed that it was his "desire" that his attorneys not present any evidence or testimony of any kind on his behalf. (T-8). Mr. Ware also stated that he had spoken to Pearce about it before and that "not presenting mitigating evidence" is against his advice. (T-8). Pearce then addressed the court regarding a motion he filed for counsel to file an "interlocutory appeal." Pearce responded to the prosecutor's contention that the issues were not proper for such an appeal, stating: "I'd go further to say that the issue to be resolved is a violation of the 14th Amendment right to due process; has very little to do with ineffective assistance of counsel and would, therefore, be covered under an interlocutory appeal had it been filed timely." (T-13). The court denied the motion.

B. THE POST CONVICTION HEARING

Trial Attorneys

A.J. Ivie testified that he was a conflict attorney appointed to represent Pearce in Pasco County. He replaced another conflict attorney, Samuel Williams, who withdrew from the case. Ivie had been lead counsel on a number of capital cases during the course of his career but did not specifically recall how many. (VI,843-44). Ivie had "thirty-six" years experience in private practice. During that time a large percentage of his practice was devoted to criminal defense work. (VI,849).

Since representing Pearce, Ivie has had a number of medical problems, including suffering a stroke in November of 2002 or 2003. (VI,841). Ivie explained that his "left side has become involved and my ability to recall details has been compromised." (VI,842). In fact, Ivie's memory has been significantly compromised as a result of the stroke and he can recall "very little." (VI,842).

Ivie seemed to recall attempting to minimize Pearce's involvement in the murders during the guilt phase.[1] (VI,813). He had no recollection of it, but, had no reason to dispute that he argued in opening statement that Tuttle would testify that no one threatened him to get into Pearce's car. (VI,813). He did

[1] Ivie had no reason to dispute defense counsel's assertion that he took some depositions of potential witnesses and Sam Williams and Phillip Cohen, took others. (VI,816-17).

not recall whether any uncharged crime was introduced but did not dispute the record if it reflected the prosecutor stated in opening that Pearce was enraged and put a .40 caliber handgun to Tuttle's head and forced him to perform a sex act upon him. (VI,819-20). He agreed the trial record would reflect accurately whether an objection was made to the prosecutor's statements. (VI,821).

Ivie filed a motion for appointment of an additional attorney which was granted by the court. (VI,828). He recalled having conferences with Ware but did not remember whether he was given any guilt phase witnesses. (VI,829). Ware had not previously tried a capital case. However, Ivie testified that he had tried "a lot of capital cases" at that point. (VI,829). Ivie was trying to get Ware experience so that he could try capital cases on his own. (VI,829). Ivie had previously prepared penalty phases on his own. (VI,831).

Ivie retained the services of a private investigator in this case. (VI,831-32). Ivie did not dispute defense counsel's suggestions that the investigator only worked on the guilt phase. (VI,833). He did not recall ordering the investigator to obtain medical records or records from the Department of Children and Families. (VI,833). Ivie testified that he did not recall personally talking to relatives, or ordering probation files or medical records but talked to Mr. Ware about

doing that. (VI,837).

Ivie did not have any independent recollection of what work was conducted on the penalty phase but thought that his co-counsel, Mark Ware, was working on it. (VI,842). He did not recall whether prior counsel, Sam Williams, obtained money to hire a mental health expert and could not recall if such an examination ever occurred. (VI,843).

In previous cases, Ivie has sought funds from a court to hire mental health experts to evaluate clients in terms of competency, sanity, and retardation. (VI,849). Had Ivie suspected any of those problems in Pearce's case, he would have asked for the court's assistance. (VI,849-50). In previous capital cases, Ivie employed mental health experts in preparation for the penalty phase. (VI,844). He was aware of the importance of such evidence and had previously weighed the benefits and the potential risks associated with presentation of such evidence. (VI,844). He had considered for example, the possibility that such evidence might reveal an antisocial personality disorder, a condition he would not want to disclose to the jury. (VI,845).

Ivie could not recall any conversations with Pearce regarding penalty phase evidence. (VI,845). He recalls that at some point Pearce opted not to present any mitigating evidence. (VI,846). Ivie and Ware tried to get him to change his mind

and persuade him it was in his best interest to present mitigation of any sort to save his life. (VI,846). Pearce chose not to follow that advice. (VI,846).

Ivie agreed that the sexual battery upon Tuttle was not the only uncharged offense revealed at trial. While he did not specifically recall the evidence, he recalled there was no charged offense of aggravated assault upon Ms. Havner. (VI,847). Nor, was there an aggravated battery charged when Pearce slammed Amanda's head against the air conditioning unit in the house. (VI,847). Nor, was there a charge leveled against Pearce for kidnapping Amanda Havner. (VI,848).

Mark Ware testified that he was appointed second chair counsel with Mr. Ivie. Ware said that he had been practicing law for 15 or 16 years beginning in the State Attorney's Office. He then worked for Barry Cohen on a high profile case in Tampa. (IX,1278-79). From there he worked for the Public Defender's Office in Dade City and the Hillsborough County Public Defender's Office. (IX,1280). From the public defender's office, Ware went to a Dade City law firm which handled criminal cases. (IX,1280). The vast majority of his legal experience has been in criminal law. (IX,1280).

Ware was seeking capital case certification and this was his first capital case. Ivie was lead counsel and he was assigned "three or four witnesses" and he would perform the penalty phase

"with his help." (VIII,1263). Ware explained that certification required him to sit second chair on two death cases. (IX,1261). At the time he worked on Pearce's case, Ware had "handled all cases from misdemeanor through felony. I had sexual battery cases, but I'd never done a death case." (IX,1264). Ware had not attended any death seminars, but, Ivie gave Ware a "Life over Death" book to familiarize him with the types of things he would be doing. (IX,1266). Ware acknowledged that he did not read completely read the book. (IX,1302).

Mr. Ivie was responsible for filing pretrial motions. (IX,1267). Ivie was also responsible for making objections during opening and closing arguments. (IX,1263). Ware vaguely recalled that Pearce forced Tuttle to perform oral sex upon him. (IX,1269). Ware would not dispute the record if no objection was made to that testimony. (IX,1269).

Ware agreed that if a collateral crime was repulsive and can become a feature of the case, it would be prudent to file a motion in limine to prevent its admission. (IX,1289-90). Ware agreed that Pearce's forcing Tuttle to perform oral sex upon him fell into that category. (IX,1290). However, Ware testified that in certain circumstances uncharged crimes come into evidence. For example, when the uncharged crime is inextricably intertwined with the charged crime. (IX,1281). Ware agreed

that a felony murder may be based upon kidnapping or any number of uncharged felonies. (IX,1282).

At the beginning of his entry into the case, Ware knew there was going to be a penalty phase and he attempted to educate himself on how to prepare for it. (IX,1283). He reviewed a Life Over Death manual. (IX,1284). He was aware of the statutory mitigating circumstances which could be considered by the jury and was aware that family history was important. (IX,1284). He was aware of the possibility of presenting mental mitigation, both statutory and non-statutory. (IX,1284). He was aware he could request funds from the court for hiring a mental health expert to evaluate Pearce. (IX,1284).

At some point, Ivie told Ware that Pearce did not want a penalty phase. (IX,1285). However, he did not satisfy himself with that response and met with Pearce. (IX,1285). Ware advised Pearce of the possibility of presenting family and friends at the penalty phase. (IX,1286). Ware and Pearce discussed his family early on in the case. (IX,1293). Pearce did not authorize Ware to bring in family members and, in, fact, told Ware not to do it. (IX,1286). Ware testified that he did not contact any outside witnesses to prepare for the penalty phase. Ware was "advised" by Pearce that he could only talk to "one" witness, "Chris." (IX,1273). Ware was told he could only advise Chris of what was going on, "[n]othing of substance, just

to let her know we're going to trial here, we have a hearing here, that type of thing." (IX,1273). In accordance with Pearce's wishes, he spoke to Christina two or three times about logistical matters. (IX,1285).

Ware advised Pearce that he had the right to present mental mitigation, either statutory or non-statutory, to aid the jury in its determination of life or death. (IX,1286). He asked Pearce to be evaluated by a mental health professional, but, Ware testified: "I was told not to." (IX,1286-87). In fact, Pearce told Ware he would not cooperate. (IX,1287). Ware thought he put that fact in the record at the time of trial. (IX,1287).

Ware did not believe Pearce had any mental health issues but did seek to have him examined. (IX,1274,1275). Pearce and Ware met a number of times throughout the matter, Ware explained:

> And he and I discussed the potential of having psychologists or psychiatrists come in to evaluate him for purposes of the penalty phase, and that we could speak with family members and get into those types of things.
>
> I think that I had listed some things on the record as to what the mitigating evidence would be, and I believe I addressed to the Court that Mr. Pearce did not want to be psychiatrically or psychologically evaluated.

(IX,1275). Ware told the court at sentencing that Pearce chose not to put mitigating evidence on during the penalty phase against his advice. (IX,1276).

Pearce's decision to waive mitigation was against his advice. (IX,1287). Ware was in court when Judge Swanson made an inquiry of Pearce regarding the waiver of mitigation. (IX,1287). Ware was convinced that Pearce's decision not to present mitigation was a voluntary decision on his part. (IX,1288). Ware had several conversations with Pearce and he seemed intelligent and at no point did he have any reason to question Pearce's competency. (IX,1288-89). At the time he represented Pearce Ware had experience dealing with mentally ill clients. (IX,1292).

Ware did not notice mood swings when he represented Pearce. (IX,1294). Ware testified that he met with Pearce at least a dozen times and spent "significant" time with him each time. (IX,1297-98).

When confronted with ABA guidelines regarding investigation into the penalty phase, even when faced with a client who wishes to waive mitigation, Ware testified: "At the time I was told don't do it. And I was in the midst of it if I don't follow what the client - -[judge interrupts]. (IX,1292). Pearce told Ware at some point that his focus was on the appeal of his convictions as a reason not to go forward with mitigation evidence. (IX,1293). Pearce explained that the Florida Supreme Court was "more lenient towards non-shooters and would probably overturn the case to life as opposed to death as I remember."

(IX,1300). Ware strongly advised Pearce against taking this course: "I told him that was incredibly risky and shouldn't be done, that we should put mitigation evidence on." (IX,1300). It appeared that Pearce had done his own research on this issue. (IX,1300). But, again, Ware explained: "I told him that it was absolutely against my advice, that he needed to do this, otherwise, he was looking at death." (IX,1300-01).

The post-conviction court asked Ware about having a doctor examine Pearce "just to see what they say so we know what we're talking about, what you're giving up? Ware replied: "I did discuss with him about having a psychiatrist appointed, he, and he said he would not cooperate." (IX,1301).

B. Mental Health Experts

Licensed psychologist Dr. Richard Carpenter was retained by post-conviction counsel to examine Pearce. In criminal cases, Dr. Carpenter has testified "hundreds of times for the defense."[2] (VI,910). In contrast, he has only testified for the state a "handful" of times. (VI,910). Dr. Carpenter saw Pearce twice and was provided depositions and trial transcripts as well as the direct appeal opinion and taped transcripts of some witnesses. (VI,866). He also examined Pearce's letters which suggested he had a "grandiose cognitive style." (VI,867).

[2] In addition, Dr. Carpenter admitted that in testifying in Jimmy Ryce cases he has "always" been called by the defense. (VI, 911).

Carpenter talked to Pearce's mother and Pearce's first wife in addition to reading interviews conducted by the CCRC investigator. (VI,872). Pearce had an extensive history of drug abuse, using LSD in his mid-teens through the time of the offense. (VI,874). Sometimes he would use acid as many as 3 to 5 times a week but more often 3 to 5 times a month. (VI,874). He liked the effects so much that he would take up to 10 hits at a time. (VI,874). People who use LSD on a regular basis "know how to navigate the symptoms and they derive pleasure from the altered states." (VI,875).

Pearce's brother was diagnosed with bipolar disorder and Pearce's mother volunteered that she thought Pearce's natural father was bipolar. (VI,873). However, aside from the mother's suspicion, he had no documentation or evidence that Pearce's father was bipolar. (VI,900). Two of Pearce's children have been diagnosed with attention deficit disorder but not bipolar disorder. (VI,901).

Dr. Carpenter diagnosed Pearce with bipolar disorder, predominately manic type, "as well as a rule out or consider cognitive disorder, secondary to head injury, and polysubstance abuse." (VI,876). Pearce was typically more manic than depressed, with "high levels of energy, feelings of grandiosity, some sense of omnipotence." (VI,876). "His mother said that he had an impulsive personality type, you know, sort of behavioral

pattern." He would do things on impulse. He also had anger – what I would call meltdown, in layman's terms. He would have very bad anger outbursts." (VI,885-86). He could stay up for long periods of time and work around the clock. (VI,886).

Pearce was not taking any medication at UCI. (VI,917). Pearce fell down the stairs as a baby and injured his head but it "didn't seem to have any lasting effects." (VI,878). But, it was possible he got dyslexia from the head injury. (VI,878). His impression from the mother was that the results of the auto accidents were relatively minor. (VI,903). He could not recall seeing any hospital records from the auto accidents. (VI,909).

Dr. Carpenter thought that Pearce's parents, as strict Baptists, would administer corporal punishment. (VI,881). Now, he thought it would be considered child abuse. (VI,881). Pearce's mother did not tell Dr. Carpenter about any abuse, but said "they were strict." "She said they only spanked their kids if they disobeyed a direct order. She said most of time they would lose privileges or be placed on restriction. She stated that there wasn't any type of abuse in the home of any kind, physical mental, or sexual, et cetera." (VI,898-99). Pearce's mother and adopted father both have Ph.D's. (VI,897).

Although he did have instances of three potential head injuries, he did not have enough information to make a definitive judgment on brain damage: "It's neither ruled out or

in." (VI,883). He did not have enough data to support that diagnosis. (VI,890). Dr. Carpenter did not find any evidence of a psychotic disorder: "I didn't - - I didn't see any psychotic symptoms. He didn't report any to me." (VI,902).

Dr. Carpenter was able to conclude Pearce was operating under an extreme mental or psychological disturbance at the time he committed the crimes. This was based upon Pearce taking drugs and having a bipolar disorder. (VI,889). Dr. Carpenter also cited witness statements that said he was going from one extreme to another at the time of the offense. (VI,890). He did not, however, find the other statutory mental mitigator, that Pearce was substantially impaired in his ability to conform his behavior to the requirements of the law. (VI,892).

Clinical psychologist and neuropsychologist Henry Dee testified that he examined Pearce at UCI in July of 2005 at the request of CCRC. (VII,939). Dr. Dee admitted that the majority of his work in criminal cases is done on behalf of the defendant. (VII,1041). Pearce's history revealed a normal pregnancy and developmental milestones, "walk, talk, use words and so forth." (VII,942). Pearce attended a number of elementary schools because his adopted father was a physicist and astronomer who "worked in the industry and taught." (VII,943).

Pearce was discovered to have a learning disability in the

sixth grade, dyslexia. (VII,943). Pearce thought that he was also diagnosed with attention deficit disorder, however, the mother did not recall that. (VII,944).

Pearce was frustrated with school and dropped out in the eighth grade, which is not uncommon for those with a learning disability. (VII,945). He did, however, later learn to read and obtained his GED. (VII,945). The mother described the teachers as saying that Pearce had a high level of potential, but, he was a daydreamer, which would "be consistent with the diagnosis of ADD." (VII,946).

Pearce's natural father was an abusive husband and abandoned the family before Pearce was born. (VII,947). Pearce's mother did not believe Pearce was hurt in a couple of automobile acidents, "in the sense that he was seen in the emergency room, treated and released." (VII,949). The mother did notice some changes in Pearce after the accident, "but she was less clear about it." (VII,950). Pearce had temper tantrums that "became quite distressing to everyone in the family." (VII,950).

Some of the three children Pearce fathered with his first wife displayed aggressiveness and had significant "behavioral problems." (VII,952). Dr. Dee thought it was difficult to distinguish between children with ADHD and bipolar disorder. (VII,954). Pearce was treated or diagnosed at Rollins College as dyslexic and ADD. (VII,964).

Dr. Dee talked with Daniel Pearce, Pearce's older brother, who described two auto accidents Pearce had. Daniel told Dr. Dee that after the second accident Pearce's sleep disturbance became worse and that he became quite irritable, "quick to anger." (VII,967). Also, Daniel said that Pearce's memory "seemed much worse, or some words like that, very soon after the accident." (VII,967). Dr. Dee testified that the two most common "sequela of any cerebral injury, no matter what the location, are impaired memory and increased impulsivity and irritability." (VII,967).

According to Daniel, Pearce used about every drug there was. (VII,970-71). During the clinical interview, Pearce claimed he was beaten or whipped all the time, by belts, ping pong paddles, "far too much." (VII,973). Pearce said that he had some suicidal ideation periodically throughout his life but had never been treated by a psychiatrist or psychologist. (VII,974). However, his brother Daniel, has been treated for bipolar disorder by a psychiatrist with medication. (VII,974). Pearce told Dr. Dee he started smoking marijuana at about age 13 and also tried alcohol, but didn't drink that much. (VII,975). He also used cocaine, heroin, and various prescription medications but that his typical drugs of choice were marijuana or cocaine. (VII,975). At the time of the crime, he was using marijuana but when he wanted something stronger, his drug of choice was

LSD, “sometimes in prodigious quantities.” (VII,976).

On the day of the crime, he was using “marijuana, powder cocaine, about two grams—.” (VII,977). Pearce also claimed he was using ecstasy, MDMA and mescaline. (VII,977). Pearce told Dr. Dee that LSD was his drug of choice and was a long time user. (VII,978). Dr. Dee opined that brain damage and/or an underlying psychological condition may exacerbate the effects of such a drug on an individual such as Pearce. (VII,979).

Dr. Dee administered the Wisconsin Card Sorting test, Multilingual Aphasia Examination, Judgment of Line orientation, facial recognition, finger localization and right-left orientation. The Weschler Adult intelligence scale was administered and Pearce’s full scale IQ was 111. (VII,988). The verbal IQ was 124 and the performance or non-verbal, was 94. (VII,988). The difference between verbal and non-verbal scores may be associated with a learning disability but is typically a result of brain damage. (VII,988). Dr. Dee thought that the 30 point difference was “almost certainly” the result of brain damage. (VII,989).

The Denman was also administered and it measures memory. (VII,991). Pearce’s full-scale “memory quotient” is “99.” (VII,991). The mean or average performance on the Denman is 100. However, Dr. Dee thought it was “significantly below” Pearce’s “full-scale intelligence quotient of 111.” (VII,991).

He thought that since Pearce has above average intelligence, Pearce should have scored about a 111 memory quotient. (VII,992).

Dr. Dee concluded that Pearce was brain damaged, more in the right hemisphere than the left. (VII,1001-02). The brain impairment manifested itself in Pearce's impulsivity. "That's how he got himself into trouble for years and years." (VII,1002). Pearce is probably more "irritable" than "most" people. (VII,1002). Moreover, Pearce's history suggests a mood disorder but "it's a little difficult for me to know at this late date whether that's clearly depression or bipolar disorder. And I don't know that it makes much difference in a sense except in some fine diagnostic sense, but then it's present, yes." (VII,1002). Dr. Dee was familiar with the statutory mental mitigators and thought that Pearce was under a major mental or emotional disturbance, either the mood disorder, be it major depression or bipolar disorder. The impulsivity that comes with brain damage is "of course" a major mental or emotional disturbance. (VII,1005).

As for non-statutory mitigation, Dr. Dee thought there was child abuse based upon what Pearce told him about his childhood. (VII,1005-06). Also, Pearce's addiction to drugs might be mitigating. (VII,1006). When asked about Pearce's ability to be a loving father as a non-statutory mitigator, Dr. Dee

admitted that he had no information that Pearce was in fact, a loving father. (VII,1016). To the contrary, he had information that Pearce provided no regular emotional or financial support for the children. Pearce was behind in child support and had been arrested a number of times. (VII,1016).

Dr. Dee acknowledged that scale 9 on the MMPI measures mania, impulsivity, overactivity, and grandiosity. Dr. Dee acknowledged the MMPI he reviewed showed Pearce scored 53, which is "normal." (VII,1012-13). Also, on scale 4, the psychopathic deviate scale, Pearce scored a 79, which is, as Dr. Dee acknowledged, "extremely elevated." (VII,1019-20).

Dr. Dee acknowledged that he had not reviewed any medical records relating to Pearce's automobile accidents or treatment for cat scratch fever. (VII,1024). Pearce's mother did not recall ever giving Pearce medication for either dyslexia or ADD. (VII,1024). Dr. Dee did not know of any medical evidence to corroborate his finding that Pearce has or may have some degree of brain damage. (VII,1033-34).

As far as Dr. Dee knew, there was no evidence that Pearce was using LSD on the day of the crime or the night before the crime occurred. (VII,1027). Dr. Dee reviewed his notes from Pearce's conversation about drug use, and repeated: "I was taking marijuana, I snorted some cocaine, a couple of grams, also had ecstasy and then beans." (VII,1028). As far as his

conversations with Pearce or anyone else, be they truthful or not, Dr. Dee admitted that he had no indication that Pearce was using LSD on the date of the offense. (VII,1028). Whatever the long term affects of LSD are, Dr. Dee did not see any behavioral impact on Pearce. (VII,1057).

Dr. Dee admitted that Pearce's verbal and performance IQ's are statistically within the normal range. On the Denman Memory test, Dr. Dee also acknowledged that Pearce scored "dead-straight average." (VII,1035). And on the remaining tests, with the exception of facial recognition,[3] Pearce scored "normally." (VII,1035). The Wisconsin Card Sorting test was designed to show frontal lobe damage and Pearce "passed well." (VII,1038). In fact, Dr. Dee admitted that of the tests he administered to Pearce, he scored either average or above average. (X,1555).

Forensic Psychologist Dr. Berland acknowledged that since entering private practice he has testified in easily over 100 capital penalty phases. He thought that it was probably true that in each and every one of those cases he was called by the defense. (VIII,1119-20). His role in this 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

[3] Pearce displayed "moderate impairment" in facial recognition. (VII,1035).

at the time of trial that were not investigated." (VIII,1074). Dr. Berland thought that he had enough information just from Pearce to conclude that he was under an extreme mental or emotional disturbance at the time of the crime. (VIII,1075). His opinion was based upon the MMPI-II he administered and a detailed "interview" with Pearce. (VIII,1076).

Dr. Berland testified that Pearce's F, L, and K, the validity or test taking attitude scores, indicated that Pearce had a chronic psychotic disturbance. (VIII,1086). Dr. Berland had no evidence that Pearce had ever been medicated for mental illness. (VIII,1087). However, Pearce's clinical scales showed some signs of mental illness, including paranoid, delusional thinking. (VIII,1090).

Dr. Berland thought that Pearce was very bright in spite of brain injury. (VIII,1094). Dr. Berland summarized his interpretation of the MMPI, that Pearce was attempting to hide mental illness but that the MMPI showed a disturbed individual. Pearce revealed that he has in the past had had hallucinations; auditory, visual, tactile and smell. (VIII,1098).

Pearce told Dr. Berland his attorneys did not make any effort to gather any data and as he put it "made an uninformed decision to not present" evidence in the penalty phase. (VIII,1104-05). Dr. Berland thought that Pearce suffered from an extreme emotional disturbance at the time of the crime.

(VIII,1105). Dr. Berland also thought that Pearce had difficulty conforming his conduct to the requirements of the law which was also a statutory mitiagtor. Dr. Berland based his opinion on the biological nature of Pearce's mental illness, that he was psychotic. (VIII,1106).

Pearce told Dr. Berland he has injected crystal methadrine, heroin, Dilaudid. Pearce also sniffed Freeon, powder cocaine, mushrooms, various forms of acid. And, as "much as a fifth of alcohol, at some points as much as a fifth of alcohol every other day." "So there was at least evidence from him of extensive and diverse drug and alcohol abuse." (VIII,1111).

Dr. Berland testified that Pearce described frequent beatings administered by his stepfather. "These appeared to be overreactions to minor events by him and the other kids." (VIII,1113). Pearce described his stepfather as "hyper-religious" with "constant unreasonable pressure on the kids." (VIII,1114). But, Dr. Berland testified: "And, again, I didn't go out and confirm any of that, but it's confirmable." (VIII,1114).

Dr. Berland thought that Pearce was intelligent even though he did not conduct any testing on him. "Intuitively, when you talk to him, partly because of the way he uses language, he seems to be very bright to me. Vocabulary corresponds with overall intelligence more than any other intellectual skill."

Pearce used "a very sophisticated vocabulary." Thus, Dr. Berland concluded that Pearce is "very bright even after the brain injuries." (VIII,1115).

Dr. Berland admitted that in his eight hours with Pearce he found him intelligent, responsive, and did not observe any signs of incoherence or insensibility. (VIII,1121). Dr. Berland admitted that he relied upon Pearce's self-report in the interview and on the MMPI in making his assessment. He did not believe his mission was to check up on the information he received. He relied upon the MMPI to diagnose a psychotic thought disorder. (VIII,1123). He admitted he had no evidence from Pearce's mother or brother or any mental health professionals in the Florida State Prison System to confirm that Pearce had some kind of psychotic thought disorder. (VIII,1123). In fact, Dr. Berland admitted that he had no evidence showing that Pearce had ever been treated for any mental illness. (VIII,1123-24).

Dr. Berland testified that the F scale on the MMPI is also known as the faking scale but is technically known as the "infrequency scale." (VIII,1127-28). Dr. Berland thought Pearce's F scale at 79 was not high by "research standards." (VIII,1128). Dr. Berland was confronted with a portion of the MMPI-II Manual for Administration Scoring and Interpretation," revised editing by Butcher, Graham, Tellegen, Daghlstrom and

Kaemmer," which he acknowledged was published by the University of Minnesota Press, which, is in Minneapolis, the birth place of the MMPI. (VIII,1131). Although Graham publishes a lot and is widely known for his work on the MMPI, Dr. Berland thought that he was not someone who is to be "blindly" followed. (VIII,1138). Dr. Berland agreed that the interpretation manual indicates that a T score between 65 and 79 suggests the profile may be exaggerated. (VIII,1132). The manual suggests Pearce might be exaggerating as a "cry for help." (VIII,1133). But, Dr. Berland testified that was just the "opinion" of the people that publish the "professional manual" that accompanies the MMPI. (VIII,1133-34). Dr. Berland admitted that according to the manual, a T score of 80, just one more point, you would have to consider whether it was even a valid test. (VIII,1135). In fact, Pearce's F scale was so high, the MMPI manual suggests it might show he is "faking bad." (VIII,1135). Dr. Berland agreed "that's certainly one hypothesis, yes." (VIII, 1135).

Dr. Berland admitted that scale 4, the psychopathic deviate scale, was also elevated. (VIII,1136). Dr. Berland attempted to explain that scale 4 is influenced by potentially criminal thinking and craziness. (VIII,1137). Dr. Berland did not determine whether Pearce had a personality disorder because he did not think it would be mitigating in this case. "To determine that he suffered from personality disorder wouldn't be

mitigating, so that was not something that I was supposed to be looking at and I didn't." (VIII,1137).

Dr. Berland admitted that Dr. Graham who published a textbook on the MMPI showed that extremely high psychopathic deviate scale scorers, like Pearce, with a 78, can be described as follows: "Extremely high scores . . . tend to be associated with difficulty in incorporating the values and standards of society. Such high scorers are likely to engage in a variety of asocial, antisocial and even criminal behaviors." (VIII,1139-40). The description also notes "high scorers tend to be rebellious toward authority figures and often are in conflict with authorities of one kind or another. They often have stormy relationships with families and family members tend to be blamed for their difficulties." (VIII,1140). Dr. Berland admitted that psychopaths tend to blame their difficulties on others. (VIII,1140). Dr. Berland agreed that "[t]hey are often underachievers in school, they have a poor work history and marital problems are characteristic of high scorers." (VIII,1140). Dr. Berland agreed that high scorers are impulsive and their "behavior may involve poor judgment and considerable risk taking, they tend not to profit from experience and my find themselves in the same difficulties time and again." (VIII,1140-41).

Dr. Berland thought that Pearce "may be all of these things

and he may be a character disorder, but you can have more than one problem at a time. And even if he's a character disorder, he's also psychotic. And so one doesn't preclude the other." (VIII,1141). Dr. Berland thought that Pearce had a psychotic thought disorder or "schizo-effective" based upon his interview and the MMPI. (VIII,1144). Dr. Berland was confronted with the DSM-IV-TR which indicates in schizo-affective disorder, there must be a mood episode that is concurrent with active phase symptoms of schizophrenia. (VIII,1164). Dr. Berland admitted that in order to diagnose someone with schizo-affective disorder you need to have delusions for an extended period of time. (VIII,1165). However, Dr. Berland thought that Pearce told him that he had difficulty trusting people and avoided large crowds. (VIII,1166). Dr. Berland thought that to be paranoid "is delusional." (VIII,1166). But, Dr. Berland did admit that psychopaths also have difficulty trusting people. (VIII,1167).

For Pearce's hallucination claims, Dr. Berland admitted that he asked Pearce leading questions such as; have you noticed on a regular basis "that it feels like someone touches you on the shoulder from behind, but when you turn to look there's none there?" (VIII,1145). Dr. Berland took umbrage at the suggestion that a leading question would be inappropriate. (VIII,1145). Dr. Berland admitted that the only evidence of psychotic symptoms he had were based upon "leading questions

about somebody taping him on the shoulder or a phone ringing and him answering it…" (VIII,1149).

Dr. Berland read from his 2006 interview notes, and agreed, Pearce told him he took "three hits of ecstacy [sic] and, as he put it, was doing maintenance amounts of cocaine and marijuana" the day and evening before the crime. (VIII,1151). Dr. Berland agreed that Pearce made no mention of taking any acid on the May 17th interview. (VIII,1152). On May 27th in 2005, Pearce told Dr. Berland something different about drug use. (VIII,1152). Dr. Berland thought that Pearce's drug use could have been investigated by talking to the witnesses who were with him. (VIII,1153). By Pearce's own self report, there was doubt about whether Pearce took acid before the offense. (VIII,1153). But, Dr. Berland testified: "The ecstacy [sic] is enough. It's bad." (VIII,1153). Pearce did not mention taking mescaline to him. (VIII,1153).

Dr. Berland did not read the record of trial or talk to any witnesses who were present with Pearce when the crimes occurred in an effort to see if Pearce appeared intoxicated. (VIII,1154). In fact, Dr. Berland admitted that he did not ask Pearce any questions regarding what occurred at the time of the murders or what he was thinking. (VIII,1154-55). Dr. Berland testified that he typically does not ask a defendant about his participation in an offense, stating, in part: "And since it's

mitigation, I'm not involved in a determination of guilt or innocence, it simply undermines the validity or usefulness of any information I get if they have lied to me and it can be shown they lied, because then the argument is made well, how do you know they didn't lie about everything? So I just don't ask because that's not my role in the process." (VIII,1155). Nonetheless, Dr. Berland found Pearce qualified for the mental mitigators because "he's been continuously psychotic since a fairly young age, which means he was psychotic during the offense." (VIII,1156).

Dr. Berland admitted that he did not know if Pearce was a good and loving father, simply that it might be a mitigator. But, he did not check to see if what Pearce told him was true. (VIII,1163). Dr. Berland admitted the PSI stated that "Pearce has had little contact with the children in recent years. He was to pay $100 per month per child in child support, however, he's at this time quite delinquent and there is an arrest order as a result of failure to pay." (VIII,1170). But, Dr. Berland said that Pearce may have been warm and loving when he was actually with the kids, but, that he may not be responsible or a "socially defined good father." (VIII,1170-71). Dr. Berland admitted a Child Welfare Case Plan for Pearce, stated, in part: "[H]e provides no regular emotional or financial support. He has been arrested six times on felony charges and has been

convicted…" (VIII,1172). So, the evidence suggests that Pearce was not a good and responsible father, but, Dr. Berland opined, he might still have been capable of having or forming a warm and loving relationship. (VIII,1172).

In rebuttal, the State called Dr. Michael Gamache, a board certified forensic psychologist who has been recognized as an expert in neuropsychology. (X,1364).[4] Dr. Gamache testified that his work in forensic cases is equally divided between being retained by the State, the defense, and court appointments. (X,1431). Dr. Gamache interviewed Pearce, reviewed records, test data, and depositions of the defense doctors. (X,1367). His intent was to conduct a forensic evaluation relevant to issues raised by the defense and potential mitigation. (X,1367-68).

Dr. Gamache began with a simple mental status examination and then proceeded with some testing. (X,1369). He only performed two of the psychological tests that he intended to administer. (X,1369). He administered the TOMM and the PAI. (X, 1370).

The TOMM is a test designed to evaluate the effort and test taking attitude of an individual in a neuropsychological

[4] Dr. Gamache completed an internship and residency at the University of Florida, Shands Hospital. And, took a faculty position at the University of South Florida in the department of law and mental health with an adjunct appointment in the department of neurology. (IX,1363).

evaluation. (X,1370). The test is "long recognized in the field of neuropsychology, particularly in the context that many neuropsychological examinations are done, such as claims of injury, damage, forensic settings, that people may have some vested interest in feigning neuropsychological impairment, presenting themselves as though they are brain damaged." (X,1370). Pearce did very poorly on the test. (X,1374). Even people with genuine, serious, memory problems, can still accurately recognize 43, or 44 of the original items. (X,1379). Dr. Gamache concluded "that it was going to be meaningless to administer to him any of the rest of the neurological measures that I had because I could have no faith that he would put forth reasonable effort." (X,1379-80). "In fact, my expectation would be that he would approach those just like he approached this test; and that is that he would either not put forth effort or he would try to feign impairment on those measures and they would, therefore, be invalid." (X,1380).

Dr. Gamache disagreed that Pearce suffered from brain damage. Dr. Gamache testified that IQ testing can be useful in formulating opinions related to neuropsychological status. (X,1382). On the Weschler, there are three quotients that are traditionally measured, the performance (PIQ), verbal (VIQ), and full scale intelligence quotients. (X,1383). One hemisphere, the left, is more associated with language, while the right,

tends to be dominant for spatial, motor, and emotion-related functions. (X,1384). The early hypothesis was that a discrepancy between VIQ and PIQ is indicative of somebody with lateralized brain damage. (X,1387). However, that is not the hypothesis today. Dr. Gamache testified that many studies have attempted to determine the accuracy of that hypothesis and the most convincing evidence has been "related to studies where they actually did IQ testing with people that had visual, documented, radiological evidence of clear lateralized brain damage…" (X,1386). Dr. Gamache testified that the result of the study was that they did not find "significant PIQ/VIQ discrepancies in either lateralized patient group." (X,1387).

Assuming Dr. Dee's data was correct, Dr. Dee emphasized two findings to support his conclusion that Pearce is brain damaged. (X,1389). The first was the discrepancy between VIQ and PIQ. The second finding was the difference between the full scale IQ and Pearce's "memory quotient." (X,1389). However, Dr. Gamache noted that Pearce's performance on both tests was "within the normal range." (X,1389). "In fact, his verbal IQ was more than a standard deviation above average. But his performance IQ was within the average range. Both of those would be considered normal scores." (X,1390). The difference between the verbal and performance IQ was more than a standard deviation, but, it would not cause him "to assume that that existed because of

brain damage." (X,1390). Dr. Gamache explained:

> …While many people score at comparable levels on these measures, there's quite a range of performance. And there are natural differences that can occur, inherited or biological predispositions to be a little bit better at verbal kinds of tasks and performance tasks. Growing up in an environment where your parents are avid readers, use language well, have good language skills would facilitate the development of your own language skills and contribute to your performing better.

(X,1391).

Time is also more sensitive on the performance test than the language based test. "So if you've got somebody that's reasonably bright but tends to work somewhat more slowly, you can see those kinds of discrepancies in the VIQ/PIQ. (X,1391). "With respect to the IQ scores 25 years ago, clinically we might have been more likely to suggest, oh, take a look and see whether there's any evidence of lateralized brain damage." (X,1393). However, Dr. Gamache testified, "[n]ot today." (X,1394).

Dr. Gamache then addressed the second test, the Denman memory scales, which Dr. Dee utilized to diagnose brain damage. (X,1391). Dr. Gamache agreed that you can make a direct comparison between a memory quotient and an intelligence quotient. (X,1391-92). You would expect somebody with a normal intelligence to have normal memory performance. (X,1392). Dr. Dee found Pearce's full scale memory quotient "[p]erfectly

normal." (X,1392). The test provides no support for finding that Pearce suffers from brain damage. Dr. Gamache explained:

> "Well, first of all, I don't find those to be discrepant scores. Those are both within normal range. If we look at the bell curve which represents performance of the population as a whole on these tests, both of those scores are tight there near the center of the curve in the standard normal range. This is normal memory performance.
>
> Most of use would be happy if our memory was at this level. And this is consistent with what you expect with somebody that's got a normal average IQ.

(X,1393). Dr. Gamache explained even twenty-five years ago, these findings would not support a finding of brain damage. "This would be normal performance that you would expect to see in a neurologically intact non-brain-damaged individual." (X,1393).

Dr. Gamache took issue with Dr. Berland's oral administration of the MMPI. "As a generalization, that is considered unacceptable and that is not how the test was normed or standardized." (X,1399). The MMPI profiles were normed and developed based upon self administration, "the person reading each of the statements and responding on their own." (X,1399). Dr. Gamache explained: "We don't know for sure how it affects somebody if, instead of them being in a quiet room by themselves with nobody looking over their shoulder, told to answer and respond honestly in answering on their own versus if I'm sitting face to face reading the items to them with my own individual

intonation or emphasis, as well as the self-consciousness that that might provoke in terms of their responses." (X,1399).

Dr. Gamache also noted that Dr. Berland did not administer the entire test, only the first 350 out of 566 items. (X,1403). Dr. Gamache explained that Dr. Berland's failure to administer the entire test affects the validity of the test as a whole because some "validity measures" cannot be scored. (X,1403). So, Dr. Gamache questioned the validity of the entire test, stating the entire test was not administered, and, it was orally administered. (X,1404). Nonetheless, Dr. Gamache testified that the F, or, infrequency scale, on the MMPI administered by Dr. Berland was elevated, suggesting that Pearce may have been malingering on the test. Dr. Gamache explained:

> Well, setting aside those concerns that I described earlier and just hypothetically, for the time being, assuming that this is a - - that none of those issues affected performance, and just looking at the validity scales, this - - both of the profiles that Dr. Berland gave me show a significant elevation on the F or the infrequency scale.
>
> The mean is 50. Mr. Pearce is scoring around 80 on the F scale, the infrequency scale. That would suggest to me that he was endorsing a number of items that may sound to him like this is what you say if you're really mentally ill, but in reality these are not commonly endorsed by people that are mentally ill.

(X, 1406).

The PAI or Personality Assessment Inventory is similar to the MMPI to help evaluate the presence or absence of mental illness or psychopathology. (X,1371). It measures the same

kinds of psychological issues as the MMPI. (X,1407). Dr. Gamache preferred the PAI because the "items have been chosen to isolate illnesses more effectively." (X,1407). The PAI gives a person a range of choices, unlike the MMPI, which only gives a choice of true or false. (X,1407). The PAI also has validity scales like the MMPI, but, unlike the results obtained by Dr. Berland, Dr. Gamache found Pearce approached the test in a straightforward manner. "It did not appear as though he were attempting to exaggerate or feign psychological illness as opposed to neuropsychological illness or brain damage, so it looked valid." (XI,1409).

The profile he obtained from Pearce was pretty much what Dr. Gamache expected based upon Pearce's background, his clinical examination, and records. Dr. Gamache found Pearce "looks like an antisocial drug abuser."[5] (X,1409).

Dr. Gamache disagreed that Pearce was bipolar or had a mood disorder which might result in potential mitigation of "extreme psychological distress or duress" at the time of the offense. Dr. Gamache found that the "psychometric data is not suggestive

[5] Dr. Gamache did not attempt to render a formal diagnosis of antisocial personality disorder, but, testified: "I certainly know that he has many of the features of that. I think it's a – probably a good probability that he would meet the diagnostic criteria, but I didn't try and evaluate that." (X, 1453). The personality disorder is "generally characterized by antisocial, law breaking, rule breaking kinds of behavior, deceitfulness, and disregard for the impact of that behavior on others." (X, 1460).

of that at all." (X,1410-11). "The psychological testing data, the PAI results, are not suggestive of that at all. He did not - - for example, on the depression scale of the PAI, his standard score is 56, and that's right in the normal range. If you've got somebody with bipolar disorder, you would expect to see them endorsing a lot of symptoms of depression." (X,1411).

Dr. Gamache disagreed with any suggestion that the PAI or MMPI simply a "snapshot" of a patient and measures "their current state" and "mood." (X,1411-12). Dr. Gamache explained that "many of the items are designed specifically to get more than a snapshot, and they are questions that pertain to historical mood states and experiences. Consequently, these measures are not just a snapshot of one's current psychological condition. Although they yield information about that, they are also indicative of longstanding problems and personality traits." (X,1412). In Pearce, neither the depression nor mania scales were elevated: "So if I'm doing testing with somebody who has been diagnosed with or is suspected of suffering, either currently or historically, with bipolar disorder, the two clinical scales that I'm going to most expect to see elevated would be the depression scales and the mania scales. And in Mr. Pearce's case, neither of those scales were elevated." (X,1413). Consequently, the test data did not suggest bipolar disorder. Id.

Dr. Gamache next looked at Pearce's mental state at the time of the incident to see if he was experiencing signs or symptoms of bipolar disorder at the time of the offense. (X,1415). He looked to see if Pearce might have been experiencing either a manic episode or depressive episode. (X,1415). Dr. Gamache testified: "I asked him generally about his mood states, emotions and experiences of depressive episodes. And, secondly, I went though each and every one of the diagnostic criteria in the DSM–IV-TR, for major depressive episode and inquired about whether or not he was experiencing those signs or symptoms at the time of the offense." (X,1415). Dr. Gamache concluded that of the eight symptoms or signs of a major depressive disorder, "the only thing that he even partially endorsed was the insomnia issue, and that was not consistent in his description with depression, and there was not an elevation on depressive scales on the psychometric measures [MMPI and PAI]. I found no evidence to support the existence of a depressive episode that might be associated with a mood disorder in general or bipolar disorder specifically." (X,1421).

Dr. Gamache then examined the manic side of the diagnostic equation. Unlike what you would typically see in someone with bipolar disorder, Mr. Pearce told me he does sleep relatively little, less than the average person does, but that's always his habit. It's not associated with fluctuations and mood. If he

were bipolar and he had that kind of sleep disturbance or decreased need for sleep, you would expect him to be reporting that, yeah, I normally sleep eight hours, but when I'm going through one of these periods where I feel really energized, I only sleep three or four." (X,1422). But, that was not what Pearce reported to Dr. Gamache. (X,1423).

Pearce also denied an increase in sexual or goal directed activities that someone might experience during a manic episode. (X,1425). "People get very impulsive when they're going through a manic episode and, consequently, we frequently see that during manic episodes. They go on unrestrained buying sprees, they engage in sexual indiscretions, they enter into foolish business investments and decisions." (X,1420). Although Pearce admitted "that he was sexually promiscuous and that he had a lot of what he described as affairs[]" this was "not associated with fluctuations and mood." (X,1426). Pearce denied buying sprees or excessive involvement in "pleasurable activities other than drugs and alcohol which were a constant." (X,1426).

Dr. Berland's MMPI, whether valid or not, is not consistent with the data generated from Dr. Gamache's examination of Pearce. (X,1427). Moreover, there was a distinct difference between the PAI and MMPI results. "On he PAI, I found the PAI to be remarkably consistent with what Mr. Pearce told me about

himself. He has abused and misused drugs and alcohol for most of his life and he has engaged in a lot of antisocial behavior. And that's how he responded to the PAI." (X,1427). For the most part, Pearce did not endorse common symptoms of mental illness. Moreover, Pearce has "never been diagnosed or treated for any mental illness." (X,1427). If we simply accepted the MMPI results, there "is a gross elevation across multiple clinical domains that you would expect this is somebody that's had serious psychological and emotional problems that's been in treatment and probably needed medication for." (X,1427).

Dr. Gamache conducted a clinical evaluation, reviewed the defense doctors "data" and conducted testing. (X,1462). While he did not interview Pearce's family members, he "obtained a history from Mr. Pearce and "reviewed and considered the information from family members that had been generated by others." (X,1462). Dr. Gamache took into account hereditary factors, but, testified "absent the presence of any of the symptoms of bipolar disorder, those hereditary factors carry very little weight for me." (X,1464). When asked if Pearce's drug use was an attempt to self-medicate for bipolar disorder, Dr. Gamache testified: "But I simply do not find evidence of the underlying mental illnesses posited by the defense experts. I do not find evidence of bipolar disorder, so I do not believe his drug use was to self-medicate for bipolar disorder. I do

not find evidence of depression, so I don't believe that his drug use was to self-medicate for depression." (X,1475).

C. Lay Witnesses

Pearce admitted that in addition to having been convicted of murder and attempted second degree murder he has been convicted of six felonies, including a charge of perjury. (IX,1221-22). Pearce testified that he was represented by Ware and Ivie at trial. He testified that he did not meet with Ivie much prior to trial, maybe six or eight times. (IX,1306-07). Pearce met more often with Ware, maybe between eight and twelve times. (IX,1307).

Pearce testified that Ivie told him there would be no need for a penalty phase. (IX,1307). Pearce claimed Ivie told him that he "could see a psychiatrist" but he "turned right around and again told me it didn't appear to him that there was any need for that." (IX,1307).

Pearce admitted that he and Ware "discussed a couple of things like he spoke about in his testimony earlier, about things that he could offer up." (IX,1308). However, Pearce claimed that he "never really - - he never explained things really well." (IX,1308). Ware would bring up a subject like family issues and say we could bring a parent, brother, and sister, down for trial. (IX,1308). But, Pearce told him "I don't see any reason for that." (IX,1308). Pearce claimed that

"a good deal of our time was actually spent in casual conversation having nothing to do with the case at all." (IX,1308). Pearce claimed that when Ware talked about bringing family down, "I believed that he was offering that as support." (IX,1308-09).

On talking to a psychiatrist, Pearce claimed Ware did explain the court would provide one, but, it "wasn't explained" that it was "actually going to be a part" of the case. So, Pearce did not feel "like I needed one." (IX,1309).

Pearce did disclose to Ware his school background and the fact he got his GED in prison. (IX,1310). Although Pearce asserted Ware never specifically asked about his family background, Pearce did admit: "I know that in our discussions at times, you know, I might have mentioned thinks like, you know, I had an older brother and sister, who my parents were. I might even have mentioned to him the religious nature of my parents. But as far as him - - like a probing questionnaire-type deal, no, it was never" (IX,1311). Pearce thought that the questions on family background were just Ware's way of taking a friendly interest in his life: "Our visits had that air about them." (IX,1311).

Pearce claimed that Ivie repeatedly told him the State did not have the evidence to convict him. (IX,1314). Pearce thought that if a mistake was made, then the justice system

would fix that mistake "through the appeals process." (IX,1314). Ware, according to Pearce, made a "vague" reference to a second or penalty phase. Pearce testified: "Mr. Ware, in passing conversation, yes. He - - I mean he was always vague on things that he said. He was never specific like, you know, this - - this could be this, or we want to do this because of this. I mean he would make mention of this that were - - you know, were beyond my understanding." (IX,1316).

Pearce testified that had he known about all of the potential mitigation available to him in order to avoid the death penalty, and, his options explained to him, then, "of course, I would have considered them." (IX,1318). Pearce admitted he talked with post-conviction counsel prior to the hearing about his "waiver being uninformed." (IX,1318). Pearce claimed that he would not have refused to present mitigation if it had been presented to him and explained. (IX,1319).

Pearce admitted that prior to being represented by Ivie and Ware, he was represented by Sam Williams and "some other gentleman." (IX,1322). While Pearce was aware there would be a sentencing or penalty phase, he again testified that he did not have an "understanding of it." (IX,1324). Pearce claimed not to remember jury selection when the judge explained in his presence that there "may be a penalty phase during which the State would present aggravating circumstances and the defendant

would present or may present mitigating circumstances." When asked if he paid attention during trial to the jury selection when questions and answers were given regarding the possibility of a penalty phase in "which the State would present aggravating circumstances and the defendant would present - - or may present mitigating evidence" Pearce claimed, not to recall. (IX,1325). In fact, Pearce claimed not to remember "a great deal of the trial." (IX,1326).

Pearce did recall the judge asking him whether he wanted to see a psychologist or psychiatrist after he was found guilty. Pearce testified: "and I remember at some point you [the prosecutor] were saying a lot of blah-blah-blah-blah-blah." (IX,1326). Pearce thought that when Ware suggested he see a psychologist it was simply to help him with his incarceration or facing the charge. (IX,1328). Pearce testified that he thought that conversations with Ware regarding his family life, schooling, and religious nature of his family life were just Ware's attempt to "get to know" him. (IX,1328).

Pearce asserted that he did not remember Ware discussing mental mitigators, psychologists, drug usage, or, otherwise looking for mitigation that could be presented to the jury. (IX,1329). Pearce claimed that with his limited experience with the justice system, he was putting "all his eggs in the appeals basket." (IX,1330-31).

Pearce acknowledged that he has some experience with the justice system and has done some legal research. Pearce testified: "I read some case - - case law and - - as would be indicated in some of the writings that I sent to the Court." (IX,1332). Pearce admitted that he can write letters and in fact did cite some cases: "I believe in that area was - - had to do with a person's right to an attorney" and he complained that his previous lawyer, Mr. Williams, was "ineffective." Pearce acknowledged citing cases concerning ineffective assistance of counsel before his conviction in this case. (IX,1333-34).[6] Pearce wanted Williams off his case because he wasn't keeping him informed, wasn't giving him the discovery, and wasn't allowing him to participate in his own defense. (IX,1345).

Kathryn Burford testified that Pearce was at one time married to her step-daughter, Lisa Dawson. (VIII,1190). She did not know how long their marriage lasted, but, guessed it was five, six or seven years. (VIII,1191). Burford testified that she was aware Pearce used marijuana and that Lisa used "crack and stuff like that." (VIII,1191). Burford thought that Pearce and Dawson were equally "volatile." (VIII,1192).

Pearce and Dawson had four children. (VIII,1192). One of

[6] Pearce claimed that his previous attorney, Mr. Williams, lied

their children, Andrew, had very severe behavioral problems. He was in Foster care and Burford was the only stable adult to visit him. (VIII,1194). Andrew seemed to have a violent temper. (VIII,1195). Burford thought Andrew had "[a]lcohol syndrome" and thought he was "bipolar and several other things." (VIII,1195). Burford admitted she was "guessing" that he was bipolar. (VIII,1200). Moreover, Burford admitted she hasn't seen Andrew "since he was about five or six." (VIII,1195). Andrew would be about 18 now. (VIII,1193).

Burford testified that Pearce was "very, very good to his children." (VIII,1196). However, Burford admitted the children were taken from Pearce and Dawson five or six times because of "drug use" and "very violent fighting." (VIII,1202). When Pearce and Dawson separated, Pearce stopped seeing and supporting the children. (VIII,1203-04).

Pearce's older brother, Daniel, testified that at the time of trial he was living in Georgia and was only contacted by the State Attorney's Office, not an attorney representing the defense. He said the State Attorney's Office wanted him to testify as a state witness, but, Daniel testified: "And I didn't give them any information or - - I wouldn't do that." (VIII,1207).

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to him. (IX,1335).

Daniel testified that his parents were Baptist and were "pretty" strict. (VIII,1210). His father's disciplinary philosophy was "spare the rod, spoil the child." (VIII,1210). Daniel testified: "Well, I mean, we got our share of whoopings. I mean, you know, if - - if we acted out or if we disobeyed, it was - - it was pretty much guaranteed a belt." (VIII,1210). On a couple of occasions, Daniel testified that he and Pearce were hit preemptively. (VIII,1211).

Pearce ran away from home a "couple" of times when he was ten or twelve-years old. (VIII,1211-12). When Pearce was asked about where he had been, Daniel testified: "None of your business." (VIII,1211). On occasion, Pearce would pack some clothes with a bedroll and go camping. Sometimes he would tell the family where he was going, "and sometimes he wouldn't." (VIII,1213). He would tell his mom and dad that he was leaving "and going to spend the weekends in the woods with, you know, his buddies, and that they were going to go camping and he'd go." (VIII,1214).

Daniel entered the service at a young age [16] and admitted that he and Pearce had separate lives, and "just didn't work in the same circles." (VIII,1214,1219). Pearce was moody growing up, happy one day, then the next day he would not want to talk to anybody. (VIII,1215). He started noticing "bad" mood swings

after Pearce had been in a car wreck. (VIII,1215).

Daniel was diagnosed with bipolar disorder in 1995. (VIII,1216). In the last couple of years Daniel was taught techniques by mental health professionals to control his condition without medication. (VIII,1226).

Pearce did drugs when he was young, as did, Daniel: "I mean, you know, everybody smoked our share of pot." (VIII,1217). Every now and then there would be a quaalude and white cross, which he described as speed. (VIII,1217). Daniel was aware his brother had tried "maybe like LSD or whatever." (VIII,1218). However, Pearce's drug of choice was "alcohol and marijuana." (VIII,1218).

Daniel described a car wreck Pearce was in as a teenager. Pearce totaled his car and had a "good gash on his head, and he was, kind of, wandering around, kind of aimlessly." (VIII,1220). Daniel thought that Pearce changed after the accident, "he didn't really come around the family much." (VIII,1229). Pearce was taken to the hospital, treated, and released the next morning. (VIII,1244).

Pearce was smart but did not do well in school. (VIII,1230). Daniel testified: "My brother didn't do things well in regimen, if you know what I mean." (VIII,1230).

Pearce was able to hold a job and he had buddies who worked

on jobs with him. (VIII,1234). Daniel was not aware of Pearce ever walking off of a job. (VIII,1234). Pearce could contract a job and amass the labor needed to finish the job. (VIII,1234-35). His mood swings did not get in the way of finishing a job. (VIII,1235).

Daniel admitted that his father was a very intelligent and religious man. (VIII,1236). He is a doctor of Physics and Astronomy. (VIII,1236). His mother had a Master's Degree in "Art History." (VIII,1236). They were involved in the church as counselors, but, his dad would once in while step in when the preacher was out of town. (VIII,1237). Daniel admitted that when he was younger "spare the rod, spoil the child" was pretty much an accepted form of parenting. (VIII,1232-33).

Although they moved around a lot as children when his dad was teaching, they always stayed in one place for the school year. (VIII,1241). Daniel again described his brother as "very intelligent." (VIII,1242).

SUMMARY OF THE ARGUMENT

ISSUE I – The post-conviction court erred in finding defense counsel rendered ineffective assistance in failing to file a motion in limine or otherwise object to attempted murder victim Tuttle's testimony that he was forced from the office at gun

point, threatened with death, and, forced to perform oral sex upon Pearce. These relevant acts occurred during a single criminal episode which resulted in the murder of one victim and the attempted murder of the victim of Pearce's sexual assault, Tuttle. Defense counsel cannot be faulted for failing to make a futile objection to clearly admissible evidence. In any case, given the overwhelming evidence of Pearce's guilt, there is no reasonable possibility that had this evidence been excluded, Pearce would have been acquitted.

ISSUE II – Petitioner refused to be examined by a mental health expert, directed counsel not to contact potential mitigation witnesses, and, waived the presentation of mitigating evidence. Petitioner received exactly the penalty phase he desired. He cannot fault counsel for failing to present evidence which he himself, directed counsel not to pursue or present on his behalf. The post-conviction court's finding of deficient performance and resulting prejudice must be reversed.

ARGUMENT

ISSUE I

WHETHER THE POST-CONVICTION COURT ERRED 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 THE THREAT OF DEATH.

The post-conviction court erred in finding 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 from the office at gun point, threatened with death, and, forced to perform oral sex upon Pearce. The sex act occurred during a single criminal episode which resulted in the murder of one victim and the attempted murder of the victim of Pearce's sexual assault, Tuttle. Defense counsel cannot be faulted for failing to make a futile objection to clearly admissible evidence.

A. Standard Of Review

This Court summarized 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.

B. Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims

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

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the

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

C. Trial Counsel Cannot Be Considered Ineffective For Failing To File A Futile Motion To Exclude Relevant Evidence

Collateral counsel below raised the purely legal issue of whether counsel were ineffective in the guilt phase for failure to object to the State's introduction of Defendant's sexual battery of Tuttle. This issue did not even warrant an evidentiary hearing below, much less, the remedy of a new trial. The two defense attorneys who represented Pearce below simply had no objection of any legal merit which could be made on the evidence presented. See Raleigh v. State, 932 So. 2d 1054, 1064 (Fla. 2006)("defense counsel cannot be deemed deficient for failing to make a meritless objection.").

In proving its case, the State is entitled to paint an accurate picture of events surrounding crimes charged. Smith v. State, 699 So. 2d 629 (Fla. 1997). Inextricably intertwined evidence or inseparable crime evidence may be admitted at trial to establish the entire context out of which a criminal act arose. Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995), cert.

denied, 516 U.S. 1128 (1996). See also, Remeta v. State, 522 So. 2d 825, 827 (Fla. 1988). Here, the threat and accompanying sexual act occurred between the same parties, occurred during the same criminal episode, and, was relevant to the charged attempted murder of Tuttle under either a premeditation or felony murder theory [kidnapping].

The post-conviction court's premise for granting relief in this case is not supported by the facts or the law. First, the court asserts that the sexual battery was an uncharged collateral crime upon which the State failed to file a notice of "intent to rely upon a collateral crime by the State." (V,774). The post-conviction court is unaware of, or clearly misapprehends the nature of the evidence at issue. The sexual battery upon Tuttle was not a collateral crime. It occurred at the same time, occurred between the same parties, and, was clearly connected in an episodic sense with the charged offenses. Under these circumstances, the acts were not "collateral" but simply comprised part of the state's presentation of relevant evidence.[7] See e.g., U.S. v.

[7] The rationale for filing a notice of intent to rely upon a collateral crime is to put a defendant on notice of the State's intent to present evidence on a crime that is not temporally, logically, or episodically connected to the charged offenses. Such a notice is unnecessary when the bad act is connected to the charged crime by time, victim, and circumstance. Discovery

Cancelliere, 69 F.3d 1116, 1124 (11th Cir. 1995) ("Furthermore, Rule 404(b)[8] does not apply where the evidence concerns the 'context, motive, and set-up of the crime' and is 'linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.'")(quoting United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985)).

In Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994), this Court explained the difference between similar fact or collateral crimes evidence and evidence which is part of the same criminal episode or inextricably intertwined with the charged offenses. This Court stated:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
>
> This rule of evidence is often called the "Williams rule," because the statutory language tracks the language in Williams v. State, 110 So. 2d 654, 662 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959). If the State wishes to introduce Williams rule evidence in a criminal action, it must provide the defendant notice, at least ten days before

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relating to the charged offenses is sufficient to place the defense on notice.

[8] The Federal equivalent to Section 90.404 of the Florida Statutes.

> trial, of the acts or offenses it intends to offer. §90.404(2)(b)1., Fla. Stat. (1991).
>
> In the past, there has been some confusion over exactly what evidence falls within the Williams rule. The heading of section 90.404(2) is "OTHER CRIMES, WRONGS, OR ACTS." Thus, practitioners have attempted to characterize all prior crimes or bad acts of an accused as Williams rule evidence. This characterization is erroneous. The Williams rule, on its face, is limited to "similar fact evidence." §90.404(2)(a), Fla. Stat. (1991)(emphasis added).
>
> Thus, evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue. . . . It is necessary to admit the evidence to adequately describe the deed." *Charles W. Ehrhardt*, Florida Evidence §404.17 (1993 ed.); see Gorham v. State, 454 So. 2d 556, 558 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S. Ct. 941, 83 L. Ed. 2d 953 (1985); Erickson v. State, 565 So. 2d 328, 332-33 (Fla. 4th DCA 1990), review denied, 576 So. 2d 286 (Fla. 1991); Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA), review denied, 496 So. 2d 144 (Fla. 1986).

See also Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995), distinguishing 90.404(2)(a), governing similar fact evidence, from 90.402, governing relevant evidence. Accord, Damren v. State, 696 So. 2d 709, 711 (Fla. 1997); LaMarca v. State, 785 So. 2d 1209, 1212—13 (Fla. 2001).

It must be remembered that Strickland carries a strong presumption of effectiveness. While faulting counsel for failing to file a motion in limine or otherwise object to admission of this uncharged act and accompanying threat, the

post-conviction court cites absolutely no authority to support its premise that such a motion or objection would succeed. To the contrary, an examination of relevant case law establishes that the uncharged sexual act and accompanying threat is clearly admissible.

In Smith v. State, 699 So. 2d 629 (Fla. 1997), this Court found no error in admitting evidence of an uncharged sexual battery where it occurred during the same criminal episode as the charged offenses. This Court stated:

> Next, we reject Smith's issue 7: whether the trial court abused its discretion in admitting evidence of Smith's uncharged sexual battery upon the female victim. Nolden testified at trial and gave direct evidence of the events surrounding the battery. He stated that after the female victim was removed from the trunk, Smith taped her face and mouth as she was shaking her head no. Nolden testified that the victim was then laid on her back on the ground, and Smith placed a stick into her vagina. This testimony was consistent with other evidence presented at the trial: the victim was found stripped of her pants, and her jeans shorts were recovered from under an abandoned house near where the second taping occurred. However, the medical examiner testified that there was no medical evidence of trauma to Gibbs' vagina.
>
> Based upon our review of the record, we find this evidence of sexual battery was relevant as an inseparable part of the criminal episode at issue and not unduly prejudicial. See §90.402, Fla. Stat. (1989); Griffin v. State, 639 So. 2d 966, 968-69 (Fla. 1994). Moreover, we do not find that the medical examiner's testimony changes the result. Clearly, there was a conflict in the evidence testified to by Nolden and the medical examiner's findings of no trauma to Gibbs' vagina. However, this conflict does not render this relevant evidence inadmissible. Id. at 970 (HN20in proving its case, State is entitled to

> paint accurate picture of events surrounding crimes charged); see also Hunter v. State, 660 So. 2d 244, 251 (Fla 1995), cert. denied, 133 L. Ed. 2d 871, 116 S. Ct. 946 (1996). Accordingly, we find this issue meritless.

Smith, 699 So. 2d 629 at 645.

The post-conviction court attempted to distinguish Smith by noting that the defendant in that case was charged with "[m]any more offenses than in this case." (V,773). This is a distinction without a difference. Although the defendant in Smith was charged with more offenses, the defendant was not charged with sexual battery. This Court stated that although not charged, the sexual battery was nonetheless "relevant as an inseparable part of the criminal episode at issue and not unduly prejudicial." 699 So. 2d at 645. In this case, aside from being inextricably intertwined with the charged offenses as in Smith, the threat and accompanying sexual act possessed independent relevance. Thus, the case for admissibility of this evidence is even stronger than in Smith.

Pearce's sexual assault upon Tuttle included a threat to kill him at gun point, immediately prior to the charged attempted murder. The State has found no case wherein a defendant's threat to kill a victim, made immediately prior to the actual attempt to kill, has been excluded by a court in this state. Since Pearce was charged with the attempted first degree

murder of Tuttle, Pearce forcing Tuttle to commit a sexual act under the threat of death was relevant to show Pearce's malice toward Tuttle and the "prior difficulties" between the parties. See Johnson v. State, 32 Fla. L. Weekly S 445 (Fla. July 5, 2007)("Premeditation can be inferred from circumstantial evidence such as 'the nature of the weapon used, the presence or absence of adequate provocation, **previous difficulties between the parties**, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.'")(quoting Sochor v. State, 619 So. 2d 285, 288 (Fla. 1993)(emphasis added)).

The sexual act and accompanying threat was also relevant to show the dominance and control of Pearce over Tuttle. This was important both in the State's case in chief and in its rebuttal argument on the issue of felony murder with an underlying kidnapping. The fact that Pearce forced Tuttle from the office at gunpoint, and forced him to perform oral sex under threat of death, helped rebut the defense argument that there was no kidnapping because Tuttle and Crawford "voluntarily" entered the car. See Williams v. State, 32 Fla. L. Weekly S 347 (June 21, 2007)(under a felony murder theory the victim's pregnancy was relevant to prove lack of consent for the underlying attempted sexual battery). Indeed, this Court has already implicitly recognized the relevance of this evidence in rejecting Pearce's

direct appeal challenge to felony [kidnapping] murder.

In rejecting Pearce's challenge to his murder conviction, this Court stated:

> Pearce also moved for a judgment of acquittal on the theory of felony murder, arguing that the State failed to establish that he was an aider or abetter of an underlying kidnapping and presented no proof of his intent to participate in a kidnapping that would support a theory of first-degree felony murder. The trial court denied the motion and submitted the case to the jury. Pearce now argues that the trial court erred in denying his motion.
>
> As discussed above, there are two ways in which first-degree murder can be proven under Florida law: through a premeditated design to kill or when the killing occurs during the course of an enumerated felony, including kidnapping. See §782.04(1), Fla. Stat. (1999). In order to prove kidnapping in Pearce's case, the State had to prove three elements: (1) Pearce forcibly or by threat confined and abducted Crawford and Tuttle against their will; (2) Pearce had no lawful authority to do so; and (3) Pearce acted with the intent to inflict bodily harm upon or terrorize the victims or another person. See §787.01(1)(a), Fla.Stat.(1999).
>
> Both Havner and Tuttle testified that Pearce ordered them into the business office, waved a gun around, and pointed the gun at them. **Tuttle testified that Pearce threatened to shoot him in the head if he did not perform oral sex on him. Tuttle also testified that he repeatedly asked Pearce if he could leave and Pearce told him no.** Havner and the others present testified that Pearce slammed her head against the air conditioner and threatened to shoot her in the head. Testimony also showed that Pearce refused to let the boys go when asked by Havner and Loucks at separate times. Even though Pearce may have left the victims alone in the office several times, there was little opportunity for them to escape from the business premises, which were surrounded by a high fence topped with barbed wire and behind a locked gate. According to Havner's brother, Havner was

> hysterical even after Pearce permitted her to leave and that she spent the rest of the night placing phone calls trying to verify the safety of Tuttle and Crawford. Havner testified that she was afraid of Pearce, that Pearce was irate, and that she and her companions were not free to leave the business location where Pearce confined them.
>
> Pearce called his associate Butterfield, told him that he needed some help because he had been ripped off, and asked Butterfield to come armed. Butterfield arrived with Brittingham and Smith, who were also visibly armed. According to Butterfield, Pearce was "calling the shots" and was "in charge." Tuttle and Crawford were ordered into the car by Pearce, who had a gun in his hand. Brittingham testified that he interpreted Pearce's actions as threatening to the boys. Tuttle testified that he did not feel that he or Crawford was free to leave. Pearce stated his intent was to "rough up" the boys and teach them a lesson for losing his money. Pearce drove the car to a deserted area, ordered Tuttle out of the car, and instructed Smith to "break his jaw" or "pop him in the jaw." Pearce then drove a short distance more and ordered Crawford out of the car. Because the victim's liberty was never restored prior to his death, there was a continuing kidnapping here. See Stephens v. State, 787 So. 2d 747, 754 (Fla. 2001) (citing with approval State v. Stouffer, 352 Md. 97, 721 A.2d 207, 215 (Md. 1998)).

Pearce, 880 So. 2d at 573-574 (emphasis added).

Curiously, the post-conviction court recognized that the State could have charged Pearce with a sexual battery upon Tuttle: "He was not prosecuted for sexual battery on Mr. Tuttle, but he could have been." (V,773). However, simply because Pearce benefited from the State's charging decision in this case does not mean he could exclude relevant evidence of his conduct at the time of the charged crimes. Indeed, the fact the sex act

upon Tuttle could have been charged and tried along with the murder and attempted murder lends further support to overturning the post-conviction court's decision.

Severance of the sodomy charge would not be granted because it occurred close in time, close in proximity, and, involved the same parties as the attempted murder. The law is well settled that even serious offenses may be charged and tried together if connected in an episodic sense. See Mendyk v. State, 545 So. 2d 846, 849 (Fla.), cert. denied, 493 U.S. 984 (1989)(consolidation of indictment for first degree murder and information charging two counts of sexual battery and one count of kidnapping was proper because all the crimes were committed upon a single victim in one continuous episode); Johnson v. State, 438 So. 2d 774, 778 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); (no need to sever murder charges where "only hours separated the three homicides and related crimes."); Ziegler v. State, 402 So. 2d 365, 370 (Fla. 1981)(consolidation of indictments charging defendant with murder of three family members, and the murder of a fourth person in the same location on the same evening was proper); King v. State, 390 So. 2d 315, 317-18 (Fla. 1980)(approving consolidation of offenses against a work release inmate who was charged with escape and attempted murder of a work release counselor and by indictment with charges related to

the murder of a woman who lived near the facility where the offenses took place within approximately one hour).

The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992). The presumption of effectiveness is difficult to overcome, especially when addressing the conduct of an experienced defense attorney such as Mr. Ivie. See Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000), en banc, ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.").

A defense attorney is under no obligation to file a motion in limine or otherwise make an objection to evidence at trial which has little or no chance of success. As discussed above, evidence of the threat and forced sodomy of victim Tuttle was relevant and admissible at trial below. Consequently, counsel cannot be deemed ineffective for failing to object. See Thomas v. Jones, 891 F.2d 1500, 1504-05 (11th Cir. 1989)(counsel cannot be considered ineffective for failing to object to evidence and prosecutorial comments suggesting an uncharged sexual assault

upon the victim when such evidence was relevant and therefore admissible). The post-conviction court clearly erred in finding Pearce met his burden of proving constitutionally inadequate assistance. See Cox v. State, 32 Fla. L. Weekly S 427 (July 5, 2007)("Trial counsel cannot be deemed ineffective for failing to object to admissible testimony.").

D. The Post-Conviction Court Erred In Finding Prejudice Under Strickland

Even assuming, *arguendo*, trial counsel was ineffective for failing to object to this evidence, Pearce failed to meet his burden of establishing prejudice under Strickland. The post-conviction court's entire prejudice analysis consisted of the following: "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." (V,774-75). The post-conviction court did not preside over Pearce's trial and provided absolutely no facts to support its decision to reverse Pearce's convictions. Under the facts of this case, there is no possibility that evidence of Pearce's threat to kill and forced sodomy of Tuttle improperly or unfairly influenced the verdict.

The fact that Pearce was the primary actor in the kidnapping, murder and attempted murder was established by the

trial testimony of Havner, Loucks, Shooks, Brittingham, Butterfield, and surviving victim Tuttle. Absolutely no evidence presented during the evidentiary hearing cast any doubt upon the evidence presented at trial. Based upon this record, the underlying felony of kidnapping and the fact the murders occurred in the course of a kidnapping cannot be subject to dispute.

Pearce was clearly in charge of the victims' fate from the moment they left with his money. Pearce told them as they left, the money was their life. They did not return with the money or drugs and Pearce used Smith to take Crawford's life and attempt to take Tuttle's. The goal of Pearce's drive from We Shelter America was to get rid of the boys Pearce believed stole his money.

The evidence was uncontradicted that Pearce was the one who did not let the boys leave from We Shelter America. Pearce called for armed backup, bringing Smith, Butterfield, and Brittingham into the criminal episode. Pearce is the one who told the victims to get in the car. Pearce is the one who drove the victims to a remote location. Pearce provided Smith with the murder weapon after Smith complained that his 9mm was prone to malfunction.

Tuttle was removed from the car by Smith at the direction of

Pearce. Pearce, hearing only one shot, wanted assurance from Smith that Tuttle was dead. After receiving such assurance, Pearce drove off, only to stop a short while later, again in a remote area. Despite Crawford's pleas for mercy, he was taken out of the car and shot two times. Pearce did not need any assurance from Smith of Crawford's death this time, after hearing and/or observing Crawford being shot twice.

This Court recognized the strength of the State's evidence in finding any limitation on the cross-examination of Brittingham harmless under the facts of this case.[9] Overwhelming evidence established Pearce's guilt as a principle to attempted first degree murder on Tuttle and of first degree murder on Crawford. However, the jury apparently gave Pearce the benefit of any doubt with regard to Tuttle, finding him guilty of only attempted second degree murder. This shows the jury was not inflamed by the threat and sexual act Pearce forced Tuttle to commit.

The trial court's decision to reverse Pearce's first degree murder and attempted second degree murder convictions is not

[9] In Pearce , 880 So. at 571, this Court stated, in part:
> …Brittingham's account of the evening (i.e., that Pearce played the primary role in the kidnappings) was corroborated in every significant detail by the testimony of Butterfield, Tuttle, Loucks, Shook, and Havner.

supported by the evidence or relevant law. Consequently, the post-conviction court's ruling must be vacated.

ISSUE II

WHETHER THE POST-CONVICTION COURT ERRED IN FINDING COUNSEL INEFFECTIVE FOR FAILING TO INVESTIGATE POTENTIAL PENALTY PHASE MITIGATION.

The post-conviction court found defense counsel rendered constitutionally deficient performance in failing to prepare for the penalty phase.[10] However, the post-conviction court ignored the fact that Pearce was responsible for limiting defense counsel's mitigation investigation. Under these circumstances, the trial court clearly erred in finding counsel rendered deficient performance.

This Court has repeatedly recognized the right of a competent defendant to waive the presentation of mitigating evidence. See e.g., Pettit v. State, 591 So. 2d 618 (Fla.), cert. denied, 506 U.S. 836 (1992); Anderson v. State, 574 So. 2d 87 (Fla.), cert. denied, 502 U.S. 834 (1991); Chandler v. State, 702 So. 2d 186 (Fla. 1997); Wuornos v. State, 676 So. 2d 966 (Fla. 1995). It is undisputed that Pearce did not want counsel to present any evidence or argument, rebut anything, or make any effort to spare his life. Pearce waived his right to present mitigating evidence. There was no evidence presented either at trial or during the evidentiary hearing below that Pearce was

[10] The standard of review for this ineffective assistance of counsel claim is the same as that under Issue One, above, *de novo*.

incompetent to make this decision.

Amazingly, in his post-conviction motion Pearce asserted his defense attorneys were ineffective in failing to prepare for and, presumably, present evidence during the penalty phase. The fact that Pearce chose, against the advice of counsel, to waive presentation of mitigating evidence should preclude Pearce from raising an allegation that his defense attorneys were ineffective for failing to prepare for the penalty phase. See Downs v. State, 740 So. 2d 506 (Fla. 1999) (where defendant waived his right to representation during the resentencing proceeding and counsel was appointed as "stand-by" counsel only he may not complain of counsel's failure to present mitigating evidence); Goode v. State, 403 So. 2d 931 (Fla. 1981) (where defendant acted as his own attorney and could not later complain that his "co-counsel" ineffectively "co-represented" him). Petitioner did not want to present mitigating evidence, communicated his intention to his attorneys early on in this case and frustrated their attempts to prepare for the penalty phase.

The 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. While Ivie had little recollection of specific conversations with Pearce, Ivie testified that at some point Pearce opted not to present

any mitigating evidence. (VI,846). Ivie and Ware tried to get him to change his mind and persuade him it was in his best interest to present mitigation of any sort to save his life. (VI,846). Pearce chose not to follow that advice. (VI,846).

Ware, whose primary responsibility was the penalty phase, testified about the strict limitation Pearce placed upon his investigation of mitigating evidence. Pearce only authorized Ware to speak to Christina Wade, Pearce's girlfriend. (IX,1282-83). He spoke to Christina two or three times about logistical matters. (IX,1285). Ware and Pearce discussed his family early on in the case. (IX,1293). Pearce did not authorize Ware to bring in family members and, in, fact, told Ware not to do it. (IX,1286). Thus, trial counsels' allegedly deficient background investigation is directly and solely attributable to Pearce. Consequently, the post-conviction court's finding of deficient performance for counsel's failure to talk to Pearce's mother or brother (V,777) is clearly erroneous. See Mora v. State, 814 So. 2d 322, 332 (Fla. 2002)("...Mora was adequately advised of his ability to present the mitigating evidence from his family members, and his decision not to have Malnick [defense counsel] disturb these relatives under the circumstances of this case should have been respected."); See Boyd v. State, 910 So. 2d 167, 190 (Fla. 2005)("Whether a defendant is represented by counsel or is proceeding pro se, the defendant has the right to

choose what evidence, if any, the defense will present during the penalty phase.")(citing Grim v. State, 841 So. 2d 455, 461 (Fla.), cert. denied, 540 U.S. 892, 124 S.Ct. 230, 157 L.Ed.2d 166 (2003)).

Even more perplexing, is the post-conviction court's finding that counsel rendered deficient performance in failing to uncover potential mental health mitigation. (V,777-78). First, the court erroneously stated that "[h]ad counsel investigated the drug history, counsel would have discovered Defendant's mental health history noting that Defendant had been self-medicating." (V,777). Ware testified that Pearce had no history of mental health treatment and no evidence of such treatment was revealed during the evidentiary hearing below. Obviously, counsel cannot be faulted for failing to uncover Pearce's mental health history where no such record existed.[11] More important, it cannot be disputed based upon this record, that Pearce did not want to be examined by a mental health professional and, in fact, told counsel he would not cooperate with such an examination.

Ware advised Pearce that he had the right to present mental mitigation, either statutory or non-statutory, to aid the jury in its determination of life or death. (IX,1286). He asked

[11] Pearce admitted that he had never been treated by a psychologist or psychiatrist. (VII,974).

Pearce to be evaluated by a mental health professional, but, Ware testified: "I was told not to." (IX,1286-87). In fact, Pearce told Ware he would not cooperate. (IX,1287). Ware put that fact in the record at the time of trial. (IX,1287).

Curiously, the post-conviction court did not make a credibility determination between Ware, Ivie, and Pearce. The court largely ignored the obvious conflict between Ware's and Pearce's testimony.[12] However, even if the post-conviction court's order can be read to credit the testimony of Pearce over Ivie and Ware, such a determination would be plainly erroneous on this record. Ware's evidentiary hearing testimony is supported by counsel's statements at the time of the sentencing proceeding, Pearce's own declarations to the trial court, and Ivie's limited recollection.[13]

After Pearce advised the trial court that he was freely and

[12] Aside from being corroborated by the record and to some extent the limited recollection of Ivie, Pearce possessed some six felony convictions, including a conviction for perjury. In contrast, collateral counsel did not present any evidence to suggest much less establish any blemish upon Ware's professional record. Pearce also has an obvious and personal incentive to misrepresent the nature of his conversations with Ware. Consequently, crediting Pearce's testimony over Ware's in this case would be clearly erroneous, particularly when the post-conviction court failed to even address the conflict between Ware's and Pearce's testimony.

[13] Ivie testified that he and Ware tried to get Pearce to change his mind and persuade him it was in his best interest to present mitigation of any sort to save his life. (VI, 846).

voluntarily waiving presentation of mitigating evidence,[14] the prosecutor raised the concern that Pearce had not been examined by a mental health expert. The trial court advised Pearce that he had the "right to have a psychiatrist or psychologist" examine him. (TXI,1031-32). Pearce stated that he did "[n]ot particularly" care to be examined. (TXI,1032). When the prosecutor raised the possibility of having Pearce examined now, Ware responded, in part: "Mr. Pearce has indicated he does not wish to have any psychological/psychiatric report; he would not cooperate. He has indicated he has no mental history, mental health problems in the past." (TXI, 1038).

At the close of the prosecutor's penalty phase argument, Ware asked to approach the bench. He stated for the record, the following:

> Judge, for the record I want it to be clear that Mr. Pearce had asked me to argue, number one, that he did not want independent counsel, he did not want psychological or psychiatric doctors appointed, he did not want this proceeding continued. He wanted to proceed. He did not wish for me to produce any mitigating evidence, testimony, or argument. All this was against my legal advice as well as against Mr. Ivie's legal advice.

(TXI,1072).

[14] Pearce stated that it was his desire to waive the presentation of any mitigating evidence to the jury. (TXI,1030). Pearce told the court that no one forced, compelled, or threatened him to waive mitigating evidence. (TXI,1030). He again told the court that he was freely and voluntarily waiving the presentation of mitigating evidence. (TXI,1030).

This record makes it absolutely clear that any failure to uncover potentially mitigating mental health issues by having Pearce examined by an expert was squarely and solely the responsibility of Pearce. Pearce simply would not cooperate with defense counsel and allow himself to be examined. Thus, the conflicting expert testimony raising issues concerning brain damage and the possibility Pearce suffers from bi-polar disorder developed during the evidentiary hearing below was simply not available to trial counsel. Trial counsel explained the purpose and nature of mitigating evidence to Pearce and asked him to submit to an examination. Pearce's refusal to cooperate was not the fault of trial counsel.

The trial court's order erroneously states that "[d]efense counsel did not know what they were supposed to be looking for because they were so poorly prepared." (V,777). To the contrary, Ware knew that Pearce should be examined by mental health experts and that Pearce's family background should be explored for potential mitigation. (IX,1275). Ware reviewed Life over Death Manuals, was aware that mental health issues can be used as both statutory and non-statutory mitigation, and that family history was important. (IX,1283-84). Moreover, Ware had the benefit of working with Mr. Ivie, who possessed capital litigation experience. Thus, the record clearly reflects that defense counsel knew what to look for in preparation for the

penalty phase.

In Schriro v. Landrigan, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007), the defendant refused to allow defense counsel to call two family members, the defendant's mother and ex-wife in mitigation. The Court reversed the Ninth Circuit Court of Appeals decision to grant an evidentiary hearing on the defendant's ineffective assistance of counsel claim for failing to investigate and present evidence during the penalty phase. In doing so, the Court noted Landrigan was responsible for the failure to present mitigating evidence and under such circumstances he could not make a colorable claim for relief under the ADEPA.[15] Consequently, the Ninth Circuit erred in reversing a district court ruling denying Landrigan's ineffectiveness claim without a hearing in federal court.

The defendant in Landrigan refused to allow his defense counsel to present the mother and ex-wife to present mitigating evidence of drug use during pregnancy, the possible effects of drug use, Landrigan's drug and alcohol abuse and that Landrigan had been a good father. The witnesses had been instructed by Landrigan not to testify and defense counsel stated that he advised Landrigan that it was very much against his interest to take "that particular position." On the record, the defendant

[15] The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §2254.

confirmed that was his decision and interjected when defense counsel attempted to proffer the mitigation. Landrigan, 127 S.Ct. 1937-38.

The state courts denied Landrigan's ineffective assistance claims without a hearing. The post-conviction court noted that notwithstanding Landrigan's claim that he would have cooperated had "other mitigating evidence" been presented, the court noted his statements at sentencing "'belie his new-found sense of cooperation.'" Id. at 1938 (quoting the post-conviction court). The Supreme Court found the Ninth Circuit erred in granting an evidentiary hearing and failing to provide sufficient deference to the Arizona court. The Court stated:

> On the record before us, the Arizona court's determination that Landrigan refused to allow the presentation of any mitigating evidence was a reasonable determination of the facts. In this regard, we agree with the initial Court of Appeals panel that reviewed this case:
>
> "In the constellation of refusals to have mitigating evidence presented . . . this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one. No flashes of insight could be more fulgurous than those which this record supplies." Landrigan v. Stewart, 272 F.3d 1221, 1226 (CA9 2001).
>
> Because the Arizona postconviction court reasonably determined that Landrigan instructed his attorney not to bring any mitigation to the attention of the [sentencing] court," App. to Pet. for Cert. F-4, it was not an abuse of discretion for the District Court to conclude that Landrigan could not overcome §2254(d)(2)'s bar to granting federal habeas relief. The District Court was entitled to conclude that

> regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence. Accordingly, the District Court could conclude that because of his established recalcitrance, Landrigan could not demonstrate prejudice under Strickland even if granted an evidentiary hearing.

Landrigan, 127 S.Ct. at 1941-1942.

This case presents a much stronger case for rejection of Pearce's ineffectiveness claims than Landrigan. Here, Pearce clearly waived the presentation of all mitigating evidence whereas in Landrigan there was some question as to whether the defendant waived presentation of all evidence or just the two witnesses defense counsel brought to court. Moreover, unlike Landrigan, Pearce had a full and fair post-conviction hearing wherein it was established that Pearce would not cooperate with counsel's attempt to have Pearce examined by a mental health expert. Pearce also instructed defense counsel that he could only contact one person, his girlfriend, and restricted counsel's contact with her to logistical matters. Consequently, in addition to Pearce's clear in-court waiver, the post-conviction testimony makes it clear that Pearce limited defense counsel's mitigation investigation.

The post-conviction court's statement that Pearce's waiver was not knowing and intelligent because Pearce did not know what mitigation was available to him fails to acknowledge the role Pearce played in limiting counsel's investigation. See

Cummings-El v. State, 863 So. 2d 246, 252 (Fla. 2003)(counsel was not ineffective in limiting his mitigation investigation where defendant was adamant about not wanting his family to beg for his life and defendant understood the consequences of his decision not to present mitigating evidence). Moreover, pursuant to Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) defense counsel proffered to the Court evidence that they were prepared to present to the jury as mitigating circumstances but for being instructed by Pearce not to do so. There is no reason to believe that had counsel disregarded Pearce's instructions and mentioned additional mitigation, that he would have changed his mind. Similar to Landrigan, Pearce's new found "sense of cooperation" is suspect. Landrigan, 127 S.Ct. at 1938.

Pearce was intelligent, took an active role in his defense, had prior experience with the criminal justice system, and even fired his first court-appointed attorneys, citing case law on ineffective assistance of counsel. (IX,1333-35). Pearce was clearly not a timid man of limited intelligence with little or no experience in the criminal justice system.[16] Thus, Pearce's self-serving and unsupported post-conviction testimony that he would not have waived mitigation if only counsel had more fully

[16] As just one example of Pearce's relative sophistication and his understanding of mitigating evidence, Pearce told one defense doctor not to examine his prior incarceration record as "it would not be flattering, that he had DR's. [disciplinary reports]" (VIII,1147).

informed him of the nature of, or existence of potential mitigation is not only suspect, it is fatuous. Again, Pearce directed counsel not to contact any potential mitigation witnesses and only allowed counsel to talk to his girlfriend about logistical matters. See Rutherford v. State, 727 So. 2d 216, 225 (Fla. 1998)(rejecting ineffective counsel claim in part because the defendant placed restrictions on what evidence counsel could present during the penalty phase).

Finally, there was absolutely no compelling mitigation below that would suffice to establish prejudice under Strickland. With regard to the penalty phase, this Court observed that a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), cert. denied, 534 U.S. 878 (2001)(quoting Strickland, 466 U.S. at 695). The non-mental health mitigation consisted of the testimony of only two lay witnesses. Daniel Pearce, the defendant's brother, who testified that their parents were strict, highly educated (VIII,1236) and practiced a 'spare the rod, spoil the child' theory of child rearing which he admitted was common when he was growing up. (VIII,1232-33). At most, his testimony established some very mild form of physical abuse, but, certainly nothing

that could be considered significant mitigation.[17] The other witness, Kathryn Burford, testified that Pearce was "very good to his children" (VIII,1196), but, admitted he fought with his wife in the children's presence. (VIII,1202-04). Moreover, Pearce did not visit his children after the divorce and did not support his children financially. (VIII,1203-04). Thus, Pearce's parental record, if mitigating at all, would be entitled to little if any weight.

The mental health testimony which was not available to defense counsel because Pearce refused to cooperate, was conflicting and not altogether favorable to Pearce. Pearce's own experts did not seem to agree with one another. Dr. Carpenter thought Pearce was bipolar but did not have sufficient evidence to conclude Pearce suffered from brain damage. (VI,890). Contrary to Dr. Berland's testimony, Dr. Carpenter found no evidence of a psychotic thought disorder. (VI,902). Dr. Dee thought Pearce was brain damaged based almost entirely upon the difference in Pearce's verbal and performance IQ scores. However, Pearce's IQ score was average overall, with an above average verbal and average performance scores. (VII,1034-35). Dr. Dee acknowledged that of the numerous tests administered to Pearce to discern brain damage, he scored either

[17] According to Dr. Carpenter, Pearce's mother denied that Pearce was physically abused. (VI,881). They only spanked the kids if they disobeyed a direct order. (VI,899).

average or above average. (X,1555).

Dr. Dee acknowledged that Pearce's score on the MMPI-II psychopathic deviate scale at 79, was "extremely elevated." (VII,1019-20). While Dr. Dee thought Pearce might have a mood disorder, but, unlike Dr. Carpenter, he did not know whether it was depression or bipolar disorder. (VII,1002).

Dr. Berland was the only expert to conclude that Pearce had a psychotic thought disorder. However, his conclusion was based almost entirely on an MMPI in which some recognized authorities in the field would consider invalid based upon exaggeration or outright malingering.[18] (VIII,1132-34). Moreover, the MMPI-II shed light upon Pearce's character, which, Dr. Berland acknowledged, was not flattering.

Dr. Berland noted that Pearce's psychopathic deviate scale on the MMPI-II was extremely elevated. (VIII,1139). Dr. Berland acknowledged that extremely high scorers on this scale like Pearce are likely to engage in a variety of asocial, antisocial, and, even criminal behaviors. (VIII,1139). They are also impulsive and their behavior "may involve poor judgment and considerable risk taking, they tend not to profit from experience and may find themselves in the same difficulty time

[18] The only evidence of Pearce's psychotic thought was gained through Pearce during his interview with Dr. Berland. Dr. Berland asked leading questions regarding hearing bells ringing, a non-existent person tapping Pearce on the shoulder, or hearing his name being called out. (VIII,1145,1149).

and again." (VIII,1140-41). Dr. Berland agreed that psychopaths tend to blame others for their problems and lack empathy. (VIII,1140). Dr. Berland thought Pearce "may be all these things and he may be a character disorder, but you can have more than one problem at a time." (VIII,1141).

Dr. Gamache's testimony strongly disputed the findings of the defense experts.[19] Dr. Gamache's psychological testing revealed that Pearce has clear antisocial/psychopathic tendencies. (X,1409). Pearce's profile on the PAI was that of an "antisocial drug abuser." (X,1409). Dr. Gamache disagreed that Pearce had a bipolar disorder or was under extreme emotional distress at the time of the offenses. (X,1410-11). Dr. Gamache's interview with Pearce did not suggest either the depression or mania required to support a bipolar diagnosis under the DSM-IV-TR. (X,1419, 1421, 1423, 1426). The PAI was remarkably consistent with the information he gathered from Pearce himself. (X,1427). "He has abused and misused drugs and alcohol most of his life and he has engaged in a lot of antisocial behavior. And that's how he responded to the PAI." (X,1427). Pearce did not endorse common symptoms of mental illness and has never been diagnosed or treated for any mental

[19] Unlike Pearce's experts who testify almost exclusively for the defense, Dr. Gamache was retained almost evenly in criminal cases between the State, the defense, and court appointments. (X,1431).

illness. (X,1427). This suggests that Pearce is motivated by a character disorder, antisocial tendencies, rather than any recognized mental disorder, which a jury might consider mitigating.

Dr. Gamache did not find any evidence to support a conclusion that Pearce suffers from brain damage. Dr. Dee's finding of brain damage was based upon an out of date and largely discredited view of the point differential between verbal and performance IQs. (X,1387,1394). Pearce's performance on both the verbal and performance sections of the Wecshler was "within normal range." (X,1389). Moreover, the Denman memory test reflected a "perfectly normal" score which provides no basis for finding brain damage. (X,1393). It was exactly what Dr. Gamache would expect for someone with a normal IQ. (X,1393). According to Dr. Gamache, even twenty-five years ago these findings would not support a brain damage diagnosis. (X,1393).

The post-conviction court's order does not recite what mitigation was reasonably established during the hearing below. The post-conviction court mentioned child abuse from the alleged "pre-emptive beatings" but, Daniel Pearce testified that such he and Pearce were only given a "couple" such beatings. (VIII,1211). Such evidence is hardly sufficient to undermine confidence in the penalty phase, particularly in a case like

this where Pearce was responsible for the premeditated, execution style murder of one boy, and the attempted murder of another.

The only statutory mental mitigator the post-conviction court mentioned in granting a new penalty phase was the following: "[A] diagnosis of mental illness impairing defendant's ability to conform his conduct to the requirements of the law would have been a mitigator the jury should have heard." (V,778). However, the post-conviction court did not attempt to resolve the conflicts between the experts' testimony below. The State's expert strongly disputed the notion that Pearce suffered from any mental disease or defect. In fact, of the four experts who testified below, only Dr. Berland found Pearce qualified for the statutory mental mitigator of ability to "appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of the law was substantially impaired." 921.142(7)(e). Thus, even if the trial court had concluded that Pearce established this mitigator, such a finding would be clearly contrary to the greater weight of the evidence.[20]

Pearce failed to carry his burden of establishing prejudice

[20] While Dr. Carpenter was retained by Pearce and testifies almost exclusively for the defense in criminal cases, he candidly admitted he could not find that Pearce was substantially impaired in conforming his behavior to the requirements of the law at the time of the crimes. (VI,892).

under Strickland. The trial court found three aggravating factors, CCP, the contemporaneous attempted murder and the kidnapping. Pearce failed to present any compelling mitigation which would have altered the result in this case, even assuming for a moment, counsel can be faulted for Pearce's recalcitrance. See Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997)(no reasonable probability of different outcome had mental health expert testified, in light of strong aggravating factors); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989)(post-conviction evidence of abused childhood and drug addiction would not have changed outcome in light of three aggravating factors of HAC, during a felony, and prior violent convictions).

In conclusion, Pearce had a constitutional right to control his own destiny. Faretta v. California, 422 U.S. 806 (1975); Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988)("in the final analysis, all competent defendants have a right to control their own destinies"). Petitioner received exactly the penalty phase he desired. He cannot fault counsel for failing to present evidence which he himself, directed counsel not to pursue or present on his behalf.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard E. Kiley, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this 4th day of September, 2007.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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