No. 14-906

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Thomas Woodel was sentenced to death after the jury heard a constitutionally deficient mitigation case. Although the State of Florida casts this as a fact-bound case, the critical facts are undisputed. There is no dispute that under Florida's unique death penalty scheme—the constitutionality of which this Court agreed to review last week, *see Hurst* v. *Florida*, No. 14-7505, 2015 WL 998606, at *1 (U.S. Mar. 9, 2015)—Woodel was sentenced to death by a Florida judge on the recommendation of just seven out of twelve jurors. There is no dispute that Woodel's trial counsel failed adequately to investigate mitigation evidence before his 2004 resentencing—the Florida Supreme Court below did not disturb that finding. And there is no dispute about what testimony was presented at Woodel's 2004 resentencing or what testimony *could have* been presented had counsel conducted a reasonable investigation—the trial court issued extensive findings on this point, which the Florida Supreme Court did not disturb.

In fact, the mitigating facts of this case demonstrate just how prejudicial the deficient performance of Woodel's counsel was because the jury should have heard all the facts surrounding Woodel's "nightmarish background." Opp. 15. For example, Woodel's maternal grandparents were abusive alcoholics, App. 100a, 112a; his paternal grandparents abandoned their children, *id.* at 100a; Woodel's mother had an IQ of 80, dropped out of school, and would frequently drink to the point of passing out, *id.* at 100a, 118a; Woodel's father was an abusive alcoholic involved in drug dealing and

human trafficking, *id.* at 100a, 143a; and chronic alcohol and drug abuse plagued each of his siblings, *id.* at 101a, 118a. Expert testimony explained the adverse impact of his experiences on his neurodevelopment and communication, *id.* at 147a, as well as the severe effects alcohol had on him over the course of his life and the night of the crime, *id.* at 132a. Despite all of this, prison personnel viewed Woodel as an uncharacteristically good prisoner who could spend a productive life in prison without posing a threat to others or himself. *Id.* at 118a. The sympathetic portrait of Woodel that this evidence presents would have been almost unrecognizable to the jury that sentenced Woodel to death.

Remarkably, the State suggests that counsel appropriately "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." Opp. 7-8. And the State relies on the fact that counsel "was satisfied with the mitigation presentation from the first trial, and saw no need to conduct a further investigation." *Id.* at 7. But the first mitigation presentation failed. And the whole point of a proper *Strickland* analysis is that counsel cannot make a valid strategic judgment about mitigation without first conducting a reasonable investigation. *See Strickland v. Washington*, 466 U.S. 668, 680-81 (1984). Rather than attempt to justify the Florida Supreme Court's prejudice analysis, the State's opposition seeks to re-litigate deficient performance—a conclusion not even at issue.

Although this mitigation evidence matters greatly, it is the misapplication of this Court's *legal* precedents to the undisputed factual record here that warrants this Court's review of the questions at issue: whether Woodel met the *Strickland* standard by showing a "reasonable probability" that the result of his resentencing hearing would have been different but for counsel's errors, and whether the Florida Supreme Court erred in reversing the trial court's holding that Woodel had satisfied that standard. In fact, the Florida Supreme Court did not even question that Woodel's counsel was deficient.

This Court has repeatedly undertaken to ensure adequacy of representation during the penalty phase of capital cases by reversing erroneous applications of *Strickland*, 466 U.S. at 668 and *Williams* v. *Taylor*, 529 U.S. 362 (2000). Indeed, this case fits squarely among the cases that this Court has used to elucidate and reinforce the *Strickland* standard in the capital-sentencing context.

The decision below should therefore be reversed. But in light of this Court's grant in *Hurst*, the Court should, at a minimum, hold this Petition for that case. After *Hurst* is resolved, the Court may then decide whether it would be better to reverse the Florida Supreme Court outright, or (depending on the outcome of *Hurst*) whether a remand in light of *Hurst* is more appropriate.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's *Strickland* Prejudice Analysis Violates This Court's Precedents.

The State contends that "Woodel's disagreement with the Florida Supreme Court does not identify any error in the legal standard applied." Opp. 12. But the State can make that argument only by ignoring both the Petition itself and the dissenting opinion below, *which the State does not even acknowledge in its response*.

1. Under this Court's precedents, applying the *Strickland* prejudice standard to counsel's failure adequately to investigate mitigation evidence requires a court (a) to review "the entire postconviction record, viewed as a whole," and then (b) to assess whether there is "a reasonable probability that the result of the sentencing proceeding would have been different." *Williams*, 529 U.S. at 398-99. The Florida Supreme Court did not conduct this analysis. Indeed, the Florida Supreme Court never even purported to "reweigh the evidence in aggravation against the totality of available mitigating evidence," *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003), focusing instead on the perceived similarity of specific aspects of the 2004 sentencing hearing and the post-conviction record.

Justice Pariente in dissent succinctly explained the Florida Supreme Court's error:

> [T]he majority never conducts a full analysis of the *Strickland* prejudice prong. Specifically, the majority engages 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. * * * The majority's piecemeal approach is contrary to the United States Supreme Court's holding in *Strickland*.

App. 61a.

It should be unsurprising, then, that the State offers no substantive response to the charge that the Florida Supreme Court's decision misapplied *Strickland* prejudice by failing to assess it based on "the entire postconviction record, viewed as a whole." *Williams*, 529 U.S. at 398-99. All that the State offers is a six-page block quotation of a section of the Florida Supreme Court's opinion with "Cumulative Analysis" in the heading. Opp. 19-24. But this Court need only read that block quotation to appreciate that it is not the analysis dictated by *Strickland* and *Williams*. And the Florida Supreme Court's error is further underscored by its statement that, "because we do not find multiple errors in this case, there is no cumulative error effect that establishes prejudice." App. 42a.

This Court's review is thus warranted to make clear that courts cannot reject a mitigation-evidence *Strickland* claim by dismissing each constitutionally deficient act or decision by counsel as cumulative or insufficient on its own to establish prejudice, without weighing the effect of the newly-developed record as a whole.

2. As the Petition explains, Pet. 18-19, this case falls squarely within this Court's practice of

reviewing mitigation-evidence *Strickland* claims to ensure that lower courts are correctly applying this Court's Sixth Amendment jurisprudence. Indeed, many of those cases arose in the same posture as this one, where the trial court below granted relief but was reversed on appeal. *See Porter* v. *McCollum*, 558 U.S. 30 (2009) (reversing Court of Appeals' reversal of order granting federal habeas relief); *Rompilla* v. *Beard*, 545 U.S. 374 (2005) (same); *Wiggins*, 539 U.S. 510 (same); *Williams*, 529 U.S. 362 (reversing Court of Appeals' reversal of order granting federal habeas relief, after the Virginia Supreme Court had reversed the state trial court's order granting state post-conviction relief). If anything, this case provides a better vehicle because it comes directly from the state court and thus is not subject to the strictures of the Antiterrorism and Effective Death Penalty Act.

The State tries to sweep aside *Porter*, *Rompilla*, *Williams*, and *Sears* v. *Upton*, 561 U.S. 945 (2010), by asserting that Woodel's claim is "not supported by the record," Opp. 27-28, and by citing *Wong* v. *Belmontes*, 558 U.S. 15 (2009). But the record does not help the State because the trial court below ruled in *Woodel's* favor, not the State's. *See* Part II *infra*. *Wong* does not help the State either. *Wong* arose in the opposite posture of this case: the trial court had denied the prisoner's *Strickland* claim for want of prejudice, only to be reversed by the Ninth Circuit. *See* 558 U.S. at 16. Relying on the district-court record, the Court recounted "[s]ubstantial evidence indicat[ing] that Belmontes had committed a prior murder," and that counsel had limited his mitigation case to avoid opening the door to this evidence. *Id.* at 17-18. Reaffirming that the *Strickland* prejudice analysis makes it "necessary to consider *all* the

relevant evidence that the jury would have had before it," the Court faulted the Ninth Circuit for ignoring the new *aggravating* evidence the State would have been entitled to introduce. *Id*. at 20. Unlike in *Wong*, however, neither the Florida Supreme Court nor the State has ever suggested that Woodel's newly admitted evidence would have opened the door to additional aggravating evidence.

II. The Record Confirms the Misapplication of *Strickland*.

Ignoring Woodel's legal arguments, the State focuses on the facts to downplay the Florida Supreme Court's legal errors. But the State is not entitled to its own version of the facts. The trial court below ruled in Woodel's favor, and the Florida Supreme Court did not hold that any of its findings were clearly erroneous.

1. The State contends that a "wealth of evidence [was] 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." Opp. 15. But that is a gross over-statement and ignores the overall picture presented to the jury. That trial counsel in 2004 presented evidence in these three categories of mitigating evidence does not remotely show that the evidence presented in 2004 and in the post-conviction hearing below was comparable. It was not.

Family History. In 2004, the jury heard generally that Woodel "suffered chronic depression and low self-esteem from his abnormal childhood."

Id. at 3. "Woodel's household [w]as filled with domestic violence, child abuse and neglect, and alcohol and drug abuse." App. 22a. But the presentation of this general evidence is not equivalent to the specific evidence of abuse and neglect presented in Woodel's post-conviction hearing.

For example, the State cites the testimony of Dr. Henry Dee and isolated testimony about Woodel's father to suggest that his family history was fully vetted at the 2004 sentencing. *Id.* at 16-17, 25. Yet as the trial court recounted, "Dr. Dee wanted someone to assist with some social history investigation," App. 96a, but his investigator did not have enough time to provide a complete picture of Woodel's background, *id.* at 98a-99a. The observation that Dr. Dee is a "well known, respected mental health professional," Opp. 16, is thus irrelevant; he did not have all of the facts. Nor does the State suggest that the jury heard evidence establishing, for instance, that Woodel's mother had an IQ bordering on mental retardation, or the extent of his siblings' dysfunction. App. 100a, 118a. In fact, it is difficult to see how the State can do anything other than now concede that Woodel's background was "nightmarish." Opp. 15.

Isolated statements about his father's temper, *id.* at 25, also in no way blunt the prejudice of counsel's failure to discover (for instance) that Woodel's father was a known thief and predator, or that he stole Woodel's girlfriend (27 years his junior), whom he decided to marry shortly before the murders, Pet. 4-6. The suggestion that the jury heard about how dysfunctional Woodel's father was, Opp. 25-26, also

contradicts counsel's own testimony about the theme of his mitigation case: maternal neglect. Moreover, it is irrelevant that Woodel himself "did not suggest that any of his father's testimony was misleading or inaccurate." *Id*. at 25. It was counsel's responsibility to research and present an adequate mitigation case; he could not just rely on Woodel to do it for him. *See Rompilla*, 545 U.S. at 377.

Toxicology. The State entirely misses the point in arguing that the jury heard "testimony about Woodel's history of drinking as well as * * * his consumption on the night of the murders." Opp. 17. The point is that, having decided to focus on an intoxication defense, counsel unreasonably failed to consult an expert (like Dr. Buffington) who could have helped the jury understand the chemical effect that Woodel's alcoholism and excessive consumption had on his ability to form intent. The jury should have heard expert evidence that Woodel's "drinking or controlling his drinking was not a choice for him," and that "[b]ased on the concentrations of alcohol he was taking at the time of the crime, alcohol was controlling the Defendant." App. 132a. And it should have heard the testimony about the cognitive and physical effect of drinking 12 to 24 beers over the course of an evening. *Id.* Counsel instead chose to rely on jurors' lay understanding of what it means to be drunk. Pet. 24-28. The State actually tries to justify this decision, Opp. 8, but not even the Florida Supreme Court went that far.

Prison Behavior. The State finally tries to downplay evidence that Woodel was an uncharacteristically non-violent prisoner, claiming that "[t]he jury was well aware that Woodel had no

history of violence and that he had only one disciplinary report." *Id.* at 18. But the jury—who no doubt considered whether Woodel could spend a productive life in prison—never heard from prison staff, nor from the prison's own consultant who felt Woodel could "safely [be] confined for the remainder of his life without causing undue risk of harm to staff, inmates, and the general public." App. 118a. Those state employees' testimony would have conveyed a stronger message than the isolated facts the State cites.

2. The State also accuses Woodel of "overstat[ing] the facts and at times asserting complete misrepresentations," Opp. 25, but the charges are unfounded. The actual misrepresentations appear in the State's response. Its assertion that no Children of Deaf Adults ("CODA") expert could have testified in 2004, Opp. 25-26, is flatly inconsistent with the trial court's findings, App. 167a. And the State's claim that the record establishes Woodel's great-grandmother "had a substantial role in Woodel's upbringing" and was "very loving," while another grandmother "provided a stabilizing influence," *id.* at 26, only highlights the prejudice of counsel's failure to show the dysfunction of Woodel's grandparents outlined in the Petition, Pet. 22-23.

III. Florida's Death Penalty Scheme Exacerbated the Prejudice to Woodel; At a Minimum, a Hold for *Hurst* v. *Florida* Is Warranted.

As the Petition explains, Pet. 32-35, the prejudice of counsel's errors were exacerbated by Florida's outlier death penalty scheme which allowed Woodel to be sentenced to death by "the slimmest margin

possible—a seven-to-five vote," App. 60a (Pariente, J., dissenting). Just last week, this Court granted certiorari to consider "[w]hether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002)." *Hurst*, 2015 WL 998606, at *1.

At a minimum, the Court should hold the Petition for *Hurst*. The question presented in *Hurst*—whether a sentencing scheme is constitutional where it allows for death by a vote of 7-to-5 and does not even require that slim majority to agree on which aggravating factors exist—is directly relevant to the question presented here: whether the Florida Supreme Court's prejudice analysis, within that sentencing framework, can be squared with this Court's precedents. Surely, the prejudice that results from grave deficiencies in the development and presentation of mitigating evidence is exacerbated when a defendant is sentenced to death by a bare majority. After this Court decides *Hurst*, it can then decide whether it would be better to reverse the Florida Supreme Court outright or (depending on the outcome of *Hurst*) to remand for further consideration. Woodel ought to receive a new sentencing hearing, and the decision of the majority below ought to be reversed, even if Florida's death penalty scheme is constitutional. But if that scheme is unconstitutional, the prejudice of the 7-to-5 vote is all the worse, and the Florida Supreme Court may be given the opportunity to address the error in the first instance, in light of this Court's guidance in *Hurst*.

In a mere three sentences, the State dismisses concerns about the effect that Florida's death penalty

scheme had on Woodel's resentencing, Opp. 28-29, even though—in nearly every other American jurisdiction—the jury's vote would have resulted in a life sentence. The State argues that "[t]his Court has never suggested that the standard for prejudice under *Strickland* might vary based on the death penalty sentencing scheme." *Id.* at 29. But that is only because Florida's scheme is such an outlier. Only one of this Court's mitigation-evidence *Strickland* cases has come out of Florida—*Porter* v. *McCollum* (2009)—and in that case, the jury had recommended death "[b]y a vote of 12-0." *Porter* v. *Crosby*, No. 6:03CV1465ORL31KRS, 2007 WL 1747316, at *2 (M.D. Fla. June 18, 2007). The Court therefore had no occasion to address the effect of a 7-to-5 vote.

Under *Strickland*, moreover, which asks whether there is "a reasonable probability that the result of the sentencing proceeding would have been different," *Williams*, 529 U.S. at 398-99, it makes no sense to ignore the fact that, under Florida's death penalty scheme, a judge sentenced Woodel to death against the vote of five jurors. That certainly bears on whether there is a "reasonable probability" of a different result.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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