No. __-____

In the Supreme Court of the United States

THOMAS D. WOODEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Petitioner Thomas Woodel, a man with no prior violent record and a uniquely compelling mitigation background, was sentenced to death in 1998 after minimal investigation into potential mitigating evidence by counsel. Woodel's sentence was vacated on other grounds, but counsel made no meaningful further investigation and put on nearly the same case at his 2004 re-sentencing. The jury recommended death by a vote of 7-to-5, and Woodel was again sentenced to death.

The Florida Circuit Court below vacated Woodel's death sentence following a nine-day evidentiary hearing upon finding that he received ineffective assistance of counsel. A divided Florida Supreme Court reinstated Woodel's death sentence on the ground that—notwithstanding the 7-to-5 jury recommendation—he was not sufficiently prejudiced by counsel's deficiencies.

The Question Presented is:

Whether the Florida Supreme Court's prejudice analysis—notwithstanding grave deficiencies in counsel's development and presentation of mitigating evidence—can be squared with *Strickland* v. *Washington*, 466 U.S. 668 (1984), and subsequent decisions of this Court applying *Strickland*'s prejudice standard.

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Thomas Woodel respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The opinion of the Florida Supreme Court (Pet. App. 2a) is reported at 145 So. 3d 782. The opinion and order of the Florida Circuit Court granting postconviction relief (Pet. App. 81a) is unreported.

JURISDICTION

The Florida Supreme Court issued its opinion on June 5, 2014, Pet App. 2a, and denied rehearing on August 28, 2014, *id.* at 1a. On November 19, 2014, Justice Thomas extended the time within which to file a petition for a writ of certiorari by 60 days, to and including January 25, 2015 (14A521). Because January 25, 2015, fell on a Sunday, the time within which to file a petition for a writ of certiorari extends to Monday, January 26, 2015, per this Court's Rule 30.1. This Court has jurisdiction under 28 U.S.C. § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Thomas Woodel is sentenced to death because a bare majority—seven of twelve jurors—voted for the death penalty after hearing a constitutionally deficient mitigation case. The Florida Circuit Court below held a nine-day postconviction evidentiary

hearing and concluded that the evidence Woodel's trial counsel had failed to discover painted a completely different picture about Woodel's family history, the effects of alcohol on his behavior, and his lack of future dangerousness than what the sentencing jury actually heard when it voted for the death penalty by the slimmest of margins. Surveying the mitigation evidence that was unearthed in the postconviction proceedings, one expert testifying below believed "this was one of the worst cases that he had encountered." Pet. App. 77a.

The trial court granted Woodel a new penalty-phase trial where he could present an adequate mitigation case, but a divided Florida Supreme Court reversed. While assuming that counsel's performance was constitutionally deficient, the majority held that Woodel could not establish prejudice. That conclusion, however, is unsupported by the undisturbed factual record, inconsistent with this Court's precedents, and made only more problematic by Florida's unusual death penalty scheme. This Court's review is urgently needed to address a capital sentence in which a single juror's vote is the difference between life and death.

A. The Underlying Offense.

Clifford and Bernice Moody, an elderly married couple, were found dead in their mobile home trailer on December 31, 1996. Pet. App. 3a-4a. Clifford was found on the floor in the couple's dining room with multiple stab wounds that had caused extensive internal bleeding. *Id.* at 4a. Bernice was lying in a bed in the back of the trailer; pieces of a porcelain toilet tank lid were found underneath her. *Id.* She

died from blunt trauma to her head and numerous cut or stab wounds. *Id.*

When questioned by the police, Thomas Woodel provided a taped confession wherein he "admitted to drinking with others that evening after work in the lot next to the Pizza Hut where he worked," and then walking to the Moodys' trailer park, where Woodel also lived. *Id.* at 6a (quoting *Woodel* v. *State*, 804 So. 2d 316, 320 (Fla. 2001)). He later recalled consuming "between 12 and 24 beers" that night. *Id.* at 167a. Woodel, who did not have a weapon on him that evening, told police that he entered the Moodys' trailer "to ask for the time" upon seeing Bernice through the window, *id.* at 6a; Woodel is the child of two deaf parents, and entering a house unannounced is common in the deaf community. 2011 ROA Vol. XVII at 2797-98. Woodel said that "she came at him with a knife" and that he "then proceeded to stab her many times and hit her over the head with a porcelain toilet tank lid one to three times." Pet. App. 7a. Woodel also told police that "he was leaving the trailer when Clifford came inside" and "then stabbed Clifford." *Id.*

Woodel was charged with two counts of first-degree murder, as well as one count each of armed robbery and armed burglary, and was convicted on all four counts in December 1998. *Id.* at 3a.

B. Thomas Woodel

As the Florida Circuit Court recounted below, *see id.* at 90a-150a, Woodel had a tragic upbringing with multigenerational dysfunction that was never fully developed by his trial counsel.

Family History. Woodel's upbringing was characterized by alcohol, abuse, and abandonment. Woodel and his sister, Bobbie, were born to Jackie Alward and Albert Woodel, who "were both unfit parents." *Id.* at 115a. Albert was "violent" with a "bad temper." *Id.* He and Jackie both "drank every day." *Id.* Woodel "moved 27 times by the time he was in middle childhood." *Id.* at 148a.

Woodel's mother, Jackie, had grown up in a household with domestic violence and two alcoholic parents. Pet. App. 100a. She was deaf, but "neither of [her] parents learned sign language," *id.*, and her father was violent toward both Jackie and her mother, *id.* at 112a-113a. Jackie's mother (Woodel's grandmother) once shot and killed "an Indian man who she claimed wanted her hair." *Id.* at 113a. Jackie was sent to the Michigan School for the Deaf when she was about fourteen, *id.*, where it was determined she had "an IQ of 80." *Id.* at 100a. Jackie would often "skip school and go down to downtown Flint[, Michigan,] where she would hang out with hearing people," among whom she "was known for drinking and sex." *Id.* at 113a Even as an adult, Jackie was "very immature, naïve, almost like a child." *Id.* at 110a. She never obtained a high school degree. *Id.* at 100a.

Woodel's father, Albert, also deaf, had an alcoholic father and a mother who "got pregnant by another man" while his father was away for military service. *Id.* at 100a. Both parents abandoned him at a young age, and he was raised by his grandmother. *Id.* Albert was also "an abusive alcoholic," and "known in the deaf community as a thief and [someone who] preyed on people [who] were deaf."

Id.; *see also id.* at 113a. Among other things, he engaged in trafficking deaf people from Mexico into the United States. *See* Pet. App. 118a, 143a; 2011 ROA Vol. XXXIII at 5447-50. These individuals were forced to beg and peddle trinkets, and were beaten if they did not bring in at least $100 per day. *Id.* at 5448-49. Some were sexually abused. *Id.* at 5447.

For Woodel, being the "child of deaf adults," termed a CODA, had a "profound effect" on his development, as a clinical psychiatrist explained below. Pet. App. 128a. Indeed, in Woodel's case, the psychiatric issues associated with being a CODA combined with "other family dysfunction and other events in [his life]" to create "a perfect storm" of psychiatric problems. *Id.* at 129a.

Woodel was repeatedly abandoned as a child. For example, Woodel and his sister Bobbie spent several years at a children's home in Winston Salem, North Carolina. *Id.* at 101a. While most children were placed there on court order, Woodel and Bobbie were just dropped off. *Id.* at 54a, 59a. At the home, Woodel was "in the bottom of the social pecking order," and was only "animated" when he and his sister would communicate in sign language. *Id.* at 102a. When he was not signing with Bobbie, "his face was blank," and "[h]e had an expression * * * that seemed to look like he was dazed." *Id.* As the clinical psychiatrist explained below, spoken English "is the[] second language" for a CODA after sign language. *Id.* at 128a. Among other things, this leads to "a diminished ability to express their feelings." *Id.*

Woodel became estranged from his father after his father had an affair with a 17 year-old girl,

named Beverly, and impregnated her. *Id.* at 101a, 116a; 2011 ROA Vol. XII at 1989-90, 1994. Woodel and Beverly had previously dated and he still "had feelings for Beverly," even "carr[ying] a picture of [her] in his wallet." Pet. App. 143a. Woodel viewed his father's affair and child with Beverly as "the ultimate betrayal." *Id.* at 101a. Several years later—and only a few weeks before the murders in this case—Woodel learned that his father and Beverly were getting married. 2011 ROA Vol. XII at 1995-96.

Woodel's siblings had serious problems as well. His sister, Bobbie, "had an alcohol problem and attempted suicide at the age of 13." Pet. App. 101a. Woodel also had two half-brothers on his mother's side: Charles died at 16 in an alcohol-related car accident, *id.*; and Scott had "chronic drug and alcohol problems," *id.*, "since the age of 13," *id.* at 118a, and was sentenced to prison the first time at age 18, *id.* at 101a, 118a. Scott was also raped multiple times by Jackie's boyfriend, Roberto, who was one of the Mexican nationals that Albert had brought into the country. *Id.* at 118a-119a. As one witness observed below, "nobody left this family unscathed." *Id.* at 101a.

Dr. Mark Cunningham, a clinical and forensic psychologist, testified below to help make sense of Woodel's complex and unusual family history. Dr. Cunningham concluded that the effects of disrupted attachment, emotional and physical neglect, wiring deficits, probable sexual abuse, abandonment and rejection, parental drinking and inadequacy, and intoxication to the level of a blackout, among other things, were "significant

damaging developmental factors," *id.* at 77a-78a, and in this case, "catastrophic," 2011 ROA Vol. XXXIII at 5481-84. He further explained that, based on the "numerous damaging developmental factors, the family history, the generational abuse, and the dysfunctions to which Woodel was exposed, this was one of the worst cases that he had encountered." Pet. App. 77a.

Alcoholism. Woodel also had severe problems with alcoholism, both throughout his life and on the night of the murder. He began using "both alcohol and marijuana at approximately 14 years old," and "at an early age he was consuming high volumes [of alcohol] for the purpose of impairment." *Id.* at 131a. Both his family history of alcoholism and being a CODA created a "significant increased risk * * * for substance abuse." *Id.* At the time of the murders, Woodel was regularly "binge drinking * * * due to his finances." *Id.* As a result of Woodel's alcoholism, "drinking or controlling his drinking was not a choice for him." *Id.* at 132a.

Woodel consumed "between 12 and 24 beers" on the night of the murders in this case. *Id.* at 167a. A toxicology expert testified below that, based on Woodel's condition and this level of consumption, Woodel "was incapable of forming the specific intent" to kill and "incapable of forming the premeditation require[d] for first-degree murder." *Id.* at 132a. He testified that Woodel likely committed the murders during "[a]n alcohol related blackout," *id.* at 130a, as a result of "chronic alcoholism" and his heavy binge drinking, *id.* at 132a.

Prison Behavior. Notwithstanding his volatile past, Woodel has managed to live a productive life in

prison following his incarceration and has shown no signs that he was likely to be a danger to others in the future. Woodel voluntarily sought out mental health treatment in prison—after learning that his mother was terminally ill and that his half-brother had impregnated his girlfriend. 2011 ROA Vol. XV at 2473. The specialist who worked with him from 2000 to 2003 found him to be "respectful, compliant, and interested in resolving his issues when he was in his sessions." Pet. App. 117a. A correctional officer who interacted with Woodel regularly for several years also found him to be "respectful and compliant," and noticed that he "got along with other inmates." *Id.* at 116a.

A correctional consultant tasked with evaluating Woodel's "institutional adjustment," concluded that he "can be safely confined for the remainder of his life without causing undue risk of harm to staff, inmates, and the general public." *Id.* at 118a. While most "[i]nmates tend to be disruptive [at first] and then level out as they get older," Woodel exhibited no violent behavior, which was highly unusual. *Id.* Indeed, the only write-up Woodel has received in prison was for possessing "contraband"—namely, "excessive stamps, a popsicle stick, and a latex glove"—earlier on in his term. *Id.* at 116a.

C. Original Sentencing—The Jury Votes 12-0 And 9-3 To Impose Death.

The original penalty phase of Woodel's trial took place in 1998 and lasted only one day. As the Florida Circuit Court later found, Woodel's state-appointed lawyers, Allen R. Smith and Gilberto Colon, Jr., conducted only minimal investigation into potential mitigating evidence, and as a result, they presented

a limited mitigation case. Pet. App. 167a. They did not present a portrait of Mr. Woodel's life resembling anything near the evidence set forth above.

The prosecution's case, at both the guilt and penalty phases, focused on the violent nature of the murders and the Moodys' vulnerability. Woodel's mitigation case focused on the bare-bones information his counsel had obtained through their cursory mitigation investigation. His counsel put on a friend and coworker who testified that Woodel was a good person and that the murders seemed out of character. Counsel also put on Woodel's father, aunt, and sister, who testified about his good character and some of the difficult aspects of his childhood. Counsel also called Dr. Henry Dee, a clinical psychologist and clinical neuropsychologist, who provided abbreviated testimony explaining Woodel's childhood and "what kind of role it might have had" in the murder. *Id.* at 91a.

Counsel failed, however, to present a fully developed case surrounding these themes of family history and intoxication, or to present any evidence about Woodel's positive behavior in prison.

Counsel made only limited efforts to speak with Woodel's family and to understand his background. *Id.* at 104a. At Dr. Dee's urging on the eve of trial, counsel did hire a mitigation specialist, Toni Maloney, *id.*, but she did not have enough time to conduct a full investigation of Woodel's family history and had to leave numerous leads unexplored, including contacting out-of-state family and friends, following up on records from the children's home, and understanding Woodel's status as a CODA. *Id.* at 96a-99a. Maloney first discovered that Woodel

was a CODA during trial upon noticing that he signed with his hands while they spoke. *Id.* at 97a-98a. She attempted to find an expert who could help Woodel's defense team and the jury understand the effects of being a CODA, but could not do so in time, settling instead for giving Dr. Dee a book she found called *Mother Father Deaf*. *Id.* at 98a. Counsel requested additional time to prepare for the penalty phase, but that request was denied. *Id.* at 67a. As a result, counsel never followed up on these additional leads.

Also, despite pursuing intoxication as a central theme at the penalty phase, counsel never consulted with a toxicology expert. He chose instead to rely on jurors' own personal experience regarding the inhibiting effects of alcohol, later explaining that "we live in Polk County and I knew that at least a good portion of those jurors knew what it is to be drunk, so I knew what a drunk person does when they're - - when they're drunk, such as do stupid things, have memory loss, things of that nature." *Id.* at 107a. It "never crossed [counsel's] mind to get an expert to determine his blood alcohol or to get testimony." *Id.* Contrary to counsel's assumptions, however, "most jurors *do not* have the level of sophistication to really know about alcohol and the effects of alcohol, and particularly the effects of longterm alcohol abuse." *Id.* at 134a (emphasis added).

Counsel also did not speak with anyone from the Florida Department of Corrections, who could have explained that Woodel was a model prisoner who could live out a productive life in prison.

Following the one-day penalty phase hearing, the jury unanimously recommended death for the

murder of Mrs. Moody and also recommended death for the murder of Mr. Moody by a vote of 9-3. *Id.* at 7a. Under Florida law, the jury's recommendation is advisory. Fla. Stat. Ann. § 921.141. Here, the judge followed the jury's recommendations and sentenced Woodel to death for both murders. Pet. App. 8a. On direct appeal, the Florida Supreme Court affirmed Woodel's convictions but vacated the death sentences on the ground that meaningful appellate review was impossible due to the trial court's failure to evaluate each mitigating circumstance, determine whether the mitigators were truly mitigating, or properly weigh the aggravators against the mitigators. *Id.* at 9a.

D. Second Sentencing—The Jury Votes 7-5 to Impose Death, and 12-0 for Life.

Because the judge who presided over Woodel's original trial and sentencing was unavailable to reconsider the evidence, the case was reassigned to a new judge, who held a new penalty-phase proceeding in 2004. The trial court also reappointed Colon as Woodel's defense counsel.

In spite of a second opportunity to develop and present a compelling mitigation case—and his prior recognition that further time was needed to conduct a thorough investigation—Colon did not conduct any meaningful further investigation. Maloney was not rehired, Pet. App. 99a, and another investigator was retained only "to serve subpoenas," using about $128 of the $1,500 the court had authorized, *id.* at 95a.

Rather than "investigating or reinvestigating the case when he was preparing for the 2004 penalty phase," Colon simply "talked to the same three family members, Bobbie, Albert and Aunt Becky that

had testified at the 1998 trial." *Id.* at 109a. He did not recall doing any additional preparation beyond "reviewing [the] file, the record, [and] the transcript," upon which he "decided to proceed with the same - - same type of defense." *Id.* That defense focused on maternal neglect, without informing the jury that Woodel's father was abusive, neglectful, and alcoholic. Counsel in fact portrayed Albert as a loving father struggling to provide for his family and compensate for the failings of Woodel's mother. *See* 2004 ROA Vol. XIV at 2102-2118. And counsel allowed Woodel's father to portray himself as a man who never drank, as opposed to the abusive alcoholic he truly was. *Compare id.* at 2107, *with* Pet. App. at 100a.

This time, a bare majority of the jury in a 7-5 vote recommended death for the murder of Mrs. Moody, while unanimously voting for a term of life in prison in the case of Mr. Moody. *Id.* at 9a. Even though five jurors opposed a death sentence in the case of Mrs. Moody, Florida is one of only two States in the country that allows a jury to reach a death sentence based on a bare majority vote. *See Florida* v. *Steele*, 921 So. 2d 538, 548-49 (Fla. 2005). If one additional juror had voted against a death sentence, the 6-6 vote would have resulted in a jury recommendation of life in prison.

The new trial judge again followed the jury's recommendations. Pet App. 9a. The court found four statutory aggravating factors: prior violent felony conviction (based on the contemporaneous murder); crime committed during the commission of a burglary; especially heinous, atrocious or cruel circumstances; and the victim's vulnerability due to

age or disability. *Id.* at 10a n.6. But the court also found fourteen statutory and non-statutory mitigating factors, including several that were developed in further detail only in the later postconviction proceedings, such as: no significant criminal history; substantial impairment of capacity to appreciate his actions or conform his conduct to the requirements of law; extreme emotional disturbance; physical abuse as a child; neglect and rejection by his mother and others; an unstable home as a child; parents who were deaf and spoke primarily in sign language; abuse of alcohol and drugs; the defendant's belief in God; his voluntary confession; and the defendant's compassion for others. *Id.* at 10a nn.7-8.

Woodel's death sentence became final following direct appeal, *id.* at 10a-11a, including an unsuccessful petition for certiorari to this Court, 555 U.S. 1036 (2008).

E. The Circuit Court Vacates The Death Sentence Due To Ineffective Assistance of Counsel.

Woodel received new counsel and sought state postconviction relief in the Florida Circuit Court claiming, among other things, that he had received ineffective assistance of counsel in the development and presentation of mitigation evidence during the penalty phase of his trial.

In the 2004 penalty phase, counsel had only presented 8 witnesses: three family members, three coworkers, Dr. Dee, and Woodel himself. Over the course of nine days in 2011, in sharp contrast, Woodel's new counsel put on testimony from 27 witnesses who testified on Woodel's behalf and could

have provided the same testimony in 2004. *See id.* at 90a-150a. These witnesses included additional family members and childhood acquaintances whom trial counsel had never contacted, a mental-health counselor who had treated Woodel as a child, corrections personnel who testified to Woodel's conduct in prison, a clinical psychiatrist with CODA expertise, a clinical and forensic psychologist, a clinical pharmacologist who testified about Woodel's alcohol abuse, and additional witnesses who testified to trial counsel's original investigation (including trial counsel). *See id.* at 104a (trial counsel "conceded that a multigenerational family pattern of alcoholism should have been developed for trial"); *id.* at 109a-110a (trial counsel testifying that he "wished [he] would have hired somebody that would come in and provide further testimony" about growing up as a CODA). This testimony established extensive new mitigation evidence that Woodel's trial counsel failed to uncover, let alone present.

The Florida Circuit Court, after hearing this testimony, including the testimony of Woodel's trial counsel, and considering the State's own presentation, granted Woodel's motion in part and vacated his death sentence. In an 87-page order, Pet. App. 81a, the court concluded that trial counsel had rendered constitutionally deficient performance which had prejudiced Woodel in his 2004 penalty phase. *Id.* at 42a; *see also Strickland*, 466 U.S. at 690-91. Woodel's counsel's failure to develop and present sufficient mitigation evidence "fell below an objective standard of reasonableness," and "but for this deficient performance there is a reasonable probability that the result of the proceedings would have been different"—specifically, that "Woodel may

have received a life recommendation." Pet. App. 166a. The court thus concluded that Woodel is "entitled to a new penalty phase trial" and vacated his death sentence. *Id.* at 177a.

F. A Divided Florida Supreme Court Reinstates The Death Penalty.

A divided Florida Supreme Court reversed on the ground that Woodel was not prejudiced by any of his counsel's deficiencies. Without disturbing the Florida Circuit Court's holding that counsel's failure to investigate, develop, and present sufficient mitigating evidence was deficient, *id.* at 19a, a majority of the court concluded that counsel's errors were not prejudicial under the *Strickland* standard because the additional mitigating circumstances were of relatively minor importance or cumulative of mitigating evidence presented in 2004. *Id.* at 39a-42a.

The majority "agree[d] that counsel failed to explore" Woodel's family history and background, and "did not explore Woodel's background stemming from his childhood years in Michigan and North Carolina even though such information could have been presented to the jury." *Id.* at 23a. But it nevertheless found "no reasonable probability that the proposed additional mitigating circumstances pertaining to Woodel's personal history and family background would have had any impact on the trier of fact." *Id.* at 40a.

The majority also rejected the Florida Circuit Court's conclusion that Woodel was prejudiced by counsel's failure to present a toxicology expert who could explain the effect of the alcohol Woodel consumed prior to the murders. *Id.* The court

believed that the failure to consult an expert was "harmless error" because "the trier of fact was able to understand from Dr. Dee's testimony and other evidence that Woodel was an alcohol abuser who had difficulty dealing with his alcohol abuse during the period when he murdered the Moodys." *Id.* The court discounted the testimony of Dr. Buffington, the clinical pharmacologist who testified below that Woodel's excessive drinking caused him to experience a partial alcohol-induced blackout at the time of the murders, because Woodel could "recall many pertinent details about the events pertaining to the Moodys' murders." *Id.* at 31a.

The court did not address the testimony presented below and accepted by the Florida Circuit Court concerning Woodel's positive prison behavior, but it did address other deficiencies that the lower court had identified. It then re-summarized its holding as to each category of evidence and stated, without further elaboration, that

> [w]e find no cumulative error because the allegedly unexplored mitigating circumstances were: (1) cumulative to those presented during the second penalty phase; (2) insufficiently demonstrated during the postconviction evidentiary hearing; or (3) otherwise failed to satisfy the *Strickland* standard. Furthermore, because we do not find multiple errors in this case, there is no cumulative error effect that establishes prejudice.

Id. at 41a-42a (internal quotations omitted). The court's isolated statement that it "d[id] not find multiple errors," *id.*, came despite the court's earlier

statement that it was assuming deficient performance on each ground and addressing only prejudice, *id.* at 19a.

Justice Pariente dissented, in particular highlighting the majority's cursory piece-by-piece prejudice analysis. *Id.* at 60a. The dissent explained that "the majority engage[d] in a flawed legal analysis never adopted by this Court, addressing each individual failure to present mitigation evidence in a vacuum and never analyzing whether counsel's deficiency as a whole operated to undermine confidence in the outcome of the penalty phase." *Id.* at 61a. When analyzing prejudice under *Strickland*, the dissent observed, the court "cannot simply analyze the prejudice caused by counsel's failure to present each individual piece of evidence alone. Instead, the Court must review whether *counsel's deficient performance* itself prejudiced the defendant." *Id.*

The dissent explained that, here, "the quality of the witnesses presented at the postconviction evidentiary hearing provided a more complete picture of not only the abuse, but the impact of being a child of deaf parents." *Id.* at 64a. The dissent also emphasized the fact that the jury had voted for death by only "the slimmest margin possible—a seven-to-five vote." *Id.* at 60a. Given the substantial new mitigation evidence presented below, there was simply no justification for the "rare step of reversing the trial court's determination that its confidence in the death sentence was undermined." *Id.*

REASONS FOR GRANTING THE WRIT

The *Strickland* Prejudice Analysis Conducted By The Florida Supreme Court Violates This Court's Established Precedents.

This Court has monitored application of the Sixth Amendment in capital cases to ensure that death sentences are carried out only after a full and fair adversarial process. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court established a two-part test to establish a claim of ineffective assistance of counsel. A defendant must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) that performance was prejudicial because there is a reasonable probability that, if counsel had performed adequately, the result would have been different. *Id.* at 687, 694.

In *Williams* v. *Taylor*, 529 U.S. 362, 368–70, 395–96 (2000), this Court made clear that counsel performs deficiently by failing to conduct an adequate mitigation investigation in a capital case. The failure to properly investigate can never be considered a strategic decision. *See Wiggins* v. *Smith*, 539 U.S. 510, 522 (2003) (explaining that "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision * * * because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background'") (alteration in original) (quoting *Williams*, 529 U.S. at 396)).

Subsequently, this Court has granted certiorari to address counsel's performance in developing and presenting mitigation evidence, providing important

guidance regarding the prejudice inquiry required by *Strickland* under such circumstances. *See e.g.*, *Sears* v. *Upton*, 561 U.S. (2010); *Porter* v. *McCollum*, 558 U.S. 30 (2009); *Rompilla* v. *Beard*, 545 U.S. 374, 381–90 (2005).

In particular, this Court has required that courts consider the totality of counsel's errors in assessing prejudice, not just each error in isolation. In *Sears*, this Court "categorically rejected the type of truncated prejudice inquiry undertaken by the state court" below. 561 U.S. at 955. And in *Porter*, the Court explained that courts must consider the "totality of the available mitigation evidence evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation." 558 U.S. at 41 (alteration in original) (quoting *Williams*, 529 U.S. at 397). The "totality of the available mitigation evidence" means the evidence as a whole. *See Williams*, 529 U.S. at 398–99 ("In our judgment, the state trial judge was correct * * * in his conclusion that the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised a reasonable probability that the result of the sentencing proceeding would have been different * * * ." (quotation omitted)).

This case calls for the Court's intervention once again, and presents a particularly suitable candidate for review. First, the majority below accepted the Circuit Court's factual findings and assumed there was deficient performance, yet found Woodel was not prejudiced notwithstanding the completely different picture of his life and upbringing presented at the

postconviction evidentiary hearing. That holding, on a clean, undisturbed record, is a grave misapplication of the Sixth Amendment. Second, as the dissent below highlighted, the majority's prejudice analysis, which addressed each category of evidence in a vacuum and gave only lip-service to the totality of the evidence, conflicts with this Court's precedents—which is, unfortunately, not an isolated incident for the Florida Supreme Court. And third, the prejudice to Woodel is underscored by the fact that, under Florida's outlier death penalty scheme, he was sentenced to death on the 7-to-5 vote of a jury, which would have meant life in prison in almost any other American jurisdiction. That Woodel was a single vote away from a life sentence for Mrs. Moody's murder—from a jury that unanimously recommended a life sentence for the murder of Mr. Moody that Woodel committed at nearly the same time—sharply undermines confidence in the death sentence.

A. The Florida Supreme Court's Prejudice Determination Cannot Be Squared with the Undisturbed Record Below

As the Circuit Court properly found after listening to days of witness testimony, Woodel was prejudiced by his trial counsel's failure to develop and present an effective mitigation case. This is particularly clear in light of the fact that his counsel had the advantage of knowing that his initial strategy had already failed; all twelve jurors at Woodel's 1998 penalty-phase trial had rejected it. While the Florida Circuit Court found that counsel failed to discover useful mitigation evidence on a wide range of topics, three are particularly glaring:

family history, toxicology, and likelihood of future dangerousness. The truncated prejudice analysis conducted by the Florida Supreme Court in reversing the Florida Circuit Court is flatly inconsistent with the record below and this Court's prior admonitions about how to apply *Strickland*.

Family History. In 1998, and again in 2004, trial counsel failed adequately to investigate and present important elements of Woodel's multigenerational family history. This kind of testimony is particularly valuable, as reflected in this Court's reversal of death sentences when counsel failed to adequately present evidence concerning the defendant's "'nightmarish' childhood." *Williams*, 529 U.S. at 395-96; *see also id. at* 370-71; *Sears*, 561 U.S. at 948-51, 956; *Porter*, 558 U.S. at 43; *Rompilla*, 545 U.S. at 390-93; *Wiggins*, 539 U.S. at 524-29, 538. Indeed, in *Porter*, this Court acknowledged that "[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood." 558 U.S. at 43.

Comprehensive background and family information is particularly relevant and important "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background * * * may be less culpable than defendants who have no such excuse." *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989) (internal quotations & citations omitted), *abrogated on other grounds by Atkins* v. *Virginia*, 536 U.S. 304 (2002). "The description, details, and depth of abuse in [Woodel's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the

jury was told." *Johnson* v. *Sec'y, Fla. Dep't of Corrections*, 643 F.3d 907, 936 (CA11 2011); *see also Sears*, 561 U.S. at 954-56. Counsel undisputedly had enough notice to conduct a further investigation into Woodel's family background, and while the Court's refusal to grant a continuance may have hampered him in 1998, he had no excuse in 2004. Counsel simply failed to investigate, even though "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses" and presenting the most effective case. *Wiggins*, 539 U.S. at 525.[1]

The penalty phase testimony included testimony about Woodel's dysfunctional immediate family, but it was incomplete and inaccurate. For example, there was no testimony about the grandparents who helped to raise Woodel and their dysfunction, including the fact that his grandmother once killed a

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[1] Counsel's failure to adequately investigate Woodel's multigenerational family history does not just violate this Court's precedent. It also violates professional standards reflected in ABA Guideline § 11.4.1 from 1989—reflecting prevailing professional norms nine years before Woodel's trial. 1998 ABA Guidelines for the Performance & Appointment of Counsel in Death Penalty Cases § 11.4.1(C). Moreover, a mitigation specialist testified in 2011 that she would recommend—based on the 2003 ABA guidelines, in effect during the 2004 sentencing proceedings—to obtain an expert in Children of Deaf Adults and deaf culture in this case. The Guidelines speak to the importance of not relying on a generalist or all-purpose expert. ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases (2003), at 1061; *see also* Pet. App. 101a.

man. Although the jury heard a small sliver of Woodel's volatile upbringing, including the fact that he was neglected by his mother and was a child of deaf parents, the jury heard little about the far-reaching effects of his being a child of two deaf parents and nothing of Woodel's neglect by his father, or his father's violence and human trafficking activities. This evidence, like the evidence of the defendant's childhood in *Williams*, surely could have made a difference. *See* 529 U.S. at 395-96.

And the evidence presented below was not merely cumulative of the limited evidence presented in 2004; it was new evidence. *See Rompilla*, 545 U.S. at 390-91 (holding the additional evidence regarding the defendant's childhood "pictured [a] childhood and mental health very differently from anything defense counsel had seen or heard"); *Wiggins*, 539 U.S. at 527-28. Extensive testimony related to Woodel's grandparents, siblings, and even his father, bore no relation to the mitigation case presented in 2004.

This new evidence about Woodel's family history and highly unstable upbringing is precisely the "kind of troubled history [this Court has] declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535. Dr. Cunningham testified below that it "was one of the worst cases that he had encountered." Pet. App. 77a. "According to Dr. Cunningham, without this crucial information, the jury was left with a simple impression that Woodel's life should be spared because he had a bad childhood, but the jury was never provided * * * [the] damaging developmental factors that affected Woodel." Pet. App. 78a.

Nevertheless, the Florida Supreme Court dismissed this evidence, concluding that it would not have made any difference. That conclusion is seriously flawed. The Florida Supreme Court itself acknowledged that defense counsel focused on the neglect Woodel experience since childhood without fully developing the full extent of that neglect or several other facets of Woodel's broken past. *Id.* at 23a ("We agree that counsel failed to explore other mitigation about Woodel's personal history and his multigenerational family background. And, it is evident from the postconviction evidentiary record that counsel did not explore Woodel's background stemming from his childhood years in Michigan and North Carolina even though such information could have been presented to the jury."). Indeed, counsel testified below that, while his goal in 2004 was to show that "growing up in the family that he grew up and the environment that he grew up in may have provided" an explanation for Woodel's crimes, "Dr. Dee *could not pinpoint that*." *Id.* at 109a (emphasis added). Instead, they were forced to speculate "that perhaps this was some kind of repressed aggression that he had for his own mother that had come out during the contact that he had with Ms. Moody." *Id.* Where the 2004 mitigation case focused on this maternal-neglect theory, the Florida Supreme Court could not reasonably conclude that all of the other evidence presented below concerning Woodel's family background was merely "cumulative."

Toxicology. The record also shows that the factfinder would likely have reached a different result had a toxicology expert testified about the

effect of Woodel's alcohol abuse over time and on the night of the murders.

Expert testimony concerning acute alcohol intoxication can make a meaningful difference in how a jury receives an intoxication-based defense. *See, e.g. Rompilla*, 545 U.S. at 390-91; *Hardwick* v. *Crosby*, 320 F.3d 1127, 1167 (CA11 2003) (holding that defendant was prejudiced by counsel's failure to investigate and present expert testimony concerning effect of drugs and alcohol on his ability to form malicious intent). Moreover, it is an accepted practice for defense counsel to hire a toxicology expert (or, at least, to consult with one) when an intoxication-based defense is at issue. Indeed, Florida defense attorneys routinely rely on expert toxicology evidence in raising voluntary intoxication or insanity defenses based on intoxication. *See, e.g.*, *Foster* v. *State*, 929 So. 2d 524 (Fla. 2006); *Johnson* v. *State*, 769 So. 2d 990, 1001 (Fla. 2000); *Easley* v. *State*, 629 So. 2d 1046, 1049 (Fla. Ct. App. 1993); *Barber* v. *State*, 576 So. 2d 825, 831 (Fla. Ct. App. 1991); *Burch* v. *State*, 522 So. 2d 810, 812 (Fla. 1988).

While a toxicology expert may not be needed in every case, expert toxicology testimony would have been particularly important in Woodel's case. Counsel's mitigation case focused on Woodel's alcohol consumption in the late-night hours leading up to the murders, and counsel had specifically requested and received a jury instruction on voluntary intoxication. Pet. App. 90a. Counsel did not consult with a toxicologist, or other similar type of expert, to assess the effects of alcohol on brain function or thought processes at the time of the murders.

Instead of presenting actual evidence that would support such a mitigation case, Woodel's counsel decided to simply rely on the jurors' own personal experiences with alcohol. Needless to say, it was unreasonable for counsel to assume that jurors would have a good lay sense for how generations' worth of alcoholism and the consumption of between 12 and 24 beers would affect one's ability to commit a premeditated murder. That is particularly so considering that Woodel otherwise did not have a criminal history of violent crime.

To be sure, there was some limited evidence of alcohol use presented in the 1998 and 2004 proceedings, but nothing close to what a toxicologist could have presented and nothing from an expert qualified to explain the complicated effects of years of alcohol abuse on Woodel at the time of the murders. The expert toxicology evidence presented below was in no sense "cumulative" of what the jury and judge heard in 2004.

The prejudice from counsel's failure to put on a toxicology expert is highlighted by the State's closing argument, which capitalized on Woodel's counsel's failure to put on evidence of how his intoxication reduced his culpability. In the absence of a toxicologist's testimony, the prosecutor was able to argue in closing that alcohol "was not impairing him" because "he walked home * * * one-and-a-half miles," and "[i]f someone has had a sufficient amount of alcohol to drink that's going to put him in a[n] intoxicated state, are they going to be able to navigate a busy thoroughfare?" 2004 ROA XVII at 2585-86. He further argued that "it's obvious and it's clear that whatever he had to drink was not

impairing his ability to not only remember what's going on but even how he was thinking." *Id.* at 2588. Woodel's counsel had no way to rebut the prosecutor's lay toxicology opinion, but expert testimony like that of Dr. Buffington presented below could have been used to rebut these arguments.

Counsel's failure to develop and present expert toxicology evidence thus undermines "confidence in the fundamental fairness of the state adjudication." *Williams*, 529 U.S. at 375. In rejecting this conclusion, the Florida Supreme Court concluded that, since there was some evidence from Dr. Dee in 2004 suggesting that Woodel may have consumed more than the 7 to 8 beers his confession mentioned, the jury was adequately provided "with information showing that Woodel had had problems with excessive alcohol consumption that he was dealing with at the time of the crimes." Pet. App. 30a. The court also noted that Dr. Dee had testified that "Woodel exhibited the behavior of an alcoholic," and echoed trial counsel's determination "that the jurors who lived in Polk County were aware that when someone gets drunk they have memory losses and 'things of that nature.'" *Id.* But these observations, offered primarily by a witness with no expertise in toxicology, in no way paint the same picture that the Florida Circuit Court recognized below.

Again, Dr. Buffington, a clinical pharmacologist, provided an expert opinion below about the effects alcohol had on Woodel's behavior. *Id.* at 130a. He testified, among other things, that "[a]n alcohol related blackout is actually a cognitive phenomenon where the individual can be functioning, talking, having thought process, having behaviors and have

no recollection of them at a later point in time." *Id.* He explained Woodel's numerous risks factors that contributed to his susceptibility for alcohol abuse based on his family history, his status as a CODA, and his genetic predisposition, including that Woodel had witnessed three generations of alcohol abuse, had started drinking from the time he was fourteen years old, and binge drank frequently. *Id.* at 131a. In Dr. Buffington's opinion, "[b]ased on the concentrations of alcohol he was taking at the time of the crime [the evidence suggested up to 24 beers], alcohol was controlling the Defendant," and that Woodel's "intoxication had rendered him incapable of forming the premeditation require for first-degree murder." *Id.* at 132a.

There is simply no support in the record for the Florida Supreme Court's conclusion that, "[a]t most, the lack of such expert testimony constitutes harmless error based on this record." *Id.* at 32a. To the contrary, the Florida Circuit Court heard and accepted testimony that "most jurors do not have the level of sophistication to really know about alcohol and the effects of alcohol, and particularly the effects of longterm alcohol abuse." *Id.* at 134a. The Florida Supreme Court never held that any of the lower court's factual determinations were erroneous.

Prison Behavior. Finally, counsel failed to present any evidence of Woodel's prison behavior, which would have showed that he could live a productive life in prison and did not pose a threat of future dangerousness. The importance of this evidence cannot be understated when future dangerousness is almost always on the minds of juries. *See* 2003 ABA Guidelines, at 1056, 1062.

Counsel did present some limited evidence in 1998 and 2004 concerning Woodel's general character. For example, Woodel's friend and co-worker testified that Woodel's behavior at the time of the murders was completely out of character and that he was "quiet, soft spoken, kind and intelligent." Pet App. 41a.

Trial counsel did not, however, develop or present any of the evidence presented below that involved Woodel's post-incarceration conduct and therefore bore more directly on how he might serve a life sentence and whether he posed a threat of future dangerousness. Indeed, trial counsel testified below that there would have been "no downside" in bringing in a corrections officer to testify in 2004 "about the fact that Tommy was a good, compliant inmate." 2011 ROA Vol. XVII at 2745-47. He simply did not "recall ever having that thought process," and did not contact anyone at Union Correctional Institution where Woodel is being held pending execution, *id.* at 2746, even though the testimony would have fit squarely in with another part of trial counsel's proffered strategy—namely, to convey Woodel as a kind and compassionate individual. Pet. App. 141a.

It was also particularly important to rebuff the state's emphasis of Woodel's status as a candidate for the aggravators of a prior violent felony conviction (which was based on the contemporaneous murder of Mr. Moody), *see* 2004 ROA Vol. XVI at 2523-25, and the commission of a heinous or atrocious crime, *see* 2004 ROA Vol. XVII at 2540-47. The prosecution, in fact, was able to emphasis this point throughout the proceedings, but particularly in closing arguments.

See, e.g., 2004 ROA Vol. XVI at 2527-28 (arguing to the jury that the prior violent felony aggravator "deserves a great deal of weight."). It surely would have helped to be able to show that Woodel was an unusually non-violent prisoner.

B. The Florida Supreme Court Failed to Give Due Consideration to the Totality of the New Mitigation Evidence, in Conflict with This Court's Precedents.

This Court has made clear that a sentencing court must "accord appropriate weight to the [whole] body of mitigating evidence [that would have been] available to trial counsel" in its reweighing analysis. *Williams*, 529 U.S. at 398. More specifically, in *Williams*, this Court held the state supreme court's "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Id.* at 397-98 (citing *Clemons* v. *Mississippi*, 494 U.S. 738, 751-52 (1990)). The error was "apparent in [the state Supreme Court's] consideration of the additional mitigation evidence developed in the postconviction proceeding," according to this Court, because it "failed to accord appropriate weight to the [whole] body of mitigating evidence [that would have been] available to trial counsel." *Id.* at 398.

The Florida Supreme Court committed the same error here. The majority did not evaluate the totality of Woodel's mitigating evidence. Instead, it engaged in a piecemeal weighing of Woodel's postconviction mitigation evidence and then simply summarized these piecemeal holdings under what it called a

"Cumulative Analysis." Pet. App. 39a. The error in this analysis is captured in the court's ultimate conclusion that "there is no cumulative error effect that establishes prejudice" "because we do not find multiple errors in this case." *Id.* at 41a-42a. By reasoning that new evidence should not be considered together because none of it established a *Strickland* violation on its own, the court abdicated its obligation "to evaluate the totality of the available mitigation evidence." *Williams*, 529 U.S. at 398.

As Justice Pariente ably explained in dissent below, "the majority engage[d] in a flawed legal analysis * * * addressing each individual failure to present mitigation evidence in a vacuum and never analyzing whether counsel's deficiency as a whole operated to undermine confidence in the outcome of the penalty phase." *Id.* at 61a. Had the majority conducted a proper prejudice analysis under *Strickland*, assessing the prejudicial effect of counsel's multiple errors considered as a whole, it could not have justified the "rare step of reversing the trial court's determination that its confidence in the death sentence was undermined." *Id.*

Unfortunately, the Florida Supreme Court's misapplication of the *Strickland* standard here is not an isolated incident. Just five years ago, in *Porter*, this Court held that it was objectively unreasonable for the Florida Supreme Court to conclude that counsel's failures in developing and presenting mitigation evidence did not prejudice the defendant. *See* 558 U.S. at 31. Notwithstanding that admonition, the Florida Supreme Court has continued to reject valid Sixth Amendment claims involving mitigating evidence in death penalty cases

on the ground that the undeveloped evidence was merely cumulative, as it did here. *Cf. Cooper* v. *Sec'y, Fla. Dep't of Corrections*, 646 F.3d 1328, 1353 (CA11 2011) (holding that "the Florida Supreme Court's finding that the mitigation evidence * * * was cumulative to that presented at sentencing was an unreasonable determination of the facts"); *Anderson* v. *Sec'y, Fla. Dep't of Corrections*, 752 F.3d 881, 911 (CA11 2014) (Martin, J., concurring) (expressing "serious concerns about whether the Florida Supreme Court reweighed the totality of the mitigating evidence against all the aggravating evidence, old and new,").

This case presents an ideal opportunity to correct this error and to ensure that individuals sentenced to death under Florida's outlier death penalty scheme are afforded constitutionally effective representation. Effective mitigation is critical to our current death penalty regime, which is no doubt why this Court has been particularly careful to police the standards, expectations, and legal requirements relating to sufficient investigation and presentation of mitigation evidence in both the guilt and penalty phases of capital trials.

C. The Procedural Irregularities in the Florida Death Penalty Scheme That Lead to Woodel's Death Sentence Underscore the Prejudice Caused by Counsel's Failures

It would be particularly tragic to leave the Florida Supreme Court's error uncorrected where Woodel stands to die by "the slimmest margin possible—a seven-to-five vote." Pet. App. 60a (Pariente, J.,

dissenting). Indeed, in nearly every State in the Union, Woodel would be serving a life sentence.

Florida is a national "outlier" in how it administers the death penalty. *Steele*, 921 So. 2d at 550; *see also id.* at 548 (expressing the Florida Supreme Court's "considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that * * * the Legislature should revisit the statute to require some unanimity in the jury's recommendation"). Specifically, "Florida is now the *only state in the country* that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote." *Id.* (initial emphasis added); *see also* Fla. Stat. Ann. § 921.141. Making matters worse, "[n]othing in the statute, the standard jury instructions, or the standard verdict form * * * requires a majority of the jury to agree on *which* aggravating circumstances exist." *Steele*, 921 So. 2d at 545. A death sentence may thus be imposed without even a majority agreeing on the existence of any one aggravating factor.

The near unanimity among death-penalty States on juror unanimity is not an accident. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held, under the Sixth Amendment, that any factual finding which increases the maximum sentence to which a defendant is exposed—with a limited exception for prior convictions, not relevant here—must be made by the jury. Two terms later, in *Ring* v. *Arizona*, 536 U.S. 584 (2002), this Court held that, where the death penalty may be imposed only upon a finding that one or more aggravating factors is present, that determination must be made by the

jury as well. Because *Ring* dictated that death-eligibility is question for the jury, like any substantive element of the offense, nearly every State with the death penalty changed its law to require a unanimous jury finding in favor of death following *Ring*.

Mr. Woodel would not have been sentenced to death absent Florida's unusual death penalty scheme, a scheme that allows juries to recommend death by a bare majority and that leaves the ultimate sentencing discretion in the hands of the trial judge. These irregularities in Florida's death penalty scheme—but for which Woodel would not have been sentenced to death—only underscore the prejudice caused by counsel's failure to present a full mitigation case.

Taking due account of how the Florida death penalty regime impacts the outcome in this case, there is a reasonable probability that the outcome of Woodel's second sentencing would been different but for counsel's failure to develop and present an effective mitigation case. The majority gave no apparent consideration to the fact that only a bare majority of seven jurors voted to impose the death penalty while five jurors voted for life (and all twelve jurors voted for life in connection with the murder of Mr. Moody, which took place shortly after the murder of Mrs. Moody). In any other jurisdiction, this vote would not have resulted in a death sentence, but even in Florida, it was death by the narrowest of margins, as the dissent below emphasized. By failing to consider these circumstances, the Florida Supreme Court treated Woodel no differently than a defendant sentenced to

death upon the unanimous recommendation of the jury. *Strickland*'s "reasonable probability" standard for prejudice cannot be blind to the votes of those five jurors who believed only a life sentence was justified, and to the fact that one juror changing his or her mind would have resulted in a recommendation of life in prison instead of death.

Moreover, the facts of this case make it especially unreasonable to rule out the possibility of a different outcome since there was already a five-juror swing between Woodel's first and second sentencing hearings. If even counsel's constitutionally ineffective mitigation investigation and presentation could lead to a 7-5 death vote, there is at least a reasonable possibility that a constitutionally *adequate* mitigation case could have garnered a sixth vote.

Given both the record here and the procedural realities of the Florida death penalty scheme, it was error for the Florida Supreme Court to conclude that "'there is no reasonable probability that the omitted evidence would have changed * * * the sentence imposed.'" Pet. App. 42a (quoting *Strickland*, 466 U.S. at 700). This Court's intervention is necessary to correct a miscarriage of justice here and ensure proper application of the Sixth Amendment.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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January 26, 2015

APPENDIX

Appendix A

Supreme Court of Florida

THURSDAY, AUGUST 28, 2014

CASE NO.: SC12-132

Lower Tribunal No(s). 53-1997-CF-000047-A0

STATE OF FLORIDA vs. THOMAS D. WOODEL

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

LABARGA, C.J., and QUINCE, LEWIS, CANADY, POLSTON, and PERRY, JJ., concur.

PARIENTE, J., dissents.

A True Copy

Test:

s/ John A. Tomasino

John A. Tomasino

Clerk, Supreme Court

mh
Served:
PAUL R. WALLACE
CAROL MARIE DITTMAR
MARIA E. DELIBERATO
MARIE-LOUISE SAMUELS-PARMER
HON. RICHARD M. WEISS, CLERK
HON. J. MICHAEL HUNTER, JUDGE

Appendix B

Supreme Court of Florida

No. SC12-132

STATE OF FLORIDA,
Appellant,

vs.

THOMAS WOODEL,
Appellee.

No. SC12-132

THOMAS D. WOODEL,
Cross-Appellant,

vs.

STATE OF FLORIDA,
Cross-Appellee.

[June 5, 2014]

CORRECTED OPINION

PER CURIAM.

This case is before us on the State's appeal from an order granting a new penalty phase based on the defendant's motion to vacate a sentence of death under Florida Rule of Criminal Procedure 3.851 and the defendant's cross-appeal from the trial court's order denying a new trial as to both the guilt and penalty phases. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons addressed in this opinion, we reverse the trial court's order granting a new penalty phase, affirm the trial court's order denying an entirely new trial, and reinstate the defendant's sentence of death.

I. BACKGROUND

Thomas D. Woodel was convicted in Polk County, Florida, for the first-degree murders of Clifford and Bernice Moody, an elderly married couple, who he cut and stabbed. Woodel, who was twenty-six years old on the date of the crimes, was also convicted of burglary and robbery in the same case. The pertinent facts pertaining to Woodel's convictions are addressed in our decision issued in his first direct appeal:

> Clifford Moody, who was seventy-nine years old, and his seventy-four year old wife, Bernice, lived in a mobile home trailer on lot 533 at Outdoor Resorts of America in Polk County. The Moodys owned another trailer on adjoining lot 532, which they sometimes rented. Bernice was seen by the newspaper delivery man cleaning lot 532 about 4:30 to 4:45 a.m. on December 31, 1996. Clifford was last seen by a security person at the Outdoor Resorts Laundromat at about 5:30 a.m. The

Moodys were preparing to show the mobile home for rental that day.

The Moodys were found dead a little after 1 p.m. on December 31, 1996. Clifford was found lying on his back in the dining room area of the trailer on lot 532. His underwear and pants had been pulled down to below his knees. His eyeglasses lay approximately two feet from his head. Dr. Alexander Melamud, the medical examiner, testified that Clifford received a total of eight stab wounds, causing more internal than external bleeding, and that he died as a result of these stab wounds close in time to his wife's death.

Bernice was found in the same trailer with multiple stab wounds. She lay dead on a bed in the back of the trailer and was nude except for one sock. A nightgown and female underwear with a knot tied in it lay on the floor next to the bed. Additionally, pieces of a porcelain toilet tank lid were found underneath her. Dr. Melamud testified that Bernice incurred a total of fifty-six cut or stab wounds, many of which on her right arm he opined to be defensive. Her jugular vein had been slit. Additionally, she had received significant blunt trauma injuries to her head, and her nasal bones were fractured. Dr. Melamud testified that Bernice died as a result of her injuries sometime in the early morning hours of

December 31, 1996. No semen was detected on Bernice.

With the permission and assistance of Outdoor Resorts, detectives searched the park's dumpsters the morning of January 3, 1997. The dumpsters had not been emptied since prior to December 31, 1996. During the search, detectives found three garbage bags containing pieces of a porcelain toilet tank lid, a wallet containing Clifford's identification and credit cards, keys with a tag stating "Cliff's keys," glasses, bloody socks, paperwork with the address of lot 301, and paperwork bearing the names of the defendant and his son, Christopher Woodel.

That afternoon, detectives went to lot 301. Woodel lived there with his long-time girlfriend, Christina Stogner, and his sister, Bobbi Woodel. Woodel and his sister signed consent forms to have their trailer searched. Stogner was out of town at that time. Also present that day at lot 301 was Gayle Woodel. Although not known at that time, it would later be discovered that Gayle married Woodel in 1989, and they had a son together, Christopher. Gayle and Woodel separated in 1992 but never divorced. In 1996, Gayle and Christopher lived in North Carolina while Woodel lived in Florida. However, Gayle had just come to Florida from North Carolina so that Christopher

could spend some time with Woodel. Gayle, Christopher, and two of Gayle's friends were staying at Woodel's trailer.

While some detectives searched the premises, Woodel agreed to be questioned by other detectives. As Woodel left with the detectives, Woodel went over to Gayle and whispered for her to get rid of the knife Woodel had hidden. Gayle told Woodel's landlady and friend about the content of the communication. Gayle later told deputies as well.

The detectives gave Woodel Miranda warnings, and he consented to talk with them. He initially told the detectives that he had been home asleep at the time of the murders. After further questioning, Woodel began to write out a statement. He then stopped and confessed to killing the Moodys, whom he said he had never met. The detectives then tape-recorded Woodel's confession. In this taped confession played for the jury, Woodel admitted to drinking with others that evening after work in the lot next to the Pizza Hut where he worked. Afterwards, Woodel walked to Outdoor Resorts, a little over a mile from the Pizza Hut. Woodel admitted to entering the Moody's rental trailer early in the morning after seeing Bernice through the window. He said he went in to ask for the time. According to Woodel, Bernice was alone in the trailer.

> Upon seeing him, she came at him with a knife, over which Woodel soon gained control. He then proceeded to stab her many times and hit her over the head with a porcelain toilet tank lid one to three times. The toilet lid shattered.
>
> Clifford was last seen doing laundry at the Laundromat by security guard Elmer Schultz between 5:30 and 5:40 a.m. In his confession, Woodel said that he was leaving the trailer when Clifford came inside. Woodel then stabbed Clifford. As Clifford lay on the floor, Woodel picked up a bucket and placed pieces of the shattered toilet tank lid in it. He also placed the knife along with several other items in the bucket. Woodel said that after stabbing Clifford, he took Clifford's wallet.
>
> Woodel also said in his confession that he threw some items into a canal in the mobile home park, threw some items away in his garbage, and hid the knife behind a dresser. Deputies would later find pieces of the toilet tank lid and Bernice's eyeglasses in the canal, and a knife in Woodel's room wedged between a wall and the dresser.

Woodel v. State (Woodel I), 804 So. 2d 316, 319-20 (Fla. 2001).

The jury voted twelve to zero for Mrs. Moody, and nine to three for Mr. Moody in recommending that Woodel be sentenced to death. Id. at 320. The

trial court found the same aggravators[1] and mitigators[2] for both murders. Id. The trial court accepted the jury's recommendations and imposed sentences of death for both murders. Id. On direct appeal, Woodel raised three guilt phase issues[3] and

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[1] We previously stated:

> In aggravation, the trial court found that: (1) the defendant had previously been convicted of another capital offense; (2) the killings were perpetrated while the defendant was engaged in a burglary; (3) the killings were especially heinous, atrocious, or cruel (HAC); and (4) the victims were particularly vulnerable due to advanced age or disability. The trial court specifically rejected that Clifford's murder occurred as a result of Woodel's effort to escape and avoid being arrested.

Id. at 320-21 (footnotes omitted).

[2] Similarly, we also stated:

> The trial court found the statutory mitigator that Woodel had no significant history of criminal activity. The trial court also found seven nonstatutory mitigators: (1) Woodel was physically abused as a child; (2) he was neglected by his mother; (3) there was instability in his residences as a child; (4) both of Woodel's parents were deaf and mute; (5) use of alcohol and drugs; (6) Woodel was willing to meet with the victim's family prior to trial; and (7) he was willing to be tested for a possible bone marrow donation for his daughter, who had leukemia. The trial court specifically rejected a finding that Woodel was so intoxicated that he could not form the intent to kill.

Id. at 321.

[3] Woodel raised the following guilt phase issues:

> Woodel argue[d] that: (1) his motions for judgment of acquittal should have been granted by the trial court regarding premeditation, robbery, and burglary; (2) the trial court impermissibly allowed constructive amendment of the indictment; and (3) his mistrial

three sentencing phase issues.[4] Id. at 321. We affirmed the convictions, but vacated the sentences of death because the sentencing order failed to assign weights to the aggravating and mitigating circumstances. Id. at 327. The case was remanded with instructions "to reconsider the sentence." Id.

However, when the case returned to the circuit court in 2001, the original trial judge was unavailable to reconsider the sentence. Therefore, Woodel was granted a new penalty phase with a successor judge presiding. Woodel v. State (Woodel II), 985 So. 2d 524, 527 (Fla. 2008). At the conclusion of the second penalty phase, held in 2004, the jury recommended a life sentence for the murder of Mr. Moody, and recommended by a vote of seven to five that the sentence of death be imposed for the murder of Mrs. Moody. Id. After holding a Spencer hearing,[5] the sentencing court followed the jury's recommendations, and imposed the sentence of death only for the murder of Mrs. Moody. Id. The sentencing court found the same four aggravators

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> motion should have been granted because the State made an impermissible reference to a marital communication in its opening statement.

Id. at 321 n.7.

[4] Woodel raised the following sentencing phase issues:

> Woodel argue[d] that: (1) the trial court committed reversible error for rushing the penalty phase; (2) the trial court erred in finding the burglary and advanced age aggravators; and (3) the trial court erred in evaluating the mitigation evidence.

Id. at 321 n.8.

[5] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

that were found in Woodel's initial trial;[6] however, it found four statutory mitigators[7] and ten nonstatutory mitigators.[8] Id. On direct appeal, Woodel raised six claims.[9] Id. at 527-28. We determined that the

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[6] The sentencing court found four aggravating circumstances (prior violent felony conviction; committed during commission of a burglary; especially heinous, atrocious or cruel (HAC); and victim vulnerability due to age or disability). Woodel II, 985 So. 2d at 527.

[7] The sentencing court found "four statutory mitigators (no significant criminal history; defendant's age; substantial impairment of capacity to appreciate his actions or conform his conduct to the requirements of law; and extreme emotional disturbance)." Id.

[8] The sentencing court further found

> ten nonstatutory mitigators (physical abuse as a child; neglect and rejection by his mother and others; an unstable home as [a] child; parents who were deaf and spoke primarily in sign language; abuse of alcohol and drugs; willingness to meet with the victims' daughter; willingness to be tested for bone marrow donation for his daughter; the defendant's belief in God; his voluntary confession; and the defendant's compassion for others).

Id.

[9] Woodel's claims on direct appeal consisted of the following:

> (1) the trial court erred in excusing for cause two jurors who were not sufficiently fluent in the English language without the aid of an interpreter; (2) fundamental error occurred when the jury heard and considered prejudicial testimony from a State witness; (3) the trial court erred in finding the aggravating factor of "vulnerability due to advanced age or disability" with regard to the murder of Bernice Moody; (4) Woodel's sentence of death is not proportional; (5) Woodel is entitled to a life sentence because Florida's death penalty law violates his right to due process, and his right to trial by a jury; and (6) execution by lethal injection constitutes cruel and unusual punishment.

sentence of death imposed on Woodel was proportionate to other cases in which the death penalty was imposed. Therefore, we affirmed Woodel's sentence of death. Id. at 532-34.

II. POSTCONVICTION PROCEDURAL HISTORY

In April 2010, Woodel filed a motion in the Circuit Court of the Tenth Judicial Circuit in and for Polk County, pursuant to rule 3.851, in which he sought postconviction relief. A second successor judge presided over the postconviction proceedings due to the unavailability of the circuit judge that presided over Woodel's second penalty phase in 2004.

The postconviction court ruled that an evidentiary hearing was necessary to address Woodel's allegations of ineffective assistance of counsel. The evidentiary hearing was held in 2011 over nine nonconsecutive days. Woodel presented twenty-seven witnesses, including his former trial attorneys, expert witnesses, and other witnesses. No witnesses appeared for the State.

Woodel presented seven general claims for postconviction relief. In four of his claims, Woodel alleged that he was deprived of his constitutional right to reliable adversarial testing due to ineffective assistance of counsel.[10] Woodel sought a new guilt

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Id. at 527-28.

[10] In his initial motion for postconviction relief, Woodel sought relief under the following general claims: Claim I—Deprivation of the right to reliable adversarial testing due to ineffective assistance of counsel during the guilt phase; Claim II—Deprivation of the right to reliable adversarial testing due to ineffective assistance of counsel during the penalty phase; Claim III—Deprivation of the right to due

phase under Claim I, which consisted of four subclaims. He also sought a new penalty phase under Claim II, which consisted of seven subclaims. After the evidentiary hearing concluded, the postconviction court entered an order that included the following judgment:

> Therefore, it is ORDERED AND ADJUDGED that Defendant's Amended Motion To Vacate Judgments of Conviction And Sentence, is DENIED with respect to his Claims that he is entitled to a new guilt phase trial. It is further, ORDERED AND ADJUDGED that the Defendant's Amended Motion To Vacate Judgments of Conviction And Sentence, is GRANTED to the extent that he is entitled to a new penalty phase trial based on Ground IIA [Failure to conduct a reasonably competent mitigation investigation and failure to present mitigation], Ground IIB [Failure to ensure a reasonably competent mental health evaluation was conducted] and Ground IIC [Trial

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process to develop factors in mitigation because the psychologist engaged by the defense failed to conduct appropriate tests for brain damage or mental illness; Claim IV—Violation of the rules set forth in Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Claim V—Deprivation of a fair trial due to cumulative procedural and substantive errors; Claim VI—Violation of Eighth Amendment rights demonstrated by newly discovered evidence; and Claim VII—Violation (prospectively) of Eighth Amendment rights due to potential incompetence at the time of execution.

> counsel failed to object to Arthur White's testimony claiming that Woodel told him that he fondled Mrs. Moody] of his Amended Motion To Vacate Judgments of Conviction And Sentence.

State v. Woodel, No. CF97-00047A-XX (Fla. 10th Cir. Ct. Dec. 28, 2011). The postconviction court denied Woodel any relief for Claim I, subclaims E through G under Claim II,[11] and Claims III through VII.

III. DISCUSSION

On appeal, the State raises three general issues in which it asserts that Woodel failed to establish that: (1) he was prejudiced regarding his assertion that penalty phase counsel failed to investigate, prepare, and present a mitigation case in a proper manner; (2) penalty phase counsel allegedly failed to ensure that Woodel received a reasonably competent mental health evaluation; and (3) he was prejudiced regarding his assertion that penalty phase counsel should have moved to have certain testimony excluded that Woodel sexually fondled Mrs. Moody. We reverse the postconviction court's order granting a new penalty phase, because Woodel failed to satisfy both prongs set forth in Strickland v. Washington,

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[11] The subclaims under Claim II for which the postconviction court denied relief were: E—Counsel failed to object to hearsay testimony about Mrs. Moody's medical condition that allegedly made her more vulnerable; F—Counsel failed to re-raise the alleged spousal or marital communication privilege violation; G—Counsel failed to preserve for appellate review the trial court's excusing for cause two Spanish-speaking potential jurors. Woodel withdrew subclaim IID—Counsel failed to move to suppress Woodel's statement to law enforcement officers, or to obtain an interrogation specialist.

466 U.S. 668 (1984), to obtain postconviction relief due to allegations of ineffective assistance of counsel where the death penalty has been imposed.

On cross-appeal, Woodel raises two general issues in which he asserts that: (1) guilt phase counsel provided ineffective assistance for failing to object to the admission of certain testimony that Woodel sexually fondled Mrs. Moody; and (2) the State violated the rules set forth in Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). We deny Woodel's cross-appeal claim that he is entitled to new guilt and penalty phases by affirming the portion of the postconviction court's order that denied Woodel's motion for a new guilt phase.

A. Ineffectiveness of Penalty Phase Counsel

1. Elements of the Claim

This Court has repeatedly upheld the Strickland standard in capital appeals that address allegations of ineffective assistance of trial counsel:

> Following the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:
>
> > First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear,

> substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.
>
> Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted).

Williamson v. State, 123 So. 3d 1060, 1065 (Fla. 2013), cert. denied, 134 S.Ct. 1519 (2014). When this Court has previously rejected a substantive claim on the merits, counsel cannot be deemed ineffective for subsequently failing to make a meritless argument. See Dennis v. State, 109 So. 3d 680, 690 (Fla. 2012) (citing Schoenwetter v. State, 46 So. 3d 535, 546 (Fla. 2010)).

2. Standard of Review

In applying the Strickland standard where the defendant who was convicted in a capital case alleges ineffective assistance of counsel, this Court employs a mixed standard of review. We defer to the circuit court's factual findings that are supported by competent, substantial evidence, but review the circuit court's legal conclusions de novo. See Anderson v. State, 18 So. 3d 501, 509 (Fla. 2009) (citing Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004)).

There is a strong presumption that trial counsel does not provide ineffective assistance. See

Strickland, 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." Id.

3. Merits

a. Penalty phase counsel allegedly provided ineffective assistance by failing to properly investigate, prepare, and present a mitigation case.

The postconviction court's 2011 order stated the following regarding Woodel's Claim IIA—Counsel's failure to conduct a reasonably competent mitigation investigation and failure to present mitigation:

> The Defendant asserts in his Amended Motion, "Because Mr. Woodel's attorneys failed to conduct a reasonably competent investigation of Mr. Woodel's background, they failed to present reasonably available mitigation to the jury and to link it to the crimes, including giving adequate weight to the statutory mental mitigators."
>
> . . . .
>
> In preparing this Order, the [postconviction court] was particularly

> concerned with how [trial] counsel used the experience of the 1998 penalty phase in preparation for the 2004 penalty phase.
>
> . . . .
>
> In Wiggins v. Smith, [539 U.S. 510, 521 (2003),] the [United States Supreme Court] went on to say, "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. . . ."
>
> In preparation for the [s]econd penalty phase, Mr. Colon talked to three family members. . . . He did not go to North Carolina or Michigan and he did not hire an investigator to do so. All he did was review records and proceed with the same type of defense. . . . [Colon] acknowledged on redirect [examination by postconviction counsel] that it may have been a bad decision. . . .

In 2011, the postconviction court expressed concern about how counsel used the experience of the 1998 penalty phase in preparation for the 2004 penalty phase.

Although the sentencing order resulting from the penalty phase in 1998 was vacated by our decision in Woodel I, the continuity of certain aspects of counsel's performance during both the 1998 and 2004 penalty phases has relevance to the issues

raised in this appeal. We address, without applying hindsight, the consequences of counsel's alleged failure to investigate, prepare, and present a proper mitigation case. Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. . . ."); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, in hindsight . . . .").

During the 2011 evidentiary hearing, the postconviction court heard testimony from multiple experts and other witnesses concerning the relevant aspects of Woodel's background. The experts offered their opinions about Woodel's mental and emotional condition at the time of the crimes. Within its final order, the postconviction court expressed concern that former counsel Gilberto Colon inadequately prepared for the 2004 penalty phase.

The postconviction court concluded that penalty phase counsel's performance during Woodel's 2004 penalty phase was unreasonable under the prevailing professional norms for counsel representing defendants in capital cases wherein the sentence of death has been imposed. As counsel for Woodel during the 2004 penalty phase, Colon had a duty to act reasonably by investigating available mitigation or to make an informed decision as to why such investigation was not necessary. See Strickland, 466 U.S. at 691; Coleman v. State, 64 So. 3d 1210, 1217 (Fla. 2011) ("Under [Strickland], 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' ") (quoting Strickland, 466 U.S. at 691).

In light of the circumstances presented in this case, we determine that there is no need for us to address whether counsel's performance was deficient during the penalty phase, as it pertains to his failure to investigate, prepare and present a proper mitigation case. Instead, we conclude that Woodel cannot demonstrate that he is entitled to a new penalty phase because he failed to establish prejudice under the second prong of the Strickland standard. See Williamson, 123 So. 3d at 1065; Davis v. State, 928 So. 2d 1089, 1105 (Fla. 2005) (quoting Maxwell, 490 So. 2d at 932); Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) ("[B]ecause the Strickland standard requires establishment of both prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong."). Furthermore, we see nothing in the record before us that undermines our confidence in the outcome of Woodel's penalty phase. See Sochor, 883 So. 2d at 771 (citing Strickland, 466 U.S. at 694).

In 2011, Colon testified at the postconviction evidentiary hearing that he defended Woodel during the penalty phases by emphasizing the following to the jury: (1) Woodel's alcohol consumption was one of multiple factors involved with these crimes; (2) Woodel had no violent criminal record; (3) Woodel grew up in a family with deaf parents; (4) Woodel's mother was abusive, neglectful, and provided a poor household environment; (5) Woodel and his sister stole food from the neighbors as often as possible; and (6) Woodel and his sister were placed by their parents in a children's home for a period of years.

We observe at the outset that the late Dr. Henry Dee, a clinical psychologist and clinical

neuropsychologist, provided expert testimony before the jury that addressed and augmented the referenced aspects of the defense that Colon presented. Furthermore, the substance of Dr. Dee's expert opinions was directly reflected in the mitigating circumstances found by the sentencing court in 2004.

We find that the testimony provided by Dr. Dee during the 1998 trial and 2004 penalty phase is relevant in the present capital postconviction appeal. We have examined pertinent portions of the transcripts filed as part of the respective records in Woodel I and Woodel II, in which Dr. Dee appeared as an expert witness for the defense. The final order on review indicates that the postconviction court also reviewed Dr. Dee's 2004 testimony:

> The [c]ourt is of the opinion after reading the trial transcript of Dr. Henry Dee from the 2004 penalty phase, that Dr. Dee made a determined effort to present as complete a mental health picture of the Defendant as possible. Considering his limited knowledge of [children of deaf adults] and the deaf culture, he did his best to try to convey to the jury how that factor impacted on Mr. Woodel.

See Order at 77-78. Because we determine it is relevant to the issues on appeal, we will address specific aspects of Dr. Dee's testimony in our discussion below.

i. Counsel's Alleged Failure to Explore Woodel's Personal History and Family Background

Regarding Colon's handling of the presentation of mitigating circumstances in 2004, the postconviction court found that "[a]ll [Colon] did was review records and proceed with the same type of defense." The postconviction court also found that Colon conducted no additional investigation into Woodel's background for mitigation.

Following the 1998 penalty phase, the jury recommended by a vote of nine to three that the sentence of death be imposed for Mr. Moody's murder, and by a vote of twelve to zero that the sentence of death be imposed for Mrs. Moody's murder. In the 1998 penalty phase, Woodel did not testify. During the first trial, the court found substantial mitigation—one statutory mitigator (no significant history of criminal activity) and seven nonstatutory mitigators[12]—which were contrasted by its finding of four aggravators.[13]

Dr. Dee's testimony during the 1998 trial addressed Woodel's background and immediate family history. In summary, Dr. Dee testified that he: (1) reviewed all of the discovery material; (2) learned some time after his initial interviews with Woodel that both of his parents were deaf; (3) interviewed Woodel's father, Albert Woodel, his sister, Bobbi Woodel, his aunt, Margaret (Becky) Russell, his coworker Leola Kilbourn, and Kilbourn's daughter, Lisa; (4) learned from Woodel "the reason [Woodel's mother Jackie] wasn't here is that, after

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[12] See supra note 2.

[13] See supra note 1.

all, she has her own life. And [Dr. Dee couldn't] imagine a time in his life when [Woodel] needed his mother more than he does right now. And she's not here and [Dr. Dee] can't get in touch with her. I guess that's the way life had been for him"; (5) pointed out that because he was the eldest child, Woodel was born into a different household than Bobbi—i.e., Woodel was the only hearing person in his immediate family until Bobbi was born; (6) noted that Woodel had a tendency to sign while he spoke, signing is a "terribly different [language than] ours"; (7) learned from Woodel that his mother was not accepted by other people (family members described her as psychotic and his friends made fun of her); and (8) described Woodel's household as filled with domestic violence, child abuse and neglect, and alcohol and drug abuse.

The record shows that Woodel's former defense lawyers testified that they presented to the jury essentially the same mitigating circumstances in the 2004 penalty phase, including Dr. Dee's expert testimony, as they presented during the 1998 trial. The only exception to the same mitigation case was that Woodel testified for the first time during the 2004 penalty phase. We observe that Dr. Dee's 2004 testimony revisited certain points that he made during Woodel's 1998 penalty phase.

We find it significant that during Woodel's second penalty phase, Dr. Dee testified before the jury that he: (1) reviewed the discovery material obtained from the public defender's office—comprising investigation notes, summaries of the crime investigators and a copy of the taped confession; (2) interviewed Woodel's father, his sister, his aunt and two or three coworkers of Woodel's from

Pizza Hut for an estimated four hours; (3) met with Woodel at least seven times for an estimated total of twelve hours; (4) spent a great deal of time with Woodel trying to understand the impact that belonging to a mother-father deaf household had on him; and (5) discussed various other pertinent aspects of Woodel's personal history and family background.

Notwithstanding the substantial mitigating circumstances that the trial court found during Woodel's 2004 penalty phase, the postconviction court concluded that penalty phase counsel provided ineffective assistance to Woodel because counsel neglected to explore other available mitigating circumstances. We agree that counsel failed to explore other mitigation about Woodel's personal history and his multigenerational family background. And, it is evident from the postconviction evidentiary record that counsel did not explore Woodel's background stemming from his childhood years in Michigan and North Carolina even though such information could have been presented to the jury. However, we respectfully disagree with the postconviction court's legal conclusion that Woodel was prejudiced under the Strickland standard because the additional potential mitigating circumstances were of relatively minor importance and, therefore, the lack thereof does not undermine our confidence in the outcome of Woodel's 2004 penalty phase.

A review of Dr. Dee's unimpeached, expert testimony before the jury in 2004 demonstrates to our satisfaction that Woodel's troubled background was comprehensively presented to the jury. Dr. Dee discussed at length various aspects of Woodel's

background including his status as a mother-father deaf person, the pronounced dysfunction of his immediate family's household, and his history of alcohol and drug abuse that began at a very early age. The jury was presented with expert testimony explaining the dynamics of Woodel's personal history and family background. The jury also heard Woodel's testimony that provided information consistent with Dr. Dee's expert opinion.

Consequently, we are satisfied that the jury received a thorough presentation of Woodel's life history and his relevant family background. We further conclude that the presentation of Woodel's personal history and family background was instrumentally accomplished through the extensive expert testimony provided by Dr. Dee. We also note that Dr. Dee's testimony provided key testimonial evidence for the sentencing court's findings of the existing mitigating circumstances related to Woodel's personal history and family background. In 2004, Dr. Dee's testimony was informative and persuasive to the trier of fact.

Accordingly, we find that Woodel was not prejudiced by counsel's alleged failure to investigate, prepare, and present additional and relatively minor mitigation stemming from Woodel's personal history and family background. See Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007) ("Under Strickland, to demonstrate prejudice a defendant must show that there is a reasonable probability—one sufficient to undermine confidence in the outcome—that, but for counsel's unprofessional errors, the result of the proceeding would have been different.") (citing Strickland, 466 U.S. at 694).

ii. Counsel's Alleged Failure to Consult with an Expert on the Effects of Alcohol Consumption

Next, Woodel alleges his trial counsel was ineffective because he chose not to present expert testimony to explain to the jury the cognitive effects of alcohol abuse beginning at an early age, and how alcohol affected him physically and mentally throughout his life. In support of his claim, Woodel asserts that Colon should have presented an expert who could explain that due to Woodel's blood alcohol level, he was in a partial alcohol-induced blackout at the time of the murders. Woodel further asserts that given the fact that the jury voted seven to five in its recommendation that a death sentence be imposed, it is plausible that with additional mitigation testimony from an expert on alcohol consumption, the balance of aggravating and mitigating circumstances would have been different.

Colon testified on cross-examination during the 2011 evidentiary hearing that he did not consider using a toxicologist or a similar type of expert to explain to the jury the effects of alcohol or to calculate Woodel's blood alcohol level at the time of the crimes. Colon testified as follows:

> Well, my opinion, we live in Polk County and I knew that at least a good portion of those jurors knew what [it] is to be drunk, so I knew what a drunk person does when they're - - when they're drunk, such as do stupid things, have memory loss, things of that nature. So no, it never crossed my mind to get an expert to determine his blood alcohol or to get testimony . . . .

In responding to whether there were any foreseeable, negative consequences of presenting an expert on the effects of alcohol, Colon further testified that "when you start producing experts in every piece of the defense, I call that shotgun defense and now the jury starts questioning the validity of the actual defense."

The State contends that Colon's decision not to use an expert on the effects of alcohol should be viewed as a strategy that adhered to his theory for the 2004 penalty phase. The State points out that Colon testified that he wanted to humanize Woodel—by presenting to the jury that Woodel's alcohol consumption was only one of several factors involved in his commission of the crimes.

The record in this case shows that Colon testified that he did not remember all of the circumstances involving his decision not to present expert testimony concerning the effects of Woodel's alcohol consumption. And, the record is silent about whether the non-use of an expert on the effects of alcohol consumption was a strategic decision by Woodel's defense team. But see, e.g., Davis v. State, 928 So. 2d 1089, 1119 (Fla. 2005) (finding counsel's strategy to preserve first and last closing arguments reasonable); White v. State, 559 So. 2d 1097, 1100 (Fla. 1990) (denying ineffectiveness claim that was based on counsel's unconventional courtroom actions that were attributed to trial strategy). Nevertheless, we decline to address whether Colon's performance is deficient under the first prong of the Strickland standard.

Instead, we conclude that Woodel was not prejudiced under the Strickland standard. Even if Colon's failure to present testimony from an expert on alcohol consumption constituted error, such error

was harmless beyond a reasonable doubt. See Mendoza v. State, 87 So. 3d 644, 660-61 (Fla. 2011) ("The test for harmless error is whether there is a reasonable possibility that the error affected the verdict.") (citation omitted). We find that there is insufficient support in the record for recognizing a reasonable probability that, had counsel presented testimony from an expert on the effects of alcohol consumption, the trier of fact would not have decided the death penalty was appropriate. See Rhodes v. State, 986 So. 2d 501, 512 (Fla. 2008) ("If counsel's failure to present the mitigating evidence was an oversight, and not a tactical decision, 'then a harmlessness review must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' ").

We observe that during the 2004 penalty phase Dr. Dee testified, as he did during Woodel's first trial,[14] about how he assessed Woodel's self-described

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[14] During the 1998 trial, Dr. Dee provided pertinent testimony regarding Woodel's practice of alcohol consumption:

> Q. [Mr. Colon] Did you speak with the defendant to find out what time he began in his life to consume alcoholic beverages?
>
> A. Yes, to the best of my knowledge, and to his best estimate, it was sometime between 10 and 12 years of age.
>
> Q. How did he characterize his usage from that point in time when he first started at age 10 or 12 until the time of this incident?
>
> A. Well, according to his description, it was sporadic. But when he drank, he drank to intoxication. And you, know, from a mental health professional's point of view, what he was describing was binge drinking, what I

excessive alcohol consumption during the period of the crimes:

> Q. [Mr. Colon] As to the actual murders themselves, did you talk to the defendant in your discussions with him to find out what he said actually occurred [in those] early morning hours? Did you go through and try to elicit from him his scenario of what had happened?
>
> A. Well, I had been instructed not to on the first occasion that I saw him if you'll recall from the Public Defender's Office. Later on when I went over the information with him, I mean after I started seeing him again, went over the statement that he gave to the police, basically I used that as an outline to interview him about it. And he just didn't give me any other information about it[.] [He] wasn't able to so far as I was able to tell.
>
> Q. So you gave him the opportunity to add to or take away from the statement he had given to the police?
>
> A. Yeah. And he didn't -- as I recall, he didn't tell me anything significantly different.

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would characterize as an alcoholic, although he declined to characterize it that way.

Q. So the way he described it was when he told you he would drink, he'd simply drink until he –

A. Was out [i.e., unconscious] . . .

> Q. Well, in the statement to the police, he told them that he had had maybe seven or eight beers to drink. Is that what he told you?
>
> A. No, he did add to that. He told me that he had told the police he had seven or eight beers to drink but he actually had a lot more than that but he didn't want to tell them that he drank any more because he didn't want them to think, A, that he was drunk or, B, he was using it for an excuse.
>
> Q. So he told you that he did lie to the police or at least attempt to?
>
> A. Yeah, about that. Which is actually rather odd. Most people lie in the opposite direction when they're looking for something exculpatory, you know. To excuse what they're doing, they'll say they drank more than they did. But he said he drank much less than he apparently did.

Dr. Dee explained, and during the 2004 penalty phase Woodel confirmed during his testimony, that Woodel substantially underrepresented to the police the actual amount of alcohol that he consumed on the night he murdered the Moodys. Woodel apparently under-represented how much he drank in the hours immediately before the Moody murders, because he had an inexplicable aversion to admitting to the detectives the actual amount of alcohol that he consumed. Thus, we observe that Dr. Dee's 2004 testimony, in the context of his evaluation of Woodel's psychological and

emotional profile, provided the jury with information showing that Woodel had had problems with excessive alcohol consumption that he was dealing with at the time of the crimes. Dr. Dee's testimony further addressed that in the period of his life prior to the Moodys' murders, Woodel exhibited the behavior of an alcoholic. Colon recalled that he assessed during Woodel's trial that the jurors who lived in Polk County were aware that when someone gets drunk they have memory losses and "things of that nature."

The postconviction evidentiary record shows that during the 2011 hearing Dr. Daniel Buffington, a clinical pharmacologist, provided his expert opinion about the effects alcohol had on Woodel's behavior. From his interviews with Woodel, Dr. Buffington identified certain factors that put Woodel at risk for experiencing partial alcohol-induced blackouts—including family history, genetic predisposition, and binge drinking. Dr. Buffington assessed, as did Dr. Dee, that Woodel exhibited the signs of chronic alcoholism. Dr. Buffington further testified that partial alcohol-induced blackouts would have permitted Woodel to be functional, but experience memory loss of the events pertaining to the crimes. The record shows that Woodel apparently only experienced memory loss about certain aspects of the crimes. For example, when being interviewed by detectives, Woodel stated that he could not remember: (1) how he wrested the serrated-edged knife (the murder weapon) from Mrs. Moody; (2) why her body was found completely nude, except for one sock; or (3) why her panties and nightgown had been wadded up and cast aside near the bed where her body was found.

However, it is evident from the record before us that Woodel was able to recall many pertinent details about the events pertaining to the Moodys' murders during his recorded interview by police detectives. For example, Woodel described how he: (1) entered the Moodys' residence without invitation in the hours before sunrise; (2) inflicted numerous stab and cut wounds on two elderly persons who were many decades older than he; (3) shattered a porcelain toilet tank lid over Mrs. Moody's head to stop her from yelling; and (4) took items from the Moodys' residence including Mr. Moody's wallet, keys, and other items that did not belong to Woodel.

Even if Dr. Buffington's testimony concerning Woodel's probable alcohol-induced partial blackout, or some other comparable expert's testimony had been presented to the penalty phase jury in 2004, we conclude that such expert testimony is not dispositive for establishing prejudice under Strickland. We determine that Woodel's recorded interview with detectives, which was admitted into evidence, included statements that were sufficiently inculpatory regarding his convictions. Furthermore, Woodel's recorded interview provided some of the direct evidence for the trier of fact's finding of the weighty aggravating circumstances during Woodel's second penalty phase in which the trial court imposed the sentence of death. See Sochor, 883 So. 2d at 771 ("In the penalty phase context, 'the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' ") (quoting Strickland, 466 U.S. at 695). Therefore, despite the relative validity of Dr. Buffington's partial alcoholic

blackout theory, as applied in Woodel's case, the lack of such in-court expert testimony in 2004 does not undermine our confidence in the outcome of Woodel's second penalty phase. At most, the lack of such expert testimony constitutes harmless error based on this record.

iii. Counsel's Alleged Failure to Locate an Expert on Children of Deaf Adults (CODA)

Next, Woodel alleges his trial counsel was ineffective for failing to locate and consult with an expert on the deaf culture and its impact on CODA. According to Woodel, Colon's reliance on Dr. Dee's inadequate testimony about Woodel's CODA status prejudiced him during the 2004 penalty phase. Instead, Woodel urges us to conclude that the testimony of CODA expert, Dr. Alan G. Marcus, during the 2011 postconviction evidentiary hearing demonstrates why Colon was ineffective regarding his failure to locate a CODA expert.

The postconviction evidentiary record shows that Dr. Marcus testified that there were numerous studies available about CODA in 2004. Dr. Marcus also testified that the scholarly book Dr. Dee read to provide consultation about CODA to Woodel's defense counsel in 1998 and 2004 was an anthropological study, not a psychological review. The postconviction court observed that: "[Dr.] Marcus concluded that Dr. Dee did not totally understand the profound effect of having two deaf parents had on [Woodel]." The State argues that there is no showing that Colon could have readily uncovered a CODA expert in 2004.

In the 1998 and 2004 court proceedings, Dr. Dee provided extensive and unimpeached expert testimony about the deaf culture in general, and

persons with "mother-father deaf" status in particular. After reviewing Dr. Dee's testimony, we determine that his reference to Woodel's "mother-father deaf" status is equivalent to the parties' present discussion of Woodel's CODA status. In our view, Dr. Dee utilized his expertise and experience as both a clinical psychologist and clinical neuropsychologist to provide extensive testimony that was relevant in Woodel's sentencing phase. In 1998, Dr. Dee testified that he performed independent research and also utilized the assistance of a professional librarian to familiarize himself with the deaf culture and mother-father deaf subculture. In 2004, Dr. Dee again testified about his additional research into the deaf culture; he also discussed his understanding of the mother-father deaf subculture.

Given the quality of testimony Dr. Dee provided to the jury in 2004, we determine that the jury was presented with a reasonably clear description of Woodel's background in a mother-father deaf household, and his life within the deaf culture. Notwithstanding that the prevailing terminology has apparently been most recently designated as CODA, the jury was presented with relevant expert testimonial evidence from Dr. Dee concerning Woodel's CODA status during the 2004 penalty phase. We note that the sentencing court found the nonstatutory mitigating circumstance that his parents were deaf and spoke primarily in sign language—giving that factor moderate weight. We conclude that the trier of fact had a sufficiently thorough presentation about the mitigating circumstances that existed concerning Woodel's status as a CODA and, therefore, our confidence in the outcome of the penalty phase has not been

undermined regarding this subclaim based on counsel's failure to present cumulative mitigation.

b. Penalty phase counsel allegedly provided ineffective assistance by not ensuring that Woodel received a reasonably competent mental health evaluation.

The postconviction court's order made the following findings and conclusion of law regarding Woodel's Claim IIB—Counsel's failure to ensure a reasonably competent mental health evaluation:

> The Defendant alleges that[:] Counsel failed to ensure that Mr. Woodel received reasonably competent mental health evaluation and failed to retain reasonably qualified experts to determine the extent of Mr. Woodel's mental, emotional and psychological deficits due to his neglect and the abuse he suffered throughout his childhood. . . .
>
> . . . At the evidentiary hearing, Dr. Cunningham, a clinical and forensic psychologist, testified extensively about the factors that put someone at risk for alcohol and drug abuse, and how those factors could be applied to Mr. Woodel. Dr. Daniel Buffington, a clinical pharmacologist testified at the evidentiary hearing regarding alcoholic blackouts and cognitive and physical effects of alcohol consumption [and calculated that Woodel consumed] between 12 and 24 beers. Dr. Alan G. Marcus, a Clinical Psychiatrist who

> works with deaf and hard of hearing adults and families, including CODAs [children of deaf adults], discussed the deficiencies in Dr. Dee's presentation with respect to the special problems faced by Mr. Woodel as a CODA. . . . Considering [Dr. Dee's] limited knowledge of CODA and the deaf culture, he did his best to try to convey to the jury how that factor impacted on Mr. Woodel.
>
> . . . The [postconviction court] finds that [trial] counsel's performance fell below an objective standard of reasonableness with respect to Claim IIB of the Defendant's Motion. The [postconviction court] finds that but for this deficient performance there is a reasonable probability that the result of the proceedings would have been different, and Mr. Woodel may have received a life recommendation.

The postconviction court considered testimony from three experts (Drs. Cunningham, Buffington, and Marcus) in drawing its conclusion that trial counsel failed to ensure that Woodel received a reasonably competent mental health evaluation. However, the postconviction court did not explain how such expert testimony influenced its conclusion that Woodel was prejudiced by Colon's alleged professional errors during the 2004 penalty phase. And, the postconviction record provides insufficient testimonial evidence from the identified experts that trial counsel failed to ensure Woodel had a proper mental health evaluation in preparation for trial.

Colon testified during the postconviction evidentiary hearing "that there was no testimony or evidence available that Mr. Woodel had any mental illness." Colon further testified that "Dr. Dee looked for [any mental illness] but came up empty." Colon further testified that "growing up in the family that [Woodel] grew up [in] and the environment that he grew up in may have provided a basis for this, but Dr. Dee could not pinpoint that."

The record filed along with Woodel's previous appeals to this Court also shows that Dr. Dee examined and performed the mental health evaluation of Woodel for the defense. Dr. Dee also provided multi-faceted information about Woodel's life history within his report to Woodel's defense team. The postconviction court did not state why Colon's reliance on Dr. Dee's mental health evaluation of Woodel, in lieu of obtaining such an evaluation by another mental health clinician, resulted in Woodel receiving an unreliable penalty phase in 2004.

Based on the evidence presented to the jury, including information provided from Dr. Dee's mental health evaluation of Woodel, the sentencing court found extreme emotional disturbance as a statutory mitigating circumstance and accordingly assigned it little weight. Furthermore, the experts that testified during the postconviction evidentiary hearing addressed issues that had been previously identified and given weight as mitigating circumstances during Woodel's 2004 penalty phase: (1) Drs. Cunningham and Buffington identified certain risks associated with Woodel's alcohol and drug abuse—this circumstance was found as the statutory mitigator of substantial impairment of capacity to appreciate his

actions or conform his conduct to the requirements of law (given little weight), and nonstatutory mitigator abuse of alcohol and drugs (given little weight); and (2) Dr. Marcus opined that there were special psychological and emotional problems faced by CODA—this circumstance was found as the statutory mitigator of extreme emotional disturbance (given little weight), and the nonstatutory mitigator of being a child of parents who were deaf and spoke primarily in sign language (given moderate weight). Based on the totality of the record, our confidence in the outcome is not undermined so as to establish prejudice, because there is no evidence that Woodel did not receive a reasonably competent mental health evaluation in preparation for trial.

c. Penalty phase counsel allegedly provided ineffective assistance by failing to move to exclude testimony by Arthur White that Woodel sexually fondled Mrs. Moody.

The postconviction court's 2011 order includes the following statements regarding Woodel's Claim IIC—Counsel's failure object to Arthur White's testimony that Woodel fondled Mrs. Moody:

> The [postconviction court] finds that counsel was deficient in the penalty phase in 2004 just as in 1998 with regard to not filing a motion to exclude this testimony. The prejudicial effect of this testimony regarding fondling far outweighed the probative value of the testimony. Because this was a death case, . . . the [postconviction court] is concerned that but for this deficiency of [penalty phase] counsel the result of the 2004 penalty phase proceedings would

> have been different. The [postconviction court] finds that counsel's performance fell below an objective standard of reasonableness with respect to Claim IIC of the Defendant's Motion. The [postconviction court] finds that but for this deficient performance there is a reasonable probability that the result of the proceedings would have been different, and Mr. Woodel may have received a life recommendation.

The postconviction court found that Colon was deficient in the 1998 and 2004 penalty phases for not filing a motion to exclude White's testimony because the prejudicial effect regarding fondling far outweighed the probative value. However, the State aptly points out that in Woodel II, we previously decided the issue of whether White's challenged testimony should have been excluded at trial.

> Woodel provides no direct authority as to why White's statements would be improper other than alleging that this was irrelevant and highly inflammatory, constituting a nonstatutory aggravating circumstance. Section 921.141(1), Florida Statutes (2005), which governs the penalty-phase proceedings, provides in pertinent part that evidence "relevant to the nature of the crime and the character of the defendant" is admissible "regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." In this case, White's

> statements regarding Woodel's confession that he pushed Bernice into the bedroom and fondled her were relevant to the nature of the crime. Woodel failed to show a meritorious basis for excluding this testimony and clearly did not demonstrate why the admission of this evidence constituted fundamental error.

985 So. 2d at 530. In Woodel II, we determined that White's testimony was "relevant to the nature of the crime" and, therefore, Woodel cannot demonstrate prejudice regarding counsel's failure to file a motion in limine.

4. Cumulative Analysis of the Allegations of Ineffective Assistance of Trial Counsel

The postconviction court found it unnecessary to perform a cumulative assessment of alleged trial counsel errors in light of its judgment that penalty phase counsel was ineffective. And, although neither party raises any cumulative effect of trial counsel errors on this appeal, we nevertheless address the reasons why there is no cumulative effect of the alleged errors entitling Woodel to relief due to ineffective assistance of trial counsel. See Anderson v. State, 18 So. 3d 501, 520 (Fla. 2009) (rejecting a claim of cumulative error when appellant's claims, addressed individually, did not establish ineffective assistance of counsel or that appellant's constitutional rights were violated) (citing Israel v. State, 985 So. 2d 510, 520 (Fla. 2008)); Suggs v. State, 923 So. 2d 419, 441 (Fla. 2005) (stating the cumulative effect of evidentiary errors and allegations of ineffective assistance of trial counsel will be considered together).

First, we find no reasonable probability that the proposed additional mitigating circumstances pertaining to Woodel's personal history and family background would have had any impact on the trier of fact, because such information would have been cumulative to evidence that was presented and the mitigating circumstances that were found during Woodel's second penalty phase. See Rhodes, 986 So. 2d at 512-13 ("Even if we were to find counsel's conduct deficient, [the defendant] cannot demonstrate prejudice. Any testimony the additional witnesses would have provided would have been cumulative to that provided by the witnesses at resentencing. . . . The additional testimony would only have added to the mitigation already found. Even if given more weight, the mitigation would not outweigh the three strong aggravators . . .") (citation omitted).

Next, the record reflects that, despite the lack of testimony from an expert on the effects of alcohol consumption, the trier of fact was able to understand from Dr. Dee's testimony and other evidence that Woodel was an alcohol abuser who had difficulty dealing with his alcohol abuse during the period when he murdered the Moodys. Thus, even if counsel's failure to present testimony from an expert on alcohol consumption constituted error, it was harmless error. See Floyd v. State, 850 So. 2d 383, 408 (Fla. 2002) (citing Whitton v. State, 649 So. 2d 861, 864–66 (Fla. 1994) (applying cumulative error analysis and determining there was no reasonable probability that the cumulative impact of harmless errors affected either the jury's verdict or the defendant's overall right to a fair trial)).

Next, we determine that there is no reasonable probability that additional testimonial evidence about Woodel's CODA status from another expert would have changed the outcome of Woodel's second penalty phase; therefore, our confidence is not undermined because such evidence would have been cumulative to what the trier of fact actually heard. See Butler v. State, 100 So. 3d 638, 667 (Fla. 2012) ("[W]here the additional mitigation is minor or cumulative and the aggravating circumstances substantial, we have held that confidence in the outcome of the penalty phase is not undermined.") (citation omitted).

Next, the postconviction evidentiary record does not show that any expert explained why the mental health evaluation performed on Woodel for trial was not competent, or identified any previously undisclosed mental health issue that would have had a reasonable probability of changing the judgment of the trier of fact to impose the sentence of death. See Kilgore v. State, 55 So. 3d 487, 504 (Fla. 2010) ("Kilgore has failed to demonstrate that the proffered evidence [of failure to ensure an adequate mental health evaluation was performed for trial] had a reasonable probability of changing the outcome, which is a probability sufficient to undermine our confidence in the verdict.").

Finally, Woodel's allegation that trial counsel was ineffective for failing to move to exclude Arthur White's testimony is unavailing. As noted above, in light of our decision in Woodel II, trial counsel cannot be deemed ineffective for declining to file a motion in limine concerning this claim.

We find no cumulative error because the allegedly unexplored mitigating circumstances were: (1) cumulative to those presented during the second

penalty phase; (2) insufficiently demonstrated during the postconviction evidentiary hearing; or (3) otherwise failed to satisfy the Strickland standard. See generally Bradley v. State, 33 So. 3d 664, 684 (Fla. 2010) ("Where, as here, the alleged errors urged for consideration in a cumulative error analysis 'are either meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel[,] . . . the contention of cumulative error is similarly without merit.' ") (quoting Israel, 985 So. 2d at 520). Furthermore, because we do not find multiple errors in this case, there is no cumulative error effect that establishes prejudice. See Johnson v. State, 104 So. 3d 1010, 1029 (Fla. 2012) ("[B]ecause multiple errors did not occur in this case, Johnson's claim of cumulative error must fail."). Despite the lower tribunal's detailed order granting Woodel postconviction relief as to the penalty phase, most of its findings relate to its judgments about counsel's deficiency, and there are only conclusory statements regarding prejudice.

In conclusion, we find the assertions that trial counsel's professional errors deprived Woodel of a fair second penalty phase fail to satisfy the prejudice prong of the Strickland standard. Thompson v. State, 990 So. 2d 482, 490 (Fla. 2008) (quoting Strickland, 466 U.S. at 687); see also Strickland, 466 U.S. at 700 ("Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed."). Accordingly, Woodel is not entitled to a third penalty phase.

B. Ineffectiveness of Guilt Phase Counsel (Cross-Appeal)

1. Merits

a. The postconviction court allegedly erred in finding that trial counsel's failure to consult with an expert about the effects of alcohol did not prejudice Woodel during the 1998 guilt phase.

The postconviction court denied Woodel relief from ineffective assistance of counsel under this claim regarding his convictions during the 1998 guilt phase. The court below found that Allen R. Smith, guilt phase counsel, was deficient to the extent that Smith did not "at least consult with a toxicologist or similar type of expert to determine if such an expert could provide useful assistance to the defense with regard to [the defense's] argument of voluntary intoxication and lack of premeditation on part of the Defendant." However, the postconviction court found no prejudice pursuant to the Strickland standard. Therefore, the postconviction court denied Woodel relief based on his allegation of ineffective assistance of counsel, because Woodel would still have been found guilty of first-degree felony murder. We agree.

Woodel's argument that Smith provided ineffective assistance of guilt phase counsel for allegedly failing to consult with an expert on the effects of Woodel's alcohol consumption is without merit. In our decision pertaining to Woodel's first direct appeal, we acknowledged that the trial court specifically rejected the defense's assertion that Woodel was so intoxicated that he could not form the intent to kill. See Woodel I, 804 So. 2d at 321. And, we subsequently affirmed all of Woodel's convictions

on direct appeal, including those for the two counts of first-degree murder. Id. at 327. The record shows that there was also legally sufficient evidence to support alternative convictions of Woodel for first-degree felony murder. Accordingly, the postconviction court's order is affirmed to the extent it denies Woodel a new guilt phase based on Woodel's claim that Smith was ineffective for failing to consult an expert on the effects of alcohol consumption. See Dennis v. State, 109 So. 3d 680, 690 (Fla. 2012) (citing Schoenwetter, 46 So. 3d at 546) (stating trial counsel is not ineffective for failing to make a meritless argument).

b. The postconviction court allegedly erred in finding that trial counsel's failure to object to Arthur White's testimony did not prejudice Woodel during the 1998 guilt phase.

The postconviction court denied Woodel relief based on his allegation of ineffective assistance of counsel for failure to object to White's testimony during the 1998 guilt phase. The lower tribunal concluded that there was no evidence presented during the 2011 evidentiary hearing to demonstrate that Smith was deficient for not filing a motion to exclude White's testimony that Woodel admitted to sexually fondling Mrs. Moody. The postconviction court also concluded that there was no prejudice under the Strickland standard because the State's case against Woodel "was very strong" and, thus, the results of the 1998 guilt phase proceedings would not have been different.

We have previously decided, for the reasons discussed above, that there was no showing that the admission of White's testimony constituted fundamental error. Woodel II, 985 So. 2d at 530.

Accordingly, we now determine that Woodel is not entitled to any relief concerning his cross-appeal claim that Smith was ineffective for not making efforts to exclude White's testimony about Woodel allegedly fondling Mrs. Moody because this claim is procedurally barred. Miller v. State, 926 So. 2d 1243, 1256 (Fla. 2006).

C. Alleged Brady and Giglio Violations (Cross-Appeal)

The postconviction court found that Woodel did not prove any of his allegations that the State violated his rights under Brady or Giglio. We now address Woodel's specific Brady and Giglio cross-appeal claims in turn.

1. The postconviction court allegedly erred in finding that the State did not commit Brady violations in its presentation of Arthur White's testimony.

a. Elements of the Claim

More than a decade ago, the Supreme Court of the United States reiterated that in order to establish a Brady violation, a defendant must show that there is evidence: (1) favorable to the defendant—either exculpatory or impeaching; (2) willfully or inadvertently suppressed by the State; and (3) that caused the defendant to be prejudiced, because it was material. See Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

With regard to any alleged Brady claims, we have previously explained that the second prong of the analysis is not satisfied "where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of

reasonable diligence." Floyd v. State, 18 So. 3d 432, 451 (Fla. 2009) (quoting Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993)). In addition, in order to establish the materiality of disputed evidence under the third prong of the Brady analysis, the defendant must demonstrate a reasonable probability that, had the evidence been disclosed to the defense, the jury would have reached a different verdict. See Duest v. State, 12 So. 3d 734, 744 (Fla. 2009). We have previously defined "reasonable probability" to be "a probability sufficient to undermine confidence in the outcome." Id.

b. Standard of Review

This Court applies a mixed standard of review on postconviction Brady claims. See Griffin v. State, 114 So. 3d 890, 905 (Fla. 2013) ("Where the trial court has conducted an evidentiary hearing, this Court will defer to the factual findings of the trial court that are supported by competent, substantial evidence, but will review the application of the law to the facts de novo.") (citing Sochor, 883 So. 2d at 785 and Lowe v. State, 2 So. 3d 21, 29 (Fla. 2008)).

c. Merits

i. The State allegedly failed to disclose evidence in 2004 about White's alleged deal with the State.

We find nothing in this record to contradict the postconviction court's judgment that there was no evidence that White made a deal with the State to testify against Woodel. Thus, there is no showing that any evidence favorable to Woodel existed to satisfy the first prong under Brady for Woodel to obtain any relief. Accordingly, we affirm the

postconviction court's 2011 order denying Woodel relief.

ii. White's allegedly false testimony about his felony conviction record.

The postconviction court denied relief under Brady, and we see nothing in the record that supports Woodel's contention that the State violated the tenets of Brady regarding White's allegedly false testimony. White's prior felony conviction record was readily available to Woodel's defense team and, therefore, White was subject to impeachment under cross-examination by the defense. Whether White was confused about the number of felony convictions that he had when he testified that the number "was about five," or if he simply asserted untruths about his felony conviction record as being lesser in number than it actually was is inconsequential. The correctness of White's testimony is not dispositive to our consideration of whether Woodel is entitled to any relief. Woodel fails to satisfy the second prong under Brady because the information about White's felony convictions was not suppressible by the State. See Floyd, 18 So. 3d at 451. Again, Woodel fails to establish sufficient proof for an element under the Brady standard to obtain relief. Accordingly, we affirm the postconviction court's 2011 order denying Woodel any relief to the extent he alleges a Brady violation occurred with regard to White's testimony about his prior felony conviction record.

2. The postconviction court allegedly erred in finding that the State did not commit Giglio violations in its presentation of Arthur White's testimony.

a. Elements of the Claim

In previous cases, we have stated that whenever a claimant alleges that the prosecutor has acted in violation of Giglio, the claimant must show the following: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew that the testimony was false; and (3) the false testimony was material. See Guzman v. State, 868 So. 2d 498, 505 (Fla. 2003) (citing Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001)). With regard to the third prong of Giglio, "the false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " Id. at 506 (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)). Under the Giglio analysis, once the defendant has established that the State knowingly presented false testimony, the State bears the burden of proving that the false testimony was not material. Id.; see also Johnson v. State, 44 So. 3d 51, 64 (Fla. 2010) ("Once the first two prongs are established, the State bears the burden of showing that the false evidence was immaterial by showing that its use was harmless beyond a reasonable doubt.").

b. Standard of Review

In our consideration of postconviction Giglio claims we apply a mixed standard to resolve questions of law and fact. See Johnson, 44 So. 3d at 65 ("A court's decision with respect to a Giglio claim is a mixed question of law and fact, and a reviewing court will defer to the lower court's factual findings if

they are supported by competent, substantial evidence, but will review the court's application of law to facts de novo.") (citing Sochor, 883 So. 2d at 785).

c. Merits

i. The State allegedly presented false testimony from White.

There is simply no showing in the record that a deal was struck between White and the State regarding White's testimony against Woodel. Here, Woodel urges us to infer that because White was an habitual felony offender, who had been in and out of prison for twenty-five years, White should not have been able to receive relatively lenient sentences for his then new convictions. In addition, Woodel asserts that White's prison terms were to be followed by a moderate probation period. Woodel argues that the inexplicable leniency shown in White's eventual sentencing evinces that White had a deal with the State to testify against Woodel. The Giglio standard requires that Woodel bear the burden of persuasion that White's testimony at issue was false, and that the State knowingly presented White's false testimony to a jury, without correction. Id. at 64. However, Woodel fails to carry his burden by his use of inductive reasoning with regard to White's supposedly lenient sentences. Accordingly, we affirm the postconviction court's 2011 order to the extent it denies Woodel any relief pursuant to his allegation that the State violated Giglio concerning a supposed deal it made in exchange for White's testimony against Woodel.

Woodel also alleges that White gave false testimony concerning his felony conviction record,

and that the State failed to correct it. Assuming, arguendo, that Woodel can carry his burden under the first two prongs, we evaluate whether the State can carry its burden under the third prong of the Giglio analysis by showing that White's allegedly false testimony was not material. Id.

The State argues that White's testimony was not material because it is reasonable that the jury's verdict would not have been affected by White's allegedly false testimony. The State further argues that the jury was well aware that White had been in and out of prison during his then twenty-five-year history as a habitual offender; and that White was motivated to testify against Woodel, because he hoped to gain some benefit from his testimony.

We, therefore, conclude that the allegedly "false testimony" from White was not material in Woodel's case because there is no reasonable possibility that the jury's verdict was affected by White's openly self-serving testimony. Accordingly, we affirm the postconviction court's 2011 order to the extent it denies Woodel any relief because there is no evidence establishing that the State violated Giglio regarding any allegedly false testimony provided by White.

IV. CONCLUSION

In reversing the postconviction court's judgment that Woodel be afforded a new penalty phase, we briefly pause to reiterate our continual adherence to the general premise that the appellate courts of this State should give all due deference to the trial courts' findings of fact that are based on

competent, substantial evidence.[15] However, we respectfully disagree with the postconviction court's conclusions of law concerning the issues raised by the State in this case.

We hold that Woodel is not entitled to any relief due to ineffective assistance of counsel under the Strickland standard. Accordingly, we reverse the postconviction court's 2011 final order only to the extent the order affords Woodel a new penalty phase. In every other respect, we affirm the postconviction court's order and, therefore, hold that Woodel is not entitled to any of the relief he seeks in his cross-appeal. Woodel's sentence of death is hereby reinstated.

It is so ordered.

QUINCE, LABARGA, and PERRY, JJ., concur.
LEWIS, J., concurs in result.

CANADY, J., concurs in result with an opinion, in which POLSTON, C.J., concurs.

PARIENTE, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED

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[15] See generally Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999) ("When sitting as the trier of fact, the trial judge has the 'superior vantage point to see and hear the witnesses and judge their credibility.' Appellate courts do not have this same opportunity. Despite this deference to a trial court's findings of fact, the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle.") (internal citations omitted).

CANADY, J., concurring in result.

I concur with the majority's decision reversing the portion of the trial court's order granting a new penalty phase and affirming the portion of the trial court's order denying a new guilt phase. Even assuming that Thomas Woodel demonstrated that his trial counsel conducted an unreasonable penalty phase investigation, Woodel failed to establish that he was prejudiced as required by Strickland v. Washington, 466 U.S. 668 (1984).

In this case, the postconviction court wrote a detailed order in which it concluded that trial counsel erred by failing to: (1) consult a toxicologist or similar expert to testify about the role Woodel's alcohol abuse played in the crimes; (2) investigate and present a multigenerational history showing the pattern of alcoholism, abuse, and abandonment in Woodel's family; (3) present a reasonably competent mental health evaluation; and (4) file a motion to exclude witness White's testimony. The postconviction court did not, however, include any reasoning for its conclusion that these errors prejudiced Woodel. I agree with the majority's determination that the postconviction court's unexplained finding of prejudice cannot withstand scrutiny.

After explaining the legal error in the postconviction court's determination that trial counsel erred by failing to file a motion to exclude White's statements, the majority—contrary to the dissent's criticism—examines "whether counsel's deficiency as a whole operated to undermine confidence in the outcome of the penalty phase." Dissenting op. at 59. The majority explains that the "allegedly unexplored mitigating circumstances" were either cumulative to mitigating evidence actually

presented, insufficiently proven at the evidentiary hearing, or not significant enough to undermine confidence in the penalty phase as required by Strickland. Majority op. at 38. As a result, the majority concludes that even when considered cumulatively, "the assertions that trial counsel's professional errors deprived Woodel of a fair second penalty phase fail to satisfy the prejudice prong of the Strickland standard." Majority op. at 39. This conclusion—unlike the postconviction court's unexplained finding of prejudice—is supported by the record.

During the 2004 penalty phase, trial counsel called Woodel, his sister Bobbie, his father Albert, and an aunt who helped raise them to testify about the abuse and extreme neglect Woodel suffered as a child. Woodel and Bobbie also testified about Woodel's adult life, including his abuse of alcohol. The defense then called Dr. Henry Dee, a clinical psychologist and neuropsychologist, who explained the psychological impact of Woodel's experiences and addressed some of the unique difficulties that Woodel suffered as a result of being a hearing child of deaf parents.

Based on this testimony, the sentencing court concluded that the defense proved four statutory mitigating factors—including both mental health mitigating factors—and fourteen nonstatutory mitigating factors. Regarding the circumstances of the offense, the sentencing court found that on the night of the crime, Woodel felt "acutely alone" and quickly drank "an unquantified amount of beer that may have been as much as twenty-four cans or bottles," that left Woodel unable to "recall what he was doing during some of the time leading up to the

crime." State v. Woodel, No. CF97-00047A-XX at 5-6 (Fla. 10th Jud. Cir. Jul. 1, 2005) (Sentencing Order). When reviewing Woodel's background, the sentencing court concluded that Woodel had been neglected and rejected by his parents and others. The sentencing court stated that Woodel's parents were alcoholics and described his father as "often cruel" and his mother as unreliable and uncaring. Id. at 6. The sentencing court included examples of the hardships endured by Woodel, including that Woodel and his sister were once left so hungry that they had to steal food from a neighbor, that Woodel's brother had tried to drown him, that all three children were abandoned without explanation at a children's home, and that Woodel may have been sexually abused by a person invited into the home by one of his parents.

The sentencing court found these mitigating factors were weighty but ultimately concluded that they did not outweigh the serious aggravating factors that applied to the murder of Bernice Moody: (1) Woodel was previously convicted of a contemporaneous capital felony; (2) the murder was committed during the commission of a burglary; (3) the murder was especially heinous, atrocious, or cruel; and (4) the victim was particularly vulnerable due to advanced age or disability. Id. at 2-4. The sentencing court explained that Woodel's impaired capacity could not be given more than moderate weight due to the "pitiless, cruel manner in which he murdered Mrs. Moody" and reasoned that the period during which Woodel ceased stabbing Bernice to search for a heavy object to use as a bludgeon established that Woodel "was not substantially impaired throughout the entire episode." Id. at 5-6.

The mitigating evidence presented during the postconviction evidentiary hearing primarily differed from the penalty phase evidence in that it provided more detail about deaf culture and documented the dysfunction of several generations of Woodel's extended family, not just the family members who spent considerable time with Woodel. The postconviction evidence—considered as a whole—did not, however, paint a materially different picture of Woodel's mental state or "change[] the very nature of the crime." Dissenting op. at 78. No evidence at the hearing established a reason—other than burglary—for the attack or refuted the evidence that despite Woodel's intoxicated state and usual mild demeanor, the attack on Bernice lasted for "some time" and involved both the repeated stabbing and bludgeoning of a partially disabled seventy-four-year-old woman. Sentencing Order at 5. Regardless of any flaws in trial counsel's investigation, the postconviction presentation did not undermine confidence in the 2004 penalty phase.

The dissent's position that Woodel did prove that he was prejudiced appears to rest primarily on an exaggerated view of the differences between the postconviction testimony of clinical psychologist Dr. Alan Marcus and Dr. Dee's 2004 penalty phase testimony. The dissent rests on the unfounded conclusion that "Dr. Marcus's testimony, if it had been presented, would have provided the jury a completely different picture of how the crime occurred and substantially increased the mitigation available to the finder of fact." Dissenting op. at 71.

First, Dr. Marcus's testimony did not establish a mitigating "possible explanation as to how this baffling crime transpired." Id. At the evidentiary

hearing, Dr. Marcus testified that "in the early days before the advent of flashing lights and doorbells[] that would have lights and buzzers," deaf people "usually left their doors open" because "if they locked them and they had a guest or visitor . . . they would never hear the door pounding." Dr. Marcus then explained that as a corollary, "it's not unusual or unheard of for deaf people to show up at another deaf person's home and actually just walk in." Dr. Marcus also testified that likely as a result of frequent interaction with deaf individuals during his childhood, Woodel "really wouldn't think twice about walking in without knocking" when going to a friend's home. Dr. Marcus did not, however, testify that Woodel habitually walked uninvited and unannounced into the homes of strangers.

Furthermore, Woodel's own penalty phase testimony refuted the theory that due to his upbringing in the deaf community and his intoxication, he mistakenly believed that it was appropriate for him to enter the Moodys' trailer without invitation. Woodel testified that when he first approached the screen porch door of the Moodys' trailer, he "stood there waiting for [Bernice] to . . . turn around and notice me so I could ask her what time it was." Once on the porch, Woodel testified that he heard Bernice tell him to "[g]et out of my trailer" and that when she came to the back door with a knife, he "pushed her back" in order to actually enter the trailer. It would be unreasonable for the jury to conclude from this evidence that Woodel did not know—until it was too late to retreat—that he was unwelcome in the Moodys' trailer.

Second, the postconviction evidence did not establish that Dr. Dee "present[ed] misleading

evidence to the jury that psychological testing indicated that Woodel was psychotic." Dissenting op. at 72. To the contrary, Dr. Dee testified that he could not interpret the Minnesota Multiphasic Personality Inventory (MMPI) given to Woodel because the test results were invalid and repeatedly explained that other testing and his clinical evaluation demonstrated that Woodel was not psychotic or schizophrenic. Dr. Dee testified that he administered an instrument expressly designed to test for psychopathic traits and that Woodel's "score didn't even approach—even get close to the cut-off score of 30 that's necessary [for] psychopathy." Dr. Dee further testified that the invalid results of the MMPI, Woodel's "idiosyncratic" interpretation of items in the psychological testing, and Woodel's hand movements, led Dr. Dee to discover that Woodel's parents were deaf. Accordingly, while Dr. Dee did not know prior to administering the MMPI that the results would likely be invalid due to Woodel's status as a child of deaf parents, Dr. Dee discovered that fact and explained to the jury that Woodel was not psychotic.

Third, while Dr. Marcus testified in more detail about the deaf community and the particular difficulties faced by children of deaf adults (CODAs), Dr. Marcus's explanation of Woodel's experiences as a CODA and the psychological effects of those experiences did not materially differ from Dr. Dee's presentation during the 2004 penalty phase. Dr. Dee testified about the "specific subculture" of hearing children of deaf parents. Dr. Dee explained that through adolescence, such children generally associate with and identify with deaf individuals and then experience "shock" and "hurt" when they are "progressively excluded from that culture because

they have to enter the hearing world." And because the parents do not know what it is like to hear, the parents cannot appreciate the struggles their children experience when transitioning between two worlds. Moreover, Dr. Dee explained that Woodel's "verbalizations [were] often incomplete and almost b[are] in content" but when Woodel signed, "there was a richness of communication and depth of feeling." Dr. Dee opined that as a result of Woodel's experiences as a child, he had "difficulty with abstract concept formation and understanding feelings" but that Woodel nevertheless did, in fact, feel remorse.

Dr. Dee also testified about the social dynamic between deaf parents and hearing children generally and Woodel and his parents specifically. Dr. Dee explained that when Woodel's parents were young, deaf children were generally raised in schools for the deaf—rather than by their parents—and that the administrators of these schools did not use sign language. Children raised in those environments learned that they could not communicate meaningfully with adults and were rarely told why they were being disciplined. As a result, the children looked to each other to solve problems, and once they became parents, this generation expected their children to act as peers and tended to be either very permissive or arbitrarily harsh. Dr. Dee noted that where the children of deaf parents can hear, there is an additional layer of "pseudoresponsibility and pseudomaturity" thrust upon the children. He explained that because they could hear and speak, Woodel and his sister, like many CODAs, were expected to communicate for their parents, often in developmentally inappropriate situations such as

when a parent needed medical care or was questioned by law enforcement officers.

Finally, while Dr. Dee did not himself use sign language to communicate with Woodel, Dr. Dee was able to interview Woodel about his upbringing. In addition to testifying about the struggles Woodel and his siblings faced as CODAs, Dr. Dee testified about other "pernicious factors going on in" Woodel's childhood. Dr. Dee explained that Woodel and his siblings "were frequently abandoned by their parents." Dr. Dee noted that Woodel moved at least twenty-three times before he was fifteen years old—including being left at a children's home for approximately two years—that the siblings would be left with relatives for long periods, and that for days at a time, they would be left with "whomever would take them" or entirely without adult supervision. Dr. Dee explained that such abandonment "leads to terrifying loneliness," "chronic depression," and "low self-esteem." Dr. Dee also testified that Woodel was physically abused on at least one occasion. Further, while Woodel did not report any sexual abuse, Woodel's sister testified that she was sexually abused by one of her mother's boyfriends, and despite Woodel's denial, Dr. Dee suspected that Woodel might also have been sexually abused. Overall, Dr. Dee opined that Woodel's childhood was "[f]illed with some of the most spectacular neglect and abuse that I think I [have observed] ever."

Based on the foregoing, this is not a case in which "minimal mitigation evidence [was] presented to the jury at Woodel's resentencing" and "other significant mitigation" was overlooked. Dissenting op. at 58, 76. Accordingly, I concur in the majority's

conclusion that a new penalty phase is not warranted.

POLSTON, C.J., concurs.

PARIENTE, J., dissenting.

After conducting a lengthy evidentiary hearing and analyzing all of the evidence presented at the hearing in a comprehensive eighty-six-page order, the trial court concluded that a new penalty phase is required because confidence in the sentence of death has been undermined based on trial counsel's troubling failure to properly prepare for the penalty phase and present important available mitigation, even after he was given a second chance when a new penalty phase was previously ordered. I dissent from the Court's rare step of reversing the trial court's determination that its confidence in the death sentence was undermined.

This Court's reversal of the trial court's exceptional grant of postconviction relief is even more troubling in light of the fact that, even with the minimal mitigation evidence presented to the jury at Woodel's resentencing, the jury recommended a life sentence as to one of the murders and recommended a death sentence for the other murder by the slimmest margin possible—a seven-to-five vote. For the reasons addressed below, after a full assessment of all of the evidence presented at the resentencing, in addition to the newly discovered mitigation evidence presented during postconviction proceedings, in my view, competent, substantial evidence supports the trial court's factual findings that formed the basis for granting a new penalty phase and the trial court did not err when in undertook its legal analysis.

Like the trial court, I conclude that the failure of trial counsel to pursue additional mitigation and perform any additional meaningful investigation prior to Woodel's resentencing undermines confidence in the outcome of the death sentence, which was recommended by a bare majority of the jury. A proper analysis of Woodel's ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984), demonstrates that Woodel is entitled to a new penalty phase.

In this case, not only does the majority fail to address deficiency at all, but the majority never conducts a full analysis of the Strickland prejudice prong. Specifically, the majority engages in a flawed legal analysis never adopted by this Court, addressing each individual failure to present mitigation evidence in a vacuum and never analyzing whether counsel's deficiency as a whole operated to undermine confidence in the outcome of the penalty phase. Succinctly stated, when analyzing Strickland prejudice, if the Court finds that counsel was deficient in numerous aspects of his or her performance, the Court cannot simply analyze the prejudice caused by counsel's failure to present each individual piece of evidence alone. Instead, the Court must review whether counsel's deficient performance itself prejudiced the defendant. The majority's piecemeal approach is contrary to the United States Supreme Court's holding in Strickland, as well as this Court's precedent, in which the Court considers the Strickland prejudice prong cumulatively. See, e.g., Simmons v. State, 105 So. 3d 475, 503 (Fla. 2012) (reviewing the claim that counsel failed to properly investigate and failed to present certain mitigation witnesses as a singular claim and

reviewing the prejudice from this deficiency on the whole); Robinson v. State, 95 So. 3d 171, 177 (Fla. 2012) (same); Franqui v. State, 59 So. 3d 82, 98 (Fla. 2011) (reviewing Strickland claims individually and cumulatively after determining that counsel may have been deficient in failing to object to multiple prosecutorial comments).

While the majority undertakes a separate cumulative error analysis after erroneously concluding that Woodel's Strickland claim lacks merit, cumulative error is a separate and distinct analysis from analyzing prejudice under Strickland. See, e.g., Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003) (analyzing cumulative error separately and holding that a cumulative error claim fails when the defendant fails to establish any of his claims under Strickland). Thus, the cumulative error analysis cannot be substituted for a Strickland prejudice analysis, without conflating a cumulative error analysis with a Strickland prejudice analysis.[16]

For those reasons, I view this case as very similar to the United States Supreme Court's reversal in Sears v. Upton, 130 S. Ct. 3259 (2010), where the Supreme Court held that the state supreme court applied the wrong prejudice analysis when it denied the defendant relief on the basis of counsel's constitutionally inadequate initial mitigation investigation. After emphasizing counsel's inadequate mitigation investigation, the Supreme

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[16] In addition to the flawed legal analysis, the majority conflates deficiency and prejudice. See majority op. at 34-35. The majority also uses a harmless error standard when it should be applying a Strickland prejudice standard. See id. at 24, 29-30.

Court stressed that it had never limited its prejudice inquiry under Strickland to cases in which there was "only little or no mitigation evidence presented." Id. at 3266 (citations omitted). The Supreme Court then stressed that it "categorically rejected the type of truncated prejudice inquiry undertaken by the state court" below and emphasized its holding in Porter v. McCollum, 558 U.S. 30, 33 (2009), in which the Court recently explained:

> "To assess [the] probability [of a different outcome under Strickland], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation." 558 U.S., at 41 (internal quotation marks omitted; third alteration in original).
>
> That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. Indeed, it is exactly this kind of probing inquiry that Justice SCALIA now undertakes, post, at 3268–3271, and that the trial court failed to do. In all circumstances, this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of a penalty phase mitigation investigation.

Sears, 130 S. Ct. at 3266-67 (emphasis added) (quoting Porter, 558 U.S. at 41).

Moreover, this flawed analysis in this case may have led the majority to improperly conclude that the prejudice prong of Strickland was not met by looking at the deficiencies and prejudice arising from the individual failures piecemeal rather than as a whole. This type of piecemeal analysis is particularly problematic because the majority addresses only prejudice and never focuses on the numerous deficiencies in trial counsel's failure to follow-up on mitigation before the second trial after requesting a continuance of the original trial to pursue that very mitigation.

Even though defense counsel did present some witnesses who testified during the resentencing as to the abuse that Woodel suffered during his life, one of the primary witnesses counsel relied upon was the abuser himself who attempted to mitigate his own actions. The other witness was Woodel's aunt, who did not have much contact with Woodel.

By contrast, the quality of the witnesses presented at the postconviction evidentiary hearing provided a more complete picture of not only the abuse, but the impact of being a child of deaf parents. Postconviction counsel found numerous witnesses who were willing to testify, all of whom were available to trial counsel if he had just performed a proper investigation. These witnesses included Woodel's half-brother, who also grew up in the same abusive environment and suffered significant addiction problems as an adult; Woodel's uncle, who discussed the inter-generational abuse within the family; witnesses who knew Woodel when they lived at the Children's Home and saw Woodel's desperate

attempts to fit into the hearing world; people who interacted with Woodel's parents and interacted with Woodel when he was a child and who could have testified as to the situation that Woodel faced growing up; a mental health counselor who saw Woodel when he was young and thought his parents were unfit to raise children; neighbors and acquaintances who knew Woodel's parents and expressed concern because, based on their limited interactions, they understood that Woodel's parents were unfit to raise children; a psychiatrist who works with the deaf and hard of hearing, as well as with children of deaf adults (CODAs); an expert as to clinical pharmacology, who discussed the effect of alcohol on Woodel at the time of the crime; and a psychologist who testified as to the significant limitations that Dr. Dee had in attempting to provide his diagnosis during the trial and the second penalty phase based on Dr. Dee's lack of sufficient information.

As addressed in more detail below, I first review the deficiency of Woodel's trial counsel in completely failing to ensure that a full mitigation investigation was undertaken in this case, even though counsel had two attempts in which to act, and second, I review the clear prejudice that this deficiency had on the case.

DEFICIENCY

While this Court can properly deny relief if either deficiency or prejudice is lacking, the majority's failure to address counsel's numerous glaring deficiencies, in addition to its piecemeal approach to each subclaim of prejudice, provides an incomplete picture of why a new penalty phase is required. The deficient performance is even more

egregious because counsel had a second chance to pursue important investigative leads between the initial and second penalty phases and completely failed to do anything additional during this significant timeframe.

As the trial court pointed out, although the prejudice analysis must focus on the 2004 trial, the deficiency must be seen as starting during the 1998 proceeding. The evidentiary record establishes trial counsel's complete failure to investigate necessary mitigation prior to the start of the first trial, including crucial social history and Woodel's background. Instead, counsel relied solely upon hiring a mental health expert, Dr. Dee, who had not been provided with the necessary background information. Dr. Dee himself requested counsel to hire a person who could help him find witnesses to interview as a part of his evaluation.

But it was not until three days after jury selection began during the initial trial that Toni Maloney was appointed to assist in the case as a witness coordinator. However, Maloney was not hired to "perform a thorough mitigation investigation"; she was hired to help put the records together and contact witnesses so that Dr. Dee could interview them as a part of his evaluation. In locating witnesses for Dr. Dee, Maloney interviewed Woodel at the jail and noticed that Woodel would communicate by attempting to sign and talk at the same time. During the interview, Maloney discovered that both of Woodel's parents were deaf and informed both counsel and Dr. Dee about this critical development. Because Maloney was attempting to find necessary information for Dr. Dee after the trial had already commenced, and because

she was retained during the same time period as the Thanksgiving holiday, Maloney had a difficult time obtaining all of the information and records that she needed in time for the defense's use at trial. Counsel requested a continuance to pursue additional mitigation, but this request was denied.

One of Woodel's trial attorneys admitted during the postconviction evidentiary hearing that he did not realize that both of Woodel's parents were deaf until the trial had commenced. Defense counsel did not recall interviewing Woodel's father until after the trial began and never found Woodel's mother, although counsel also did not hire an investigator. At the initial penalty phase, counsel called Dr. Dee, a few people who knew Woodel at the time of the crime, and three of Woodel's family members: Woodel's father, sister, and aunt. However, at trial, Woodel's father testified in an inconsistent manner from his prior statements to Dr. Dee, and because a proper background investigation was never conducted, the defense did not have adequate information to respond.

After the initial penalty phase, the jury recommended a sentence of death for both murders, which the trial court imposed. However, because the trial court failed to provide an adequate sentencing order, this Court reversed for a new penalty phase. Woodel v. State, 804 So. 2d 316, 327 (Fla. 2001). Probably most tellingly as to the degree of deficient performance during the resentencing, although trial counsel was aware of the significant amount of mitigation investigation that was necessary, after a new penalty phase was required, counsel failed to follow up at all—even though counsel had previously recognized in 1998 that additional time to discover

mitigation was essential and for that reason had requested a continuance.

Specifically, counsel failed to request that Maloney, or any other individual, finish the investigation that began in 1998. Instead, trial counsel simply proceeded with the same information gleaned from the original trial. As the trial court stated:

> In preparation for the second penalty phase, Mr. Colon talked to three family members, Bobbie Hermes, Albert Woodel and Margaret Russell. The same three people that testified at the 1998 trial. He did not go to North Carolina or Michigan and he did not hire an investigator to do so. All he did was review records and proceed with the same type of defense. He did not hire Toni Maloney, or for that matter, any mitigation specialist to talk to family members and other potential witnesses. He acknowledged on redirect that it may have been a bad decision. He did no additional investigation or try to find a CODA expert. Mr. Colon said "looking back, I wish I had hired somebody that would have come in and provided further testimony." Mr. Colon was on notice that he had unique issues regarding his client.

While this Court does not engage in 20/20 hindsight or second-guess strategic decisions, to reach the conclusion that trial counsel was seriously deficient, the Court needs only to look at what trial counsel himself told the trial court in 1998 as to the

further necessary investigation, when counsel requested a continuance in order to pursue the additional mitigation sought by Dr. Dee and Maloney. Moreover, the failure to properly investigate can never be considered a strategic decision. See Wiggins v. Smith, 539 U.S. 510, 522 (2003) (explaining that "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background' " (quoting Williams v. Taylor, 529 U.S. 362, 396 (2000) (alteration in original))). In fact, as recognized by the United States Supreme Court, when counsel "conduct[s] a constitutionally deficient mitigation investigation . . . , at the very least, [this] call[s] into question the reasonableness of [counsel's] theory." Sears, 130 S. Ct. at 3265.

Maloney testified at the evidentiary hearing, detailing the considerable additional investigation that she normally would have conducted had she not been constrained by the significant time limitations during the original trial. Maloney, who served as a mitigation specialist in a number of prior cases, was familiar with the substantial amount of work required to investigate and prepare for a penalty phase, stating that she usually had almost a year to investigate a capital defendant's background and history when she was hired as a mitigation investigator. In this case, she was hired as support during the few weeks while the trial progressed. She testified that when she learned that both of Woodel's parents were deaf, she was "frantic . . . to try to understand that particular issue and the dynamics of it" but had very little time. She found a book on the

matter, which she gave to Dr. Dee. If she had been appointed to perform a mitigation investigation with sufficient time, however, she testified that she would have contacted Thomas Kerwin, a mental health expert that Woodel saw as a child; contacted people who worked at the Children's Home where Woodel lived for years as a child; visited the areas where Woodel grew up; and contacted people in the deaf community.

In addition, attorney Robert Norgard testified as an expert on prevailing professional norms among capital defense attorneys. While he was troubled by many things that occurred in this case, Norgard was particularly bothered by the fact that Woodel's trial counsel did not realize that Woodel's parents were both deaf until well into the guilt phase of the trial, as this would have been apparent if counsel had interviewed the parents prior to trial. As he testified, "[That is] the part that just really boggles my mind about the whole situation is that a basic penalty phase investigation would start with the parents. And the first contact with the parents you would have known they were deaf, whether your client told you or not, so. I mean, that's the part that, you know, surprises me about the late discovery of it." The trial court detailed the numerous problems that Norgard discussed, including the amount of research defense counsel failed to undertake before determining whether to present expert testimony concerning a voluntary intoxication defense, evidence concerning addiction and its genetic components in this case, and the complete lack of additional preparation when a new penalty phase was ordered.

Trial counsel himself recognized that although he was responsible for investigating all possible

mitigation, he never spoke with numerous members of Woodel's family, including Woodel's mother, half-brother, or childhood friends. In addition, trial counsel recognized that he did not retain a mitigation investigator to help prepare for the second penalty phase or perform additional investigation, even though counsel had previously recognized that additional time and investigation were necessary. Trial counsel explained his decision not to investigate all available mitigation as follows: "I didn't feel that it was necessary based on the package I was presenting. And, as I said before, looking back now, that may have been a very bad idea."

The trial court detailed the numerous deficiencies, and based on the record in this case, there can be no question of counsel's deficient performance. The inquiry then turns to whether prejudice has been demonstrated such that our confidence in the sentence of death has been undermined, as the trial court found.

PREJUDICE

Numerous witnesses testified at the postconviction evidentiary hearing in great detail as to the abuse that Woodel suffered and the additional mitigation available. While there was discussion of abuse in the second penalty phase proceeding, the quality of the witnesses who were called at the postconviction evidentiary hearing provided a more complete picture of not only the abuse, but the impact of being a child of deaf parents. Although Woodel's trial counsel simply chose not to fully investigate the available mitigation because he was content with the witnesses that he found, failing to investigate and failing to present the lay testimony at issue can never be considered a strategic decision of counsel.

Moreover, while trial counsel did not believe that it was necessary to introduce a toxicologist to assist in explaining voluntary intoxication, in describing why he did not investigate whether an expert on the deaf culture would have been helpful, trial counsel again dismissed the need to seek out such information because he "felt comfortable with the package" he was presenting to the jury.

Thus, the issue before this Court does not involve a scenario where counsel failed to present certain evidence because it would open the door to the admission of unfavorable evidence or evidence that would damage a defense. Instead, counsel made an unreasonable decision to not conduct any additional investigation that would have uncovered other important mitigation witnesses who could have been very helpful to the defense.

During postconviction proceedings, Woodel presented the testimony of Dr. Alan Marcus, a clinical psychologist who works with the deaf and with children of deaf parents and who is also a child of deaf parents. Dr. Marcus noted the limitations of the testimony presented by Dr. Dee at the resentencing since Dr. Dee had no prior experience working with children of deaf parents and his sole preparation for testifying in the case was to review the book Mother/Father Deaf, which is a scholarly, anthropological study, as opposed to a psychological review. Dr. Marcus's testimony, if it had been presented, would have provided the jury a completely different picture of how the crime occurred and substantially increased the mitigation available to the finder of fact—in particular as to four critical aspects.

First, and perhaps most importantly, because Dr. Marcus was familiar with the deaf community and culture, he was able to provide a possible explanation as to how this baffling crime transpired—testifying that the murder may have occurred after an escalation stemming from an initial misunderstanding that was based on the fact that Woodel still acted like a member of the deaf community. Specifically, Dr. Marcus thoroughly explained the importance of socialization for those in the deaf community and how it was common in the deaf community for people to leave their front doors unlocked so they would not miss the arrival of visitors. Likewise, it was not contrary to societal norms for members of the deaf community to walk into each other's homes, unannounced.

Here, the murder happened after a very intoxicated Woodel walked into the victims' home to inquire as to the time. Woodel saw that Bernice Moody was awake when she was cleaning, and he knocked on the door. When she did not answer, Woodel thought she could not hear his knock and walked in. Woodel's statements describing how he first approached the victim were difficult to follow as he contradicted himself, giving three different accounts as to where he was located when Bernice first saw him: he was at the door that went into her bedroom, he was not inside yet, and he was on the porch. When he was questioned further as to where he was when Bernice first saw him, he stated that he could not remember and was unsure. He testified that when Bernice saw him, she took a few steps away, picked up a knife, and swung it at him as she yelled. Woodel attempted to explain why he was there, as she yelled and swung the knife. On the

third swing, Woodel pushed her backwards and somehow acquired the knife, although he could not recall how. According to his statement, Woodel thought at the time that she was trying to cut him. Taking Dr. Marcus's insight together with Woodel's intoxication and his upbringing where it was permissible to walk into each other's homes, the defense could have argued that Woodel did not realize his error in entering her house and thought the victim was threatening him.

Second, and important to the quality of the mitigation presented, because Dr. Dee was unfamiliar with the deaf community, he utilized the incorrect psychological testing, thus presenting misleading evidence to the jury that psychological testing indicated that Woodel was psychotic. Before addressing the testing itself, Dr. Marcus explained how English is a second language to a child of deaf parents, with sign language being his or her primary language. Further, Dr. Marcus noted that even Dr. Dee recognized Woodel's difficulties in being able to fully express himself orally in English. Dr. Marcus explained critical differences between the English oral language and American Sign Language, stressing that a person cannot simply translate the English language into American Sign Language because American Sign Language is visually driven, while the English language is sound driven.

As to the administration of psychological testing, including the Minnesota Multiphasic Inventory (MMPI), Dr. Marcus testified that it is widely recognized that the MMPI is inappropriate for deaf people or children of deaf parents because there are too many concepts and terminologies that are misunderstood in the translation, which skews the

results. However, the test had never truly been translated into American Sign Language because of the difficulty in translating some of the questions and concepts that are sound based. Based on these problems and the skewed results, as Dr. Marcus directly stated, "They come out looking crazy in simple terms." However, Dr. Dee administered this test to Woodel, testifying to the jury that when he administered the MMPI to Woodel, the test results indicated that Woodel was psychotic. Although Dr. Dee questioned this result, he did not realize that the MMPI was inappropriate, and merely expressed his concerns that the results of the MMPI must have been flawed for some reason, but was unable to provide an explanation for this result to the jury.

Third, Dr. Marcus interviewed Woodel in sign language, which was incredibly important in light of the apparent difficulties that Woodel had in fully expressing himself verbally. Although Dr. Dee recognized that Woodel was not fully stating his thoughts and opinions verbally as he used both sign language and oral responses, Dr. Dee attempted to remedy this problem by asking Woodel what he was signing. Yet, Dr. Dee also recognized that Woodel's interpretation of words and his use of language were so odd that as to certain discussions, Dr. Dee "couldn't make any sense out of what [Woodel] was trying to tell me." However, neither Dr. Dee nor Woodel's counsel ever obtained an interpreter to assist in the communication problems. In interviewing Woodel in sign language, Dr. Marcus was able to provide significantly more details about the impact of Woodel's upbringing on his life and how the abandonment from his parents and the exclusion from the deaf community affected him. In addition,

because Dr. Marcus was a child of deaf parents himself, he was able to provide a detailed picture about the culture of the deaf community and other relevant factors.

Finally, having personal familiarity with being a child of deaf parents, Dr. Marcus was able to provide a fuller picture of the relationship between deaf parents and hearing children and the subsequent rejection of older hearing children from the deaf community. Generally, when deaf adults have infants, there is not much separation between parent and child. However, once a child is able to communicate with the hearing world, he or she would be expected to become an adult for his parents, despite the child's very young age.

Many children of deaf parents are forced to help their parents navigate through the hearing world, including helping them obtain Social Security benefits or helping them to deflect any possible trouble with the law. For example, if the child is being required to intervene when his or her parents are involved with a police officer, the child would not tell the officer the truth, but would protect his or her parents. Thus, the families do not obtain the help they need. If a police officer were to encounter a child who was abandoned at the mall by a parent, like the situation that occurred to Woodel, the child would not tell the officer the truth, but would lie for the parent and say that he or she simply got lost.

Despite this close attachment to the deaf community as a child, however, based on the mistrust of the hearing world, as a hearing child gets older, he or she could end up being excluded from the deaf world. Thus, children of deaf parents often feel they have no place where they belong. In Woodel's case,

he was abandoned by both his family and the deaf community, which was the society in which he grew up. For Woodel and his sister, being a part of the deaf world was a part of their identity. Woodel and his sister tried to sign at the Children's Home in order to keep their identity as a part of the deaf world, but they were punished because others thought that they were keeping secrets.

Not only did postconviction counsel present evidence at the evidentiary hearing as to this important factor, but counsel also presented other significant mitigation, including that all of Woodel's siblings, including his two half-brothers, had significant addiction problems; that Woodel's parents had serious addiction and physical abuse problems; and that Woodel's half-brother had been raped by his mother's boyfriends, just like his sister had been—evidence that was important for the jury to hear because Woodel testified that he was unable to recall that period of his life and whether he had been raped.

Woodel also called Dr. Mark Cunningham, who testified that based on the numerous damaging developmental factors, the family history, the generational abuse, and the dysfunctions to which Woodel was exposed, this was one of the worst cases that he had encountered, and the lack of a proper mitigation investigation prior to the trial affected Dr. Dee's ability to perform an adequate assessment. Specifically, Dr. Cunningham discussed the significant hereditary and genetic predispositions that impacted Woodel—Woodel had significant damaging developmental factors as he grew up, including being uprooted and moved at least twenty-seven times by the time Woodel was in middle childhood; Woodel suffered from deficient and

disrupted attachment, emotional and physical neglect, probable sexual abuse, abandonment, and rejections and failures; and significant parental drinking and abuse. According to Dr. Cunningham, without this crucial information, the jury was left with a simple impression that Woodel's life should be spared because he had a bad childhood, but the jury was never provided with over thirty well-articulated damaging developmental factors that impacted Woodel and the generational abuse within his family that would have provided necessary information to show the significance of the mitigation and how it impacted him.

On too many occasions, this Court has addressed cases in which counsel failed to conduct a mitigation investigation until trial began—conduct that is clearly deficient and will have a significant impact on the case. See, e.g., Blackwood v. State, 946 So. 2d 960, 973 (Fla. 2006) (affirming the trial court's decision to grant a new penalty phase where counsel attempted to secure a mental health evaluation five weeks prior to trial but did not take sufficient actions when the expert declined to provide an evaluation shortly prior to trial based on a fee dispute, even though counsel then secured additional mental health mitigation at the Spencer hearing); State v. Coney, 845 So. 2d 120, 129-133 (Fla. 2003) (affirming the trial court's decision to grant a new penalty phase where counsel attempted to secure mental health evaluations after the guilt phase and failed to adequately prepare); State v. Lewis, 838 So. 2d 1102, 1112 (Fla. 2002) (same); Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993) (requiring a new penalty phase where trial counsel failed to investigate mitigation evidence prior to trial, resulting in his client waiving the

presentation of mitigation altogether). Here, trial counsel likewise failed to conduct the mitigation investigation in a timely manner, and upon being given a second chance when a new penalty phase was ordered, made the unreasonable decision to not undertake any additional investigation because he decided he could simply rely on the testimony previously presented at the initial penalty phase.

During postconviction proceedings, however, current counsel discovered significant additional mitigation, some of which changes the very nature of the crime, and clearly could have impacted the jury's bare majority seven-to-five recommendation. The bottom line is that trial counsel chose not to undertake a full mitigation investigation, which would have uncovered other important mitigation witnesses who were far more compelling than the witnesses that trial counsel utilized during the second penalty phase, who were simply recycled without any additional thought or analysis.

Accordingly, the failure to present the considerable mitigation that existed but was never pursued, due to the deficiencies of trial counsel, results in prejudice such that confidence in the outcome has been undermined. The trial court considered all of this evidence, asked careful and thoughtful questions throughout the evidentiary hearing, and analyzed all of the relevant information in an extensive eighty-six-page order. Based on the analysis above, I would affirm the trial court's decision to grant a new penalty phase.

An Appeal from the Circuit Court in and for Polk County,

J. Michael Hunter, Judge - Case No. 53-1997-CF 000047-AO

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Carol M. Dittmar, Assistant Attorney General, Tampa, Florida,

for Appellant/Cross-Appellee

Marie-Louise Samuels Parmer and Maria E. Deliberato, Assistant Capital Collateral Regional Counsels, Middle Region, Tampa, Florida,

for Appellee/Cross-Appellant

Appendix C

In the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida

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Case No. CF97-00047A-XX

STATE OF FLORIDA,
Plaintiff

vs.

THOMAS WOODEL,
Defendant

December 28, 2011

ORDER ON AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

THIS MATTER is before the Court upon Defendant's Motion To Vacate Judgments Of Conviction And Sentence, filed on November 6, 2009; the State's Answer To Motion To Vacate and Memorandum of Law, filed on January 4, 2010; the Defendant's Amended Motion To Vacate Judgments of Conviction And Sentence, filed on April 16, 2010, the State's Answer To Amended Motion To Vacate, filed on May 6, 2010; the Defendant's Notice of Withdrawal Of Ground 1(B) of Amended 3.851 Motion, filed on June 30, 2010; the Defendant's Notice of Withdrawal Of Ground 2(D) of Amended

3.851 Motion, filed on August 18, 2010; the Defendant's Written Closing, filed on July 25, 2011; the State's Closing Argument, filed on August 22, 2011; and the Defendant's Reply To State's Closing Argument, filed on September 9, 2011. An evidentiary hearing was conducted on March 21-25, May 11-13, and June 3, 2011. The Court having reviewed Defendant's Amended Motion, and the State's Answer to the Amended Motion, having heard the testimony and reviewed the evidence presented at the evidentiary hearing; having heard the arguments of legal counsel; having reviewed the Closing Arguments, Responses, and Replies from all parties; having review the case file, and the applicable case and statutory law; and being otherwise fully advised in the premises, finds as follows:

STATEMENT OF PROCEDURAL HISTORY

On January 16, 1997, the Defendant, Thomas D. Woodel, (hereinafter referred to as Mr. Woodel), was charged by indictment with two counts of first-degree premeditated murder, one count of armed burglary, and one count of armed robbery for the murders of Bernice and Clifford Moody, which occurred on December 31, 1996. The jury returned a verdict of guilty on all charges on December 4, 1998.

The penalty phase of the trial was conducted, and on December 7, 1998, the jury recommended a sentence of death by a vote of 9 to 3 for the murder of Clifford Moody, and a sentence of death by a vote of 12 to 0 for the murder of Bernice Moody. The Honorable Robert E. Pyle, followed the jury's recommendations and sentenced Mr. Woodel to death for both of the murders. On direct appeal the Florida Supreme Court affirmed all of the convictions. However, the Florida Supreme Court vacated both of

the death sentences. In its Order, the Florida Supreme Court stated; 'The sentencing order at issue here fails to expressly each mitigating circumstance, fails to determine whether these mitigators are truly mitigating, fails to assign weights to the aggravators and mitigators, fails to undertake a relative weighing process of the aggravators vis-a-vis the mitigators, and fails to provide a detailed explanation of the result of the weighting process." The Florida Supreme Court went on to state, "We are unable to provide a meaningful review of the imposition of the death sentence or undertake our proportionality review. See Jackson, 767 So.2d at 1159." See Woodel v. State, 804 So.2d at 327 (Fla. 2001).

On remand to the trial court, the original trial judge was not available and a new penalty phase was conducted by the Honorable Susan Roberts. On remand the jury recommended a sentence of life for the murder of Clifford Moody and a sentence of death for the murder of Bernice Moody by a vote of 7 to 5. Judge Roberts followed the jury's recommendation and sentenced Mr. Woodel to death for the murder of Bernice Moody. Judge Roberts found that there were four aggravating circumstances. The aggravating circumstances found by the trial court were prior violent felony conviction; committed during commission of a burglary; especially heinous, atrocious or cruel (HAC); and victim vulnerability due to age of disability. The trial court found four statutory mitigators. The four statutory mitigators found by Judge Roberts were no significant criminal history, defendant's age; substantial impairment of capacity to appreciate his actions or conform his conduct to the requirements of law; and extreme emotional disturbance. Judge Roberts also found ten

non-statutory mitigators. The ten non- statutory mitigators found by Judge Roberts were physical abuse as a child; neglect and rejection by his mother and others, an unstable home as a child; parents who were deaf and spoke primarily in sign language; abuse of alcohol and drugs; willingness to meet with the victim's daughter; willingness to be tested for bone marrow donation for his daughter; the Defendant's belief in God; the Defendant's voluntary confession, and the Defendant's compassion for others. Judge Roberts found the aggravating factors far outweighed the mitigating factors and sentenced Mr. Woodel to death for the murder of Bernice Moody. The Florida Supreme Court affirmed Mr. Woodel's sentences including his sentence of death for the murder of Bernice Moody. Woodel v. State, 985 So.2d 524 (Fla. 2008). The Supreme Court denied rehearing on June 26, 2008. On November 17, 2008, the United States Supreme Court denied certiorari. Woodel v. Florida, 129 S.Ct. 607, 172 Fed 2d 465 (2008). Mr. Woodel filed his Motion To Vacate Judgments of Conviction And Sentence on November 6, 2009. Mr. Woodel filed his Amended Motion To Vacate Judgments Of Conviction And Sentence on April 16, 2010.

STATEMENT OF THE CASE FACTS

The facts of the case are set forth in Woodel v. State, 804 So.2d 316,319-320 (Fla. 2001), and are presented below:

> A Polk County grand jury returned a four-count indictment against Thomas Woodel, charging him with first-degree murder of Clifford Moody, first-degree murder of Bernice Moody, armed robbery, and armed

burglary. A jury convicted Woodel on all four counts.

Clifford Moody, who was seventy-nine years old, and his seventy-four year old wife, Bernice, lived in a mobile home trailer on lot 533 at Outdoor Resorts of America in Polk County. The Moodys owned another trailer on adjoining lot 532, which they sometimes rented. Bernice was seen by the newspaper delivery man cleaning lot 532 about 4:30 to 4:45 a.m. on December 31, 1996. Clifford was last seen by a security person at the Outdoor Resorts Laundromat at about 5:30 a.m. The Moodys were preparing to show the mobile home for rental that day.

The Moodys were found dead a little after 1 p.m. on December 31, 1996. Clifford was found lying on his back in the dining room area of the trailer on lot 532. His underwear and pants had been pulled down to below his knees. His eyeglasses lay approximately two feet from his head. Dr. Alexander Melamud, the medical examiner, testified that Clifford received a total of eight stab wounds, causing more internal than external bleeding, and that he died as a result of these stab wounds close in time to his wife's death.

Bernice was found in the same trailer with multiple stab wounds. She lay dead on a bed in the back of the trailer and was nude except for one sock.

A nightgown and female underwear with a knot tied in it lay on the floor next to the bed. Additionally, pieces of a porcelain toilet tank lid were found underneath her. Dr. Melamud testified that Bernice incurred a total of fifty-six cut or stab wounds, many of which on her right arm he opined to be defensive. Her jugular vein had been slit. Additionally, she had received significant blunt trauma injuries to her head, and her nasal bones were fractured. Dr. Melamud testified that Bernice died as a result of her injuries sometime in the early morning hours of December 31, 1996. No semen was detected on Bernice.

With the permission and assistance of Outdoor Resorts, detectives searched the park's dumpsters the morning of January 3, 1997. The dumpsters had not been emptied since prior to December 31, 1996. During the search, detectives found three garbage bags containing pieces of a porcelain toilet tank lid, a wallet containing Clifford's identification and credit cards, keys with a tag stating "Cliffs keys," glasses, bloody socks, paperwork with the address of lot 301, and paperwork bearing the names of the defendant and his son, Christopher Woodel.

That afternoon, detectives went to lot 301. Woodel lived there with his long-time girlfriend, Christina Stogner,

and his sister, Bobbi Woodel. Woodel and his sister signed consent forms to have their trailer searched. Stogner was out of town at that time. Also present that day at lot 301 was Gayle Woodel. Although not known at that time, it would later be discovered that Gayle married Woodel in 1989, and they had a son together, Christopher. Gayle and Woodel separated in 1992 but never divorced. In 1996, Gayle and Christopher lived in North Carolina while Woodel lived in Florida. However, Gayle had just come to Florida from North Carolina so that Christopher could spend some time with Woodel. Gayle, Christopher, and two of Gayle's friends were staying at Woodel's trailer.

While some detectives searched the premises, Woodel agreed to be questioned by other detectives. As Woodel left with the detectives, Woodel went over to Gayle and whispered for her to get rid of the knife Woodel had hidden. Gayle told Woodel's landlady and friend about the content of the communication. Gayle later told deputies as well.

The detectives gave Woodel *Miranda* warnings, and he consented to talk with them. He initially told the detectives that he had been home asleep at the time of the murders. After further questioning, Woodel began to write out a statement. He then stopped

and confessed to killing the Moodys, whom he said he had never met. The detectives then tape-recorded Woodel's confession. In this taped confession played for the jury, Woodel admitted to drinking with others that evening after work in the lot next to the Pizza Hut where he worked. Afterwards, Woodel walked to Outdoor Resorts, a little over a mile from the Pizza Hut. Woodel admitted to entering the Moody's rental trailer early in the morning after seeing Bernice through the window. He said he went in to ask for the time. According to Woodel, Bernice was alone in the trailer. Upon seeing him, she came at him with a knife, over which Woodel soon gained control. He then proceeded to stab her many times and hit her over the head with a porcelain toilet tank lid one to three times. The toilet lid shattered.

Clifford was last seen doing laundry at the Laundromat by security guard Elmer Schultz between 5:30 and 5:40 a.m. In his confession, Woodel said that he was leaving the trailer when Clifford came inside. Woodel then stabbed Clifford. As Clifford lay on the floor, Woodel picked up a bucket and placed pieces of the shattered toilet tank lid in it. He also placed the knife along with several other items in the bucket. Woodel said that after stabbing Clifford, he took Clifford's wallet.

> Woodel also said in his confession that he threw some items into a canal in the mobile home park, threw some items away in his garbage, and hid the knife behind a dresser. Deputies would later find pieces of the toilet tank lid and Bernice's eyeglasses in the canal, and a knife in Woodel's room wedged between a wall and the dresser.

POSTCONVICTION MOTIONS

The Defendant filed his Motion To Vacate Judgments Of Conviction And Sentence on November 6, 2009; and the State filed the State's Answer To Motion To Vacate and Memorandum of Law on January 4, 2010. The Defendant filed an Amended Motion To Vacate Judgments of Conviction And Sentence, on April 16, 2010; and the State filed the State's Answer To Amended Motion To Vacate on May 6, 2010. The Defendant filed a Notice of Withdrawal Of Ground 1(B) of Amended 3.851 Motion on June 30, 2010; and the Defendant filed a Notice of Withdrawal Of Ground 2(D) of Amended 3.851 Motion on August 18, 2010.

CASE MANAGEMENT CONFERENCE

Case Management Conferences were held on March 10, 2010 and May 13, 2010, pursuant to Rule 3.851, Fla. R. Crim. P. The Court found that it would be appropriate to have an evidentiary hearing on Claims IA, IC, lD, IIA, IIB, IIC, IIE, IIF, and IVB , of the Defendant's Amended Motion To Vacate Judgments of Conviction And Sentence, filed on April 16, 2010.

EVIDENTIARY HEARING- TESTIMONY

An evidentiary hearing was held in this matter on March 21-25, 2011; May 11-13, 2011; and June 3, 2011. The testimony presented by the witnesses included the testimony summarized below.

Testimony of Allen R. Smith from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume I, pages 33- 132.

The Defense called Allen R. Smith as a witnesses. Mr. Smith is an attorney who was appointed to represent Mr. Woodel on February 5, 1997. Mr. Smith testified that he was primarily responsible for the guilt phase in Mr. Woodel's case at his 1998 trial. Mr. Smith agreed that their theory at the guilt phase was that Mr. Woodel was too drunk to form the intent necessary for premeditation. Mr. Smith agreed that he did request and the defense did receive an instruction of voluntary intoxication. In closing arguments, Mr. Smith argued that the defendant was guilty, at worst, of second degree murder because he had no intent to commit murder. Mr. Woodel had no plan, there was no evidence that he had premeditatedly designed to commit any crime. Mr. Smith agreed that this was due to Mr. Woodel's alcohol consumption.

Mr. Smith testified that he hired investigator, Wayne Tucci. Mr. Tucci's primary responsibility was to corroborate Mr. Woodel's drinking on the night of the incident. Mr. Tucci tried to locate some people that were with the defendant on the night of the incident but was unsuccessful. Mr. Tucci did not investigate Mr. Woodel's background or do any mitigation investigation for Mr. Woodel. Mr. Smith testified that he did not consult with or consider

consulting a toxicologist to explain the effects that intoxication would have had on Mr. Woodel. Mr. Smith was asked about the testimony of Arthur White, a jailhouse snitch, who was called by the State as witness in the case in chief. It was Mr. Smith's opinion that the testimony of Arthur White with regard to fondling was not particularly damaging to Mr. Woodel. He said there was no other evidence, forensic or otherwise, supporting that testimony. Mr. Smith was asked about a statement that Mr. Woodel made to his wife about hiding the knife that the State brought up in opening statements. Mr. Smith agreed that the defense was not aware at the start of trial that Mr. Woodel was still married to Gayle and that spousal privilege would apply. He said that had they known that, they probably would have raised the issue. The defense introduced some exhibits, numbers 44, 45, and 46, which were police reports. Mr. Smith agreed that, based on the police reports, there was evidence that he would have received that Mr. Woodel was still married.

Mr. Smith was asked about Dr. Dee's roll in the penalty phase. Mr. Smith said that part of Dr. Dee's roll was to try and explain Mr. Woodel's history and his youth and what kind of roll his history might have had in the situation. He wanted Dr. Dee to talk about the impact of alcohol on Mr. Woodel and the history of his life altogether. Mr. Smith testified that he was not part of the retrial of the penalty phase in 2004. Mr. Smith agreed that Toni Maloney became involved in November, 1998 after jury selection of the guilt phase had begun. Mr. Smith agreed that he thought it was Toni Maloney who had discovered that both of Mr. Woodel's parents were deaf. Mr. Smith testified that he never considered hiring an expert in

deaf culture or an expert in the phenomenon known as CODA, which is the hearing children of deaf adults. He did not know they existed. Mr. Smith was asked about interviewing Mr. Woodel's father, Albert. He testified that he thought this happened just before the penalty phase started. Mr. Smith acknowledged that they used Mr. Woodel's sister, Bobby, as an interpreter to talk with Albert. Mr. Smith said that Mr. Colon's office was primarily responsible for finding the mitigation witnesses and the mitigation records. Mr. Smith was asked again about Arthur White. Mr. Smith agreed that he had handled the cross-examination of Mr. White in the guilt phase of the trial. Mr. Smith said that he took Mr. White's deposition and that he had also reviewed his entire criminal record. Mr. Smith testified that he didn't see anything in the files or anything in Mr. White's testimony as far as the deposition or at trial that indicated that he got some kind of special deal or that cases were modified prior to his testimony. Mr. Smith was asked why he didn't consult a toxicologist or consider consulting a toxicologist. Mr. Smith responded, "I had never done that and I didn't - I mean, it didn't --it didn't cross my mind." (EH March V1/57).

On the date that the defendant's wife, Gayle, was going to testify, the State divulged to Judge Pyle that they had just learned that she was still the wife of the defendant and they proffered her testimony. At that point, Judge Pyle ruled that her testimony was not admissible because of the marital privilege. Mr. Smith agreed that he asked for a mistrial at that point in time. Mr. Smith agreed that at the time they asked for a mistrial, the State had not introduced the defendant's taped statement. In his taped statement,

the defendant was asked what he had done with the murder weapon and he said that he had put the murder weapon behind a privacy dresser type thing in his bedroom. The defendant's taped statement was made on January 3rd. Mr. Smith testified that had the jury actually heard testimony from the defendant's wife, Gayle, that he had told her that the knife was behind the dresser that possibly could have been an issue that resulted in a mistrial, but the jury did not hear this evidence directly from Gayle and they ultimately did hear this evidence when the confession of the defendant was played for them. At the evidentiary hearing, the State asked Mr. Smith about the Florida Supreme Court opinion in Woodel v. State, 804 So.2d 316 (Fla. 2001). The State pointed out that the Florida Supreme Court noted that there was not contemporaneous objection and that the error was not so prejudicial as to vitiate the entire trial. The State quoted the following language from the Florida Supreme Court opinion: "Essentially, the comment was for Gayle to get rid of the knife. However, Woodel was not harmed by the comment because Woodel confessed to the crime, discussed the location of the knife in his confession, and signed a consent form for the trailer to be searched. For each of these reasons, the trial court did not err in denying the mistrial motion." Mr. Smith agreed that in the context of what the jury was going to hear regarding the defendant's confession, he did not really have a valid basis for getting a mistrial.

Mr. Smith was asked about his comfort level in terms of Dr. Dee's ability to identify the mental health issues that they wanted to present to the jury for mitigation purposes. Mr. Smith said that he thought that Dr. Dee was very competent. Mr. Smith

was asked the following question by the State: "As you sit there now from your standpoint, do you feel that it would have been necessary to use a psychologist who had some prior knowledge or understanding of that area as opposed to using Dr. Dee who educated himself by reading the literature and making that presentation to the jury?" Mr. Smith responded; "Well, obviously had I had knowledge of that background, that information, I could at least had inquired about that and found out what other things they would have known or been involved in that maybe Dr. Dee wouldn't have been involved in. And, obviously, had I had the knowledge now that - - back then, I might have sought out somebody who was a specialist, but I didn't even know they existed." (EH March V1/119). On redirect Mr. Smith was asked again about a legal basis to keep the issue of fondling out in a pretrial motion. Mr. Smith agreed that the defendant was never charged with sexual battery, so the defense could have argued that the testimony was irrelevant and even if it was relevant, the prejudicial value outweighed any probative value. Mr. Smith was asked if Tommy had always denied that the fondling had taken place. He answered, "Absolutely." (EH March V1/130).

Testimony of Wayne Tucci from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume I, pages 133-155.

The defense called Angelo Wayne Tucci as a witness at the evidentiary hearing. Before he retired, Mr. Tucci was a private investigator. Mr. Tucci testified that in December, 1997, he was appointed to work on the case of Thomas Woodel. Mr. Tucci testified that he did not have any particular training

in mitigation investigation or in conducting a biopsychosocial assessment of a defendant. Mr. Tucci testified that in Mr. Woodel's case, he thought that he had talked to approximately half a dozen witnesses. Mr. Tucci testified that basically the people he interviewed during his investigation was for the purpose of trying to corroborate Mr. Woodel's drinking on the night of the crime. He tried to dig up additional witnesses who saw Mr. Woodel drinking on the night of the incident. Jessica Wallace told him some other men or boys were drinking with Mr. Woodel, but her description of them was not sufficient enough for him to follow up on the matter. He also talked to interview a guy at a 7-Eleven store to see if Mr. Woodel or any other person on the witness list had purchased any alcohol there. Mr. Tucci was asked if there had been a $1,500.00 cap for his services of the 1998 trial, and he answered that he thought that was correct. Mr. Tucci was asked if he thought that he had used this entire amount and he responded that he didn't think he came close to it. Mr. Tucci was hired again for the 2004 penalty phase. He agreed that the sole purpose for which he was hired in 2004 was to serve subpoenas. Mr. Tucci testified that he thought he was paid about $128.00 for this work. Mr. Tucci testified that he was not hired in 2004 to do any further investigation.

Testimony of Toni Maloney from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume I, pages 156-184, and Volume II, pages 189-213.

The defense called Toni Maloney as a witness. Mrs. Maloney testified that she was currently employed as a licensed private investigator in the State of Florida and had been employed as such since

1998. Mrs. Maloney testified that prior to 1998, she worked at the Public Defender's Office for just under 14 years. When she worked at the Public Defender's Office, she was an investigator and she had two areas of specialization. One of the areas of specialization involved cases where significant mental health issues existed and the other area of her specialization was capital cases. Mrs. Maloney was asked how many capital cases she had been involved in as a capital mitigation investigator. She answered that she had worked on roughly well over 100 such cases.

Ms. Maloney was court appointed in November 1998 to work on Mr. Woodel's first trial. She was retained on November 12, 1998 and jury selection had begun on November 9, 1998. She testified that she thought she had been appointed because Dr. Dee wanted someone to assist with some social history investigation or help pulling some records or interview together. She said that normally she would be appointment months earlier.

Mrs. Maloney was asked about the importance of getting a multigenerational history of the defendant. She replied, "Well, what we're looking for is to see if there are things, whether they might be genetic in the history of the client or whether there is a predisposition to some issue that might impact the client's development and behavior. For example: A predisposition to addiction, whether it's drugs or alcoholism or whatever or are there any medical or physical issues that run through the family that would impact our client's behavior. (EH March Vl/161).

Defense counsel asked Ms. Maloney if it was standard practice when conducting capital mitigation to travel to an area where a client had lived for many

years. Ms. Maloney answered affirmatively, and added that this allowed you to see the environment where the client grew up. Ms. Maloney also testified that she was sure she had attempted to obtain some records. Defense counsel showed Ms. Maloney counseling records for Thomas Woodel that contained a note that she recognized as being in her handwriting. The records were dated November 4, 1982. The therapist was Thomas Kerwin. She did not recall ever having contact with Thomas Kerwin. She said that in preparation of a capital mitigation presentation Thomas Kerwin would have been someone she would have contacted right away. Defense counsel also showed Ms. Maloney some records from the Children's Home, Incorporated that referred to Thomas Davis Woodel and Bobbie Lisa Woodle. She testified that she remembered the records from the Children's Home and they indicated that Mr. Woodel was admitted August 30, 1976. She testified that there were several people named in the documents that they would have testified if they had had the time. Ms. Maloney was also shown some school records and she agreed that some of them were obtained by trial counsel and her, and some were obtained by CCRC. She agreed that school records would be something that was standard to obtain. These would be given to the defense's experts, and school records might turn up some potential witnesses.

Ms. Maloney testified that she interviewed Mr. Woodel in the attorney interview area at the jail. As she was asking him questions about the dynamics of his family, she recognized that what he was doing with his hands was signing. At that point in time she had no idea that either of his parents was deaf. She

asked if he knew signing and he answered affirmatively. As they talked she learned that both his father and mother were deaf. She testified that when she left the interview she immediately contacted Dr. Dee and telling him that they had an issue she had never dealt with before. She said; "This young man was raised in a household where what I just learned is that he and his sister, who was also in the household at the same time, hear and speak, neither one of his parents hear and speak and I think that that's pretty significant." (EH March Vl/171).

She said that Dr. Dee did not know that at the time. She testified that she started doing research and found a book called Mother Father Deaf which she thinks she gave to Dr. Dee. She said that they hoped to find a professional or someone that could connect with Dr. Dee to help him become more educated on the topic, but they were not able to find someone. They had less than three weeks to do this, and that period of time included the Thanksgiving holiday. At the evidentiary hearing the State said to Ms. Maloney that it sounded like she had utilized all of the avenues that were available to her to find a CODA expert. She responded; "No I don't give up that easily to be honest with you. If I had the time we would have found somebody. I have confidence in that. I-- I just didn't have time." (EH March V2/206).

Ms. Maloney was asked if she tried to contact any other witnesses besides, Mr. Woodel's sister Bobbie, his paternal aunt, Becky Russell, and his father, Albert Woodel. Ms. Maloney testified that she tried to contact Mr. Woodel's mother, but she was not successful. Ms. Maloney was asked if there was any additional mitigation investigation that needed to be done, and she responded affirmatively. She was

asked why additional mitigation investigation was not done, and she replied; "We just didn't have time." (EH March Vl/178). Ms. Maloney was asked what else should have been investigated. She testified that there should have been a visit to the area where Mr. Woodel grew up. She testified that she needed to visit North Carolina and Michigan to find people who knew the family and knew about the deaf culture.

Ms. Maloney was asked if she was ever contacted by Mr. Colon to do any mitigation investigation when the penalty phase was retired in 2004. She testified that she never had any more contact with anyone about the case after the 1998 trial. She testified that she would have recommended that additional mitigation investigation was needed had she been contacted. The Court asked Ms. Maloney if she had ever been contacted by Mr. Colon for the new penalty phase in 2004, and she replied, "- no sir, I never did. I had no contact." (EH March Vl/181).

Testimony of Danielle Waller from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume II, pages 214-332, and Volume Ill, pages 335-439.

The defense called Danielle Waller as witness. Ms. Waller is self-employed as a mitigation specialist, and she has been a mitigation specialist for 11 years. Ms. Waller worked for five years for the Florida State Appellate Defender's Office in the death penalty assistance division. Ms. Waller testified that, "A mitigation specialist interviews witnesses, obtains records, conducts a multigenerational investigation into the client and their family." (EH March V2/218). She testified that she also identified areas where expert assistance would be helpful and provided

experts with background documents. Ms. Waller interviewed 18 witnesses in preparation for this case. Ms. Waller testified that she had reviewed police reports, reports from the prosecution, the trial attorney's file, and documents that CCRC gave her. Defense counsel showed Ms. Waller a substantial amount of documentation that was located by CCRC and trial counsel about the Defendant and his family members concerning matters before the time of the 2004 penalty phase trial. These included school records, divorce records, police reports, and criminal records of Mr. Woodel, his parent's Jackie and Albert, and other relatives of Mr. Woodel.

Ms. Waller testified that the defendant's maternal grandparents, Robert and Edna Alward were alcoholics and there was domestic violence in the household. The defendant's mother, Jackie, and her brother, Robert Alward, were deaf and neither of the parents learned sign language. Ms. Waller reviewed Jackie's records from the Michigan School for the Deaf, which revealed an IQ of 80 and that she dropped out of school.

Ms. Waller testified that the defendant's paternal grandparents, Mary Young and Davis Woodel abandoned their children, Albert and Becky, when they were young. When Davis Woodel was serving in the military, Mary got pregnant by another man. Ms. Waller said that Davis Woodel was an alcoholic who was not involved in the raising of Albert and Becky. Albert and Becky were raised by Davis' mother, Ella. Ms. Waller testified that Albert Woodel was an abusive alcoholic. He was known in the deaf community as a thief and preyed on people were deaf.

After Albert and Jackie Alward divorced, Albert married Linda Mattson. The marriage lasted three years and ended due to Albert's affair with Beverly. Beverly was 17 years old and Albert was 44. Ms. Waller said that Tommy Woodel had feelings for Beverly, which is important because it was the ultimate betrayal by his father.

Ms. Waller testified that the defendant's sibling were also dysfunctional. Charles Sisk, his half-brother, died at age 16 as a result of an alcohol related automobile accident. Scott Sisk, the defendant's other half-brother, had chronic drug and alcohol problems and was sentenced to prison the first time at age 18. The defendant's sister, Bobbie, had an alcohol problem and attempted suicide at the age of 13. Ms. Waller testified that nobody left this family unscathed.

Ms. Waller was familiar with the 1989 and 2003 ADA guidelines. She identified areas where a mitigation specialist would have been helpful. She was also of the opinion that, based on the 2003 ADA guideline, a CODA expert should have been retained.

Testimony of Gene C. Bowen from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume III, pages 439-495.

The defense called James C. Bowen as a witness. Mr. Bowen testified that he was at the children's home in Winston Salem, North Carolina for three years, along with the defendant. He testified that his brother and sister were also at the children's home and they had been removed from their home because of abuse and neglect. He testified that both is parents were alcoholics. Mr. Bowen testified that the children's home was highly structured but that

the defendant, Tommy, struggled in making an adjustment pretty much over the whole three year period that he knew him. He described Tommy as being in the bottom of the social pecking order in their cottage. He said Tommy would give up things so that he could hang out with the older boys who were considered cool. He testified that the whole three years that he was at the children's home, Tommy and his sister, when they met together would always sign. He testified that when Tommy would do this with his sister, he would become very animated. When Tommy was not communicating by signing, his face was blank. He had an expression on his face that seemed to look like he was dazed. Mr. Bowen testified that he was not contacted by Tommy's defense team in either 1998 or 2004, but if had been contacted he would have been available and willing to testify to the same things he testified to at the evidentiary hearing.

Testimony of Gilbert Colon from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume IV, pages 499-560.

The defense called Gilbert Colon, Jr. as a witness. Mr. Colon agreed that he was appointed to represent Tommy Woodel on March 7, 1997. At the time he was appointed to represent Mr. Woodel, he had taken two or three capital cases to a verdict. Mr. Colon testified that he was aware of the ABA guidelines. Mr. Colon's theory of the case was that the murders were unintentional and that the defendant had been drinking and he did not remember details of the murder.

Mr. Colon did not remember if he had ever talked to the investigator Wayne Tucci, who had been hired to work on the case. Mr. Colon testified that he

was responsible for investigating the 1998 penalty phase, but he and AJ Smith both worked together on both phases of the trial. He testified that he was responsible for doing the background mitigation investigation for that trial. Mr. Colon was asked what his penalty phase theory was in 1998. Mr. Colon answered, "Well, to the best of my recollection, that alcohol was a factor; that he had no prior criminal violent record; that he had grown up in a family with deaf parents where the mother was abusive, neglectful, provided a very poor household environment where Tommy had to even go to a children's home for a period of time; where he and his sister - - where his - - him and his sister would actually have to wait until the neighbor would pull into their driveway, take a bag of groceries inside the house, and then they would go and take that - - that food out of the trunk of that vehicle, that was part of it." (EH March Vol 4/512).

The defense counsel asked Mr. Colon if he recalled Mr. Woodel's statement to Gayle to get the knife or hide the knife. Mr. Colon said that he recalled the statement after he was reminded of it and that he did not remember whether he filed a motion in limine to keep it out. Defense counsel mentioned to Mr. Colon that the State, in its opening statement, had referred to Tom's statement to his wife, Gayle, about the knife. The State later advised the Court that they realized that Gayle Woodel was still married to the defendant. Mr. Colon was asked if he knew that they were still married. Mr. Colon answered, "You know, I don't - - I remember the - - what happened when it came out in opening and I remember later on the disclosure that, in fact, they were - - they were married. What I don't remember

was whether we knew, whether the objection did not come because we just missed it, or whether because we believed they were married or not married - - sorry - - so I don't recall a reason." (EH March V4/513-514. Mr. Colon testified that it was definitely not a strategic decision to let that information come out in opening statements.

Mr. Colon testified that he did some investigation for the 1998 penalty phase, but his memory was vague. He did not remember seeing records from the children's home and did not know if they were in his file. Mr. Colon acknowledged he received a memo from Dr. Dee, in which Dr. Dee suggested hiring a mitigation specialist. Dr. Dee recommended Toni Maloney, who was appointed on November 12, 1998, three days after the trial had begun. He did not remember what investigative efforts were made for the 1998 penalty phase other than talking with the defendant and some family members.

Mr. Colon was asked about Dr. McClane, a psychologist, who was appointed on December 10, 1997, to help the defense. His records reflected that he spoke with Dr. McClane on the phone for about fifteen minutes. He did not believe that he ever received a report from Dr. McClane. When he was shown Dr. McClane's report, he agreed that the report noted that both of the defendant's parents were deaf and there was a multigenerational pattern of alcoholism and drug abuse throughout Mr. Woodel's family. Mr. Colon conceded that a multigenerational family pattern of alcoholism should have been developed for trial, but he did not agree that an expert was necessarily needed.

Mr. Colon was asked about Arthur White, a jailhouse informant that testified that the Defendant had told him that he fondled the victim. The defense alleges Mr. Colon was ineffective for failing to file a motion in limine to exclude the testimony of Mr. White. Mr. Colon testified that he thought Arthur White provided the yuck affect to the case. Mr. Colon was asked about the 2004 penalty phase. He was asked if he did his own investigation to see how many convictions Arthur White had. Mr. Colon said the only investigation that he completed was asking the State if they had any certified convictions of Mr. White. Mr. Colon testified that he didn't have an independent recollection if Mr. Wallace, the Assistant State Attorney, had shown him certified copies of the convictions; however, Mr. Colon testified that having worked with Mr. Wallace for many years, he would have no reason to doubt the number of convictions that Mr. Wallace would have told him. Mr. Colon testified that there would not have been a down side to cross examining Mr. White about crimes of dishonesty or false statements had he been aware that Mr. White gave an incorrect number of felony convictions. Mr. Colon also testified that he didn't investigate to see what kind of sentence Mr. White might have received before he testified. Mr. Colon testified that he relied on Mr. Wallace's reputation that there were no deals in place with regard to Mr. White.

Mr. Colon was asked again about the 1998 penalty phase. He testified that he was responsible for doing the background mitigation investigation for that trial. Mr. Smith also worked on that as well. Defense counsel showed Mr. Colon defense exhibit eight, which were records of which were children's

home records. Mr. Colon said that he remembered that they did a background check pertaining to the fact that the defendant and his sister had been in a home, but he did not remember the children's home records that he was being shown. Mr. Colon testified that it was likely that the children's home records were obtained by Toni Maloney and not him. Mr. Colon was shown defense exhibit seven, which were counseling records from Tom Kerwin. Mr. Colon said he didn't remember seeing those records and that they were likely obtained by Toni Maloney. Mr. Colon was asked again what kind of investigative efforts he had done to investigate the 1998 penalty phase mitigation presentation. Mr. Colon answered, "Again, I don't remember. It was so long ago. I either spoke with Tommy, spoke with - - perhaps with family members, maybe the ones that were able to communicate with. We may have done a background check but, again, I don't remember all those details." (EH March V4/524).

Mr. Colon was asked what mitigation witnesses he talked to in preparation for the 1998 penalty phase. He said that he thought remembered meeting the sister and the father, either at Dr. Dee's office or perhaps at a motel. He also said that he may have spoken with the sister, Bobbie, over the phone several times. Mr. Colon was asked if remembered that he spoke to these witnesses after the guilt phase was already over and there was already a verdict. Mr. Colon said that he would like to believe that he spoke to them before that point. Mr. Colon was asked if he recalled that he asked for a continuance at the 1998 trial. Mr. Colon answered that he did remember that. Mr. Colon was shown defense exhibit 43, which he testified was a fax from Dr. Dee to his

office dated November 6, 1998. Jury Selection started on Monday, Mr. Colon testified that he did not remember when they asked for a continuance of the trial, but he thinks that they moved to continue the trial before the trial started. Mr. Colon testified that he did not remember who first found out that Mr. Woodel's parents were deaf. Mr. Colon was asked if he ever considered trying to find an expert who specialized in deaf culture or CODA's. He testified that he did not. He was asked if he ever tried to educate himself on deaf culture or CODA's. Mr. Colon responded, "Well, that's - - that's why we went with Dr. Dee. Once we had used - - I had used Dr. Dee in the past. As a member of the defense bar, we've - we've kind of used Dr. Dee on a frequent basis. And so we asked him about it and he himself proceeded to seek some information and read upon it, so I kind of relied on Dr. Dee for direction in that - - in that area. (EH March V4/535).

Mr. Colon testified that he did not ever consider hiring a toxicologist or other similar type of expert to explain the effects of alcohol or to calculate Mr. Woodel's blood alcohol level at the time of the crime. Mr. Colon testified that he did not think hiring such an expert was necessary and explains why he didn't think such an expert was necessary. He testified, "Well, my opinion, we live in Polk County and I knew that at least a good portion of those jurors knew what it is to be drunk, so I knew that we knew what a drunk person does when they're - - when they're drunk, such as do stupid things, have memory loss, things of that nature. So no, it never crossed my mind to get an expert to determine his blood alcohol or to get testimony that - - that he was drunk and what drunk people - - what affect

drunkenness or alcohol has on a person." (EH March V4/536). Mr. Colon was asked if there was a down side to consulting a toxicologist to assist in the understanding of effects of alcohol on the brain short of presenting the expert at trial. He answered, "You know, usually, I mean, that kind of testimony, I don't see the downside other than this, when you start producing experts in every piece of the defense, I call that shotgun defense and now the jury starts questioning the validity of the actual defense. I didn't want the jury to start questioning my expert on some areas such as that, that I considered to be as basic as being drunk." (EH March V4/537-538).

Mr. Colon was reminded again that Judge Pyle had not given them a continuance in 1998. He was asked what other family members he had talked to. He agreed that he had not spoken to Tom's mother or to his half-brother, Scott. He testified that the family members he remembered were the defendant's dad, his sister and his aunt. He agreed that he never traveled to Morgan Town, North Carolina or Flint, Michigan. He also agreed that he never traveled to Pennsylvania, where Mr. Woodel lived with his Aunt Becky. Mr. Colon testified that he did not go visit any members of the deaf community in either Morgan Town, North Carolina, Flint, Michigan, or have Mr. Tucci or Ms. Maloney do that. Mr. Colon was reminded that the matter was sent back by the Florida Supreme Court because the sentencing order done by Judge Pyle for the 1998 trial was deficient.

Mr. Colon was asked what the defenses theory was for the 2004 penalty phase. Mr. Colon responded, "Again, that Tommy was under the influence of alcohol, extreme influence of alcohol, that he never intended to kill anybody, that his past as a -

- as a - - growing up in the family that he grew up and the environment that he grew up in may have provided a basis for this, but Dr. Dee could not pinpoint that. But, you know, that was the only explanation that we could come up with, that perhaps this was some kind of repressed aggression that he had for his own mother that had come out during the contact that he had with Ms. Moody." (EH March V4/551).

Mr. Colon was asked if he had Wayne Tucci reappointed to assist him in the investigation. He said that he didn't think he did, but he didn't remember. He was asked if he had only hired him to serve subpoenas and Mr. Colon answered, "If that's what the record shows, then that's what I did - -." (EH March V4/553 -554). Mr. Colon agreed that he did not ask Mr. Tucci to do any additional mitigation investigation. Mr. Colon testified that he did not think he tried to have a mitigation investigator appointed to assist in investigating or reinvestigating the case when he was preparing for the 2004 penalty phase. He talked to the same three family members, Bobbie, Albert and Aunt Becky that had testified at the 1998 trial. He did not go to North Carolina or Michigan, or hire an investigator to do so.

Mr. Colon was asked if he did any additional investigation to prepare for the 2004 penalty phase. He responded, "I don't believe I did, other than reviewing our file, the record, the transcript, and I decided to proceed with the same - - same type of defense." Mr. Colon went on to say "I - - I believed in our defense. I thought our arguments were - - were solid." (EH March V4/554). Mr. Colon was asked if he did any additional work to add to the body of work he had dealing with the issue of CODA. He

responded, "No, I did not. As I said before, I thought that what we had developed was a good strategy and was a good defense. I mean anything can be further developed or you always can do a lot more if -if-if-if you really want to. I felt that we were okay with what we had. And, you know, surely looking back now, I wish I would have hired somebody that would come in and provide further testimony to see if it would help. I mean, it was a close vote, seven to five. So could it have made a difference, I don't know. But now I wish I would have done it." (EH March V4/559-560).

Testimony of Nancy McKenzie from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume IV, pages 561-597.

The defense called Nancy McKenzie as a witness. Ms. McKenzie is a sign language interpreter, and she is the interim director for Communication Access Center for Deaf and Hard of Hearing in Flint, Michigan. McKenzie testified that they would interpret letters and other documents like that for people that walked in for assistance. Ms. McKenzie testified that she was a CODA, which is a child of deaf adults. Ms. McKenzie testified that she had met Tommy Woodel and his mother, Jackie, about twenty something years ago at a time when Mr. Woodel was about 10 or 12. Ms. McKenzie thought Jackie had come to her for some kind of financial assistance. Ms. McKenzie testified about her impression of Jackie. She said, "Jackie seemed very immature, naíve, almost like a child herself." (EH March V4/568). She testified that she did not think that Jackie was being the parent in this situation. Ms. McKenzie testified that Jackie did not fit into the deaf community in Flint, Michigan. She

explained, "I'm thinking probably - - some of it was due to her immaturity and as - - and most of the deaf people really couldn't sit down and have an adult conversation with her, so they just sort of rejected her." (EH March V4/571). Ms. McKenzie testified that Jackie had difficulty understanding things both intellectually and socially. Ms. McKenzie said that Jackie would talk about drinking alcohol, and Ms. McKenzie would confirm that maybe Jackie was drinking with the children present. Ms. McKenzie testified that she was not contacted by anybody from Mr. Woodel's defense team prior to 2005. Ms. McKenzie agreed that she would have been willing to talk to a lawyer if she had been contacted in 1998 or 2004 and she would have been willing to come to court and testify about the same things she testified to at the evidentiary hearing.

Testimony of Thomas J. Kerwin from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume IV, pages 598-648.

The defense called Thomas J. Kerwin as a witness. Prior to his retirement, Mr. Kerwin worked at the Gennesy County Community Mental Health Center in Flint, Michigan. Mr. Kerwin has a Masters Degree in Counseling. He said they provided psycho therapy in the general sense of the term. He testified that Mr. Woodel was 12 years old when he first came to them for their services. Mr. Kerwin was asked what his overall impression was of Tom. He testified that he questioned why Tom was there. He said that Tom was not doing too badly in school and that the school did not refer Tom to them. Mr. Kerwin was asked about his overall impression of Mr. Woodel's mother Jackie. He testified that he began to realize that Jackie was roping her son in here. Mr. Kerwin

testified that the first two times he saw Tom he had come to the counseling session without shoes. He testified that his theory about this was that this was an attempt by Tom's mother to block any attempt by Tom not to show up for treatment. Mr. Kerwin testified that he was stunned that Jackie was trying to get Tom out of the house. He agreed that he came to the conclusion that the problem wasn't Tom, but it was Jackie.

On cross examination, Mr. Kerwin testified that he felt Thomas' mother was an unfit mother based upon his contact with her. Mr. Kerwin agreed that on a quarterly summary treatment plan he had written that Tom is a controlling, passive aggressive individual, also manipulative. Mr. Kerwin testified that his assessment was inaccurate and once he got to know Tom, he found that he really wasn't controlling and manipulative.

Mr. Kerwin testified that he didn't think he was contacted by any lawyers on behalf of Mr. Woodel in either 1998 or 2004. He testified that he would have come to court if he had been contacted by the lawyers and would have been willing to give the same testimony that he gave at the evidentiary hearing.

Testimony of Robert F. Alward from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume IV, pages 653-684.

The defense called Robert F. Alward as a witness. Tommy Woodel is Mr. Alward's nephew and Jackie his sister. Mr. Alward testified that his father liked to get drunk, and he got drunk two or three times a month. Mr. Alward testified that his father had a temper, and he did see his father hit Jackie on the ear that had her hearing aide. Mr. Alward

testified that he remembered one time that his father was stomping or jumping on his mother. Mr. Alward testified that neither of his parents signed and he agreed that this made it hard for him to do things with his parents. Mr. Alward testified that he went to the Lutheran School for the Deaf when he was four years old, and then he went on to the Michigan School for the Deaf. Mr. Alward testified that his sister, Jackie, came to the Michigan School for the Deaf when she was about fourteen, and other students at the school teased her and made fun of her. Mr. Alward testified that at some point, Jackie became a day student at the school. He testified that she would skip school and go down to downtown Flint where she would hang out with hearing people. Mr. Alward agreed with counsel that downtown Flint was known for drinking and sex.

Mr. Alward was asked if he was embarrassed about Jackie. He answered affirmatively, and said she would go downtown without any teeth in, and she would carry a flask of whiskey with her in her purse. She was seen by some of his friends drinking in church. Mr. Alward was asked about his Mother Edna and he testified that his mother had shot an Indian man who she claimed wanted her hair. On cross-examination, Mr. Alward testified that his mother was forced to take the life of someone who was trying to harm her. Mr. Alward testified that if he had been contacted in 2004, he would have come to Court and said the same things he did at the evidentiary hearing.

Testimony of Jessie Church from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 689-708.

The defense called Jessie Church as a witness. A sign language interpreter was used to interpret Mr. Churches answers from American Sign Language to English. He testified that he knew Albert Woodel beginning in 1974. Mr. Church testified that Albert liked to get drunk a lot. Mr. Church was asked about Albert's reputation in the deaf community. He agreed that Albert was known to be a thief and a liar. Mr. Church testified that Albert ignored his children. He testified that Albert was the treasurer of the deaf fishing club, and he stole money from the club and never paid it back. Mr. Church testified that if had been subpoenaed in 2004, he would have come to court and said the same thing.

Testimony of Bonnie Holland from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 709-728.

The defense called Bonnie Holland as a witness. She knew Mr. Woodel when he and Christina were living in Michigan. Mr. Woodel was in a relationship with Ms. Holland's niece Christina Stogner. Periodically, Mr. Woodel and Christina lived with her. She testified that Mr. Woodel interacted with her children well and that he treated Christina very well. She testified that she was drinking heavily at the time that Mr. Woodel and Christina lived with her, and Mr. Woodel told her she should think about quitting drinking. He was concerned about her children. Ms. Holland testified that she knew Mr. Woodel's mother Jackie. She stopped by Jackie's house after she was separated from Don Bigelow, and she said there were pictures on the wall with faces scribbled out. She testified that she also knew Mr. Woodel's brother Scott. After Mr. Woodel was arrested and incarcerated for these

crimes, Scott entered into a relationship with Christina, and they had a child together. She testified that if she had been contacted by Mr. Woodel's lawyers in 1998 or 2004, she would have testified to the same things she testified about today.

Testimony of Annie Swan from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 729-749.

The defense called Annie Swan as a witness. A sign language interpreter interpreted her answers from American Sign Language to English. Ms. Swan lives in Belmont, North Carolina. Ms. Swan testified that Mr. Woodel used to socialize with her children when he was about seven or eight years old. She lived at the same apartment complex as Albert, Jackie, and the children. She testified that Jackie and Albert were both unfit parents. She testified that Albert was violent, had a bad temper, stole things, and got revenge on people. She testified that in Jackie and Alberts apartment they removed the doors to the bathroom, kitchen, and some bedrooms. Albert and Jackie drank every day. She remembered seeing Mr. Woodel sitting in the bathroom for one or two hours having trouble going to the bathroom. She thought he needed medical attention, but Jackie never took him. Ms. Swan testified that if she had been subpoenaed in 2004, that she would have come to Court and said the same thing.

Testimony of Linda Mattson from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 749 -770.

The defense called Linda Mattson as a witness. A sign language interpreter interpreted her answers from American Sign Language to English. She

married Albert Woodel in 1983, and they were divorced in 1986. She said Albert was a heavy drinker, and he stole things. He stole money from the deaf club. Albert was having an affair with Beverly when he was married to her. She said that Beverly was about 17 or 18, and Albert was maybe 50. She talked to Albert about Tommy taking her car without permission and putting out cigarettes on the carpet, but he did not do anything about it. She did not think Albert was a good father to Tommy. She was afraid of Albert and one time he slapped her when they had a big argument. She got an injunction to keep Albert away from her. Albert was known in the deaf community to be a liar. She testified that Mr. Woodel skipped school a lot, but Albert didn't seem to care. Ms. Mattson testified that if she had been subpoenaed in 2004, she would have come to court and said the same thing.

Testimony of Randolph L. Salle from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 776 -789.

The defense called Lieutenant Randolph L. Salle, as a witness. Lt. Salle, is a correctional officer at Union Correctional Institution. He had an opportunity to supervise Mr. Woodel from April 200 through January 2003. He described Mr. Woodel as being respectful and compliant. Mr. Woodel got along with other inmates. He reviewed Mr. Woodel's disciplinary history and Mr. Woodel only had one disciplinary report. It was a contraband disciplinary report. Mr. Woodel had excessive stamps, a popsicle stick, and a latex glove. This happened before he arrived at Union Correctional, and Mr. Woodel has had no disciplinary reports since he has been at Union Correctional. Mr. Salle testified that if he had

been contacted in 2004, he would have come to court and testified to the same things that he testified to today.

Testimony of Lisa Wiley from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 789 - 816.

The defense called Lisa Wiley as a witness. She works at Columbia Correctional Institution in Lake City, FL. She is a behavioral specialist for the Florida Department of Corrections, she testified that the working title was mental health specialist. She worked at Union Correctional from 1989 to 2005. She saw Mr. Woodel in mental health services from April 2000 to January 2003. Mr. Woodel's decision to seek mental health treatment was voluntary. Mr. Woodel was respectful, compliant and interested in resolving his issues when he was in his sessions. She testified that if she had been subpoenaed to come and testify in 2004 she would have given basically the same testimony as she gave at the evidentiary hearing, but she would have had more detail because she probably would have had more memory of the interaction with Mr. Woodel.

Testimony of James Evans Aiken from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume V, pages 817 - 859.

The defense called James Aiken as a witness. He is the president of James E. Aiken & Associates, Inc. They are a prison, jail, correctional consulting concern. He was contacted by CCRC to do an evaluation of Mr. Woodel to determine his institutional adjustment. Mr. Aiken was asked about Mr. Woodel's institutional adjustment. He responded, "His institutional adjustment was

favorable and I say that from a security perspective. For an inmate to be incarcerated for the extended period between 1997 and 2004 and having only one write-up and that was not involved with systemic or random violence or potential for violence is highly unlikely. Inmates tend to be disruptive and then they level out as they get older. In his particular circumstances, he flat-linted all the way through in my candid opinion. (EH March V5/832. Mr. Aiken was asked if he had an opinion on how Mr. Woodel has adjusted and will continue to act in confinement? He testified that, "He can be safely confined for the remainder of his life without causing undue risk of harm to staff, inmates, and the general public." (EH March V5/837.

Testimony of Scott Sisk from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume VI, pages 863 - 896.

The defense called Scott Sisk as a witness. He is Mr. Woodel's half brother. They have the same mother, Jackie. Bobbie Woodel is his half sister. He had another half sister Julie, and a full brother, Charles. Charles died in a car accident and he died on his 16th birthday in an drinking related car accident. Scott lived with several different family members as a child and was later placed in a children's home.

Scott was sentenced to prison the first time at age 18. He has been incarcerated several times since. He has had drug and alcohol problems since the age of 13. He has 4 children by 4 different mothers. Christina Stogner is the mother of his son Brandon. Christina also had a child with Mr. Woodel. He testified that he has not really been involved in being a father to his kids. When Scott was 10 or 11 years

old, his mother and he lived with Roberto, a deaf Mexican that Albert had brought into the county. He testified that he was raped a few times by his mother's boyfriend Roberto. At that time he testified that his mother was drinking a lot. She would drink and then pass out. Scott was not contacted by an of the defendant's lawyers prior to the penalty phase proceeding in 2004. He testified that if he had been contacted in 2004 he would have been willing to testify.

Testimony of Gilberto Colon, Jr. from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume VI, pages 896-1040 and Volume VII, pages 1043 - 1075.

On cross-examination Mr. Colon testified that he was the second chair at the 1998 trial for Mr. Woodel. He jointly worked the case with Al Smith. He was asked if he and Mr. Smith discussed a theory of defense or how they were going to proceed to defend Mr. Woodel at the guilty phase. Mr. Colon responded, "I think Al and I talked a lot about Tommy's case trying to figure out how could we deal with the brutality of this - of these murders and certainly we were aware of the alcohol situation and the fact that, you know, we -we had some major problems. So yes, we were trying to figure how can we convince a jury that - that there was no intent to kill anybody; that this was a situation that developed during an alcohol induced, quote, unquote, coma, as the way we referred to it, because Tommy couldn't remember much about it. So, yes, we did on - on numerous occasions." (EH March Vl/905).

Mr. Colon agreed that the defense against premeditaton and the defense against felony murder were essentually based on the defendant's alcohol

consumption. He agreed that the defense knew that one of the center pieces of the State's case was going to be Mr. Woodel's oral and taped confession to the detectives. Mr. Colon was advised that a jury instruction was asked for and given on voluntary intoxication, but he did not have an independent recollection of it. At that time voluntary intoxication was a defense to a specific -intent crime. The underlying felonies were burglary and robbery. One of the underlying felonies in this matter was burglary, and Mr. Colon agreed that the State would have to prove that the Defendant has the specific intent to commit a crime either before he went inside the trailer or while he was inside. Another of the underlying felonies was robbery and Mr. Colon agreed that the State would have to prove that Mr. Woodel intended to take some property he wasn't entitled to. The State asked Mr. Colon if the defense made the decision that they were going to argue voluntary intoxication for both premeditated murder and felony murder. He answered that he was sure they did because that was all they had at the time.

Mr. Colon said that he had never hired a toxicologist in any case he had been involved with before 1998 to assist him in terms of making a presentation of voluntary intoxication and he had never thought about doing it. Mr. Colon testified that even after the Woodel trial in 1998 he has never used a toxicologist for that purpose. He testified that he never will unless it involves something like a DUI where toxicology was an issue. In this matter to try to show the level of intoxication that Mr. Woodel had Mr. Colon testified that they had Tommy's statement and a girl named Jessica Wallace. Mr. Colon said it was his understanding that they could not find the

other people that Mr. Woodel and Jessica were drinking with. They tried to find out if Mr. Woodel had purchased some alcoholic beverages from a nearby convenience store but they were not successful.

Mr. Colon testified that he was aware at the time that Mr. Woodel had given a taped statement and had actually written out a statement for law enforcement. He was aware that Mr. Woodel had written out that he had seven beers. He indicated that he did not give that much weight because people that drink a lot often minimize their drinking. In the taped statement he told the officers 7 or 8 beers. They did not have any other testimony to show that Mr. Woodel did in fact consume form that seven or eight beers. Mr. Colon testified that the fact that they did not have Mr. Woodel testify at the guilt phase of the trial in 1998 would indicate a decision was made that it would not be a good idea to put him on the stand. One of the factors they would have considered in terms of having Mr. Woodel testify was that the taped statement Mr. Woodel gave to law enforcement had Mr. Woodel in his own words saying that he was intoxicated. Mr. Colon agreed that their strategy was to argue that Mr. Woodel was not guilty of premeditated murder and the underlying felonies because of voluntary intoxication and if successful that would bring the matter down to second degree murder as a general intent crime.

Mr. Colon was asked about the fact that Bobbie Woodel testified at pre-trial and at the trial that Mr. Woodel told her that the reason he had taken several knives before he left and had taken Mr. Moody's wallet was to divert suspicion. Mr. Colon was asked if they had hired a toxicologist if they still would have

had to explain that this Defendant did not have the specific intent to commit crimes even though he gave a rationale for his actions to his sister. Mr. Colon agreed that they would have.

Mr. Colon was asked about the statement that Gayle Woodel gave pretrial when she told the officers that when the Defendant was getting ready to voluntarily go with officers to be questioned he hugged her and whispered to her that the knife was behind the dresser. The defense did not make an objection or make a motion for mistrial when the State advised the jury in opening statement at the guilt phase, that they were going to hear Gayle Woodel, Mr. Woodel's ex-wife testify that these statements were made to her, Mr. Colon agreed that this was indicative of the fact that the defense believed Gayle was Mr. Woodel's ex-wife at that time. Mr. Colon was asked if he remembered that after the jury was selected but before Gayle testified the State announced to Judge Pyle that it had discovered that Gayle was Mr. Woodel's wife at the time and therefore had to proffer her testimony. Judge Pyle did not find that was an exception to the spousal immunity rule and did not allow her to testify. In addition, the defense made an oral motion for a mistrial. He testified that he did not have an independent recollection of it, but he was sure they moved for a mistrial.

One of the allegations in the postconviction motion is that Mr. Colon was ineffective with regard to the penalty phase in 2004 because he allowed the same testimony that he told this to Gayle to come out before the jury. The claim is that counsel was ineffective for failing to reassert the spousal privilege and allowing the Defendant to testify about what he

told his wife. Mr. Colon was asked about what context Mr. Woddel was testifying to when he brought out in this testimony at the 2004 penalty phase that he had put the knife behind the dresser. Mr. Colon answered, "Well, now that I've read it its's refreshed my recollection. He - he was just trying to explain that it wasn't to keep the knife away from the police, but was to keep it away from his own child so the child would not be hurt with the knife. And actually he moved it several times two or three days after the murder and as he said in his statement if he was going to hide it, he would have done it first thing, not move it around to keep it away from this child." (EH March V6/941-942).

Mr. Colon was asked if this testimony by Mr. Woodle given at the 2004 penalty phase regarding why he hid the knife actually helped the defense based on the fact that the officers had already located the knife behind the dresser based on Mr. Woodel's taped statement. Mr. Colon answered, Right. Well, it would help us because if we let it go on just that they found the knife behind the dresser, then the jury would certainly conclude that he was hiding the knife and they would incorrectly conclude that he was hiding the knife to keep it away from law enforcement to further protect himself from - from being arrested or charged with this crime. Here, he explains why he kept it away because of the child's safety, not because of trying to prevent detection." (EH March V6/944-945).

Mr. Colon testified that Arthur White did not have any additional information to tell the jury that they were not otherwise going to hear other than that the Defendant had told him that he fondled the

female victim. Mr. Colon was asked if based upon the impeachment they did at the 1998 trial of Mr. White, he thought it was significant that the defense didn't bring out the fact that one of the five or six convictions of Mr. White was for a crime that involved dishonesty. Mr. Colon answered; "I can tell you that I always ask a defendant, if I know they have impeachables involving dishonesty, whether, in fact, they have any. Why I didn't do it in this case, I have no idea. I don't know if it was because the cross-examination was flowing well and he was coming across as an interested liar that I wanted to paint or whether I just basically got excited or maybe just forgot. Could it have been significant, I can only speculate. I - I - - don't know. Maybe it was, maybe it wasn't. But I certainly always ask that question, so I don't' know if I answered your question, but I've at least explained the whole situation the way I remember." (EH March V6/950).

Mr. Colon was asked who he called as a witness for the 2004 penalty phase. He said, Tommy's sister, Tommy's dad, Tommy's Aunt, and Dr. Dee. He was reminded that he also called Jessica Wallace, Leola Kilbourn and Lisa Kilbourn. Mr. Colon was reminded that the one witness he called at the 2004 penalty phase that was not called at the 1998 trial was Mr. Woodel and he was asked how that decision was made. He said that he didn't remember the details of it. He went on to say, "So it might have been as simply as, we didn't - we didn't do that well back then, I believe that you can actually tell your story and the jury can see the human factor in you, not only through your family members and friends and neighbors and Dr. Dee, but also directly

from him. Humanize him in a somewhat inhumane murder. (EH March V6/974).

Mr. Colon testified that at the 2004 penalty phase they were able to convince Judge Roberts of four statutory mitigators. Mr. Colon was asked what statutory mitigators were considered proven by Judge Roberts. He answered, "Number one, that the defendant has no significant history of prior criminal activity. Number two, the age of the defendant at the time of the crime. Number three, the capacity of the defendant to appreciate the criminality of his conduct to conform his conduct to the requirements of law was substantially impaired. And Number four, the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (EH March V6/977). Mr. Colon noted that the last three statutory mitigators mentioned were not proven at the first trial in 1998.

Mr. Colon testified that he felt comfortable that Dr. Dee was well prepared to testify to the jury regarding his client being a hearing and speaking child of deaf adults and how that would come into play in terms of his upbringing, his mental processes, his emotions and other matters.

Mr. Colon was asked if he felt that it would be necessary to try to go and locate an expert in the issue of dealing with a hearing and speaking child of deaf adults. He responded, You know, that's a hard question to ask. I mean, maybe it should have been something I should have done, but, again, I - felt comfortable with the package." (EH March V6/1009).

The state asked Mr. Colon about the aggravating circumstance that the victim was particularly vulnerable. Mr. Colon remembered that

the testimony about this came from the medical examiner and the victim's daughter. He was asked about the allegation that he should have objected to the testimony of the victim's daughter and if he had a basis for objecting to her testimony. He responded, "You know, I can't think of a - - of a basis to object to her testimony, but more importantly, we have the victim's daughter on the stand, the last thing I going to try to do is get - mess that up, you know, get in there and object and make me look like the bad guy in front of this jury when the daughter's talking about her mom's condition. So, no, I wasn't going to object to her testimony unless it went a lot further deep into a medical condition that was not proven otherwise. (EH March V6/1017.

Mr. Colon testified that he did not remember filing any type of pretrial motion in 2004 to try to exclude Arthur White's testimony and he went on to say that he could not think of basis to do that. Mr. Colon was asked if he thought about trying to keep out the testimony of the fondling. He responded; "Paul, all I remember what that both Al and I thought it was horrible that a mention of fondling would - would come into this case when there was no evidence of any type of sexual contact or abuse. The problem that I remember was that we did have a pair of panties that had been cut and tied in a knot, so I just - - remember that. I don't remember about any discussion of filing a pretrial motion to keep that out. And I don't know if we made an oral motion to keep it out. I just don't recall." (EH March V6/l021).

Mr. Colon reasserted that he did not remember even hiring Dr. McClain. Mr Colon agreed that that if Dr. McClane had information that he thought would be helpful, he would have thought about

putting him on as an expert witness. Mr. Colon was asked if he considered looking at what is referred to as multi-generaltion patterns of alcoholism or abandonment or abuse or domestic violence. He replied, "-honest - honestly I don't recall even considering that. Again, I thought that the package we had was sufficient, so, no, I never thought about that as a possibility." (EH March V6/1035). Mr. Colon testified that there was no testimony or evidence available that Mr. Woodel had any mental illness. He said that Dr. Dee looked for it but came up empty.

On redirect examination, Mr. Colon agreed that it was possible that Mr. Woodel's case was the second capital case he tried. Mr. Colon was asked again if he retained a mitigation investigator such as Toni Maloney for the 2004 penalty phase. He answered, I didn't - I didn't feel that it was necessary based on the package I was presenting. And, as I said before, looking back now, that may have been a bad idea." (EH March V7/1062).

Mr. Colon agreed the argument for the capacity to appreciate the criminality and conduct mitigator was based on the testimony of Dr. Dee and Mr. Woodel and he did no further mitigation on that for the 2004 penalty phase. Mr. Colon agreed that he also relied on Mr. Woodel and Dr. Dee with regard to Mr. Woodel's emotional disturbance without doing any additional mitigation investigation. Mr. Colon agreed that the record shows he did no additional investigation on the other mitigators. Mr. Colon testified that he made no attempts to talk with Department of Corrections officials at UCI about Mr. Woodel's behavior at the prison.

Testimony of Dr. Alan Marcus from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume VII, pages 1075- 1221).

Dr. Alan G. Marcus, a clinical psychiatrist who works with deaf and hard of hearing adults and their families, including CODA's, testified at the evidentiary hearing. He has a PhD. in clinical psychology and he is a certified American Sign Language interpreter. He is also a CODA.

Dr. Marcus testified that the only book Dr. Dee read, Mother/Father Deaf, is an anthropological study. It is a scholarly book, but not a psychological review. He testified that there were numerous studies published and available in 2004 about CODA's and the psychological effects of growing up with deaf parents.

Dr. Marcus testified to a number of areas where Dr. Dee was mistaken or lacked a full understanding of CODA's and deaf culture. For example, a CODA's first language is sign language. Spoken English is there second language. He noted that Dr. Dee had discussed the lack of emotion in the defendant's vocalization. Dr. Marcus found that significant because when people speak in their second language there is a diminished ability to express their feelings. Dr. Marcus said that when he interviewed the defendant in sign language, "...I thought I was talking to somebody different. He was much more in touch with his feelings. He cried several times." (EH March V7/1088). Marcus concluded that Dr. Dee did not totally understand the profound effect of having two deaf parents had on the defendant.

Dr. Marcus was asked to sum of the story of Mr. Woodel and his deaf parents. He responded, "Tommy and Bobbie are the result of a perfect storm. In the sense that you have two deaf people who, because of their deafness, plus other family dysfunction and other events in their lives that made it very difficult for them to be successful, come together, and unfortunately have children when they themselves don't know how to even take [sic] them of them - their own self. And give birth to two, three children depending on how you look at it, and are unable to really raise these children and take care of them; never mind taking care of themselves. And so it's a - - it's a perfect tragedy." (EH March V7/1134 - 1135).

Testimony of Margaret Russell from Transcript of Evidentiary Hearing, held on March 21, 2011 to March 25, 2011, Volume VIII, pages 1226 - 1282).

The defense called Mr. Woodel's Paternal Aunt, Margaret Russell as a witness. She agreed that she was sometimes referred to as Becky. Albert is her brother. She testified in 1998 and 2004. In 1998, she believes that she spoke to Mr. Colon for the first time on December 7 in the Courtroom. She said they arrived for the weekend and they spoke with Al Smith over the weekend, but they did not speak to Mr. Colon on Saturday or Sunday. On that weekend, Al Smith came to the hotel and spoke to Bobbie, Lisa, Albert, and her. Bobbie translated for Albert, or that wrote everything out. With regard to the 2004 trial they met with Mr. Colon the night before the trial. Her brother, Albert, Bobbie, Bobbie's boyfriend, Larry, and her went to Mr. Colon's office. Again either Bobbie translated for Albert, or they wrote things down. He talked to all of them in the same

room. In 1998 they had met with Dr. Dee in a Denny's restaurant. She did not remember if Al Smith was present when they were interviewed by Dr. Dee at Denny's. Gil Colon was supposed to call them over the weekend in 1998 but he did not do so. She was asked if she thought Albert knew how to be a father. She responded, "I don't think he knew how to be a father. Coming out of the school for the deaf, he never had the responsibility of raising a child and I don't want to say selfish. I don't think he knew how to be a father." (EH March V8/1242). She testified that he was not a good father and he passed out deaf cards for money. Ms. Russell testified that if she had been asked the same questions in 1998 or 2004 she would have given the same testimony she gave at the evidentiary hearing.

Testimony of Dr. Daniel Buffington from Transcript of Evidentiary Hearing, held on May 11, 2011 to May 13, 2011, Volume I, pages 9 - 91).

The defense called Dr. Daniel Buffington, who practices in the field of clinical pharmacology. He is on the faculty at the University of South Florida College of Medicine. Dr. Buffington described an alcohol related blackout as follows: "An alcohol-related blackout is actually a cognitive phenomenon where the individual can be functioning, talking, having thought process, having behaviors and have no recollection of them at a later point in time. There's partial and complete. In a complete, the individual may have absolutely no recollection. And in a partial, it's very common that individuals describe a partial blackout like a movie scene or like snapshots that just appear in a sequence with a consistent flow." (EH May Vl/16).

Dr. Buffington agreed with defense counsel's that someone in a blackout could be walking and talking, conscious, but have no memory of what they're doing. In the interview he had with the Defendant, Mr. Woodel was able to describe previous blackouts. Dr. Buffington put together some risk factors that Mr. Woodel would have for an alcohol-induced blackout. The first factor is family history and genetic predisposition. The Defendant had a significant genetic predisposition to three generations, his, his parents, and his grandparents. The Defendant recalls using both alcohol and marijuana at approximately 14 years old. Alcohol was his substance of choice and at an early age he was consuming high volumes for the purpose of impairment. There is a significant increased risk for hearing impaired and children of hearing impaired adults for increased propensity for substance abuse. Dr. Buffington testified that deaf individuals and children of deaf individuals. Another high risk factor are emotional stressors. Dr. Buffington said that the Defendant's testimony was that he was a binge drinker during that time due to his finances. Dr. Buffington testified that alcoholism is a chronic condition not chronic everyday consumption of alcohol. Dr. Buffington testified about the effects of the quantify of alcohol consumed, ...As you begin to increase up from over .09 to .25, you begin to have the cognitive effects take place as well as physical effects that we observe. So from a progression we go from sobriety and a minor degree of impairment to euphoria to now we have actually confusion, all the way up to stupor, and even into a coma. And at significant levels alcohol actually can be fatal so we refer to that as alcohol poisoning." (EH May VI/31). Dr. Buffington further testified that, 'With

progressive blood alcohol concentrations we see intoxication that individuals have behavior disinhibition and violence is a common factor with higher levels of blood alcohol, a known complication. It's also associated with chronic alcoholism, the - - related to rapid increase in blood concentration, so." (EH May VI/33).

Dr. Buffington testified that he was asked to calculate Mr. Woodel's blood alcohol level at the time of the crime. He provided a lower estimation of 12 beers to an upper estimation of 24 beers consumed during the post-work period. Dr. Buffington reviewed the voluntary intoxication instruction used in 1997 at Mr. Woodel's trial, and he agreed that Mr. Woodel would meet the criteria for voluntary intoxication. In his opinion, Mr. Woodel was incapable of forming the specific intent due to his intoxication. Dr. Buffington testified that the Defendant's drinking or controlling his drinking was not a choice for him. Based on the concentrations of alcohol he was taking at the time of the crime, alcohol was controlling the Defendant. On Cross-examination Dr. Buffington testified that the level of the Defendant's intoxication had rendered him incapable of forming the premeditation require for first-degree murder.

Testimony of Robert Norgard from Transcript of Evidentiary Hearing, held on May 11, 2011 to May 13, 2011, Volume I, pages 92- 187) and Volume II, pages 190- 236).

The defense called attorney Robert Norgard as a witness. He testified that he has conducted 213 trials and 76 of those were homicide cases. 32 of the homicide cases involved the State actively seeking the death penalty. He has handled about 5 direct appeals of death penalty cases. He has been qualified

about 15 times to testify as an expert on prevailing norms among capital defense attorneys. He is also became board certified in criminal law in 1995. He testified that he was familiar with the 1989 and 2003 ABA Guidelines.

Mr. Norgard was critical of the defense for their failure to independently investigate the criminal record and potential deal of Arthur White, the "jailhouse snitch." Mr. Norgard stressed the importance at looking at what kind of a plea agreement a jailhouse informant received. Mr. Norgard testified, "... in my opinion it's a significant red flag if you look at what a jailhouse informant is charged with and if you look at it and on its face the person received an extremely favorable plea agreement, like I said, if you did deeper I think you'll find that, you know, certainly there were at least some efforts by somebody to bring up the fact that he's a witness in a capital case." (EH May V1/106).

Mr. Norgard was asked about the testimony of Arthur White in this case that there was fondling of the victim Bernice Moody. He was asked if the prevailing norms require an attorney where there's no charge of sexual battery to file a motion in limine to keep that obvious prejudicial information out. He testified that "... in this particular case where you have a situation where there - - you know, Mr. Woodel was not charged with sexual battery or any sexual offense, where the only evidence directly of any type of action of that nature was from the jailhouse snitch, I think that it was even more important to file a motion in limine as it related to the penalty phase in this case because although a jury in a penalty phase is allowed to hear relevant facts about the nature of the crime, in this instance

where sexual battery was not a crime that was charged, where it want not an aggravating factor, in essence, what would have come out was a non-statutory aggravating factor, and I think under those circumstances, the prejudice substantially outweighs any relevance to that and so that would be one of the major bases for a claim under 90.403." (EH May V1/108).

Mr. Norgard was asked about the prevailing norms regarding the investigation and presentation of the voluntary intoxication defense which was a defense in 1998 at the time of Mr. Woodel's trial. With respect to the use of an expert testimony Mr. Norgard testified that it would be important for a capital defense attorney in 1998 to at least investigate to retain an expert in this area and utilize the testimony if it was favorable. Mr. Norgard was asked if it was reasonable counsel to just rely on the perceived knowledge a jury would have about people that are intoxicated. Mr. Norgard answered, "In my personal experience, most jurors do not have the level of sophistication to really know about alcohol and the effects of alcohol, and particularly the effects of long-term alcohol abuse." (EH May Vl/110).

Mr. Norgard testified that you can't make a tactical decision as to whether to hire an expert unless you've done your homework to begin with. Defense counsel asked Mr. Norgard about prevailing norms in 2004 with regard to the penalty phase. Mr. Norgard agreed that it would be important to present expert testimony about the effects of alcohol on the brain and behavior as it relates to mitigation instead of just relying on the jury's own knowledge.

Mr. Norgard testified that it's important to have an expert to testify about the concept of

addiction and that it's actually a genetic process. He agreed that this is where a multigenerational history of the defendant would be important. He testified, "And that's where the expert would come in to tie that all in to show that why that's significant, why there's this predisposition, why there's the genetic issues involved, why there's the environmental issues involved in being around that type of environment." (EH May VI/115).

Mr. Norgard was asked about a difference in the 1989 and the 2003 guidelines. There is some language in the 2003 guidelines that requires using a specialist instead of just a general sense expert. He responded, "There, there was that subtle change. I think if you - - just from a practical standpoint, I think that, yes, the ABA Guidelines may have involved in change, but frankly, in terms of what was being taught through the death penalty training is the concept of a specialist existed long before that change in the ABA guidelines." (EH May Vl/115). He said it would have gone back to the 1980's.

Mr. Norgard was particularly critical of defense counsel for the total lack of effort in consulting and or retaining a CODA (child of a deaf adult) expert. Mr. Norgard testified, "And, you know, I've reviewed the penalty phase testimony of Dr. Dee and, you know, I respect Dr. Dee. I used him a lot. But the idea that the expert sits up there and says, well, I didn't know anything about it, but I read a book and here's what I read, to me that's not what you want to present to a jury." (EH May Vl/117). He testified that Dr. Dee's testimony was disorganized and unfocused. Mr. Norgard opened that the CODA background of the defendant "... is something that's so unique, so unusual, that you needed somebody

that has that expertise and training." (EH May V2/199).

Mr. Norgard was asked it part of the training of a defense attorneys are given at the courses they are required to attend would include that a mitigation investigation should include social history, a family history, a biological history, and psychological history of the client and his family. Mr. Norgard answered, "I would even state it broader than that. I mean, I would state it as broad as you need to investigate any and all aspects of your client's life record, history, to a certain extent, getting into the multigenerational research into the case, investigation into the case. Simply because that's the requirements of the U.S. Supreme Court in terms of what's possible mitigation." (EH May Vl/118).[I]

Mr. Norgard was critical of defense counsel's basic lack of investigation. He testified "... the part that just really boggles my mind about the whole situation is that a basic penalty phase investigation would start with the parents. And the first contact with the parents you would have known they were deaf whether your client told you or not, so. I mean, that's the part that, you know surprises me about the late discovery of it." See pages 193 -194, transcript of evidentiary hearing held on May 11, 2011 to May 13, 2011, Volume I.

Mr. Norgard was asked if Mr. Colon had put on an expert at the penalty phase and gained that additional testimony, that additional in light to the jury, do you believe he would have maybe had a different result?" Mr. Norgard responded, "Yes, I do. I mean, you know, one of the things, you know, really just bothers me about this case is that, you know,

here you had an expert, Dr. Dee, who essentially quoted and paraphrase from a book about CODA, spoke in very general terms about what the psychological testing showed as to character aspects of Mr. Woodel, but did not address the issue of alcohol, how, that impacted Mr. Woodel specifically in terms of his psychological background and his characteristics. You know, a jury, you know, heard none of that and I think that's important." (EH May Vl/161).

Mr. Norgard talked about what he would have done in 2004. "What I'm - - what I'm saying is that back in 2004, I would have had Toni Maloney, I would have given her adequate time, I would have had Toni Maloney hunt high or low for a CODA expert. And as she testified to, she's very good finding experts." Number two, what I would have done is - - and I've done this with Toni Maloney where we've come across very unique specialized things where she and I have gone over to the USF medical library and thoroughly researched very, very narrow topics to find articles. And as she testified to, if she had been given the time, she would have done an exhaustive search of materials to help support the expert testimony." (EH May V2/199 -200).

Mr. Norgard acknowledged that he was also asked to look at an issue in the motion for post conviction relief that dealt with the failure at the penalty phase of defense counsel to object in any fashion to the testimony of Bernie Moody's daughter concerning the aggravator that deals with the disability that Bernice Moody would have suffered. Mr. Norgard responded, "...I think there was deficient performance of counsel in not objecting to something that was hearsay and called for expert testimony."

(EH May V2/216). Mr. Norgard was asked about what impact he thought such a deficient performance would have on the jury. He answered that he didn't think it would be major because given her age alone, the jury could have found that she was particularly vulnerable.

The Court asked Mr. Norgard who Mr. Colon called at the same penalty phase that was not called at the first penalty phase. Mr. Norgard answered, "It was basically a duplicate. I mean, it was like the difference between trial one and trial two was Mr. Woodel testifying." (EH May V2/222).

The Court asked Mr. Norgard if you got a 12-0 jury recommendation if that would indicated you should do some more background work and call some more witnesses. Mr. Norgard responded, "I-- I agree with that 100 percent. I mean, you got blanked. I mean, you know, what you had didn't work and I'd be looking at every possible way I could - - could to enhance what I did the first time." (EH May V2/222).

The Court noted that Toni Maloney was not contacted for the second trial. The Court asked Mr. Norgard if Mr. Colon should have contacted Toni Maloney. Mr. Norgard responded, No ifs, ands, or buts about it. I mean, presumably the motion for continuance was made in good faith. It was based on the fact their mitigation specialist - - you know, there's no real excuse for bringing in a mitigation specialist that late, but the mitigation specialist is saying I need to do this, this, or this. She moved for continuance on it, you lost. Then by a miracle you get a reversal and, you know, it would - - I mean, it boggles my mind that you wouldn't pick up right there and say, Toni, you've got that chance that the

judge denied us when he denied that continuance motion." (EH May V2/223- 224).

Testimony of Phillip Henry from Transcript of Evidentiary Hearing, held on May 11, 2011 to May 13, 2011, Volume II, pages 237- 260).

The defense called Phil L. Henry as a witness. Mr. Henry is a Corporal in the Bartow Police Department. Mr. Henry agreed that he was involved in the arrest of and investigating the case of two robbery cases against Arthur White. Corporal Henry testified that Arthur White contacted him because he wanted substantial assistance with regard to the two robbery cases that were pending in 1999. Corporal Henry testified that he can't guarantee somebody that they will get a lesser prison sentence but, he can tell them that he is going to talk to the State Attorney's Office and let them know what kind of things they did to help. Corporal Henry agreed that Arthur White also had his girlfriend call him and offer to do some stuff. Corporal Henry testified that he didn't want to use Arthur White or his girlfriend. Mr. White seemed to be most concerned about the robbery case involving Wal Mart. Corporal Henry testified that Mr. White asked him to contact ASA, Wallace because he had indicated that he knew something about a murder case. Corporal Henry was asked by the State on cross examination if he knew at the time that the defendant had asked to speak to Mr. Wallace that the defendant had already testified in 1998 in a first degree murder trial. Corporal Henry replied that he didn't know about that. Corporal Henry testified that he never followed up in contacting Mr. Wallace based on Mr. White's request. Corporal Henry testified that Mr. White never did do substantial assistance for him.

Testimony of Leola Kilborne from Transcript of Evidentiary Hearing, held on May 11, 2011 to May 13, 2011, Volume II, pages 260- 275).

The defense called Leola Kilbournd as a witness. Ms. Kilbourne had worked with Mr. Woodel at the Pizza Hut on Highway 192 in Kissimmee. Ms. Kilbourne also lived in the same trailer park as Mr. Woodel and she rented a trailer to Bobbie, Mr. Woodel's sister, where Mr. Woodel was also living. Ms. Kilbourne agreed that she testified in both Mr. Woodel's 1998 trial and the 2004 trial. Ms. Kilbourne testified that she testified as a character witness for Mr. Woodel. Defense counsel asked her if either in 1998 or 2004 she sat down with the trial attorneys, Al Smith or Gil Colon, to go over her testimony. She replied, "I didn't really sit down with them. We spoke on the elevator coming up to the courtroom." (EH May V2/263). Ms. Kilbourne did not remember them saying that there was anything specific that they were going to talk about when she gave her testimony. Ms. Kilbourne said that she undersood that there was a place behind the back of the Pizza Hut where some of the younger workers would go and party after hours. Ms. Kilbourne imagined that Tom was involved with that group. Ms. Kilbourne testified that after Mr. Woodel was arrested, Bobbie, his sister came back to Florida and was extremely upset. Bobbie's reaction was so extreme that Ms. Kilbourne was concerned for her safety. Ms. Kilbourne was asked if the trial lawyers had asked her about drinking at the Pizza Hut about Bobbie's extreme reaction to Mr. Woodel committing the murders and the fact that Mr. Woodel had been alone for the holidays prior to the murders, would she have given that same testimony back in 1998 or 2004 as

she was giving today. Ms. Kilbourne replied that she would have given the same testimony. Ms. Kilbourne agreed on cross examination that she had given positive testimony about Mr. Woodel at the 1998 and 2004 trials. She testified that Mr. Woodel was very helpful and conscientious, and dependable. She had testified that he was gentle with Bobbie's baby; that Mr. Woodel was quiet, soft spoken, kind and intelligent and she had never seen him angry.

Testimony of Bobbie Hermes from Transcript of Evidentiary Hearing, held on May 11, 2011 to May 13, 2011, Volume II, pages 277- 381).

Defense called Bobbie Hermes as witness. Ms. Hermes is Mr. Woodel's sister. Ms. Hermes was called as a witness at both the 1998 and 2004 trial. The first person that contacted her in North Carolina about the case was Mr. Wallace from the State Attorney's Office. She testified that she was subpoenaed by the State for the 1998 trial. She testified that the State made her travel arrangements. On her first night back in Florida, she met with an investigator from the defense named Toni Maloney. She believed that she also had talked to Ms. Maloney when she was in North Carolina on the telephone. Ms. Hermes testified that Ms. Maloney had her sign a bunch of documents. She said that this was a release to get records from the orphanage. The following day she said that she met with Attorney Smith and she testified that she also talked to Dr. Dee, a psychologist. Ms. Hermes testified that she thinks she arrived in Florida for the trial on the Sunday night before the trial, which started on Monday. Ms. Hermes testified that was present when the lawyers were interviewing her father. She testified that she was the one who was

interpreting for her father. She said that this was difficult to do and she was asked why it was difficult to do. She responded, "Because when you're interpreting for someone they need to feel comfortable enough to answer and because my father and I have a relationship, that wasn't the case." (EH May V2/288. Ms. Hermes testified that she spoke up and said that they should get a sign language interpreter for her father. She said she was told that the Court would only pay for an interpreter for him while he testified. She testified that when she was interviewed, her father was in the room. She agreed that because her father was in the room, there were things that she would like to say, but she was not comfortable in saying.

Ms. Hermes testified that the first information she got about the 2004 trial was a letter from the SAO. She testified that she thought it was the defense that brought her down for the 2004 trial. She testified that she did not remember anybody from the defense team working with her in the year prior to the 2004 retrial, trying to get additional information from her about the family. She testified that nobody from the defense team ever asked her any kind of additional questions to try and find out more about her brother and her family history. Ms. Hermes recalled meeting with Mr. Colon in his office on the Sunday before the trial. Her father and her Aunt Becky were also present. She testified that she was interpreting for her father. She testified that basically Mr. Colon was going over what he was going to ask during the trial. She testified that she was in the courtroom when her father testified in 2004. Ms. Hermes testified that she was afraid of her father because he had a temper. She agreed that she had

heard of him pistol whipping deaf people. Ms. Hermes was asked about her father's third wife, Beverly. She testified that she met Beverly when she was in high school and that Beverly was maybe three years older than her. She testified that her brother, Mr. Woodel had feelings for Beverly and that at one time they had been dating. She testified that Tom carried a picture of Beverly in his wallet. She testified that after her father and his second wife, Linda, split up, her father came to live with her Aunt Becky in Pennsylvania and that Tom also came to live there. She testified that on weekends, her father would go to Washington, D.C. to Galudet University to see Beverly. She testified that there came a point in time where her Aunt Becky asked her father to spend more time with his kids. She testified that she remembered a time when her father was supposed to go away for the weekend to Galudet University and take Tommy with him. Tommy was later found hiding in the closet. Her father didn't want his son Tommy to go with him to see Beverly.

Defense counsel asked Ms. Hermes if her father did anything else to make money other than being a mechanic. Ms. Hermes testified that her father used to assist Mexicans crossing the border. The Mexicans that he assisted in crossing the border were deaf. In time, there might have been as many five or six Mexican's staying at their residence. Ms. Hermes testified that as a child growing up, it was clear that they were never to speak of their father's activities involving the deaf Mexicans. Ms. Hermes testified that in spite of the fear of her father, if she had been asked these same questions, she would have given the same testimony in 1998 and 2004, including the testimony about the deaf Mexicans.

Testimony of Arthur White from Transcript of Evidentiary Hearing, held on May 11, 2011 to May 13, 2011, Volume III, pages 392 - 450).

The Defense called Arthur White as a witness. Mr. White indicated that he was currently in prison. He testified against Mr. Woodel at the 1998 trial and at the 2004 penalty phase trial. Mr. White agreed that on January 1, 1997, Mr. Woodel got arrested and was put in I dorm on the bottom part of Polk County Jail along with him. Mr. White testified that he and Mr. Woodel talked about Mr. Woodel's case. Mr. White agreed that he wrote a letter to a detective that he had some information for him about Tom Woodel. Mr. White agreed that as a result of the letter, ASA, Aguero contacted Polk County Sheriff Deputy Allen Cloud to come and interview Mr. White. Mr. White was asked if on September 25, 1997, he was given a pretty sweet deal. He answered, "If you want to call it that. I still went to prison." (EH May V3/405-406). Defense counsel reminded Mr. White of the charge he was facing at that time. Defense counsel said, "There was a burglary, there was an extortion against witnesses, there's possession of cocaine, and there was some other misdemeanors and you end up getting - - they dropped the burglary and they reduced the extortion to a misdemeanor, harassing phone calls and you plead to a grand theft and you get - - and they drop - - do they - - do they drop the possession of cocaine or - - you plea to time served to the possession of cocaine?" (EH May V3/406). Mr. White responded that the charge for possession of cocaine was dropped. He agreed that he got 15 months in prison on the grand theft, concurrent and coterminous with a patrol violation. Mr. White was asked the following question by

defense counsel: "And you get time served on the misdemeanors and then you get three months probation on the grand theft to be - - to be completed after you get released from prison. So, for somebody who's a habitual felony offender, that was a pretty good deal?" (EH May V3/407). Mr. White responded, I would say so, yes." (EH May V3/408).

Mr. White agreed that the prosecutor who gave him the deal on his sentence in case number 91-689 and 96-5889, which involved the burglary that was dropped and the possession of cocaine, was ASA, Mr. Kirkland. Mr. White agreed that he was still finishing out his fifteen month sentence when he testified in 1998 at Mr. Woodel's trial.

Mr. White was asked if, when he testified in 2004, he responded that he had five felony convictions. Mr. White was asked by defense counsel how he knew he had five felony convictions then. He said that he knew this because he had been to trial and stuff on his other cases. Defense counsel introduced into evidence defense exhibit 55, which was an arrest charge in 2011. Defense counsel introduced defense exhibit 56 - 64, which were conviction records for Arthur White. Mr. White was asked by defense counsel if the true number of convictions he had in 2004 was actually 8 felony convictions. Mr. White said, Then that's what it is then, if that's what it say." (EH May V3/416).

Mr. White agreed that at the time of the 1999 robbery, he violated his felony probation by getting two new robbery charges. Mr. White was reminded that the State Attorney's Office reduced one of the robbery charges to a misdemeanor battery. Mr. White agreed that he didn't get convicted of the robbery. It was either reduced or dropped. With

regard to the robbery at Wal Mart, Mr. White said that he got five years in prison followed by five years probation. Mr. White was asked if for two pending robberies, five years in prison was a pretty good deal, especially for someone with a number of prior convictions. Mr. White responded that he had seen other people get less. Mr. White was asked if he had picked up a new charge in 2011 for introduction of contraband into a detention facility. He agreed that he had. Mr. White agreed that that charge had been dropped.

On cross-examination, Mr. White agreed that in both the 1998 trial and the 2004 trial, that once he found out what Mr. Woodel was in jail for, he sought him out in hopes of getting some information to help himself out. Officers came to speak to Mr. White on January 29, 1997, and he agreed that he advised them that he wanted a deal before he gave them more information about Mr. Woodel. Mr. White testified that he was never given any kind of deal as a result of giving information to the officers.

Testimony of Dr. Mark Douglas Cunningham from Transcript of Evidentiary Hearing, held on May 11, 2011 to May 13, 2011, Volume III, ages 450 - Transcript of Evidentiary Hearing Held On May 11, 2011 To May 13, 2011, Volume III, pages 450 - 578, and Volume IV, pages 581- 683.

The defense called Dr. Mark Douglas Cunningham as a witness. Dr. Cunningham is a clinical and forensic psychologist in private practice. Dr. Cunningham was retained by CCRC and he was asked by defense counsel what they asked him to do. Dr. Cunningham responded, "I was asked to do two things. I was asked to identify the presence of any adverse developmental factors that would be expected

to have a formative influence in Tommy Woodel's life. I was also asked to consult with you regarding the presentation of mitigation information at sentencing and associated conceptualizations and arguments offered by the defense regarding what additional perspectives might have been offered." (EH MAY V3/465). Dr. Cunningham discussed numerous adverse factors in Mr. Woodel's background having a developmental influence on him. These included neurodevelopmental factors, family parenting factors, residential and school instability, ambiguous cultural identification, school performance problems; communication interpersonal deficit, teen onset polysubstance abuse, military failure, premature marriage, institutionalization in early adulthood, and intoxication proximate to offense.

Dr. Cunningham testified that these factors illuminate the damaging and impairing influences on Mr. Woodel's choice and what the jury should consider with regard to a determination of his moral culpability. Dr. Cunningham testified that there is research that confirms that heredity is a major component on who becomes an alcoholic or drug dependent. Dr. Cunningham mentioned the risk factor that he spoke to Dr. Buffington about. This risk factor was an increased risk of alcohol and drug abuse among deaf adults and also among CODAS, who are the children of those individuals. Dr. Cunningham testified that there were relevant hereditary and genetic predispositions in Mr. Woodel's family background. Dr. Cunningham testified that heredity is a very significant risk factor for personality disturbance and personality disorder as well as for other psychological disorders like depression, anxiety, and schizophrenia and that sort

of thing. Dr. Cunningham testified that the jury did not get a well articulated discussion of damaging developmental factors. They did not get the anecdotal detail that would illustrate these developmental factors. He testified that this was one of the worse cases he had ever seen. He testified that Mr. Woodel moved 27 times by the time he was in middle childhood.

Dr. Cunningham described a flow chart illustrating the various factors impacting Mr. Woodel's psychological experience at the time of the offense. These factors included deficient and disrupted attachment, emotional and physical neglect, wiring related deficits, probable sexual abuse, abandonment and rejections and failures, parental drinking and inadequacy. Dr. Cunningham testified that then Mr. Woodel got intoxicated and you have situational stresses impacting him including he's been fired from the second job shortly before this and/or has been working two jobs, and Christina is pregnant, and Gayle is coming with a child, and he alone for the holidays.

Dr. Cunningham testified that he made an individualized appraisal regarding the adjustment that Mr. Woodel was projected to have for the Department of Corrections. He concluded that it was very unlikely as Mr. Woodel sat in 2004 to commit serious violence in the Florida Department of Corrections if confined for life. The Court asked Dr. Cunningham if, with respect to part of what he was saying was, could be summed up as saying the defendant had none of the protective factors in his background to offset all of the risk factors that he had. Dr. Cunningham replied that that's correct. Dr. Cunningham was asked about what kind of people he

thought would be needed in preparing for a capital defense in this matter. Dr. Cunningham talked about the importance of the mitigation specialist, the importance of a mental health evaluation, the importance of getting a toxicologist or pharmacologist. He also recommended that they absolutely needed a CODA expert.

The court asked Dr. Cunningham if his position would be that with regard to the second penalty phase, that even though Judge Roberts found that both statutory mitigators existed, had she had this information she possibly or likely would have given much greater weight to it. Dr. Cunningham agreed with that statement and said the jury would have as well.

Testimony of Dr. Mark Douglas Cunningham from Transcript of Evidentiary Hearing, held on June 3, 2011, pages 4- 177).

On cross-examination, Mr. Wallace asked Dr. Cunningham about the fact that Mr. Woodel told his sister that he took two knives and Clifford's wallet to divert suspicion, and about the fact that the Defendant subsequently through the wallet in the garbage. He indicated to Dr. Cunningham that these actions demonstrated rational decision making by the Defendant with regard to his actions. Dr. Cunningham responded: "That, that behavior that he is taking those things into his house, the stupidity of that and the irrationality of it, is inconsistent with a highly rational I think I better do this to divert any attention as if why would anybody be thinking about this anyway to divert any attention to the real cause of this event. And so in that sense, the totality of this, the drinking, the spotty recollections, the

senseless nature of the murders, the irrationality of conduct in terms of avoiding being connected to this offense, all of those things are inconsistent with this highly rational explanation that he provides to Bobbi, or that she recalls." (EH June, pages 33-34).

Mr. Wallace asked Dr. Cunningham the following question. "Are you indicating that Dr. Dee was not able to perform a competent evaluation, analysis, and testimony because he didn't talk to these people that you talked to?" (EH June, pages 47-48). Dr. Cunningham responded, "Dr. Dee was handicapped by not having extent of mitigation investigation by a mitigation investigator that I had the benefit of. And so the raw material, the building blocks of his assessment were significantly lacking. That's what he was communicating in the facts that he sent to defense counsel on November the 6th of 1998 as I recall that this, this really calls for an intensive mitigation investigation to done of Tommy's childhood. He recognizes that his - the building blocks that he has are limited in nature." (EH June, page 48).

ANALYSIS OF DEFENDANT'S CLAIMS

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), set forth the standard for determining ineffective assistance of counsel. To establish ineffective assistance of counsel, a Defendant must prove two elements. First, the Defendant must show that counsel's performance was deficient. The defendant must show that counsel's representation fell below an objective standard of reasonableness. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland. 466 U.S.

at 688. Second, the Defendant must show that counsel's deficient performance prejudiced the defense. This occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "Unless a Defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687. The Strickland standard requires establishment of both prongs. Where a Defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong. See Waterhouse v. State. 792 So. 2d 1176 (Fla. 2001). In addition, to prove ineffective counsel in the penalty phase, Defendant must demonstrate that but for counsel's errors he would have probably received a life sentence. See Rose v. State, 675 So. 2d 567 (Fla. 1996).

Brady Standards:

In his Motion, the Defendant alleges that there were multiple Brady violations. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.3d.2d 215 (1963). There are three elements a defendant must establish in order to successfully assert a Brady violation according to the United States Supreme Court decision in Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The three elements are: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State,

either willfully or inadvertently; and prejudice must have ensued." In Smith v. State, 931 So. 2d 790 (2006) the Supreme Court of Florida discussed establishing prejudice in a Brady violation. The Supreme Court stated: "To establish prejudice, the defendant must demonstrate that the suppressed evidence is material. The test for materiality is whether there exists a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial". In Smith, the Florida Supreme Court, quoting Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed. 2d 490 (1995), also added; "[i]n other words, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Giglio Standards:

In his Motion, the Defendant alleges that there were Giglio violations. See Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). A Giglio claim alleges that the prosecutor knowingly presented false testimony against the defendant. See Melton v. State, 949 So.2d 994 (Fla. 2006). In Guzman v. State 868 So.2d 498, 505 (Fla. 2003), the Florida Supreme Court discussed how a Giglio violation is established: "[t]o establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." The burden is on the State to prove that the presentation of the false testimony was harmless beyond a reasonable doubt. According to the Florida Supreme Court in Guzman v. State, 941 So.2d 1045, 1050-1051 (Fla. 2006); "[w]hatever terminology is used, the dispositive question is whether the State

has established beyond a reasonable doubt that the knowing use of perjured testimony, or failure to disclose the perjury once it was discovered, did not affect the verdict."

To better analyze the Defendant's claims, the Court will address them in the order they were presented in his Amended Motion.

CLAIM I

MR. WOODEL WAS DEPRIVED OF HIS RIGHT TO RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. WOODEL'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION.

Claim I of the Defendant's Motion is divided into parts A, B, C, and D. The Court will discuss each of these parts one at a time.

> A. Counsel's failure to present factual and expert evidence of the depth and psychological effect of Mr. Woodel's alcohol use which would have negated a finding of premeditation by the jury was deficient performance which fell below prevailing norms. Counsel's failure prejudiced Mr. Woodel to the extent that

> confidence in the outcome is undetermined.

The Defendant alleges that at his 1998 trial, counsel should have presented evidence and expert testimony to support the defense's argument that due to voluntary intoxication and psychological deficits the Defendant was guilty of either second degree murder or manslaughter because he did not have a premeditated design or plan to kill either of the victims, or did he intend to kill either victim. At the time of the Defendant's offense, voluntary intoxication was an affirmative defense to the crime of premeditated murder.

The defense did not call Mr. Woodel at the 1998 trial to testify regarding the amount of alcohol he had consumed. His confession indicated that he had consumed seven or eight beers on the night of the incident, but the defense believed that he had consumed much more than seven or eight beers. The testimony of Mr. Smith and Mr. Colon testified that they were not able to obtain more evidence to develop the extent of Mr. Woodel's intoxication. Mr. Angelo Wayne Tucci, a private investigator, was retained the defense. Mr. Tucci, testified that basically the people he interviewed during his investigation was for the purpose of trying to corroborate Mr. Woodel's drinking on the night of the crime. He tried to dig up additional witnesses who saw Mr. Woodel drinking on the night of the incident. Jessica Wallace had told him some other men had been drinking with Mr. Woodel on the night of the incident, but she was not able to give him a good enough description to locate these men.

The Defendant alleges that his counsel should have consulted a toxicologist and presented testimony

by a toxicologist to discuss the effect of alcohol use on Mr. Woodel and rebut the State's evidence of premeditation. Mr. Woodel was represented at his 1998 trial by Allen R. Smith, Esq., and Gilberto Colon, Jr. Esq. The testimony of both attorneys at the evidentiary hearing indicated that Mr. Smith was primarily responsible for the Guilt Phase of the trial, and Mr. Colon was primarily responsible for the penalty phase of the trial. However, there was some sharing of the responsibilities with respect to both phases of the trial. Mr. Smith testified at the evidentiary hearing that he had never consulted a toxicologist, and it didn't cross his mind to consult a toxicologist. Mr. Gill Colon, who was primarily responsible for the penalty phase, testified that he did not ever consider hiring a toxicologist or other similar type of expert to explain the effects of alcohol or to calculate Mr. Woodel's blood alcohol at the time of the crime. Mr. Colon expressed the opinion that he knew at least a good portion of the jurors knew what it was to be drunk and what effects that had on the drunk person. Mr. Smith testified that prior to the 1998 trial he was not aware of any defense attorney in Polk County using a toxicologist to come in and testify on the issue of voluntary intoxication. Mr. Smith also testified that he was not aware of anybody bringing in a toxicologist to support a voluntary intoxication defense at a capital murder trial. Robert Norgard, Esq., testified at the evidentiary hearing that it would be important for a capital defense attomey in 1998 to at least investigate to retain an expert in this area and utilize the testimony if it was favorable.

Dr. Cunningham, a clinical and forensic psychologist, testified at the evidentiary hearing

extensively about the factors that put someone at risk for alcohol and drug abuse, and how this could be applied to Mr. Woodel. Dr. Daniel Buffington, who practices in the field of clinical pharmacology testified at the evidentiary hearing regarding alcoholic blackouts and the cognitive and physical effects of alcohol consumption. Dr. Buffington has a doctorate of pharmacy from Mercer University. Dr. Buffington calculated Mr. Woodel's blood alcohol level at the time of the crime. He provided a lower estimation of 12 beers to an upper estimation of 24 beers consumed by Mr. Woodel. In his confession, Mr. Woodel claimed that he had consumed seven or eight beers prior to his encounter with the Moodys. Dr. Buffington testified that the level of the Defendant's intoxication had rendered him incapable of forming the premeditation required for first-degree murder.

Mr. Angelo Wayne Tucci, a private investigator, testified that basically the people he interviewed during his investigation was for the purpose of trying to corroborate Mr. Woodel's drinking on the night of the crime. He tried to dig up additional witnesses who saw Mr. Woodel drinking on the night of the incident. Jessica Wallace told him some other men or boys were drinking with Mr. Woodel, but her description of them was not sufficient enough for him to follow up on the matter. He also interviewed a guy at a 7- Eleven store to see if Mr. Woodel or any other person on the witness list had purchased any alcohol there.

The Court finds that counsel for Defendant provided ineffective assistance to the Defendant to the extent they did not at least consult with a toxicologist or similar type expert to determine if such an expert could provide useful assistance to the

defense with regard to their argument of voluntary intoxication and lack of premeditation on the part of the Defendant. Without such a consultation, counsel did not make a knowing and educated decision not to use a toxicologist or similar expert. However, despite this deficiency by counsel, the Court does not find that there is any reasonable probability that but for counsel's deficiency, the result of the proceedings would have been different. The State had a strong case against the Defendant. See the Court's discussion with regard to Claim 1D below. The Defendant's confession to law enforcement shows a recall of the facts of the offenses, purposeful behavior in carrying out the offenses, and purposeful behavior to cover up the offenses. Even should the jury find that the Defendant lacked the premeditation necessary for first degree murder premeditated murder. The Court finds that he still would have been found guilty of first degree felony murder. The evidence supported a conclusion that Mr. Woodel committed an armed burglary of a dwelling with an assault or battery and armed robbery. Claim 1A of the Defendant's motion is denied.

> B. Failure to file a motion to suppress the statement of Mr. Woodel and /or obtain an expert on police interrogation tactics and/or argue to the jury that Mr. Woodel's manner of speaking was a result of the fact that both of his parents were deaf and not indicative of untruthfulness.

This claim was withdrawn by the Defendant.

> C. Failure to raise spousal/marital communication privilege violated Mr.

Woodel's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

During opening statements the prosecutor told the jury that Mr. Woodel whispered to Gayle Woodel to hide the knife which was used as the murder weapon. There was not objection by trial counsel based on spousal privilege to the opening statement of the prosecutor. The State subsequently advised the trial court that it appeared that Gayle Woodel was still married to the Defendant. Ms. Woodel's testimony was proffered to the Court. The trial judge found that her statement fell under the marital communication privilege, and its admission was prohibited. Defense counsel asked for a mistrial, but the motion for a mistrial was denied.

In his Motion, the Defendant alleges that defense counsel failed to advise Mr. Woodel of the marital communication privilege and failed to assert the marital communication privilege prior to trial and/or opening statements. Additionally, counsel failed to lodge a contemporaneous objection when the state divulged the contents of the privileged communication failing to preserve the issue for appellate review. The Defendant asserts that reasonably competent counsel would have advised the client of the privilege and moved pretrial to assert the Defendants rights. The Defendant alleges the statement shows consciousness of guilt and intent to hide evidence prior to Mr. Woodel's admission to law enforcement that he had committed the crimes.

Both Mr. Smith and Mr. Colon testified that they were under the impression that Gayle Woodel was Mr. Woodel's ex-wife. Mr. Colon testified that it was definitely not a strategic decision to let that information come out in opening statements. Mr.

Smith was shown Defense exhibits 44, 45, and 46 which were police reports. He agreed that these police reports showed that there was evidence in the discovery that Mr. Woodel and Gayle Woodel were still married.

The Court finds that defense counsel provided ineffective assistance to the Defendant in not advising him of the marital communication privilege, not asserting the privilege pretrial, and not objecting when the State mentioned the communication in opening statements. However, the Court does not find that but for this deficiency of counsel the result of the proceedings would have been different, or that confidence in the fairness of the proceedings was undermined. The jury did not hear direct testimony from Ms. Woodel about the matter. The jury did hear Mr. Woodel's confession where he admitted hiding the knife. The State's reference to what Gayle would say is not so prejudicial as to undermine confidence in the fairness of the trial. Claim IC of the Defendant's motion is denied.

> D. Trial counsel failed to object to Arthur White's testimony claiming that Mr. Woodel told Mr. White that he fondled Mr. Moody. Further, trial counsel failed to effectively cross-examine Mr. White, a snitch with numerous prior felonies. Both of these failures violate Mr. Woodel's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

At the trial, Arthur White, a jailhouse informant, testified that Mr. Woodel had told him that he fondled Bernice Moody. The Defendant argues in his Motion that he was not charged with

any sexual offenses of Ms. Moody, nor was fondling an element of the underlying offenses. The Defendant alleges that the prejudicial effect of the statement outweighs its probative value and cites Section 90.403, Fla. Stat. The Defendant alleges that counsel was deficient in not moving in limine to exclude this testimony and not objecting to the testimony when it was presented.

The defense also alleges that defense counsel's cross-examination of Mr. White fell below prevailing norms. The Defendant alleges that counsel did not do a thorough investigation of Mr. White's background, including the number of his previous convictions he had and promises made to him by the prosecution. The Defendant alleges that the State dropped charges against the Defendant on felony charges that the Defendant faced, and he received favorable sentencing.

When he gave his testimony Arthur White said he had been convicted of 5 or 6 felonies which understated his actual number of convictions. Mr. Colon testified that he did not do his own investigation to see how many convictions Arthur White had. Mr. Colon said the only investigation that he completed was asking the State if they had any certified convictions of Mr. White. Mr. Colon testified that he didn't have an independent recollection if Mr. Wallace, the Assistant State Attorney, had shown him certified copies of the convictions. Mr. Colon testified that having worked with Mr. Wallace for many years, he would have no reason to doubt the number of convictions that Mr. Wallace would have told him.

The Court finds that counsel provided ineffective assistance when they did not file a motion

to exclude this testimony. The prejudicial effect of this testimony regarding fondling far outweighed the probative value of the testimony. Because this was a death case, there are heightened due process concerns.

However, as with Claims 1A And 1C, the Court does not find that but for this deficiency of counsel the result of the 1998 Guilt Phase proceedings would have been different. The Court does not find that these deficiencies undermine confidence in the fairness of the proceedings.

The case against the Defendant was very strong. The State had the Defendant's confession, the State had DNA evidence supporting its case against the Defendant, the toilet tank lid remains, Mr. Moody's wallet, the murder weapon (knife) was found where the Defendant said that he had hidden it. Claim lD of the Defendant's motion is denied.

CLAIM II

MR. WOODEL WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. WOODEL'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA

CONSTITUTION AND UNDER FLORIDA COMMON LAW.

Claim II of the Defendant's Motion is divided into parts A, B, C, D, E, F and G. The Court will discuss each of these parts one at a time.

A. Failure to conduct a reasonably competent mitigation investigation and failure to present mitigation.

The Defendant alleges that counsel failed to conduct a reasonable competent mitigation investigation. He argues that counsel failed to obtain a comprehensive social history, biological history, or psychological history of Mr. Woodel and his family. In his Motion the Defendant alleges that counsel "... failed to obtain basic records on Mr. Woodel, including by but not limited to, birth records and other medical records, school records, employment records, juvenile records, court records, divorce records, counseling records, orphanage records, records when he was in the Big Brother/Big Sister program, military records and others." The Defendant further alleges; Counsel failed to retain experts who were tailored to the needs of the case and rather relied on an "all purpose expert" to explain deaf culture, the effect of growing up as a hearing child with two deaf parents and the effect that had on Mr. Woodel's emotional/psychological development and ability to communicate." The Defendant also alleges that counsel failed to obtain records on Mr. Woodel's parents, aunts, uncles, grandparents and siblings and their background, including but not limited to, employment records, social security disability records, psychological records, medical records, accident records, prison/jail records, orphanage records, and others."

Additionally, the Defendant alleges that counsel "--- failed to contact and secure the appearance of witnesses including but not limited to the maternal uncle, the father's prior wives, the mother's prior husband, Mr. Woodel's counselor when he was a teenager, Mr. Woodel's Big Brother in the Big Brother/Big Sister program, friends who know Mr. Woodel's father and mother and Mr. Woodel prior to the crimes, teachers, employers, corrections officers, the parent's ex-spouses and others" The Defendant asserts in his Amended Motion," Because Mr. Woodel's attorneys failed to conduct a reasonably competent investigation of Mr. Woodel's background, they failed to present reasonably available mitigation to the jury and to link it to the crimes, including giving adequate weight to the statutory mental mitigators."

The Court's evaluation of Claim IIA involves the actions taken by defense counsel with regard to both the 1998 penalty phase and the 2004 penalty phase of Mr. Woodel's trials. However, the focus of the Court's discussion will be on the 2004 penalty phase. On direct appeal, the Florida Supreme Court affirmed Woodel's 1998 conviction but remanded the case to the Circuit Court for a new penalty phase proceeding because Judge Pyle's order failed to evaluate each mitigating circumstance and failed to determine whether these mitigators are truly mitigating, failed to assign weights to the aggravators and mitigators, failed to undertake a relative weighing process and failed to provide a detailed explanation of the results of the weighing process. In preparing this Order, the Court was particularly concerned with how counsel used the

experience of the 1998 penalty phase in preparation for the 2004 penalty phase.

In Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535 (2003), the United State's Supreme court discussed reasonable investigations and quoted the following language from Strickland.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

In Wiggins the court went on to say, "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. See Wiggins v. Smith, 539 U.S. 510, 527,123 S.Ct. 2527, 2538 (2003),

In preparation for the Second penalty phase, Mr. Colon talked to three family members. Bobbie Hermes, Albert Woodel, and Margaret Russell. The same three people that testified at the 1998 trial. He did not go to North Carolina or Michigan and he did not hire an investigator to do so. All he did was review records and proceed with the same type of defense. He did not hire Toni Maloney, or for that matter, any mitigation specialist to talk to family members and other potential witnesses. He acknowledged on redirect that it may have been a bad decision. He did no additional investigation or try to find a CODA expert. Mr. Colon said that "looking back, I wish I had hired somebody that would have come in and provided further testimony. "Mr. Colon was on notice that he had unique issues regarding his client.

The first jury made a 9-3 recommendation of death for the murder of Mr. Moody and a 12-0 death recommendation for the murder of Bernice Moody. Despite these recommendations at the 1998 penalty phase, Mr. Colon failed to hire Ms. Maloney or any mitigation specialist to prepare for the 2004 penalty phase. Mrs. Maloney testified that she would have been available for the second penalty phase, and if she had been contacted, she believed additional investigation was needed. Mr. Colon's testimony at the evidentiary hearing was that he liked the package he had. He did no new investigation. Other than calling Mr. Woodel as a witness in the 2004 trial, he called the same witnesses that were called in the first trial. Mr. Colon did not consult with a toxicologist or similar professional to help the jury understand the role alcohol abuse played in Mr. Woodel's actions. A mitigation specialist could have

developed a multigenerational history, which showed a pattern of alcoholism, a pattern of abuse and abandonment. The Court finds that counsel's performance fell below an objective standard of reasonableness with respect to Claim IIA of the Defendant's Motion. The Court finds that but for this deficient performance there is a reasonable probability that the result of the proceedings would have been different, and Mr. Woodel may have received a life recommendation.

B. Failure to Ensure A Reasonably Competent Mental Health Evaluation

The Defendant alleges that; "Counsel failed to ensure that Mr. Woodel received reasonably competent mental health evaluation and failed to retain reasonably competent mental health evaluation and failed to retain reasonably qualified experts to determine the extent of Mr. Woodel's mental, emotional and psychological deficits due to his neglect and the abuse he suffered throughout his childhood. Counsel further failed to retain an expert to calculate Mr. Woodel's probable blood alcohol level and assess the effect of alcohol on Mr. Woodel's brain and thought processes at the time of the crime."

The issues raised by the Defendant in Claim IIB have been discussed by the Court to a large extent with regard to Claim IIA. At the evidentiary hearing, Dr. Cunningham, a clinical and forensic psychologist, testified extensively about the factors that put someone at risk for alcohol and drug abuse, and how those factors could be applied to Mr. Woodel. Dr. Daniel Buffington, a clinical pharmacologist testified at the evidentiary hearing regarding alcoholic blackouts and cognitive and physical effects of alcohol consumption. Dr. Buffington calculated

Mr. Woodel's alcohol consumption at the time of the incident to have been between 12 and 24 beers. Dr. Alan G. Marcus, a Clinical Psychiatrist who works with deaf and hard of hearing adults and their families, including CODA's, discussed the deficiencies in Dr. Dee's presentation with respect to the special problems faced by Mr. Woodel as a CODA. The testimony presented at the evidentiary hearing regarding the capabilities of Dr. Dee seemed to agree that he was often used and respected as a death penalty mental health expert in Polk County. The Court is of the opinion after reading the trial transcript of Dr. Henry Dee from the 2004 penalty phase, that Dr. Dee made a determined effort to present as complete a mental health picture of the Defendant as possible. Considering his limited knowledge of CODA and the deaf culture, he did his best to try to convey to the jury how that factor impacted on Mr. Woodel.

However, after considering the testimony of Dr. Marcus regarding CODAs, the testimony of Dr. Buffington and Dr. Cunningham regarding the effects of alcohol on the Defendant, and other testimony the Court received involving multigenerational patterns of alcohol abuse, the Court is of the opinion that the defense did not present a reasonably competent mental health picture of the Defendant and was deficient regarding Claim IIB of the Defendant's Amended Motion. The Court finds that counsel's performance fell below an objective standard of reasonableness with respect to Claim IIB of the Defendant's Motion. The Court finds that but for this deficient performance there is a reasonable probability that the result of the proceedings would

have been different, and Mr. Woodel may have received a life recommendation.

> C. Trial counsel failed to object to Arthur White's testimony claiming that Mr. Woodel told Mr. White that he fondled Ms. Moody. Trial counsel also failed to consider and/or offer an objective, scientific explanation of how Mr. Woodel's inhibitions would have been lowered by alcohol as an explanation for this behavior if the trial court would have allowed the testimony about fondling over defense objection. Further, trial counsel failed to effectively cross-examine Mr. White, a snitch with numerous prior felonies, who would have known information about the crime from news reports, including suggestions that Ms. Moody has been sexually assaulted. These failures violated Mr. Woodel's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

The Defendant argues that counsel failed to object to Arthur White's testimony, or to effectively cross-examine Mr. White. The defense did not present testimony at the evidentiary hearing in furtherance of its claim that counsel did not consider and/or offer an objective scientific explanation of how Mr. Woodel's inhibitions would have been lowered by alcohol as an explanation for his behavior. The concerns regarding counsel's failure to do an independent investigation of Mr. White's criminal history and to investigate the possibility of his having received a benefit for his testimony were discussed in

Ground ID of the Court's Order and apply to Ground 2C as well. In Ground ID the Court also discussed how the prejudicial effect of Mr. White's testimony regarding fondling far outweighed the probative value of the testimony and this also applies to Ground IIC as well. The Court finds that counsel was deficient in the penalty phase in 2004 just as in 1998 with regard to not filing a motion to exclude this testimony. The prejudicial effect of this testimony regarding fondling far outweighed the probative value of the testimony. Because this was a death case, there are heightened due process concerns. Particularly in light of the fact that the jury returned a verdict of 7 to 5 in favor of death in the 2004 penalty phase proceeding, the Court is concerned that but for this deficiency of counsel the result of the 2004 penalty phase proceedings would have been different. The Court finds that counsel's performance fell below an objective standard of reasonableness with respect to Claim IIC of the Defendant's Motion. The Court finds that but for this deficient performance there is a reasonable probability that the result of the proceedings would have been different, and Mr. Woodel may have received a life recommendation.

> C. Failure to File a Motion To Suppress the Statement of Mr. Woodel or obtain an interrogation specialist or confession expert to address the interrogation tactics of the investigators and explain Mr. Woodel's language skills/speaking style was deficient performance which prejudiced Mr. Woodel,

This claim was withdrawn by the Defendant.

> E. Trial counsel failed object to hearsay testimony about Ms. Moody's medical condition which allegedly made her more vulnerable and was the basis for the aggravating factor of advanced age/particular vulnerability. Trial counsel's failures violated Mr. Woodel's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

In his Motion, the Defendant alleges, "Trial counsel rendered deficient performance by failing to object to the State's improper use of hearsay testimony to establish the aggravator of victim vulnerability due to age or disability. During the resentencing proceeding, the State offered the testimony of Maryann Richard, Ms. Moody's eldest daughter, to establish that Ms. Moody had broken her arm.

The court finds that this factor would have been shown even without this testimony of Maryann Richard. Ms. Moody was 74 yes old, wore glasses, and had experienced a serious injury to her shoulder which continued to impact strength and physical ability. Additionally, Mr. Colon testified at the evidentiary hearing that as a matter of strategy he would not object to the medical testimony provided by the victim's daughter at the resentencing, Ground IIE of the Defendant's Amended Motion is denied.

> F. Failure to re-raise spouse/marital communication privilege violated Mr. Woodel's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The Defendant alleges that trial counsel failed to reassert the marital communication privilege. The

defense claims that counsel introduced testimony through Mr. Woodel at the 2004 resentencing regarding what he told Gayle about the knife and the State asked Mr. Woodel a series of questions suggesting his statements to Gayle were made because his intention was to hide the knife from the police. At the evidentiary hearing, Mr. Colon testified regarding the tactical reason for presenting this testimony. The Defendant wanted to explain that he wasn't trying to keep the knife away from the police, but to keep the knife away from his own child. The jury was going to hear information about the hidden knife through Mr. Woodel's confession, and the Court finds that Mr. Colon's strategy was reasonable with regard to having Mr. Woodel explain his intentions with regard to the hidden knife. Even if it could be supposed that there was some deficiency by counsel with regard to this issue at the 2004 penalty phase, the Court does not find any real possibility that the result of the proceedings would have been different but for this deficient performance. Ground IIF of the Defendant's Amended Motion is denied.

> G. Trial counsel rendered deficient performance in failing to adequately preserve for appellate review the claim that the trial court committed fundamental constitutional error in excusing for cause two Spanish speaking potential jurors and failed to object to the court's failure to provide Spanish speaking interpreter for the potential jurors.

A review of the record shows that counsel did object to the exclusion of two Hispanic jurors. In

Woodel v. State, 985 So.2d 524, 528-530, the Florida Supreme Court found that counsel's objection was sufficient. The Florida Supreme Court determined that no error could be discerned even if counsel had provided support for a fair cross section claim. Ground IIG of the Defendant's Motion is denied.

CLAIM III

MR WOODEL WAS DEPRIVED OF HIS DUE PROCESS RIGHTS TO DEVELOP FACTORS IN MITIGATION BECAUSE THE PSYCHOLOGIST RETAINED BY THE DEFENSE FAILED TO CONDUCT THE APPROPRIATE TESTS FOR ORGANIC BRAIN DAMAGE AND MENTAL ILLNESS, THIS VIOLATED MR. WOODEL'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

This Court finds that this claim is procedurally barred. Claim III of the Defendant's Amended Motion is denied. See Whitfield v. State, 923 So.2d 375 (Fla. 2005); and Marshall v. State, 854 So.2d 1235 (Fla. 2003).

CLAIM IV

THE STATE VIOLATED THE CONSTITUTIONAL REQUIREMENTS OF BRADY V. MARYLAND AND ITS PROGENY,

GIGLIO V. UNITED STATES AND ITS PROGENY, AND DONNELLY V. DECHRISTOFORO, DENYING MR. WOODEL HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE (UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, THE STATE'S ACTIONS AND OMISSIONS PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE.

A. The Prosecutor misled the court during the Guilt Phase of Mr. Woodel's trial when it told the Court it had been unaware of and/or had not been told that Gail Woodel was still married to Thomas Woodel.

B. During the Resentencing trial, the State Attorney failed to disclose Brady evidence and violated Giglio when it offered untruthful testimony which it failed to correct when it allowed Arthur White to testify falsely about his prior record and lenient treatment on pending cases.

The Defendant alleges that the State violated Brady v. Marvland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), when it failed to reveal exculpatory information regarding Mr. Woodel's marital status and Arthur White's prior

record, as well as a deal to obtain Mr. White's testimony at the 1998 trial and the 2004 penalty phase trial. The Court does not find that the defense has supported allegations that there were Brady or Giglio violations. The defense has not show that the State suppressed favorable information from the Defendant, or that he was prejudiced. The Court finds that there was no showing by the defense that the State possessed any exculpatory information regarding Mr. Woodel's marital status which could not have reasonably been known to Mr. Woodel. Information cannot be deemed suppressed where the defense was or reasonably should have been aware of the information. See Owen v. State, 986 So.2d 534 (Fla. 2008). At the evidentiary hearing Mr. Colon agreed that police reports he would have received seemed to indicate that the Defendant was married. The Defendant alleges that the State failed to correct Mr. White's allegedly false testimony that he did not get a benefit in exchange for his testimony as well as his testimony that he had only 5 or 6 convictions. The Court finds that the Defendant has not shown that the State made any agreement to provide favorable treatment in exchange for Mr. White's trial testimony or knowingly allowed him to testify to an incorrect number of prior convictions. Claim IV of the Defendant's Motion is denied.

CLAIM V

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED THOMAS WOODEL OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH,

EIGHTH, AND FOURTEENTH AMENDMENTS.

As more fully explained in the court's discussion with regard to Claim I of the Defendant's Amended Motion, the Court finds that the Defendant has not shown that the results of the 1998 Guilt phase would have been different but for the claimed deficiencies of counsel. The Court is of te opinion that the Defendant is entitled to a new penalty phase trial as more fully explained with regard to Claim IIA, Claim IIB, and Claim IIC, and a cumulative assessment of alleged deficiencies has been rendered unnecessary.

CLAIM VI

NEWLY DISCOVERED EVIDENCE PROVES EXECUTION BY LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THEREFORE MR. WOODEL'S SENTENCE OF DEATH IS UNCONSTITUTIONAL.

A. Newly discovered evidence of Florida's Lethal Injection Protocol, as amended on July 31, 2007, creates and unnecessary risk of excessive pain and therefore violates the Eighth Amendment's command that "cruel and usual punishment [not be] inflicted." U.S. Const. amend. VIII. The newly acquired testimonial evidence and facts demonstrate that Florida's current lethal injection protocol is defective.

B. Florida Statute 945.10 prohibits Mr. Woodel from knowing the identity of the execution team members, denying him his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments.

C. The Florida Statute Which Prohibits Mr. Woodel's Counsel from Filing a Section 1983 Claim On His Behalf Deprives Mr. Woodel of Due Process, Equal Protection, and Access to the Courts in Violation of the Florida and Federal Constitution.

Barring a new decision from the Florida Supreme Court or the United States Supreme Court, this Court is bound by precedent from decisions of the Florida Supreme Court holding that execution by lethal injection does not constitute cruel and unusual punishment. See Ventura v. State, 2 So.3d 194 (Fla. 2009), and Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007). Claim VI of the Defendant's Motion is denied.

CLAIM VII

MR. WOODEL'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. WOODEL MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

The defense asserts in its Amended Motion, that the Defendant suffers from mental illness and brain damage, and that the poor conditions under which he is incarcerated could cause him to decline to the point that he is incompetent to be executed. In

his Motion, the Defendant acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. In his Motion, the Defendant states; "Until the death warrant is signed, the issue is not ripe. This established under Florida law pursuant to Section 922. 07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986) …" In Kimbrough v. State, 886 So.2d 965, (Fla. 2004), the Florida Supreme Court stated; "Under Florida Rules of Criminal Procedure 3.811 and 3.812, the issue of competency for execution cannot be raised until the Governor has issued death warrant. *See, e.g., Cole v. State* 841 So.2d 409, 430 (Fla. 2003); *Brown v. Moore,* 800 So.2d 223. 224 (Fla. 2001)." The Court finds that the Defendant's claim is not ripe for judicial consideration until a death warrant has been issued. Claim VII of the Defendant's Amended Motion is denied.

Therefore, it is **ORDERED AND ADJUDGED** that Defendant's Amended Motion To Vacate Judgments of Conviction And Sentence, is **DENIED** with respect to his Claims that he is entitled to a new guilt phase trial. It is further, **ORDERED AND ADJUDGED** that the Defendant's Amended Motion To Vacate Judgments of Conviction And Sentence, is **GRANTED** to the extent that he is entitled to a new penalty phase trial based on Ground IIA, Ground IIB, and Ground IIC of his Amended Motion To Vacate Judgments of Conviction And Sentence.

DONE AND ORDERED in Bartow, Polk County, Florida this 28th day of Dec. 2011.

_____

J. MICHAEL HUNTER, Circuit Judge

cc:
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