

No. 14-906

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IN THE UNITED STATES SUPREME COURT

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THOMAS D. WOODEL, *Petitioner*,  
v.

STATE OF FLORIDA, *Respondent*.

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On Petition for Writ of Certiorari to the  
Supreme Court of Florida

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BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

[Capital Case]

Whether the Florida Supreme Court erred in concluding that Petitioner Woodel failed to satisfy his burden of demonstrating prejudice, rendering his claim of ineffective assistance of counsel at his resentencing legally insufficient?

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## CITATION TO OPINION BELOW

The opinion of the Florida Supreme Court is reported at Woodel v. State, 145 So. 3d 782 (Fla. 2014). The Florida Supreme Court denied Woodel's motion for rehearing on August 28, 2014 and the mandate issued September 15, 2014.

## STATEMENT OF THE CASE

Petitioner Thomas Woodel was convicted of the first-degree murders of Clifford and Bernice Moody in 1998. On appeal, the Florida Supreme Court affirmed the convictions, but remanded the case for entry of a new sentencing order, because the sentencing judge failed to properly evaluate the mitigating evidence. Woodel v. State, 804 So. 2d 316 (Fla. 2001). Upon remand, the case was assigned to the Hon. Susan Roberts and a new jury proceeding was directed, as the original judge was not available to enter a new order. Woodel was resentenced to death for Mrs. Moody's murder and the Florida Supreme Court affirmed the sentence. Woodel v. State, 985 So. 2d 524 (Fla.), cert. denied, 555 U.S. 1036 (2008).

The Moodys were killed early on Dec. 31, 1996. Woodel had spent the prior evening drinking with friends, and was walking home through a trailer park when he walked by the Moodys' trailer and saw Mrs. Moody cleaning the windows. Her nude body was discovered a few hours later. She

had been stabbed 56 times and hit over the head repeatedly with a porcelain toilet tank lid. Her panties were cut off and tied in a knot. Mr. Moody's body was found on the floor of the living room, with eight stab wounds. Items from the crime scene recovered in a dumpster led the police to Woodel, and DNA evidence placed him at the scene and tied items in his possession to the crime. He also provided a written statement and an extensive taped interview with detectives, acknowledging his culpability and describing in detail his actions before, during, and after the murders.

Attorneys Allen Smith and Gil Colon were appointed to represent Woodel. Both had extensive experience in criminal law and had defended capital cases and routinely attended death penalty seminars. In addition, Dr. Thomas McClane, a neuropsychologist, was appointed as a confidential advisor; neuropsychologist Dr. Henry Dee and Toni Maloney, a mitigation specialist, were appointed closer to trial.

Woodel was convicted as charged in December, 1998. At the penalty phase, Woodel presented testimony from his friend, Jessica Wallace; a co-worker, Leola Kilbourn; Ms. Kilbourn's daughter, Lisa Kilbourn; trial attorney Allen Smith; his father, Albert Woodel; his aunt, Margaret Russell; his sister, Bobbi Woodel; and Dr. Dee. The jury recommended death sentences by votes of 12 to 0 for Bernice Moody and 9 to 3 for Clifford Moody, and the court followed the recommendations.

For the July, 2004 resentencing, attorney Colon and neuropsychologist Dee were reappointed. At the resentencing proceeding, the jury heard extensive family history testimony from Woodel's sister, Bobbie; his father, Albert; his aunt, Margaret Russell, and from Woodel himself, comprising nearly 400 pages of transcript. The jury heard that Woodel's parents were deaf, abusive, and neglectful, often leaving Woodel and his sister unattended or abandoning them with other family members or at the children's home, where they spent several years. The parents' deafness led to parenting and communication issues that continued even when Woodel was older. They were financially poor and did not have adequate food or clothing. The parents drank heavily and fought often, divorcing when Woodel and his sister were young.

Sister Bobbie spoke of being sexually abused by one of her mother's boyfriends and believed her mother favored an older son over Bobbie and Woodel. She and Woodel both started drinking at an early age. She recalled her mother giving her a case of beer for her 13th birthday, but they had been drinking long before that time.

The murders were completely out of character for Woodel and he expressed remorse to many witnesses. Woodel had no prior violent history and his friendly, easygoing manner and hardworking nature were highlighted in testimony by two friends and a co-worker. These witnesses also confirmed that Woodel had been drinking



excessively and showing signs of intoxication hours before the murders.

Woodel's testimony is nearly 175 pages long. Woodel described his life story, from his earliest memory through his arrest and incarceration. He started drinking at age eleven and frequently drank to get drunk. He described drinking heavily the night before the murders, noting he had underestimated his drinking in giving a statement to the police, as he did not want them to think badly of him. He vividly related details about encountering the Moodys and the violent actions that led to their deaths. He testified that he has tried to come up with some explanation but that he has no idea why this happened. He accepted responsibility for his actions and suggested that he can't be punished enough for what he'd done. He had not been in trouble while in prison, having only been written up for one disciplinary report because he unknowingly had more stamps than he was supposed to have at one time.

In addition, Dr. Dee testified extensively about Woodel's background and mental state. While Woodel had average intelligence and was not psychotic, he suffered chronic depression and low self-esteem from his abnormal childhood. Dee described Woodel as having suffered "some of the most spectacular abuse and neglect" he had seen. Between the family witnesses and Dr. Dee, the jury heard a substantial amount of anecdotal evidence of bizarre behavior, neglect, and abandonment by Woodel's parents. Dee also researched issues

relating to the deaf community, and explained to the jury that children with deaf parents are stuck in their own subculture, feeling rejected by both the deaf world and the hearing world. He observed that being a child able to hear raised in a deaf environment had major impacts on a person's development, and affected Woodel in a number of ways. Deaf parents often lack necessary parenting skills and hearing children are expected to communicate on their parents' behalf in many situations. Woodel's parents' deafness created terrible struggles for him, but Dr. Dee felt that the neglect and abandonment which Woodel continually endured had a more pernicious influence on his life. Dee confirmed that Woodel's statement to the police was not an accurate reflection of how much Woodel had to drink before the murders.

In closing argument, defense counsel Colon emphasized how the murders were an isolated incident, completely out of character for Woodel. Colon noted Woodel had accepted responsibility for his actions early, and outlined how Woodel's childhood and drinking provided some insight into why this had happened, even though Woodel had not tried to use his background or the alcohol as an excuse. Colon explained why these were not the most aggravated of crimes, deserving of the death penalty, and how Woodel's life had value. He suggested that something from Woodel's past triggered his actions that night, and perhaps repressed feelings against his mother had surfaced.

He discussed why the aggravating factors should be discounted and addressed five statutory mitigating factors, asking the jury to find both statutory mental mitigators based on Woodel's background and the alcohol involved.

The jury recommended a life sentence for the murder of Mr. Moody, and recommended a death sentence by a vote of seven to five for the murder of Mrs. Moody. Judge Roberts followed the jury recommendations. As to Mrs. Moody's murder, the court found the same four aggravating circumstances previously found, giving great weight to the prior violent felony conviction, committed during commission of a burglary, and heinous, atrocious or cruel, and moderate weight to Mrs. Moody's vulnerability due to age or disability. In mitigation, the court found: no significant criminal history; defendant's age; substantial impairment of capacity to appreciate actions or conform conduct (based on alcohol consumption); extreme disturbance (based on alcohol consumption); physically abused as a child; neglected and rejected by mother and others; instability of homes as child; parents are deaf and mute; abuse of alcohol and drugs; willingness to meet with victims' daughter; willingness to be tested for bone marrow donation for his daughter; belief in God and belief he has been forgiven; voluntary confession; and compassion for others. The court concluded that the aggravating factors "far outweigh" the mitigation and imposed a sentence of death.

After the Florida Supreme Court affirmed the death sentence and this Court denied certiorari review, Woodel filed a motion for postconviction relief in state court. He was granted an evidentiary hearing on his claim that his trial counsel provided ineffective assistance of counsel. As to counsel's actions at penalty phase, he contended that counsel should have presented more evidence of Woodel's family's dysfunction, more evidence of his drinking and its affect on him the night of the murders, and more evidence of the difficulties of life as a hearing child of deaf parents. According to Woodel, it was constitutionally deficient to use Dr. Dee as an expert witness, as the American Bar Association guidelines recommend that specific expert witnesses address unique issues, rather than having one general mental health expert. Thus, trial counsel should have presented a toxicologist and a deaf culture specialist and a forensic psychologist rather than just one neuropsychologist.

At the evidentiary hearing, counsel Colon testified that he prepared for the resentencing by reviewing the transcript of the original penalty phase, and securing the reappointment of Dr. Dee. He did not travel to North Carolina, Pennsylvania or Michigan, where Woodel had lived before moving to Florida, Colon was satisfied with the mitigation presentation from the first trial, and saw no need to conduct a further investigation. He did not feel that information about multigenerational patterns of alcoholism, abuse and neglect or a multifamily

history were helpful to the defense without some showing of a direct impact on the defendant.

In addition, Colon's familiarity with rural Polk County, and the jurors who would be deciding Woodel's fate, led him to believe that the jury had no need of hearing from an expert witness in order to assess the effects of consuming alcohol. In fact, Colon was wary of presenting expert testimony at all as you run the risk of losing credibility if the experts come across as a "bought" witness. He understood the ABA guidelines on this issue to be a recommendation rather than a requirement to use different experts for specific areas, and preferred to evaluate the effects the expert might have on the jury rather than just blindly presenting expert witnesses simply to avoid the allegation in the future that such action should have been taken. Even at the time of the evidentiary hearing, seven years after the resentencing, Colon would not use a toxicologist for a Polk County jury. Colon also testified that he thought Dr. Dee was well prepared and credible to discuss the implications of Woodel's parents being deaf.

Colon's strategy was to focus on the positive aspects to Woodel's character and he would have avoided presenting any testimony that portrayed Woodel in a negative light. He acknowledged that can be a reasonable tactic in some cases, but in this case there was extensive evidence that Woodel was kind, caring, and compassionate, and had always been that way. One big change for the resentencing was to have Woodel testify in his own behalf, in

order to humanize him to the jury. Colon might consider using a prison or corrections expert to discuss Woodel's good behavior in prison, but would not want the jury to hear that Woodel had previously been sentenced to death.

Woodel's presentation at the evidentiary hearing of what reasonably competent counsel should have offered in mitigation at the penalty phase included James Aiken, a prison consultant expert to discuss Woodel's behavior on death row; Dr. Alan Marcus, a psychologist with an expertise on deaf culture issues and the child of deaf parents himself; Dr. Daniel Buffington, a clinical pharmacologist; and Dr. Mark Cunningham, a clinical and forensic psychologist. Dr. Cunningham was flown in from Texas for approximately \$51,000 to give a two-day slideshow presentation detailing "complex interaction of biopsychosocial forces," which are adverse developmental factors which influenced Woodel's life and led to the murders of Cliff and Bernice Moody.

The mitigation case in postconviction also included a mitigation specialist who had tracked down history about remote family members that was unknown to the family Colon had spoken to at the time of the trial and resentencing. She testified that the dysfunction and alcoholism in Woodel's family went back two or three generations. Woodel's sister and aunt repeated much of their earlier testimonies and additional family members and friends offered testimony regarding Woodel's father's poor reputation for stealing and lying in

the deaf community. Individuals who knew Woodel from his time at the Children's Home and in North Carolina and Michigan offered their observations of Woodel's background and his mother's lack of parenting and social skills. At the conclusion of the hearing, Judge Michael Hunter found that Colon had performed deficiently by failing to conduct a new, full investigation when Woodel's case was remanded for the 2004 resentencing, and that Woodel was prejudiced by the deficiency.

On appeal, the Florida Supreme Court reversed, finding that the evidence at the hearing failed to demonstrate any possible prejudice. Woodel now seeks certiorari review of that decision, asserting that the Court's prejudice analysis was flawed and contrary to this Court's precedents. For the reasons that follow, review should be denied.

## **SUMMARY OF THE ARGUMENT**

Woodel has failed to offer any reasonable basis to support his request for certiorari review. What Woodel seeks is routine appellate review of the findings and conclusions reached by the Florida Supreme Court below. He has not identified any legal question which is unsettled or in conflict and in need of this Court's consideration and resolution. Moreover, a review of the full record confirms that the Florida Supreme Court ruled correctly, as Woodel failed to establish any prejudice to support his claim of ineffective assistance of counsel. Accordingly, certiorari review must be denied.



## REASONS FOR DENYING THE WRIT

### **The Prejudice Analysis Conducted Below Does Not Provide a Basis for Certiorari Review.**

Woodel asserts that the prejudice analysis conducted by the Florida Supreme Court below was inconsistent with this Court's precedent in Strickland v. Washington, 466 U.S. 668 (1984), and later cases interpreting Strickland. Woodel claims that the Florida Supreme Court failed to consider the totality of the new mitigation evidence offered in postconviction. He also argues that "procedural irregularities" in Florida's death penalty scheme underscore the prejudice caused by counsel's purportedly deficient performance.

Woodel's disagreement with the Florida Supreme Court does not identify any error in the legal standard applied or any unsettled or conflicting legal principles which need to be addressed by this Court. To the contrary, his argument is that the well established law from Strickland was ignored or misapplied by the Florida Supreme Court. Woodel's issue is fact-bound rather than a question of legal doctrine, and as such, is inappropriate for this Court's certiorari review.

Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review, and confirms that this Court focuses on unsettled or conflicting questions of law rather than resolving factual disputes. Woodel has made no attempt to identify any consideration under Rule 10 which compels review in this case. Instead, he merely disputes the state court's ultimate conclusion. He makes no attempt to explain how any potential error in the ruling below merits this Court's certiorari review.

The only question presented in Woodel's petition is whether relief was properly denied on the facts of this case. There is no conflict among the state courts of last resort or the federal circuit courts on this issue and no unsettled question of federal law. Although the failure to meet the considerations in the rule is not controlling, this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. 182, 184, n. 3 (1987). The law is well-settled that this Court does not grant a certiorari "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041 (1984).

This Court is “consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties.” Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955); see also Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction).

Even if this Court undertook a factual review, it would only confirm that the state court below properly denied relief in this case. The record fully supports the finding of the Florida Supreme Court that Woodel failed to establish any prejudice as necessary under Strickland. Woodel’s allegation that the Court failed to consider the totality of the new mitigation evidence presented in postconviction is refuted by the opinion itself, which confirms that prejudice was properly assessed and rejected.

The circuit court judge that granted Woodel a new sentencing proceeding offered express factual findings to support his conclusion that attorney Colon failed to perform in a constitutionally adequate manner. However, his determination of prejudice was conclusory, unexplained, and unsupported by any factual findings; it was only one sentence long (Pet. App. 166a). He did not identify any actual evi-

dence presented at the postconviction hearing which was unknown to the jury. He did not identify any new mitigating factors which would have been found and weighed, had the postconviction evidence been presented at the resentencing. The postconviction judge was not the judge that conducted the resentencing and imposed the death sentence, and his ruling on this claim does not provide any indication that he even read or considered the totality of the evidence in finding prejudice.

On appeal, the Florida Supreme Court recited and relied upon Strickland. Woodel v. State, 145 So. 3d 782, 791, (Fla. 2014). The state court concluded that, after full review of the entire postconviction record and the testimony presented at the 1998 penalty phase and 2004 resentencing, “we see nothing in the record before us that undermines our confidence in the outcome of Woodel’s penalty phase.” Id., at 793. Woodel disputes this ruling, noting that the circuit court judge identified three topics of mitigation which counsel failed to adequately investigate: family history, toxicology, and likelihood of future dangerousness. However, Woodel completely ignores the wealth of evidence presented at the resentencing which established Woodel’s dysfunctional family and nightmarish background; his history of alcohol consumption and intoxication on the night of

the crime; and his lack of prior violence and good behavior in prison.

The opinion first addresses Woodel's claim that Colon failed to sufficiently explore and present mitigation based on Woodel's personal history and family background. The Court described the extensive evidence and substantial mitigating circumstances found at the 2004 resentencing, from family members but primarily from Dr. Dee. Dr. Dee was a well known, respected mental health professional. His testimony at the postconviction evidentiary hearing conducted in Porter v. McCollum, 558 U.S. 30 (2009), led this Court to determine that Porter had not had a constitutionally adequate sentencing proceeding.

In this case, Dr. Dee spent a great deal of time with Woodel, as well as interviewing family members and reviewing background material. As a result:

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.

The Court also observed that the new mitigation related to Woodel's multigenerational family background and characterized it as "minor," and insufficient to establish any prejudice under Strickland.

The Court also assessed Colon's failure to provide expert testimony to the jury regarding the effects of Woodel's alcohol consumption. The Court again declined to consider deficient performance but concluded that there was no reasonable probability of a different outcome had counsel presented such an expert. Again the Court observed that Dr. Dee had provided testimony about Woodel's history of drinking as well as assessing his consumption on the night of the murders. In addition, the postconviction testimony of Dr. Buffington that Woodel may have experienced partial alcohol-induced black-outs was difficult to reconcile with Woodel's testimony, which revealed that Woodel only experienced memory loss about certain specific aspects of the crime. Woodel's ability to recall many pertinent details from commission of the murders was a legitimate basis to discount the weight of the postconviction testimony and the

Court properly concluded that confidence in the outcome of Woodel's resentencing was not undermined.

The Court also considered Woodel's claim that Colon should have presented an expert to discuss Children of Deaf Adults (CODA). Once again the Court determined that the testimony of Dr. Dee provided the jury with substantial information on this aspect of Woodel's background. In light of Dr. Dee's thorough discussion of both the deaf culture in general and persons with "mother-father deaf" status in particular, the postconviction testimony provided on this issue by Dr. Marcus was deemed cumulative and insufficient to undermine confidence in the outcome.

The postconviction evidence regarding Woodel's lack of future dangerousness focused on testimony of Woodel's non-violent nature and his good behavior in prison. The jury was well aware that Woodel had no history of violence and that he had only one disciplinary report for the time he had been in prison. In addition, the postconviction expert to discuss the lack of future dangerousness would necessarily testify that Woodel had previously been sentenced to death, which defense counsel strategically did not want the jury to hear.

After reviewing all of the allegations of ineffective assistance of counsel and contrasting

the resentencing evidence with the mitigation presented in postconviction, the Florida Supreme Court expressly engaged in a lengthy cumulative analysis:

#### **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 sub-

stantial, 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, 104 S.Ct. 2052); see also *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052 (“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.

Woodel, 145 So. 3d at 801-03.

Woodel's claim that the new postconviction evidence “painted a completely different picture,” of Woodel than what the jury heard in 2004 is refuted by the record. At the resentencing, the jury heard extensive testimony about Woodel and his sister being shuffled between caregivers and subjected to continuing abuse and neglect. Woodel's observation that his

postconviction expert testified that ‘this was one of the worst cases that he had encountered’ was in fact strikingly similar to Dr. Dee’s testimony at the resentencing, that this was one of the most spectacular cases of abuse and neglect he had ever seen.

Notably, the petition often overstates the facts and at times asserts complete misrepresentations in order to bolster Woodel’s case. For example, it asserts that the defense at resentencing “focused on maternal neglect, without informing the jury that Woodel’s father was abusive, neglectful, and alcoholic” (p. 12). In fact, Woodel testified after his father had testified and did not suggest that any of his father’s testimony was misleading or inaccurate. Sister Bobbi testified that their father, Albert, had a temper; had been violent with mom, Jackie; and had thrown Woodel across the room in anger. Police came due to fighting by the parents and Bobbi recalled having seen her father in handcuffs more than once. Woodel also discussed his father’s “tossing” him around, and destroying his bicycle with a sledgehammer, and harboring illegal immigrants from Mexico. Albert and Dr. Dee both testified that Albert was simply not around for most of Woodel’s life.

The petition also states that 27 witnesses from the postconviction hearing “could have provided the same testimony in 2004” (pp. 12-13), although one postconviction expert, Dr.

Marcus, could not have testified in 2004 and no one at the evidentiary hearing ever identified any “CODA” expert who could have done so. In addition, not all of the 27 witnesses offered at the evidentiary hearing provided mitigating evidence on Woodel’s behalf, as the hearing was much broader in scope than the ineffective assistance of counsel at penalty phase claim argued here.

The petition also states that “there was no testimony about the grandparents who helped to raise Woodel and their dysfunction, including the fact that his grandmother once killed a man” (pp. 22-23). In fact, one great-grandmother, Ella, had a substantial role in Woodel’s upbringing in North Carolina, and the jury heard evidence about her from Woodel, his sister, and his aunt. She later became ill and the decision was made to move Woodel and his sister into the Children’s Home, which the jury heard all about. In postconviction, witnesses described Ella as very loving. The jury also heard much about grandmother, Edna, who provided a stabilizing influence on Woodel when he lived in Michigan. While it is true that Edna “killed a man,” the circumstances were that she was 14 or 15 years old, living in Montana, and an Indian was trying to harm her, wanting her blond hair, so she shot him in self-defense. When Woodel was living with Edna, she was not drinking and was a good influence,

providing a stable home and making sure the children got what they needed. Most of the dysfunctional family history provided in postconviction related to earlier generations and individuals that Woodel never even knew, which is why Colon explained he did not think mitigation based on their problems with alcohol was significant for a jury to hear.

Since Woodel's petition seeks primarily a factual review, it is critical that the accurate, relevant facts are understood. Given the volume of evidence presented at the 2004 resentencing, it is unwieldy to relate all of it in this response. Therefore, the State's initial postconviction brief, filed below, is attached hereto as an exhibit in order to provide the full factual background, and is hereby incorporated by reference.

Woodel cites Sears v. Upton, 561 U.S. 945 (2010), Porter v. McCollum, 558 U.S. 30 (2009), and Rompilla v. Beard, 545 U.S. 374 (2005), and claims the Florida Supreme Court's prejudice analysis was inconsistent with these cases because the Court allegedly failed to consider the totality of the available mitigation evidence as a whole. According to the petition, a "completely different picture" of Woodel's life and upbringing was presented at the postconviction evidentiary hearing. However, that allegation is not supported by the record, and does not warrant certiorari review.



In Wong v. Belmontes, 130 S. Ct. 383, 386-91 (2009), this Court reversed the grant of habeas relief premised on a finding of prejudice which ignored the mitigation evidence already presented, the cumulative nature of the new evidence, the negative information that would have been presented had the new evidence been presented, and the aggravated nature of the crime. The Florida Supreme Court opinion entered below is much like that decision, and provides no basis for certiorari review. The new mitigation that has been offered in this case is simply “more” anecdotes and sources for the same general mitigating factors considered by the jury and sentencing judge. This is a critical distinction from cases which have granted relief on a claim of ineffective assistance of counsel. Compare Rompilla, 545 U.S. at 392 (significant mitigation available but not presented “bears no relation to the few naked pleas for mercy actually put before the jury”); Williams v. Taylor, 529 U.S. 362, 372 (2000) (five categories of mitigation, including nightmarish childhood and borderline mental retardation, never suggested by penalty phase testimony that defendant was a nice boy and confessed to the crime). Here, pointedly, Woodel offers only the same *categories* of mitigation as initially presented in 1998 and 2004.

Finally, Woodel’s expressed concerns about Florida’s procedures for implementing the

death penalty are irrelevant and do not add anything of substance to his request for review. This Court has never suggested that the standard for prejudice under Strickland might vary based on the death penalty sentencing scheme at issue. Woodel provides no authority or policy reason to support tailoring the contours of the Sixth Amendment based on a particular scheme.

Accordingly, this Court must deny the petition for certiorari review filed herein.

## CONCLUSION

For the foregoing reasons, the Court should DENY the petition for certiorari review of the decision of the Florida Supreme Court entered below.

Respectfully submitted,

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