DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

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ROBERT IRA PEEDE,

Petitioner,

vs.

ATTORNEY GENERAL, STATE OF FLORIDA,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED--CAPITAL CASE

1. Whether a defendant who is deemed "difficult", yet who in no way prohibited his counsel from investigating or presenting mitigation at the penalty phase of his capital trial, is precluded from subsequently complaining that his counsel performed ineffectively?

2. Whether a state court's determination is entitled to deference in federal habeas proceedings when the state court's analysis is based on an unreasonable application of clearly established federal law?

3. Whether a court's decision to negate the value of clear mitigating evidence on the basis of perceived negative information that the jury would also have heard is objectively unreasonable?

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Petitioner, **ROBERT IRA PEEDE,** is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

CITATION TO OPINIONS BELOW

The Eleventh Circuit's decision appears as *Peede v. Attorney General*, -- Fed. Appx. -- , 2017 WL 5172137 (11th Cir. 2017), and is Attachment A to this petition. The Eleventh Circuit's order denying panel and en banc rehearing is Attachment B to this petition. The district court's order conditionally granting the writ as to Peede's penalty phase ineffective assistance of counsel claim is Attachment C to this petition. The Florida Supreme Court's opinion affirming the denial of postconviction relief is Attachment D to this petition.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. § 1254(1). The Eleventh Circuit entered its opinion on November 8, 2017. Rehearing was denied on January 10, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the assistance of counsel for his defence.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

PROCEDURAL HISTORY

In February, 1984, Peede was tried and convicted of the first degree murder of his estranged wife, Darla. On March 5, 1984, a jury recommended a death sentence by a vote of 11 to 1 (R. 1247). On that same date, the trial court followed the jury's recommendation upon finding the following aggravating factors: (1) previous conviction of two felony crimes involving the use of force or threat to another person; (2) murder committed during the commission of a kidnapping; and (3) murder committed in a cold, calculated, and premeditated manner (CCP). *Peede v. State*, 955 So. 2d 480, 486 (Fla. 2007). The trial court also found one statutory mitigating circumstance: Peede was operating under the influence of extreme mental or emotional disturbance. The court, however, attributed "little weight" to the sole mitigating factor. *Id*. at 486 (Fla. 2007).

On direct appeal, the Florida Supreme Court struck the CCP aggravating circumstance. *Peede v. State*, 474 So. 2d 808, 817 (Fla. 1985). However, the court affirmed Peede's conviction and sentence, finding that the two remaining aggravators outweighed

"the one marginal mitigating circumstance" found by the trial court. *Id.* at 818. Certiorari was denied by this Court on June 23, 1986. *Peede v. Florida*, 477 U.S. 909 (1986).

On May 6, 1988, the Florida governor signed a death warrant and on June 6, 1988, Peede filed an emergency 3.850 motion to vacate the judgment of conviction and sentence. *Peede v. State*, 748 So. 2d 253, 255 (Fla. 1999). Peede's motion was summarily denied, and he filed an appeal to the Florida Supreme Court. Peede's case was remanded to the circuit court for an evidentiary hearing on several issues. The circuit court ultimately denied relief and the Florida Supreme Court affirmed. *Peede*, 955 So. 2d 480 (Fla. 2007).[1]

On May 5, 2008, Peede filed a petition for writ of habeas corpus in the federal district court for the Middle District of Florida. On February 27, 2015, the district court issued an order conditionally granting the writ as to Peede's penalty phase ineffective assistance of counsel claim (Doc. 34 at 76). The court denied relief as to all other grounds (Doc. 34 at 76).

The State filed a notice of appeal (Doc. 36). Peede filed a motion to alter or amend judgment and for a certificate of appealability (Doc. 40). The district court denied Peede's combined motion (Doc. 41).

On May 26, 2015, Peede requested that the Eleventh Circuit issue a certificate of appealability as to two additional issues.

[1]Peede also filed a state petition for writ of habeas corpus, which the Florida Supreme Court denied in the same opinion. *Id.*

On August 22, 2016, the court denied Peede's request. On November 8, 2017, subsequent to briefing and oral argument, the Eleventh Circuit in a split decision reversed the order of the district court and entered judgment for the State. *Peede v. Attorney General*, -- Fed. Appx. -- , 2017 WL 5172137 (11th Cir. 2017) .

On November 29, 2017, Peede moved for rehearing en banc and panel rehearing. Peede's motion was denied by the Eleventh Circuit on January 10, 2018.

FACTS RELEVANT TO QUESTIONS PRESENTED

On October 11, 1983, Dr. Robert Kirkland, after being appointed by the trial court, evaluated Peede for the purpose of determining if he was competent to stand trial or insane at the time of the offense (R. 1239). Dr. Kirkland evaluated Peede for a total of an hour and a half (R. 935). He conducted no psychological testing, received no medical records, and spoke with no collateral witnesses (R. 953-55).

In his report, Dr. Kirkland stated that Peede's behavior was "highly suggestive of a paranoid disorder", but he did not find him insane or incompetent to stand trial (R. 1239). Dr. Kirkland also stated that he did not feel he could be of any assistance to the defense at that time (R. 1239). No further contact was had with Dr. Kirkland and defense counsel until shortly before the penalty phase of Peede's trial (PC-R2. 176).

Prior to Peede's trial, he requested that he be allowed to represent himself. The trial court inquired about Peede's background and in doing so, Peede indicated that he had seen mental health professionals in his past, though he did not think

that he ever saw a psychiatrist (R. 1435). At the conclusion of the court's inquiry, the court denied Peede's request to represent himself (R. 1439).

At trial, the jury learned that Peede confessed to killing his wife, Darla Peede, during their trip from Florida to North Carolina (S-Ex. 14). During the confession, Peede repeatedly stated that he could not remember the actual killing, but that he just "nutted up." (S-Ex. 14, p. 227). Peede also told law enforcement that during the drive to North Carolina, he and Darla began to discuss the fact that Peede had seen her picture in some magazines containing naked females (R. 721). Peede was angry and upset about her posing for these magazines (R. 749). Peede told law enforcement that he never intended to kill his wife (R. 730). Peede also believed that his wife had posed for some photos with his ex-wife and a man named Calvin Wagner (R. 722).

Throughout the course of his trial, Peede's behavior was extremely bizarre. He would appear with paperclips in his ear and a hand drawn "x" between his eyes. Also, he refused to wear the civilian clothes brought by his attorneys and insisted upon wearing his jail jumpsuit (R. 1207, 1209). At several points he demanded that no cross examination be conducted of several key witnesses in the State's case. At one point, Peede requested that he be allowed to absent himself from the remainder of the trial (PC-R1. 1305). After the court and counsel met with him at the jail, the decision was made to waive Peede's presence at his trial (PC-R1. 1306-21).

After the guilt phase, trial counsel requested that another mental health examination be conducted for the purpose of the penalty phase. The trial court ordered Dr. Kirkland to re-evaluate Peede on February 24, 1984 (R. 1240). The report from that examination was filed with the trial court on March 2, 1984 (R. 1241-2). The evaluation lasted only forty minutes (D-Ex. 10). Again, no background or collateral information was provided to Dr. Kirkland and he conducted no testing (PC-R2. 176-77).

In preparation for the penalty phase, trial counsel also contacted Percy Brown, a cousin of Peede's, who was living in North Carolina. Counsel requested that Brown gather letters on Peede's behalf from several family members to use during the penalty phase (S-Ex. 7; R. 954-56).

The penalty phase took place on March 5, 1984. During the hearing, the State called two witnesses to testify about Peede's prior second degree murder conviction from California. One witness was the prosecutor of that case, and the other was an eyewitness to the shooting.

In mitigation, trial counsel introduced the letters and called only Dr. Kirkland to testify (R. 948).[2] During his testimony, Dr. Kirkland gave no specific diagnosis of what Peede's condition was, but stated that Peede's description of events showed "strong paranoid elements." (R. 952). He further stated that it was his opinion that Peede committed the murder while under the influence of extreme mental and emotional

[2]The letters were admitted into evidence without explanation (R. 958).

disturbance (R. 950). Dr. Kirkland also acknowledged, however, that "I have not seen any records, and I did not talk to any witnesses . . . only information came from Mr. Peede." (R. 950, 954). As a result, the State discredited Dr. Kirkland's testimony before the jury, arguing "you heard, I believe, through a lot of my cross examination the way in which this expert opinion of his was reached in a very limited scope." (R. 962).

In weighing the mental health mitigation, the trial court minimized the import of the statutory mitigator: "Viewing the testimony of Dr. Robert Kirkland that the Defendant experienced a specific paranoia that the victim and his ex-wife, Geraldine Peede, were posing in nude magazines, the Court, **giving the Defendant the benefit of the doubt**, will consider it a mitigating circumstance." (R. 1264) (emphasis added). In terms of other mitigation, the trial court gave no weight to the letters sent by Peede's family (R. 1265). No other mitigation was found by the trial court (*Id.*).

During Peede's postconviction evidentiary hearing, the following evidence was presented establishing substantial mitigation which was available at the time of trial but never investigated or presented to the jury or the judge who sentenced Peede to death: Robert Ira Peede was born in North Carolina on June 30, 1944 to Florentina (Tina) Brown Peede and John Ira Peede (PC-R2. 6). John Peede was known to have numerous affairs during his marriage to Tina. Because of this public humiliation, Tina began to drink. She also retaliated by having affairs of her own. As Robert grew up, he was constantly surrounded by his parents'

lack of fidelity and sexual improprieties which had a profound impact on his own relationships.

Robert's relationship with his mother was especially contentious because she took most of her frustration out on him. Robert, as the only child, was under extreme pressure from his mother to excel in his education (PC-R2. 12-13). When he failed to learn at a fast enough pace or bring home the best grades, his mother would beat him (PC-R2. 13-15). Tina's sister, Nancy Wagoner, who lived with the Peedes for most of Robert's childhood, recalled several beatings Robert suffered because he could not learn as other children did (*Id.*). It seemed like the beatings had more to do with Tina's mood rather than misbehavior (PC-R2. 15).

Robert also suffered extreme physical impairments during his teenage years through his early adulthood. He developed scoliosis and was hospitalized for six months in a body cast (PC-R2. 17). Outside of his Aunt Nancy, no other family members visited him. Robert also suffered from a rare skin condition which would cause his hands and feet to blister if any pressure was placed on them (PC-R2. 9-10, 64-65; D-Exs 15 & 16). Due to this, he was unable to walk without extreme pain (*Id.*). In most instances, he had to be carried around in a wagon to prevent his skin from blistering and peeling off (*Id.*). When not traveling in the wagon, Robert was physically carried by his mother (D-Ex. 15). He also required speech therapy to assist in his problems speaking (PC-R2. 11).

These disabilities had a profound impact on Robert's adolescence. While he was close with his two cousins, Michael and

Lynwood Brown, he was unable to play with them in any meaningful way (PC-R2. 85-88). While they played baseball and participated in other activities, he was relegated to his wagon watching from afar (PC-R2. 66, 88). In an effort to compensate for his physical handicaps, Robert was generous with his money and possessions (PC-R2. 15). He would give his friends cash or buy them whatever they wanted in an effort to feel included (PC-R2. 66).

When Robert's generosity failed to gain the friends he so desperately wanted, he began taking the blame when his cousins misbehaved (PC-R2. 15). Even when it was obvious that Robert could not be involved with certain actions, he still accepted responsibility for others' conduct. This would often result in further beatings from his mother who saw this as his continuing failure to live up to expectations (PC-R2. 12). For example, Robert's cousin Michael once broke an expensive toy and Robert told everyone he did it so that he would take the beating over his cousin (PC-R2. 15). When Nancy confronted him because she saw Michael break the toy, he continued to state that it was he who broke it (*Id.*).

Many of Robert's family members recognized that he suffered from mental problems. Robert was easily manipulated, moody, and would keep things bottled up inside until he would often explode in loud rants (PC-R2. 69). Often family members would never know what to expect from one moment to the next with his behavior. These episodes caused Tina to take him to a psychiatrist when he was eight or nine years old. Robert would be treated by this doctor twice a week for several years. It was learned that some

of Robert's childhood trauma resulted from his witnessing his father skin minks after they hunted (PC-R2. 16). Robert explained that he could not understand why his father was hurting such beautiful animals. However, the treatment sessions did not curtail the extreme mood swings Robert experienced.

Robert also had a difficult time interacting with women. While his cousins, with whom he was very close, were socializing and dating, Robert was extremely awkward around women (PC-R2. 67). He constantly questioned his own sexual adequacy in his romantic relationships (PC-R2. 67, 89-90). However, he felt things were changing when he met Kay Albright. Although she was eighteen and he, only sixteen, they soon began to date and quickly married (PC-R2. 68). The couple lived with Robert's parents (PC-R2. 18-19).

Prior to turning eighteen, Robert became a father on April 1, 1962 when his son, Michael Peede, was born. Unfortunately, Kay left Robert a few years after Michael's birth to reunite with a former boyfriend (PC-R2. 19). She soon moved to California with their son, and Robert did not see him for a long time afterwards.

Robert took the collapse of his marriage very hard. His relationship with Kay caused him to further question his sexuality (PC-R2. 89). Because he had seen his parents' consistent infidelity, and then his own wife left him for another man, Robert doubted the loyalty of women. While he greatly wanted to be in a relationship, he was unable to trust any woman to be faithful to him. Robert's conflict with women caused him to

attempt suicide by shooting himself in the stomach; he believed he was saving his then girlfriend the trouble (PC-R2. 101).

However, Robert did marry again, this time to a woman named Geraldine. Their relationship was far from harmonious. Geraldine would often insist that Robert spend all his time outside of work with her (PC-R2. 69). His cousins and many of his friends did not get along with Geraldine which, once again, alienated him from his social circle (*Id.*). Robert's friends were not allowed to come to his house while his wife was there.

Another reason that Robert's friends ceased interacting with him was that he began accusing them of sleeping with his wife (PC-R2. 70-71, 94). Even though they constantly told Robert that they did not like his wife and would never betray him in such a way, he still believed they were having affairs with her (*Id.*). On some occasions, these confrontations with his friends became violent and caused Robert to further isolate himself. During the evidentiary hearing, Robert could not resist screaming at John Logan Bell because he believed Bell had slept with Geraldine and fathered one of Robert's children, even though that was not true and impossible (PC-R2. 47-52).

As an adult, Robert's life took a drastic turn with the death of his mother. Because of the stresses in her own marriage, Tina Peede began drinking even more heavily and taking Valium (PC-R2. 21-22). Nancy often found bourbon and whiskey bottles laying around the house (*Id.*). Robert was very concerned about his mother's increased alcoholism (PC-R2. 23). In an attempt to force her to stop drinking, he refused to allow his children to

visit her (*Id.*). Tina saw this as another failure in her own life. After a fight between Geraldine and Tina, in which Robert interjected and refused to allow his mother to see her grandchildren, Tina shot herself in the head with a shotgun (PC-R2. 23).

After his mother's death, Robert could no longer cope and he set off for California (PC-R2. 24). While there, he visited with his son. However, Robert soon found that he could not cope with being around his first wife and he set off again. While at a bar in Eureka, California, he got into a fight with the bartender when the bartender tried to kick out an underage woman. Robert shot two men who chased him out of the bar. He was charged with homicide and assault and pled guilty. He was sentenced to eight years in prison.

While in prison, Robert's mental health problems escalated. He was diagnosed with schizophrenia and reported delusions involving his ex-wives (PC-R2. 1221-28). He explained that Geraldine was posing in "swinger" magazines. Although the magazine photos show no faces, he insisted that it was her because of the number of bricks in the fireplace behind the woman in the picture (PC-R2. 46-47). When his aunt Nancy visited him, she could not believe his mental state (PC-R2. 26). He insisted that she leave at once before the "people" get her (*Id.*).

After being released from prison, Robert met Darla. They married ten days later. However, Darla soon realized that Robert had serious psychological problems, and she wanted him to obtain psychiatric help as soon as he returned to North Carolina (D-Ex.

7). Yet, that help never came. Darla went to live with her daughters in Miami soon after Robert returned to North Carolina. He hoped to reconcile with her, but his delusional beliefs about her infidelity clouded his thinking. On the trip from Miami to North Carolina, Robert stabbed his wife, killing her.

During the postconviction evidentiary hearing, several experts were called to give their assessment of Peede's mental condition.[3] Dr. Sultan, a psychologist, not only interviewed Peede on several occasions, but met with several family members and reviewed extensive medical records detailing his physical and psychological impairments. Dr Sultan opined that Peede "met[] all of the diagnostic criteria for Delusional Disorder, Jealous Type, which is one of the psychotic disorders." This Axis I disorder is described as "a presence of one or more nonbizarre delusions that persist for at least a month, a delusional belief that is simply not true. Apart from the direct impact of the particular delusions, psychosocial functioning may not be markedly impaired and the behavior of the person might not be obviously odd or bizarre.". Peede was also diagnosed with an Axis II, Paranoid Personality Disorder (PC-R2. 91).

Dr. Fisher, who also evaluated Peede, agreed with Dr. Sultan's diagnosis. Dr. Fisher testified about the pervasiveness of Peede's psychosis over time (PC-R2. 217-18, 222). As to the delusional disorder diagnosis, Dr. Fisher testified:

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[3]These experts were Drs. Faye Sultan, Brad Fisher, Sidney Merin, and David Frank.

> [H]e's paranoid generally but he has Delusional Disorder, 297.1, in particular areas, which his are in the area of paranoia that are related to jealously. So you say he's got a problem generally, this paranoia. But he has a delusional disorder, a more pronounced mental disorder when it gets into the area of jealously and paranoia.

(PC-R2. 224). Dr. Fisher explained that Peede's paranoia was identified by previous doctors who evaluated him during competency evaluations, and from the statements of friends and family throughout his life (PC-R2. 226).[4] Based on Dr. Fisher's assessment, Peede's paranoid personality and delusional disorder were well established prior to the murder of his wife (PC-R2. 227-23).

Dr. Fisher testified further regarding the thoroughness of Dr. Kirkland's evaluation prior to and during Peede's trial:

> He speaks in his reports to the same - this same delusional system. He had delusional problems and paranoia. But when it comes to the testimony, the testimony did not speak to these delusional systems, the delusion itself or the delusional systems. Neither did it speak to how this delusional process and the paranoia might have related to the crime. So that whereas he had them in the report, or at least he spoke to the delusional issue and to the paranoia, it didn't come out and neither was it connected with a crime in the actual testimony that he gave.

(PC-R2. 231).

Dr. Fisher also testified to the norms back in 1983 for conducting psychological evaluations, since he also evaluated patients in that time period. This included going beyond just the

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[4]Both Drs. Berns and Krop diagnosed Peede as suffering from a paranoid disorder during their evaluations (PC-R2. 1221-28). Additionally, Dr. Fisher reviewed statements from Peede's family and friends regarding past manifestations of paranoid behavior. Also, his analysis of prior medical records supported his findings (PC-R2. 220).

information obtained from a patient. "[L]ook beyond just self-report, especially in these forensic cases where the possibility of malingering is there. And this is almost always done through records that are there." (PC-R2. 232).

Dr. Frank, who was employed by the Florida Department of Corrections, Transitional Care Unit, at the time he evaluated Peede, and who was called to testify by the State, also agreed that Peede suffered from Delusional Disorder of the Jealous Type (PC-R2. 407).[5] In addition, Dr. Frank noted that Peede suffered from a personality disorder with antisocial and borderline features or traits (Ex. E-21, 967-68).

Even the State's other expert, Dr. Merin, diagnosed Peede as having a paranoid personality disorder. While Dr. Merin disagreed about the diagnosis of delusional disorder, he testified that they performed thorough and "good" evaluations. Further, Dr. Merin did not have the opportunity to meet with Peede and only relied on background information for his assessment (PC-R2. 323-28).

As to statutory mental health mitigation, three of the four experts who testified at the evidentiary hearing found that Peede qualified for the statutory mitigator that he was under the influence of an extreme mental or emotional impairment at the

[5]Dr. Frank monitored Peede for a period of three months during his stay at the Transitional Care Unit. During that time, he had three formal evaluations with him (PC-R2. 398-99).

time of the offense.[6] Unlike Dr. Kirkland's opinion at trial, the mental health experts who testified at the postconviction hearing based their opinions on a comprehensive evaluation of Peede, including interviewing him, testing, background materials and collateral information (PC-R2. 585-92, 628-34, 778-82).

Additionally, both Drs. Fisher and Sultan testified that Peede qualified for the statutory mitigating circumstance that due to his mental impairment, he was unable to conform his conduct to the law (PC-R2. 797, 658-59). They testified that the pervasiveness of his delusional disorder fully manifested itself during the time that Peede stabbed Darla (PC-R2. 650-796). Drs. Sultan and Fisher explained how Peede believed that Darla and Geraldine were grossly unfaithful to him by having affairs with his family members and friends and by posing in swinger magazines (PC-R2. 787, 789-90, 646-51). Darla's constant denials of such behavior enraged Peede to the point where he suffered a psychotic break (PC-R2. 648, 769-70). Both experts, after reviewing the extensive documentary and testimonial evidence, found ample proof of the delusional system that played a pivotal role in Peede's violent behavior (PC-R2. 787, 789-90, 646-51).

Trial counsel Joseph DeRocher and Theotis Bronson testified about their investigation into Peede's case and his background. Trial counsel knew that the prosecutor intended to introduce Peede's 1978 conviction in California as an aggravating circumstance (PC-R2. 407, 457). Therefore, counsel sought the

[6]This was the opinion of Drs. Sultan, Fisher, and Frank (PC-R2. 452, 657, 793, 958-09, 1011).

assistance of Peede's prior California counsel. But, although the California attorney directed Peede's capital trial counsel to a myriad of sources for information regarding Peede's mental health, history, and corroborating details, trial counsel failed to pursue any of the provided leads.

Peede's prior counsel responded to trial counsel's inquiry by letter:

> Further information might be secured from the Office of the District Attorney, (address omitted) or, you might seek information from the Humboldt County Probation Department, (address omitted). In addition, I would assume that the California Department of Corrections should have a file on Mr. Peede . . . For your information, I possess boxes of files, transcripts, documents, letters, memoranda, and reports concerning Mr. Peede, and his case in Humboldt County, noted above.

(S-Ex. 3);(*see also* S-Ex. 112-13; PC-R2. 440). After the initial inquiry, Peede's capital trial counsel "had some conversation with the lead investigator [in California]." (PC-R2 407-08). But, counsel did not contact any of the agencies suggested by the California attorney or pursue any of the materials that the attorney had indicated he possessed regarding Peede's 1978 California case (PC-R2. 407, 440-41).

Peede's trial investigator did contact friends and family members of Peede. Notes in trial counsel's files document telephone conversations between counsel and Percy Brown, Nancy Wagoner, and several other people in North Carolina (S-Ex. 4-5).[7]

[7]Even though trial counsel traveled to North Carolina to speak to witnesses listed by the State, they met with none of Peede's family and friends to discuss mitigation or background (continued...)

However, after trial counsel's initial contacts with some of Peede's family members and friends, counsel never spoke to the witnesses again or requested that any testify on behalf of Peede (PC-R2. 204).[8] This was so despite trial counsel DuRocher's admission that he would have liked to have presented live witness testimony at the penalty phase (PC-R2. 221). And, none of the information was provided to a mental health expert (PC-R2. 176-77). For instance, trial counsel learned that Delmar Brown, Peede's uncle, had pertinent information about his nephew:

> Q: Mr. Brown was telling, was he not, Mr. Deprizio the fact that Mr. Peede had been sent out to California, **that he may have some mental problems, but that he hadn't received any treatment**, and the extent to which he saw him as being mentally involved is that correct?
>
> A: Correct?

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[7](...continued)
information (PC-R2. 245).

[8]Before trial, Nancy Wagoner contacted defense counsel out of concern for her nephew, Peede (PC-R2. 252; S-Ex. 6). Wagoner had visited Peede while he was incarcerated in California and had noticed a remarkable change in him (PC-R2. 251-52). She observed Peede's paranoia first-hand and described him as suddenly "real unkempt, shaggy old beard and shaggy hair and frankly, he didn't look like he had had a bath. He just didn't look like Robert at all." (PC-R2. 251-52). Defense counsel's notes reveal that Wagoner had also informed counsel that she believed Peede needed psychological help, that there was "something terribly wrong w/R[obert]'s life." (S-Ex. 6). Wagoner had known and lived with Peede as a child. She knew of the physical abuse he had suffered, of the ostracization he had endured in response to a childhood blistering skin condition and scoliosis, of his mother's struggle with alcoholism, and of Peede's bizarre behavior in reaction to discovering his mother's suicide (S-Ex. 6). Trial counsel did not ask her to testify for Peede.

(PC-R2. 256)(emphasis added) (*See also* S-Ex. 10). Yet the information concerning Peede's mental health problems was not investigated further or relayed to a mental health expert.

Likewise, Peede informed trial counsel that he believed he had a "split personality", but this information was not conveyed to a mental health expert (PC-R2. 265). Peede also told his attorney about his belief regarding the extensive infidelities of his wives. He explained, in detail, that their pictures were found in swinger magazines and the swinger clubs they went to (S-Ex. 11). Peede also told the defense investigator that he killed his wife because "she made him crazy and he stabbed her." (S-Ex. 10). Peede went on to state that "he couldn't remember when or where he actually killed her. He just pointed out an area that looked good." (S-Ex. 10). Again, none of this information was discussed with a mental health expert.[9]

As to the documents regarding Peede's convictions in California, they concerned the Eureka Police Department's investigation of the shooting that occurred and with which Peede was charged. The Eureka Police Department conducted an extensive investigation, which included sending personnel to North Carolina to interview Peede's family member and friends. John Logan Bell, Jr., for instance, provided a statement to law enforcement in which he explained Peede's behavior after his mother's suicide. He told law enforcement:

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[9]Even Peede's jail records indicated mental health problems; he had been prescribed Elavil by medical personnel at the jail. Yet trial counsel never obtained Peede's jail records and were unaware that he had been taking medication (PC-R2. 178, 243).

> After his mother committed suicide, Robert took it very hard, due to the fact that they were very close. **And he blamed himself I think for it, and . . . got extremely paranoid. And blamed himself for the . . . thought that he was directly responsible for her shooting herself. And took it very hard.**

(D-Ex. 17)(emphasis added). The reports contained in the police file concerned background information about Peede, his mental health and the circumstances of the crimes committed in California. Both trial counsel testified that they did not recall receiving the statements made by Bell or others (PC-R2. 182-83, 231-32).

THE COURTS' RULINGS

In denying Peede's penalty phase ineffective assistance of counsel claim, the Florida Supreme Court stated:

> Because Peede would not assist his counsel in providing any mitigating evidence or circumstances, the trial court concluded he cannot now complain that his counsel performed ineffectively in failing to pursue additional mitigation. The trial court also found that despite Peede's lack of cooperation, Peede's counsel employed an investigator and interviewed Peede's family and friends. Counsel also submitted some thirteen letters of support from Peede's friends and family to the jury. Ultimately, the trial court concluded that this performance, although not perfect, was adequate to meet the demands of *Strickland* and its progeny. We agree with that conclusion. Factually the record supports both the finding of lack of cooperation by Peede and counsel's efforts notwithstanding Peede's recalcitrance. We find no *Strickland* error in the trial court's evaluation and conclusions.
>
> The mitigating evidence Peede presented during the evidentiary hearing was his mother's suicide, his blistering skin condition as a child, his paranoid behavior regarding his wives' alleged sexual exploits, and his feelings of inadequacy. While this evidence could indeed be seen as mitigating, this mitigation would have been offset by the testimony of Peede's aggressive and impulsive behavior towards women, including his hitting Nancy Wagoner prior to killing Darla, and his bizarre accusations to various friends

and family of sleeping with his second wife, Geraldine. It appears that Peede's aggression has not subsided in the years since the murder either. This is illustrated by Peede's reaction when his counsel put his childhood friend John Bell on the stand during the evidentiary hearing; Peede accused him of fathering his youngest child and threatened that he would shoot Bell if he had a gun. With this background of bizarre behavior and hostility, and because of Peede's refusal to allow his counsel to cross-examine Darla's daughters while they were on the stand during the guilt phase of his trial, reasonable defense counsel would hesitate before putting any of Peede's friends and family on the stand during the penalty phase.

With regards to counsel's failure to provide Dr. Kirkland with sufficient background information to evaluate Peede for the penalty phase, we note that Dr. Kirkland, a highly respected psychiatrist, interviewed Peede twice. He, in fact, provided evidence favorable to Peede in that he opined that the extreme emotional disturbance mitigator applied in Peede's case, and the trial court agreed. The fact that Peede produced more favorable expert testimony at his evidentiary hearing is not reason enough to deem trial counsel ineffective. *See Gaskin v. State*, 822 So.2d 1243, 1250 (Fla.2002) ("[C]ounsel's reasonable mental health investigation is not rendered incompetent `merely because the defendant has now secured the testimony of a more favorable mental health expert.'") (quoting *Asay v. State*, 769 So.2d 974, 986 (Fla.2000)). Postconviction experts have the benefit of hindsight, and of researching for a long period of time the factual circumstances surrounding the case with the benefit of the trial record. Moreover, although Peede's experts believed the trial court should have found the mitigator regarding capacity to conform conduct to the requirements of the law, the circuit court was within its discretion to agree with the expert witnesses who did not share this belief.

* * *

Even if deficient performance had been established, it is apparent that prejudice was not. As noted above, in order for a defendant to meet the prejudice prong of *Strickland*, "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." *Maxwell*, 490 So.2d at 932. Here, the record reflects that the proffered mitigation developed in the evidentiary hearing would have been countered by the substantial negative aspects of Peede's character and past brought out by the mitigation witnesses and by the established

> aggravators in this case. Additionally, Peede has not demonstrated prejudice by Dr. Kirkland's lack of background information because Dr. Kirkland's essential views would not have changed, and further, the mitigator of extreme mental or emotional disturbance was considered by the trial court due to Dr. Kirkland's testimony. In fact, the experts at the evidentiary hearing essentially agreed with many of Dr. Kirkland's main findings. Although this Court found that the CCP aggravator was not supported by the evidence, the trial court found two other substantial aggravators based on Peede having been previously convicted of two felony crimes involving the use or threat of violence, one of these crimes being second-degree murder, and the murder being committed in the commission of kidnapping. In sum, we find no error by the trial court in concluding that Peede has not demonstrated prejudice, and we affirm the trial court's denial of this claim.

Peede, 955 So. 2d at 492-95.

In its order granting habeas relief as to this issue, the federal district court stated:

> The record in this case demonstrates that prior to the penalty phase either defense counsel or an investigator had spoken to Petitioner, Delmar Brown, and Nancy Wagoner about Petitioner's background. From these individuals, information was obtained that Petitioner's mother had committed suicide, her death had a significant impact on Petitioner, his family questioned his mental condition as early as the time of his California convictions, and Petitioner felt he had a split personality. *See, e.g.*, App E-30 at 163-64, 180, 190. Although defense counsel was aware that the California convictions would be offered as an aggravating factor, defense counsel did not review the statements of John Bell, Eleanor Bell, or Richard Bateman contained in the California police report, in which they noted *inter alia* the suicide of Petitioner's mother, a change in his personality/mental health, and his skin condition and scoliosis as a child. *See, e.g.*, E-30 at 68, 74, 82. Moreover, there is no indication that counsel provided any records, statements, or information they had obtained concerning Petitioner's background to Dr. Kirkland. Thus, counsel either knew or should have known that Petitioner suffered from childhood illnesses, his mother's suicide substantially impacted him, and his mental health was in question prior to the California offenses.

Had counsel provided this information to Dr. Kirkland or called witnesses to testify regarding Petitioner's family history, childhood, and behavior prior to, and after, the California convictions, the jury would have heard substantially more mitigation evidence than was presented at the penalty phase. The jury would have heard that Petitioner's parents were alcoholics and that Petitioner's childhood illnesses impacted his ability to participate in childhood activities and to develop social relationships. Evidence further could have been presented in mitigation of the California murder, namely that the shooting was indicative of Petitioner's diagnosis of Paranoid Personality Disorder as opined by Dr. Sultan (Petitioner's expert witness) and Dr. Merin (the State's expert witness).

The Supreme Court of Florida concluded that counsel was not deficient in part because Dr. Kirkland was able to provide favorable testimony for Petitioner without the benefit of this evidence. This determination, however, ignores the fact that the prosecution attacked Dr. Kirkland's testimony because his opinion was premised solely on the information self-reported by Petitioner during their two brief meetings. (Ex. A-6 at 953-54.) The prosecution undermined the credibility of Dr. Kirkland's opinion based on his failure to review any records or interview anyone to ascertain Petitioner's behavior before or after Darla Peede's murder. *Id.* Moreover, although Petitioner was a difficult client, he did not prohibit counsel from presenting mitigation evidence at the penalty phase or from providing relevant records and statements to Dr. Kirkland. The Court concludes that the Supreme Court of Florida's determination that counsel did not render deficient performance is an unreasonable application of *Strickland* as illustrated by *Rompilla*.

Turning to the prejudice analysis, in concluding no prejudice resulted, the Supreme Court of Florida determined (1) the mitigation evidence presented at the evidentiary hearing would have been countered by negative aspects of Petitioner's character as brought out by the mitigation witnesses, (2) Dr. Kirkland's essential views would not have changed based on additional background information and Dr. Kirkland was still able to find the extreme mental or emotional disturbance mitigator, and (3) two substantial aggravators were found by the trial court.

Although negative aspects of Petitioner's character, such as his volatile temper and violent behavior, would have been presented had counsel called Wagoner, Bell, and Brown as witnesses, this evidence seemingly would

have supported Drs. Sultan and Merin's diagnosis that Petitioner suffered from a Paranoid Personality Disorder and Drs. Fisher, Sultan, and Frank's diagnosis that he suffered from Delusional Disorder. For instance, when Bell testified, Petitioner became irate and subsequently stated he would like to shoot Bell. Petitioner's behavior, however, was the result of his delusion that Bell and others, including Petitioner's family members, had slept with Geraldine Peede. Further, Brown's testimony that Petitioner became angry and acted aggressively and irrationally could have been viewed as indicative of Paranoid Personality Disorder or Delusional Disorder. Consequently, even though negative aspects of Petitioner's character would have been admitted if these witnesses had testified at the penalty phase, this evidence largely would have supported the mental health experts' testimony and not countered the mitigation evidence. Moreover, Dr. Kirkland actually commented on similar negative characteristics of Petitioner at the penalty phase when he said that Petitioner "has certain, certain type of character structure that ... he's sort of a tough guy, macho, explosive at times." Thus, the jury had already been presented with some of these negative characteristics without any possible medical explanation for their existence.

With respect to Dr. Kirkland's testimony, the Court agrees that there is no indication that the additional evidence would have changed his opinion that Petitioner suffered from paranoia regarding the infidelity of his wives, which was consistent with the other mental health experts' diagnoses of Delusional Disorder. Nevertheless, had these witnesses testified or had the content of their statements or the statements contained in the California case file been provided to Dr. Kirkland, he could have determined that Petitioner also suffered from Paranoid Personality Disorder. Additionally, Dr. Kirkland would have been apprised that Petitioner's family had a history of mental illness and that Petitioner's mental health had been in deterioration since his mother's suicide. Notably, Dr. Kirkland could have offered an opinion regarding Petitioner's mental health at the time of the California murder. Like Dr. Merin and Dr. Sultan's testimony, such evidence likely would have mitigated, and thus presumably lessened the weight attributed to, one of the two aggravators.

The total mitigation evidence after the evidentiary hearing included that Petitioner suffered from childhood illnesses, his parents were alcoholics, his mental health began to deteriorate after his mother's

> suicide, he suffered from Paranoid Personality Disorder and Delusional Disorder, he had a family history of mental illness, and he was behaving bizarrely prior to, and after, the California murder. Petitioner's post-conviction experts opined that Petitioner qualified for the statutory mitigator that he was unable to conform his conduct to the requirements of the law at the time of the offense. In contrast, the State's expert witnesses determined that Petitioner did not qualify for this statutory mitigator. Even discounting this statutory mitigator, however, one statutory mitigator was found to apply, the extreme mental or emotional disturbance mitigator. Had the aforementioned additional mitigation evidence been presented, a reasonable probability exists that the jury would have determined that the prior violent felony aggravator (California convictions) was mitigated, and thus warranted less weight. When considered with the remaining aggravator, that the murder occurred during the commission of a kidnapping, the aggravators were balanced or outweighed by the total mitigation evidence. In short, "[t]his is not a case in which the new evidence would barely have altered the sentencing profile presented to the sentencing judge." *Porter*, 558 U.S. at 41 (internal quotation marks omitted). Instead, if the additional mitigation witnesses had testified about Petitioner's background or had such information been provided to Dr. Kirkland, it would have enabled counsel to present a different picture of Petitioner than the one created by the sole mitigation witness, Dr. Kirkland, who testified at the penalty phase. Reweighing the evidence in aggravation against the totality of available mitigating evidence, the Court concludes that a reasonable probability exists that Petitioner would have received a different sentence absent counsels' failure to investigate and present additional mitigation evidence. Consequently, the Supreme Court of Florida's denial of this claim was an unreasonable application of *Strickland*. Accordingly, habeas relief is granted as to claim three.

(Doc. 34 at 46-51).

In reversing the district court's order, the Eleventh Circuit stated:

> At bottom, the Florida post-conviction court made findings, adopted by the Florida Supreme Court, to which we must give deference. *See Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000) ("When there is conflicting testimony by expert witnesses, as here,

discounting the testimony of one expert constitutes a credibility determination, a finding of fact." (citation omitted)). Mr. Peede's post-conviction hearing involved dueling state and defense expert witnesses. The state's experts opined, consistent with Dr. Kirkland's testimony at trial, that despite the new mental health evidence, Mr. Peede knew right from wrong and could control whether he committed murder. State expert Dr. Frank testified that Mr. Peede's mental illness did not prevent him from knowing the wrongfulness of his conduct, as evidenced by the fact that he tried to hide Darla Peede's body, hid the knife he used to kill Darla, knew to pull the car over before stabbing her, and was afraid of being caught. Similarly, state expert Dr. Merin determined that Mr. Peede knew the wrongfulness of his actions, noting that Mr. Peede's "behavior was goal-directed, coherent, and relevant," and "he was able to make decisions." The post-conviction trial court found the state experts' opinions credible, and gave sound reasons for its findings. See Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence, Aug. 12, 2004 at 2-8.

For example, the post-conviction trial court noted that the defense experts at the evidentiary hearing testified that Mr. Peede's delusional disorder was "narrowly circumscribed" to his beliefs about Geraldine's and Darla's infidelity. *Id.* at 2, 4. Thus, the post-conviction trial court found that "other than this mistaken belief regarding the infidelity of his former wives, Mr. Peede's thoughts are fully grounded in reality." *Id.* at 2. Furthermore, the defense experts testified that "Mr. Peede was prone to severe emotional outbursts, including violent outbursts that were completely unrelated to his delusions," and "there was nothing about the structure of Mr. Peede's delusion itself that would have prevented him from judging between right and wrong." *Id.* at 4. Accordingly, the post-conviction trial court found that the defense experts' opinion that Mr. Peede was unable to conform his conduct to the law "appear[ed] inconsistent" with their testimony that his mental state did not "affect his ability to tell right from wrong." *Id.* at 5. Finally, the post-conviction court found that "Dr. Kirkland's findings and conclusions did not vary materially from the findings and conclusions of the defense's current experts."[3] *Id.* at 3, 8. Under AEDPA, Mr. Peede must rebut these findings with clear and convincing evidence. *See Bottoson*, 234 F.3d at 534.

He has failed to do so. Mr. Peede does cite new mental health evidence which shows that, at times, he had a

paranoid and unstable disposition. *See, e.g.*, Appellee's Br. at 46 (prior to the California shooting, a witness testified Mr. Peede became angry after missing a pool shot and "beat himself" in the face—"busted his mouth and bruised his eye up"); *id.* at 26 (Mr. Peede's aunt visited him while incarcerated in California, where he started crying and insisted she leave, telling her "they're going to kill you, go away"); *id.* at 44 (Mr. Peede's uncle described him as having "mental problems"). That evidence, however, fails to satisfy Mr. Peede's hefty burden of establishing that the Florida post-conviction court was clearly wrong in finding, among other things, that Mr. Peede knew right from wrong and could control whether he took the life of another.[4]

Mr. Peede's new mental health evidence largely confirms what most experts and lay witnesses seem to agree about: Mr. Peede could be a violent and angry man who had issues with jealously and paranoia, especially with women. *See, e.g.*, Peede, 955 So. 2d at 492 ("[T]he testimony of three conviction defense mitigation witnesses established that Peede had always been an angry and suspicious person and this evidence would not have been helpful to Peede."). Moreover, though more detailed, the new mental health evidence is largely consistent with Dr. Kirkland's penalty phase testimony that Mr. Peede experienced paranoia and delusions, specifically related to his wives' suspected infidelity, and that his paranoia played a role in Darla Peede's murder. Under AEDPA, therefore, Mr. Peede has not given us sufficient reason to disregard the Florida Supreme Court's conclusion that Mr. Peede was not prejudiced by counsel's failure to introduce this new, more detailed mental health evidence.

* * *

We also defer to the Florida Supreme Court's conclusion that there was no prejudice from counsel's failure to introduce evidence about Mr. Peede's background and upbringing.

* * *

The Florida Supreme Court concluded also that "the proffered mitigation evidence developed in the evidentiary hearing would have been countered by the substantial negative aspects of Peede's character and past brought out by the mitigation witnesses and by the established aggravators in this case." *Id.*

Mr. Peede challenges the Florida Supreme Court's view of the evidence, in part, by arguing that the trial court at sentencing "minimized [Dr.] Kirkland's

> opinion, including his conclusion that at least one statutory mitigating circumstance applied, precisely because Kirkland had not based his opinion on any review of the record." Appellee's Br. at 58. But Mr. Peede misreads the record. Nothing in the trial court's sentencing order suggests what Mr. Peede argues. Instead, the trial court weighed Dr. Kirkland's testimony, which included the conclusion that Mr. Peede "chose to act violently although capable of understanding the nature and consequences of his acts and to conform his conduct to the law," and found "that although a marginal mitigating circumstance, it is outweighed by the single aggravating circumstance, standing alone, of the Defendant's prior crime of Murder in the Second Degree and Assault with a Deadly Weapon." Sentencing Order, D.E. 19 at 1265.
>
> Our review of the record leads us to conclude that the Florida Supreme Court did not act unreasonably. Mr. Peede did introduce post-conviction evidence that, as the Florida Supreme Court observed, established his life was lined with difficulties leading up to the California shooting. But the new evidence also solidified that Mr. Peede had been an angry, suspicious, and sometimes violent man for a good portion of his life.
>
> * * *
>
> This new mitigation evidence, therefore, posed a doubled-edge-sword dilemma—the new information could have hurt as much as it helped, not only because the information itself could be damaging, but also because of the risk that the witnesses' testimony would trigger a violent outburst from Mr. Peede, as occurred during Bell's hearing testimony. We have repeatedly ruled that this sort of post-conviction evidence is usually insufficient to warrant habeas relief. *See, e.g.*, *Evans v. Sec'y, Fla. Dep't of Corrs.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (deferring to state court's rejection of relief where new evidence was a double-edged sword because evidence can be more harmful than helpful); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 650 (11th Cir. 2016) ("And there is a real danger that additional mitigation evidence, particularly if presented by testifying family members, would have been a 'double-edged sword,' which argues against a showing of prejudice." (citing cases)). We come to the same conclusion here.

Peede, 2017 WL 5172137 at *5-7 (fns omitted).

Eleventh Circuit Judge Jordan dissented from the opinion, stating: "This is a close and difficult case, but on balance I think the district court got it right on the issue of *Strickland* prejudice. I would affirm for the reasons set forth in pages 28-51 of the district court's order, which are appended to this dissent. *See* D.E. 34 at 28-51." *Peede*, 2017 WL 5172137 at *7 (Jordan, J., dissenting).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE ELEVENTH CIRCUIT'S ANALYSIS OF PEEDE'S PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS IN DIRECT CONFLICT WITH THE PRECEDENT OF THIS COURT.

Peede alleged during his state court proceedings that his penalty phase counsel rendered ineffective assistance in failing to adequately investigate and present evidence of statutory and non-statutory mitigating factors. The Florida Supreme Court denied this issue, finding neither deficient performance nor prejudice. As to the initial prong of the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), the Florida Supreme Court found that the record supported the circuit court's findings of a lack of cooperation by Peede and counsel's efforts notwithstanding Peede's recalcitrance. *Peede*, 955 So. 2d at 493.[10] With regard to prejudice, the Florida Supreme Court determined that the mitigation presented at the postconviction evidentiary hearing would have been countered by the substantial

[10]According to the circuit court, because Peede would not assist his counsel in providing any mitigating evidence or circumstances, he could not later complain that his counsel performed ineffectively in failing to pursue additional mitigation. *Id*.

negative aspects of Peede's character and past brought out by the mitigation witnesses and by the established aggravators in the case. *Id.* at 494. And, the court determined that Peede had not demonstrated prejudice by Dr. Kirkland's lack of background information because his essential views would not have changed, and the trial court considered the mitigator of extreme mental or emotional disturbance as a result of Dr. Kirkland's testimony. *Id.* The Florida Supreme Court also found that the experts at the evidentiary hearing essentially agreed with many of Dr. Kirkland's main findings. *Id.*

Peede asserted in his federal habeas proceedings that the state court's determination was contrary to and an unreasonable application of clearly established federal law. The district court in its opinion granted habeas relief as to this issue, finding the Florida Supreme Court's determination to be an unreasonable application of *Strickland* (Doc. 34 at 42, 45).

In reversing the district court's order, a majority of the Eleventh Circuit panel determined that in evaluating the prejudice prong, the district court should have deferred to the Florida Supreme Court's conclusion that the new postconviction mitigation evidence did not undermine confidence in Peede's sentence. *Peede*, 2017 WL 5172137 at *3.[11] According to the Eleventh Circuit, Peede's new mental health evidence largely confirmed what most experts and lay witnesses seemed to agree about, that Peede could be a violent and angry man who had issues

[11]The Eleventh Circuit assumed, without deciding, that trial counsel's performance was deficient. *Id.*

with jealousy and paranoia, especially with women. *Id.* at *6. While acknowledging that the new mental health evidence was more detailed, the Eleventh Circuit found that it was largely consistent with Dr. Kirkland's penalty phase testimony that Peede experienced paranoia and delusions, specifically related to his wives' suspected infidelity, and that his paranoia played a role in Darla Peede's murder. *Id.*

As an initial matter, Peede notes that the Florida Supreme Court's determination regarding deficient performance was objectively unreasonable and based on an unreasonable determination of the facts. As the district court found, "[a]lthough Petitioner was a difficult client, he did not prohibit counsel from presenting mitigation evidence at the penalty phase or from providing relevant records and statements to Dr. Kirkland." (Doc. 34 at 48). And, as this Court has determined, even in the face of a "fatalistic or uncooperative" client, defense counsel still has a duty to conduct "*some* sort of mitigation investigation." *See Porter v. McCollum*, 558 U.S. 30, 40 (2009), *citing Rompilla v. Beard*, 545 U.S. 372, 381-82 (2005) (emphasis in original).[12] Moreover, as in *Rompilla*, 545 U.S. at 383, counsel's performance here was constitutionally deficient

[12]By comparison, Peede was a significantly more cooperative client than Rompilla and Porter. *Compare Rompilla*, 545 U.S. at 381 (noting that the defendant was "bored" listening to defense counsel's strategy); *Porter*, 558 U.S. at 40 (describing the defendant as "fatalistic or uncooperative"). Peede informed counsel of the "spine curvature" and "skin blistering" problems he had suffered as child (S-Ex. 9). And he told counsel about his 1978 conviction in California and shared his belief that he had a "split personality" (S-Ex. 11).

because they failed to examine the record in Peede's prior felony case, which would have revealed mitigation evidence. Thus, as the district court concluded, the Florida Supreme Court's determination "that counsel did not render deficient performance is an unreasonable application of *Strickland* as illustrated by *Rompilla*." (Doc. 34 at 48).

With regarding to prejudice, Peede submits that the Eleventh Circuit erred in its determination. First, as the district court in its order noted, the Florida Supreme Court ignored the fact that the prosecution attacked Dr. Kirkland's testimony because his opinion was premised solely on the information self-reported by Peede during their two briefings (Doc. 34 at 48). As such, the prosecution undermined the credibility of Dr. Kirkland's opinion based on his failure to review any records or interview anyone to ascertain Peede's behavior before or after Darla Peede's murder (Doc. 34 at 48).

Second, as the district court also found, had Dr. Kirkland been properly informed, he could have testified not only to more mitigation, but also to an opinion that would have diminished the weight of the prior violent felony aggravating circumstance:

> With respect to Dr. Kirkland's testimony, this Court agrees that there is no indication that the additional evidence would have changed his opinion that Petitioner suffered from paranoia regarding the infidelity of his wives, which was consistent with the other mental health experts' diagnosis of Delusional Disorder. Nevertheless, had these witnesses testified or had the content of their statements or the statements contained in the California case file been provided to Dr. Kirkland, he could have determined that Petitioner also suffered from Paranoid Personality Disorder. Additionally, Dr. Kirkland would have been apprised that Petitioner's family had a history of mental

> illness and that Petitioner's mental health had been in deterioration since his mother's suicide. Notably, Dr. Kirkland could have offered an opinion regarding Petitioner's mental health at the time of the California murder. Like Dr. Merin and Dr. Sultan's testimony, such evidence likely would have mitigated, and thus presumably lessened the weight attributed to, one of the two aggravators.

(Doc. 34 at 49-50).

The Eleventh Circuit in its opinion also faulted the district court for failing to defer to the Florida Supreme Court's view that the new evidence concerning Peede's background and upbringing was a double-edged sword that likewise failed to undermine the sentence. *Peede*, 2017 WL 5172137 at *3. According to the Eleventh Circuit, the new evidence solidified that Peede had been an angry, suspicious, and sometimes violent man for a good portion of his life. *Id.* at *7. Like the Florida Supreme Court, the Eleventh Circuit found that the new mitigation evidence posed a double-edged-sword dilemma, as the new information could have hurt as much as it helped. *Id.*

Peede submits that the Eleventh Circuit's analysis, like that of the Florida Supreme Court, is in direct conflict with this Court's precedent. In *Porter,* 558 U.S. at 42, this Court addressed the Florida Supreme Court's failure to properly apply the appropriate standard as to constitutional ineffective assistance of counsel. This Court was particularly critical of the state court's application of the controlling standard used to measure a claim of penalty phase ineffective assistance of counsel. This Court determined that "[t]he Florida Supreme Court either did not consider or unreasonably discounted the mitigation

evidence adduced in the postconviction hearing." *Id*. For example, this Court determined that the state court unreasonably discounted to irrelevance the evidence of Porter's abusive childhood, and it also unreasonably concluded that Porter's military service would be reduced to inconsequential proportions "simply because the jury would also have learned that Porter went AWOL on more than one occasion." *Id.* at 43.

Here, as in *Porter*, the Florida Supreme Court (and the Eleventh Circuit) unreasonably applied the controlling standards. They either did not consider or unreasonably discounted much of the mitigation set forth by Peede at the postconviction evidentiary hearing. This is similar to the analysis which the Florida Supreme Court applied in *Porter v. State* and which was subsequently rejected by this Court as unreasonable: "[N]either the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge." *Porter*, 558 U.S. at 42-43.

As a result of the erroneous analysis in Peede's case, significant mitigating circumstances, which actually were consistent with and would have supported Peede's theory of mitigation, *See Porter*, 558 U.S. at 43-44, were unreasonably discounted. The lay witness testimony connected the dots between

Peede's traumatic childhood through his adolescence and into Peede's dramatic change in behavior following his mother's death. This testimony "would have destroyed the benign conception of [Peede's] upbringing and mental capacity"[13] that defense counsel presented to Peede's sentencing jury and judge. Moreover, as the district court explained in its order:

> Although negative aspects of Petitioner's character, such as his volatile temper and violent behavior, would have been presented had counsel called Wagoner, Bell, and Brown as witnesses, this evidence seemingly would have supported Drs. Sultan and Merin's diagnosis that Petitioner suffered from a Paranoid Personality Disorder and Drs. Fisher, Sultan, and Frank's diagnosis that he suffered from Delusional Disorder. For instance, when Bell testified, Petitioner became irate and subsequently stated he would like to shoot Bell. Petitioner's behavior, however, was the result of his delusion that Bell and others, including Petitioner's family members, had slept with Geraldine Peede. Further, Brown's testimony that Petitioner became angry and acted aggressively and irrationally could have been viewed as indicative of Paranoid Personality Disorder or Delusional Disorder. Consequently, even though negative aspects of Petitioner's character would have been admitted if these witnesses had testified at the penalty phase, this evidence largely would have supported the mental health experts' testimony and not countered the mitigation evidence.

(Doc. 34 at 49).

The Eleventh Circuit's analysis also ignores the fact that the jury was already aware of several of Peede's negative characteristics, yet it was provided little context to understand the connection between his mental health issues and his behavior. As the district court observed in its order:

> Moreover, Dr. Kirkland actually commented on similar negative characteristics of Petitioner at the penalty

[13] *Rompilla*, 545 U.S. at 391.

> phase when he said that Petitioner "has certain, certain type of character structure . . . he's sort of a tough guy, macho, explosive at times." Thus, the jury had already been presented with some of these negative characteristics without any possible medical explanation for there existence.

(Doc. 34 at 49).

Further overlooked by the Eleventh Circuit in its opinion is the fact that the district court was not required to afford deference to the Florida Supreme Court's determination, as it was based on an analysis that unreasonably applied clearly established federal law. In *Panetti v. Quarterman*, 127 S.Ct. 2842, 2858-59 (2007), this Court explained:

> When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in *§ 2254(d)(1)* is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires.

See also Cooper v. Sec'y, Dep't. of Corr., 646 F.3d 1328, 1353 (11th Cir. 2011)("Thus, the state court's decision on prejudice was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' *see* 28 U.S.C. § 2254(d)(2), and we will review Cooper's claim *de novo.*").

Contrary to the Florida Supreme Court's as well as the Eleventh Circuit's determination, Peede submits that when a proper *Strickland* analysis is conducted, there is a reasonable probability that he "would have received a different sentence after a constitutionally sufficient mitigation investigation." *See Sears v. Upton*, 130 S.Ct. 3529, 3267 (2010). As the district court determined in its order:

> The total mitigation evidence after the evidentiary hearing included that Petitioner suffered from childhood illnesses, his parents were alcoholics, his mental health began to deteriorate after his mother's suicide, he suffered from Paranoid Personality Disorder and Delusional Disorder, he had a family history of mental illness, and he was behaving bizarrely prior to, and after, the California murder. Petitioner's post-conviction experts opined that Petitioner qualified for the statutory mitigator that he was unable to conform his conduct to the requirements of the law at the time of the offense. In contrast, the State's expert witnesses determined that Petitioner did not qualify for this statutory mitigator. Even discounting this statutory mitigator, however, one statutory mitigator was found to apply, the extreme mental or emotional disturbance mitigator. Had the aforementioned additional mitigation evidence been presented, a reasonable probability exists that the jury would have determine that the prior violent felony aggravator (California convictions) was mitigated, and thus warranted less weight. When considered with the remaining aggravator, that the murder occurred during the commission of a kidnapping, the aggravators were balanced or outweighed by the total mitigation evidence. In short, "[t]his is not a case in which the new evidence would brealy have altered the sentencing profile presented to the sentencing judge," *Porter*, 558 U.S. at 41 (internal quotation marks omitted). Instead, if the additional mitigation witnesses had testified about Petitioner's background or had such information been provided to Dr. Kirkland, it would have enabled counsel to present a different picture of Petitioner than the one created by the sole mitigation witness, Dr. Kirkland, who testified at the penalty phase. Reweighing the evidence in aggravation against the totality of available mitigating evidence, this Court concludes that a reasonable probability exists that Petitioner would have received a different sentence absent counsels' failure to investigate and present additional mitigation evidence.

(Doc. 34 at 50-51).

Peede submits that this Court should grant certiorari to consider whether the Eleventh Circuit's denial of habeas relief was based on a flawed legal and factual analysis.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Eleventh Circuit in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to Scott A. Brown, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida, 33607, on this 9th day of April, 2018.

/s/ Linda McDermott
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