CASE NO. 17-8491

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT IRA PEEDE,

Petitioner,

vs.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review the denial of habeas relief on a fact intensive issue of ineffective assistance of penalty phase counsel in a case which was not contrary to, nor an unreasonable application of any of this Court's precedent and presents no significant or important federal question, and does not conflict with that of any other courts of appeal?

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The Eleventh Circuit's opinion reversing the district court decision that granted Peede partial relief has not been published in the Federal Reporter, but is reported at Peede v. Attorney General, Florida, 715 Fed. Appx. 923 (11th Cir. 2017). The district court's order dated February 26, 2015 partially granting Peede's habeas petition is unpublished and was reprinted as Petitioner's Appendix C.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion on November 8, 2017. Petitioner's "Petition for En Banc Rehearing or Panel Rehearing," was denied on January 10, 2018. On April 16, 2018, the instant petition was docketed in this Court.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the decision of the Eleventh Circuit Court of Appeals. However, Respondent submits that no question contained in the petition is worthy of this Court's consideration.

STATEMENT OF THE CASE

Petitioner, Robert Peede, is a Florida inmate under a death sentence imposed March 5, 1984 for the murder of Darla Peede.

A) State Court Procedural History

Following a jury trial, Peede was convicted of the first-degree murder of Darla Peede in 1984. Not long after being released from prison for his prior murder conviction, Peede kidnapped and murdered his estranged wife, Darla, by

stabbing her in the throat. Peede intended to use Darla in his plan to murder two other individuals in North Carolina. The trial court followed the jury's 11-1 recommendation and sentenced Peede to death. The court found three aggravating circumstances: that Peede had previously been convicted of a prior violent felony (second-degree murder and assault with a deadly weapon), that the murder was committed during the course of a kidnapping, and that the murder was committed in a cold, calculated, and premeditated manner. (R8/1263-64). The court found as a mitigating circumstance that Peede committed the murder under an extreme emotional disturbance, but, gave the mitigator little weight. The court stated that this mitigation was outweighed by the single aggravating circumstance, standing alone, of Peede's prior murder and assault with a deadly weapon offenses. (R8/1265).

On appeal, the Florida Supreme Court affirmed Peede's conviction and death sentence but found the evidence insufficient to support the cold, calculated and premeditated aggravator. Peede v. State, 474 So. 2d 808, 818 (Fla. 1985), cert. denied, 477 U.S. 909 (1986).

Peede's initial round of post-conviction review resulted in a summary denial. On appeal, the Florida Supreme Court reversed the summary denial, determining that an evidentiary hearing was warranted for several claims. Peede v. State, 748 So. 2d 253, 255 (Fla. 1999).

Following an evidentiary hearing, On August 12, 2004, the trial court issued its Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence. (2PCR 26/1774-86). On appeal, the order denying post-conviction relief was affirmed and Peede's state petition for writ of habeas corpus was denied on January 11, 2007. Peede v. State, 955 So. 2d 480 (Fla. 2007).

B) Relevant State Post-Conviction Evidentiary Hearing Facts

(i) Trial Defense Attorneys

Peede's attempts to portray defense counsel's efforts to develop mitigation on Peede's behalf as limited is not supported by the record. William DuRocher was the elected Public Defender for Orange County from 1980 until 2000. (2PCR 15/378-79). The Peede case was assigned to the senior lawyer in the felony division, Theotis Bronson. (2PCR 15/380). DuRocher was aware of difficulty Bronson was having communicating with Peede as a client. Mr. Peede was a very difficult client. (2PCR 15/427).

The defense team developed information for the penalty phase though two investigators. They were assigned to develop mitigation in North Carolina. (2PCR 15/409). DuRocher thought they made a good faith effort to develop mitigation and find witnesses who would be willing to testify. (2PCR 15/410). However, they could not come up with much mitigation. DuRocher explained:

> ...Peede had a fairly normal upbringing; was, you know, an average student, I think, went through the schools there. His family was generally well-liked in the community. But, again, we were not able to – out of that scenario, we were not able to draw out specific,

factual, good information to use for Mr. Peede.

> At some point he had left, you know, this -- this nice, kind of idyllic North Carolina small town and gone to California and shot two people, and one of them died, So we were trying to overcome -- overcome that and the aggravating circumstances that the State had presented, but we just couldn't come up with much.

(2PCR 15/410).

Notes from the defense file reflect calls to the North Carolina area and contact being made with an Aunt and Uncle of Peede's. (2PCR 15/431-32). DuRocher identified a number of letters that he submitted on behalf of Peede at sentencing from friends and family. [Exhibit 7] (2PCR 15/435). Peede's friends and family seemed to say good things about him and DuRocher thought the defense would portray Peede as a polite, pleasant, good person. (2PCR 15/437). DuRocher believed that most of the letter writers were of advanced age, and declined to come to Florida to testify. (2PCR 15/445).

Mr. Peede did not cooperate with counsel, but, DuRocher testified that he did not consider Peede incompetent. "My understanding would be that -- that the issue of competency would go to the ability to assist Counsel, not the refusal to assist Counsel. And I took Mr. Peede to be refusing to assist me and Mr. Bronson." (2PCR 15/399). Peede understood their roles and he came to view Peede as "manipulative" and guided by reason that "I didn't understand." (2PCR 15/400). Moreover, they had Dr. Kirkland's report, finding Peede competent to assist counsel and understand the proceedings. (2PCR 15/400).

Dr. Kirkland examined Peede twice; once prior to trial and again after he had been convicted.[1] DuRocher did not think he provided background material for Dr. Kirkland, but was "sure I discussed some of the background with him." (2PCR 15/402). If Dr. Kirkland had asked for any additional information, DuRocher testified that they would have supplied it. (2PCR 15/434). Dr. Kirkland, in "the late '70s and into the '80s, was recognized by the courts of this circuit as one of the preeminent forensic psychiatrists in the area, and was frequently called by both the State and Defense to do these kinds of evaluations and make these kind of reports." (2PCR 15/403). Dr. Kirkland's opinion carried a great deal of weight with the courts and his testimony was a big plus during the penalty phase. (2PCR 15/403). In 1983 and 1984 it was not as common to provide background information for a psychiatrist as it is today. At that time, few attorneys had experience in capital cases; the idea that information extended beyond the statutory mitigators was still new. (2PCR 15/434).

DuRocher knew of Peede's California homicide and had a conversation with the lead investigator there. (2PCR 15/408, 420). Another attorney in his office, his chief assistant, Lou Lorinz, also worked on the case. DuRocher thought he or someone from his office had contact with the California authorities and that he may have spoken to the attorney who represented Peede in the late

[1] Judge Bronson had Dr. Kirkland examine Peede a second time in order to develop mitigation with respect to "emotional distress or something of that nature." (2PCR 15/484).

'70s. (2PCR 15/419). The correspondence to Peede's California attorney reveals that attempts were made early on in the case to develop information which might be helpful in the penalty phase. (2PCR 15/420). The public defender file contained a witness statement to the California murder from Austin Backus which DuRocher would have reviewed at the time of trial. (2PCR 15/415).

Theotis Bronson testified that he was presently a Ninth Judicial Circuit Court judge in the Civil Division. (2PCR 15/450). This case was Bronson's first capital case. (2PCR 15/451). Judge Bronson recalled that this case went to trial unusually quickly. Peede resisted having his case continued and did not assist his attorneys in preparation. It was Peede's position, "from the first day I met him until the last time I saw him, that -- basically, he acknowledged that he killed his wife, Darla, and that he wanted to be executed for it, and he didn't want a defense to be raised on his behalf, and he demonstrated that throughout the time that I represented him." (2PCR 15/459).

Peede was consistent in his behavior and his refusal to cooperate in his own defense. (2PCR 15/469). Judge Bronson did not learn of the skin disease Peede had as a child, noting that "Peede certainly could have been the source of information like that and, of course, he never provided that information to me." (2PCR 15/471). With regard to letters gathered from people on Peede's behalf, Judge Bronson was sure that he gathered that information "from independent sources, not from Mr. Peede." (2PCR 15/474).

Judge Bronson, like Durocher, testified that the defense sought out information from North Carolina about Peede. State's Exhibit 12 reflected that Bronson talked to Hillsborough Police Department Lieutenant Biggs. Biggs was familiar with the family, having known them for 14 years, and provided background information. (2PCR 15/487). Bronson also interviewed Delmar Brown and Hoyt Crabtree who knew about Peede's family background, "his father's death, and his mother's suicide, etc." (2PCR 15/488).

Judge Bronson testified that his investigator talked to Delmar Brown who thought that Peede needed mental health treatment but that Brown did not think Peede was insane. (2PCR 15/482).

(ii) Mental Health Experts

A total of four mental health experts testified during the post-conviction hearing; two were called by the Defense and two by the State.[2] The testimony offered by the state experts, Doctor Sidney Merin and Dr. David Frank, conflicted with the two experts called by the defense in some rather significant ways. While the two experts called by the defense testified that both statutory mental mitigators applied, the two experts called by the State disagreed that Peede was substantially impaired in his ability to conform his conduct to the

[2] The defense called two experts who are exclusively retained by the defense in capital cases, Dr. Faye Sultan, a clinical psychologist, licensed in North Carolina, and Dr. Brad Fisher, a clinical psychologist. (2PCR 20/773).

requirements of the law.[3] The state courts were not persuaded by the testimony of Peede's post-conviction mental health experts. Specifically, when evaluating prejudice, the Florida Supreme Court affirmed the post-conviction court's credibility finding that Peede's experts did not establish the additional mental health mitigator of substantial impairment in Peede's ability to conform his conduct to the requirements of the law. The Florida Supreme Court stated:

> 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.

Peede, 955 So. 2d at 489-494.

While the defense experts criticized Dr. Kirkland for having viewed inadequate background material, Dr. Kirkland's diagnosis was not markedly different than that of Peede's post-conviction experts.[4] As Dr. Fisher testified, the best way to describe Peede is that he is a person with a Delusional Disorder, paranoid jealous type, "not to say he's psychotic." (2PCR 20/820). Dr. Fisher

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[3] The two statutory mental mitigators under Florida's law are: 1) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired, see § 921.141(6)(f), and (2) the capital felony was committed while the defendant was under the influence of an extreme mental or emotional disturbance, see § 921.141(6)(b).

[4] Interestingly enough, the district court noted that Dr. Kirkland's diagnosis was similar to that of the post-conviction experts in rejecting Peede's Ake claim. (Pet. App. C/55).

acknowledged that Dr. Kirkland developed a similar final diagnosis, "[p]aranoia was in there and delusional thinking was in there." (2PCR 20/820). Similarly, while Dr. Sultan criticized Dr. Kirkland for, in her opinion, failing to review background information, she agreed with Dr. Kirkland's conclusion that Peede has a "type" of paranoid disorder. (2PCR 19/129). She also she agreed with parts of Dr. Kirkland's report, such as that he was "obsessed" and noting that Peede exhibited delusional thinking. (2PCR 19/691).

The State experts also agreed with many of Dr. Kirkland's conclusions about Peede from the time of trial. Dr. Merin testified that Dr. Kirkland's conclusion that Peede suffered from a Paranoid Disorder was consistent with the conclusion that Dr. Merin arrived at with respect to Peede. (2PCR 21/913). However, unlike Dr. Kirkland, Dr. Merin disagreed that Peede suffered from an extreme mental or emotional disturbance at the time of the murder. Dr. Frank testified that Peede appeared to be suffering from Delusional Disorder, Jealous Type, which he would consider an "extreme emotional disturbance." (2PCR 22/986-87). With that disorder, functioning is not markedly impaired and behavior is not obviously odd or bizarre. (2PCR 22/988).

Both state experts also agreed that Peede had a personality disorder, with borderline and antisocial features. (2PCR 21/891, 968). Notably, on cross-examination Dr. Faye Sultan agreed that Peede's score on the psychopathic deviate scale of the MMPI was elevated above the norm. (2PCR 19/688).

(iii) Lay Witnesses

Three lay witnesses were called by collateral counsel during the post-conviction hearing in an effort to establish trial counsel's background investigation and presentation was deficient.[5] Petitioner mentions that Peede's Aunt, Nancy Wagoner, was available to testify at trial to the "beatings" Peede suffered at the hands of his mother. (Petition at 9). However, evidence of abuse presented during the post-conviction hearing from Ms. Wagoner or anyone else, for that matter, was minimal to non-existent.[6] Nancy Wagoner, testified that her sister didn't "beat" Peede but would occasionally "spank[] him" when he didn't behave or do well on his homework. (2PCR 14/238-40). Peede's mother loved Peede and expressed her love in both "words" and "gifts." (2PCR 14/241). Peede grew up in comfortable circumstances. (2PCR 14/240). Peede's father was "an easy-going guy" and more or less let his wife take care of Peede. (2PCR 14/268). Moreover, by the accounts available to counsel at the time of trial, Peede's parents were nice, well respected in the community and cared for Peede. (2PCR 14/240-41).

Similarly, while collateral counsel did present evidence Peede suffered from a blistering skin condition as a child, the evidence of "extreme physical

[5] Peede's 71 year old aunt, Nancy Wagoner, Peede's childhood friend, John Logan Bell, Jr., and Michael Brown, Peede's cousin. (2PCR 14/273).

[6] Wagoner related an incident where Peede struck her on her shoulder, causing her to 'trip' over a rubber mat and fall to the floor. (2PCR 14/256). Wagoner really liked Darla; she was pretty, sweet, and compassionate. (2PCR 14/255).

impairments" was less compelling than Peede suggests in his Petition to this Court. (Petition at 9). As testified to by Ms. Wagoner, Peede was born with a skin condition which inhibited his ability to walk. His feet had blisters on them. However, as he grew older he didn't show as much pain. (2PCR 14/236).

Peede's childhood friend, Bell also testified about Peede's skin condition as a child. Peede would get blisters from objects rubbing against his skin, "from playing basketball in new shoes or something." (2PCR 14/291). Bell testified that despite Peede's skin condition, Peede was able to play with other kids his age. (2PCR 14/291). Michael Brown, Peede's cousin, testified that Peede had blisters which were "severe" in the summer time. He had to wear soft shoes in the summer and could not be active in sports because of that condition. (2PCR 14/313).

Peede almost completely ignores the negative facts that were revealed by these three witnesses. John Logan Bell, Jr. was Peede's childhood friend. (2PCR 14/273). Peede interrupted Bell's testimony, stating that Bell was the "father of my youngest son" by his second wife and "didn't want that son-of-a-bitch on the stand." (2PCR 14/274). Peede threatened to kill Bell. Peede stated, "[w]ell, I'll tell you what, you give me a gun and bring him on back in here. Let's do that." (2PCR 14/274). "I want him to drop dead. I want him to pay all that child support for the kid he should have been paying for instead of me. . ." (2PCR 14/274). And, Peede told the court that he did not want any part of this, did not

want to hear from Bell, and that he had "dreamed some bad things about this guy." (2PCR 14/278).

Peede had a temper. (2PCR 14/295). At some point after the California case, Peede confronted Bell about Geraldine. It seemed like it was in the fall of 1981. Peede looked unstable, and grabbed Bell's arm. Peede accused Bell of having relations with his wife. Bell told Peede that he knew better than that, but Peede told Bell, "I'll be back. He said, I'll come back and see you later." (2PCR 14/297). Bell testified that he did not have relations with Geraldine. (2PCR 14/297).

After the murder, Bell was told that Peede had blood all over the back of his car. Bell recalled proving information to police in the California case, as he described it, "very lightly." (2PCR 14/298).

On cross-examination, Bell acknowledged that he had moved around frequently, was in the military for four or five years, moved to Durham and then Raleigh. (2PCR 14/299). Bell acknowledged that it was common "gossip" in the community that he had an affair with Geraldine. (2PCR 14/302-03). Bell acknowledged that he was not available to testify in 1984, because after hearing of Peede's second murder, Bell admitted he was laying low, and did not want anything to do with Peede. (2PCR 14/308).

Brown also noted that Peede had a temper, and that he was "overly aggressive" with girls: "[I]f they did not respond to his advances, he may get mad

about that and say something very disparaging to them." (2PCR 14/315). In their 20's or 30's Brown witnessed Peede in a road rage incident, yelling at a man and driving his car, which was towing a boat, erratically. (2PCR 14/320). Brown was concerned for his own safety. (2PCR 14/320).

Any additional facts necessary for disposition of this petition will be discussed in the argument, infra.

C) Relevant State Post-Conviction And Federal Habeas Decisions

On August 12, 2004, the post-conviction court issued its order denying post-conviction relief. On appeal, the Florida Supreme Court affirmed, rejecting the claim that counsel was ineffective in either investigating or presenting mitigating evidence during the penalty phase of Peede's trial. The Florida Supreme Court also agreed with the post-conviction court, that Peede had not established prejudice under Strickland v. Washington, 466 U.S. 668 (1984). Peede, 955 So. 2d at 493-494.[7]

On May 5, 2008, Peede filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida. At the request of Peede's counsel, the case was held in abeyance pending the resolution of the successive state court proceedings. Finally, on February 27, 2015, the District Court, the Honorable Anne C. Conway, issued an order denying in part and

[7] On or about November 16, 2010, Peede filed an unsuccessful successive Rule 3.851 motion to vacate, based on Porter v. McCollum, 558 U.S. 30 (2009). Peede v. State, 94 So. 3d 500 (Fla. 2012), cert. denied, 568 U.S. 1099 (2013).

conditionally granting in part Peede's habeas petition, reversing his sentence for the first-degree murder of Darla Peede. (Pet. App. C). The State filed a timely notice of appeal in the Eleventh Circuit on March 9, 2015. On November 8, 2017, the Eleventh Circuit issued its opinion reversing the decision of the district court. Peede v. Attorney General, Florida, 715 Fed. Appx. 923 (11th Cir. 2017). Peede filed a petition for rehearing and rehearing en banc on November 29, 2017, which was denied January 10, 2018. (Pet. App. B).

REASONS FOR DENYING THE WRIT

This Court should deny certiorari review of the denial of habeas relief on a fact intensive question of ineffective assistance of penalty phase counsel in a case which is not contrary to, nor an unreasonable application of any of this Court's precedent and presents no significant or important federal question. Further, the Eleventh Circuit Court of Appeals' decision does not conflict with that of any other courts of appeal.

Petitioner argues that this Court should review the Eleventh Circuit's decision affirming the denial of his writ of habeas corpus on the basis of ineffective assistance of penalty phase counsel. However, determination of whether the Eleventh Circuit's rejection of Petitioner's ineffective assistance claim on the lack of prejudice under Strickland is wholly dependent on the facts of the case and of significance to no one other than the parties to this litigation. There is no conflict between the Eleventh Circuit and this Court or any other circuit court of appeals regarding application of this Court's well settled Strickland precedent. As such, this Court should decline to exercise certiorari jurisdiction over this case. See Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140 (1985); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955); Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923). Moreover, a review of the Eleventh Circuit's detailed opinion accompanying the denial of this claim establishes correct application of this Court's precedent.

Of course, Strickland, 466 U.S. at 694, mandates that judicial scrutiny of an attorney's performance be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Since Peede's ineffective assistance of counsel claims were adjudicated on the merits in state court, "he must do more than" satisfy the Strickland standard. [Peede] must also show that in rejecting his ineffective assistance of counsel claim the state court "applied Strickland to the facts of his case in an objectively unreasonable manner." Bell v. Cone, 535 U.S. 685, 698-99 (2002). Consequently, ineffective assistance claims considered in federal court on habeas review are subject to additional deference. See Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) (noting that a "doubly deferential judicial review" applies to a Strickland claim "evaluated under the § 2254(d)(1) standard") (citing Yarborough v. Gentry, 540 U.S. 1, 5-6 (2003) (per curiam)).

The Eleventh Circuit's detailed and comprehensive opinion is fully in accord with this Court's precedent governing ineffective assistance of counsel. The court applied this Court's settled precedent of Strickland, viewed with the appropriate deference to counsel and respect which the state court ruling was entitled under the AEDPA. See Harrington v. Richter, 562 U.S. 86 (2011) (observing that under the AEDPA a petitioner must show that the state court's ruling on the claim being presented in federal court was "so lacking in justification that there was an error well understood and comprehended in

existing law beyond any possibility for fairminded disagreement.").

A) Petitioner Failed To Establish Prejudice

The Eleventh Circuit held that the district court erred in failing to credit the reasonable decision of the Florida Supreme Court below in finding Peede failed to establish prejudice, stating in part:

> ...The district court should have deferred to the Florida Supreme Court's view of the new mental health evidence and expert testimony. The Florida Supreme Court concluded:
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> - "Although it is true that Dr. Kirkland did not have available to him Peede's records or other background information the evidentiary hearing experts had at their disposal, Dr. Kirkland arrived at conclusions similar to the current experts' findings." *Peede*, 955 So.2d at 495.
>
> - Dr. Kirkland "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." *Id.* at 494 (citations omitted).
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> - "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." *Id.* at 486.
>
> - "[A]lthough 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." *Id.* at 494.
>
> - The post-conviction trial court correctly found that "much of the difference between Dr. Kirkland's conclusions and those of the current defense experts is semantic." *Id.* at 495 (quoting trial court).

The Florida Supreme Court consequently reasoned that there was "no error by the trial court in concluding that Peede has not demonstrated prejudice." *Id.* Our review of the record gives us no basis to disturb that conclusion under AEDPA.

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."[fn3] *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.[fn4]

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.

Peede, 715 Fed. Appx. at 928-30 (footnotes omitted).

The Eleventh Circuit made similar findings with regard to counsel's claimed failure to develop and present background mitigation. The court stated:

> 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 reasoned that the evidence was a double-edged sword that did not undermine confidence in Mr. Peede's sentence:
>
> > 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.
>
> *Peede*, 955 So. 2d at 494.
>
> 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, 715 Fed. Appx. at 931-32.

This was not a close case. The jury vote in favor of the death penalty was a near unanimous 11-1. The sentence is supported by one of the most weighty aggravators under Florida law, prior violent felony [second-degree murder

involving the use of a firearm and assault with a deadly weapon. (R6/929)]. See Bolin v. State, 117 So. 3d 728, 742 (Fla. 2013) ("This Court has previously stated that the prior violent felony aggravator is one of the "most weighty" aggravating circumstances set forth in Florida's statutory sentencing scheme.") (citations omitted). When coupled with the fact Peede was convicted of a contemporaneous felony for kidnapping his victim from the Miami area where her daughters were waiting at home for her, it becomes clear that the state courts reasonably concluded that Peede had not produced either the quantity or quality of mitigating evidence to undermine confidence in the outcome of his penalty phase.[8]

The state court ruling was factually and legally supportable, and, inherently reasonable. Since the State courts below cited the governing Supreme Court case law and issued a ruling on the merits, Peede had to establish an "unreasonable application" of clearly established law. This required Peede to

[8] The trial court found as a mitigating circumstance that Peede was under the influence of extreme mental or emotional disturbance, but the trial court attributed little weight to this circumstance, stating that ". . . 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." (R8/1265). Neither these convictions nor the facts presented at the time of trial were challenged by Peede's post-conviction evidence. Peede shot and killed an individual who was attempting to get up from the sidewalk after Peede knocked him to the ground with a pool cue. (R6/942). Peede drove slowly by the front of the bar and fired multiple shots, striking and killing the victim, the owner of the bar, Jack Couchman. (R6/943). Peede hit the other man in the shoulder and he "survived after a number of weeks in the hospital." (R6/931-32).

show more than a mere disagreement with the state court ruling; he had to show it was objectively "unreasonable." Peede did not come close to meeting his burden in this case. The district court merely substituted its own judgment for that of the state courts. The district court's decision is no more reasonable than that of the state courts below and, in some respects, less so. Accordingly, the district court was properly reversed by the Eleventh Circuit.

Peede asserts that this Court's decisions in Rompilla v. Beard, 545 U.S. 374 (2005) and Porter v. McCollum, 130 S. Ct. 447, 453 (2009) support granting certiorari in this case. (Petition at 32-33). However, Petitioner's claim of conflict does not survive even a cursory comparison between these cases and the facts presented here. Rather, his real complaint is in the manner in which the lower courts applied Strickland after a full post-conviction hearing in state court. Such assertions merely implicate an alleged "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Accordingly, certiorari review would be inappropriate.

Unlike the situation in Rompilla, the record reflects counsel did investigate Peede's prior conviction. Counsel knew of the California homicide and had a conversation with the lead investigator there.[9] (2PCR 15/408, 420). The public defender file also contained a witness statement to the California

[9] DuRocher did not recall seeing a statement by Eleanor Bell or Mr. Bateman and did not know how it might fit within "the Peede murder trial." (2PCR 15/409). Notably, of these three family members and friends, collateral counsel only called one to testify during the post-conviction hearing and that witness, Bell, proved rather disastrous.

murder from Austin Backus, which was reviewed at the time of trial. (2PCR 15/415). DuRocher thought he had contact with the California authorities and that he, or someone in his office, spoke to the attorney who represented Peede in the late '70s. (2PCR 15/419). Correspondence to Peede's California attorney reveals that attempts were made early on in the case by the defense to develop information which might be helpful in the penalty phase. (2PCR 15/420). Judge Bronson too, was aware of the prior murder in California and knew of Peede's assertion of self-defense. Bronson also recalled "reading a number of reports" regarding the murder. (2PCR 15/457).

Clearly this case is unlike Rompilla, where the defense attorney declined to review a readily accessible file the prosecutor had warned would be used at trial. Rompilla, 545 U.S. at 377 ("hold[ing] that ... [a capital defendant's] lawyer is bound to make reasonable efforts to obtain and review materials that counsel knows the prosecutor will probably rely on as evidence of aggravation at the sentencing phase of trial"). In Rompilla, this Court noted it was undisputed that defense counsel had access to records from his prior conviction and incarceration which established a deprived and abusive childhood, along with mental health problems, much different from anything else counsel had seen. Unrefuted evidence from the hearing below establishes counsel reasonably undertook an investigation to acquaint themselves with the facts and circumstances surrounding the California convictions. Thus Rompilla, which presented

materially distinguishable facts, does not support granting habeas relief.

Similarly, Peede's reliance upon Porter, to show either conflict or an unreasonable application of this Court's precedent is misplaced. In Porter, the issue was whether Porter was prejudiced when penalty phase counsel only had one short meeting with the defendant about mitigation, never attempted to obtain any records about the defendant and never requested a mental health evaluation for mitigation at all. Porter, 558 U.S. at 40. The type of mitigation Peede developed in post-conviction pales in comparison to the specific and weighty evidence presented by the defendant in Porter; his experience in the Korean war and its lasting impact upon the defendant. Porter, on its facts was focused upon the unique nature of military service and, specifically, the weighty mitigation of a defendant who had seen considerable combat. Id. at 32-36, 43. Moreover, in Porter there was no finding, as here, that much of the mitigating evidence was offset by damaging evidence that could be used by the State [antisocial traits, violent threats and conduct]. Porter applied well established law [Strickland] to a much different factual situation from that presented here.

Peede argues that the Eleventh Circuit Court of Appeals should have adopted the district court's reasoning in finding the trial expert "could have" offered an "opinion" on Peede's "mental health at the time of the California murder." (Petition at 33-34) (quoting the district court's order). However, Peede's contention on this point fails to accord deference where it is due under the

AEDPA, the state court, not the district court. Moreover, the district court's conclusion that Peede's prior offense was mitigated by the post-conviction evidence has no support in the record.

Defense expert Dr. Sultan's explanation of this prior murder, based upon Peede's description of it, was not credible, or mitigating. According to Dr. Sultan, Peede asserted that he thought an underage girl was being harassed at the bar, and that he came to her aid. An altercation occurred outside of the bar and Peede thought he would be hurt so he fired his gun and hit two people. (2PCR 19/607). However, Dr. Sultan read the police reports surrounding the California homicide and agreed that Peede shot at "um, people who were not in pursuit of him." (2PCR 19/674).

The other post-conviction expert who testified for Peede, Dr. Fisher, had even less to say about the California murder than Dr. Sultan. Dr. Fisher was aware of the California shooting, but asserted "there wasn't a description given to me of that barroom fight in California" but it did "involve women somehow." (2PCR 20/798). Thus, while the district court faults trial counsel for failing to prepare Dr. Kirkland and speculates that Dr. Kirkland would have somehow been able to postulate some mitigating spin on the California murder, post-conviction counsel did almost nothing to prepare his own post-conviction experts. Nor, did his experts offer any plausible connection of Peede's narrowly circumscribed delusional disorder [limited to infidelity and swinging] to the

California murder and assault committed by Peede. Consequently, the district court's speculation about Dr. Kirkland's ability to explain or mitigate the California murder on the state court record was itself, unreasonable.

The district court erred in rejecting the reasonable, factually supported conclusion of the Florida Supreme Court and improperly substituting its own judgment as to trial counsel's presentation of Dr. Kirkland. The district court cited the state attorney's cross-examination at the time of trial attempting to undercut his credibility for failing to review background material. The district court then impermissibly speculated that had Dr. Kirkland been supplied with more background material, his opinion would have been changed, altered, or given more weight.[10] However, the defense did not call Dr. Kirkland to testify and there is no evidentiary basis for such an assumption. Such speculation as the district court engaged in here cannot form the basis for habeas relief. See Wood v. Bartholomew, 516 U.S. 1, 8-9 (1995) (summarily reversing the Ninth Circuit noting that the "delicate balance between the federal courts and the States" prohibits the grant of federal habeas relief on the basis of "little more than speculation with slight support...").

Finally, the district court clearly erred in discounting the negative

[10] See Engle v. Dugger, 576 So. 2d 696, 701 (Fla. 1991) ("Counsel had Engle examined by three mental health experts, and their reports were submitted into evidence. There is no indication that counsel failed to furnish them with any vital information concerning Engle which would have affected their opinions.").

information that was introduced during the post-conviction hearing. The State courts and the Eleventh Circuit properly balanced the evidence developed during the state post-conviction hearing, recognizing that much of the information presented could be viewed negatively by the jury. The information introduced in post-conviction which included negative aspects of Peede's character and notably a threat to murder a witness called on his behalf, would have countered trial counsel's strategy of attempting to portray Peede as a person worth saving. (2PCR 15/437). And, the evidence which was presented, the skin condition as a child and the impact of his mother's suicide, as noted by the trial court and the Florida Supreme Court on appeal, was largely offset by negative information about Peede.[11] Such negative evidence included Peede's antisocial traits, prior acts of violence, disparaging attitude toward women, explosive temper, and prior physical abuse of Darla. See Ponticelli v. Secretary, Florida Dept. of Corrections, 690 F.3d 1271, 1296 (11th Cir. 2012) (noting that "both the Supreme Court and this Court have consistently 'rejected [the] prejudice argument [ ] where mitigation evidence was a two-edged sword or

[11] Peede was approximately 40 at the time of the murder. His mother committed suicide when Peede was an adult and had a family of his own. While the loss of a parent is potentially mitigating, it must be remembered that Peede murdered the mother of two daughters, both of whom testified at trial [Tanya Bullis and Rebecca Keniston]. Focusing on the loss of a parent may not have been a wise tactical move under these circumstances. Peede lost his mother in 1977 while Darla's daughters were suffering a more recent and devastating loss due to Peede's homicidal conduct.

would have opened the door to damaging evidence.'") (quoting Cummings v. Sec'y for the Dep't of Corr., 588 F.3d 1331, 1367 (11th Cir. 2009) (internal quotation marks and string cites omitted)). Defense counsel's attempt to portray Peede as someone with positive character traits and someone worth saving would be completely undercut by Peede's post-conviction evidence.[12] See Cullen v. Pinholster, 563 U.S 170, 202 (2011) (noting that in assessing prejudice under Strickland the court must consider whether the new or post-conviction testimony would "likely have undercut the mitigating value of the testimony" presented in the penalty phase).

Peede threatened to kill John Bell when he was called to testify against Peede's wishes. (2PCR 14/274). This display of potential dangerousness would alone outweigh the value of any non-statutory mitigation presented by Mr. Bell or, for that matter, the two additional lay witnesses called by collateral counsel.

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[12] James Parker described Peede's mother as "wonderful." (2PCR 30/127); Minnie C. Wagoner described Peede's parents as "honest and hard working." (2PCR 30/130). Mathew Wheely described Peede's parents as follows: "He had wonderful parents and both of them were in business and this made it possible for Robert to meet more people." (2PCR 30/134). Elaine Webster stated that "Robert grew up in a home full of love and compassion. His father and mother were always by his side when they were needed." (2PCR 30/138). Thomas Womble, however, recalled that Peede's parents were always working and that whatever Robert wanted he got, as "that was there (sic) way of showing their love for him, buying it instead of giving it." (2PCR 30/140). Frances McAlister stated that Peede's parents were "highly respected and admired by all who knew them" and "good providers" for Robert who had a "great love for their only child." (2PCR 30/142). Hazel and Calvin Parker wrote that they "knew Robert's parents and thought a lot of them and Robert too." (2PCR 30/150).

The State can hardly think of anything more prejudicial to a capital defendant, whom the jury already learned had murdered two people, than to hear he is contemplating yet another homicide. See Wong v. Belmontes, 558 U.S. 15, 22-27 (2009). The district court, rather incredibly, discounted the reasonable interpretation of the state courts' evaluation of Peede's outburst, for its own, that it was "the result of his delusion that Bell and others, including Petitioner's family members, had slept with Geraldine Peede." (Pet. App. C/49). That such an outburst would be viewed negatively by the jury is, in the Respondent's view, more reasonable than that of the district court's.[13] And, the district court was required to respect and affirm a reasonable state court decision, not create interesting or novel interpretations of evidence in order to reverse it.

Notably, while Petitioner argues that Dr. Kirkland's testimony was diminished by his failure to review background materials, Petitioner fails to consider that unlike his post-conviction experts, Dr. Kirkland's testimony was not rebutted at trial by an expert retained by the State.[14] In post-conviction, the State presented Dr. Merin who concluded that neither statutory mental

[13] The trial court too, did not find any positive aspect to Peede's courtroom threats, noting that "one of these witnesses, by simply walking into the courtroom, elicited a violent and disruptive reaction from Mr. Peede, in which Mr. Peede threatened to kill the witness and said that he would do so if given the opportunity.

[14] Dr. Merin disagreed that the extreme mental or emotional disturbance mitigator applied in this case. The other expert called by the State, Dr. Frank agreed that the extreme emotional disturbance mitigator applied. However, he rejected application of the substantial impairment mitigator.

mitigator applied. Further, while Peede had a Paranoid Personality Disorder, Dr. Merin also concluded that Peede had antisocial traits as part of his "basic personality". (2PCR 21/902). Since Peede's additional mitigation testimony was offset by testimony from the State's experts and negative aspects of Peede's personality, this is clearly not a case where a defendant can simply point to the mitigation side of the ledger and argue it has been significantly enhanced and the balance therefore altered. Accordingly, the Eleventh Circuit properly denied habeas relief.

In sum, a determination of whether the Eleventh Circuit's rejection of Petitioner's ineffective assistance claim on the lack of prejudice under Strickland is wholly dependent on the facts of the case and of significance to no one other than the parties to this litigation. Moreover, there is no conflict of law among the courts of appeal implicated by this case. The trial court and Florida Supreme Court applied the proper law and reached a conclusion supported by the facts developed below. With the appropriate level of deference due to counsel under Strickland as viewed through the optics of the AEDPA and its demand for respect for all reasonable state court judgments, it is clear that habeas relief was properly denied in this case. Accordingly, certiorari should be denied.

B) Petitioner Failed To Establish Deficient Performance

While the Eleventh Circuit Court of Appeals found it easier to dispose of

this claim on the prejudice prong, the state court's finding that Peede failed to establish deficient performance was also entitled to deference. The state court decision was neither contrary to, nor an unreasonable application of any of this Court's precedent. The decision was based upon a reasonable interpretation of the facts, and, conflicts with none of this Court's precedent. The district court erred in finding counsel ineffective for failing to discover or present background evidence and in failing to accord the state court decision the deference to which it was entitled under the AEDPA.

In rejecting this claim, a unanimous Florida Supreme Court provided, in part:

> 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.

The district court failed to accord counsel the deference that Strickland requires, particularly considering that Peede not only did not cooperate with counsel, but, told counsel he wanted no mitigating evidence presented at all.

Regardless, the district court failed to properly assess the investigation that counsel did conduct, and, instead, found it unreasonable because counsel did not discover or apparently use witnesses that were referenced in a police report on Peede's prior California conviction. The district court erred in finding deficient performance. The investigation conducted by counsel, reflected in counsel's notes, records requests, and testimony during the evidentiary hearing establish that counsel's background investigation was objectively reasonable under Strickland. Contrast Sears v. Upton, 561 U.S. 945, 951 (2010) (concurring with the post-conviction court that "the cursory nature of counsel's investigation into mitigation evidence—'limited to one day or less, talking to witnesses selected by [Sears'] mother'—was 'on its face ... constitutionally inadequate.'") (quoting the lower court).

Defense counsel were hampered by Peede's complete refusal to cooperate, but, nonetheless, contacted potential witnesses in North Carolina, employed investigators to develop potential mitigation, and, retained a well-respected psychiatrist to examine Peede. Ultimately, trial counsel presented letters from thirteen friends and family members on Peede's behalf and the testimony of Dr. Kirkland which established the emotional distress statutory mitigator. Consequently, this is clearly not a case where the defense attorneys failed to undertake a mitigation phase investigation.

While the district court recognized that Peede was a "difficult client" it

failed to fault Peede for the failure to develop or present information that was uniquely within his own knowledge.[15] Notwithstanding Peede's complete failure to cooperate, defense counsel utilized an investigator and did speak with family members and other sources of information from North Carolina where Peede resided most of his life.[16] The letters ultimately obtained from individuals and family members were gathered from independent sources, not Peede. (2PCR 15/474). Defense counsel testified that these individuals refused to come to Florida to testify on Peede's behalf.[17] (2PCR 15/437, 445).

A defendant may not fault counsel for failing to develop information that he has withheld from counsel. Faulting counsel under these circumstances would negate this Court's guidance in Strickland which indicates that counsel can rely upon a client in making decisions about the course of his or her investigation. See Strickland, 466 U.S. at 691.

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[15] It was his position, "from the first day I met him until the last time I saw him, that -- basically, he acknowledged that he killed his wife, Darla, and that he wanted to be executed for it, and he didn't want a defense to be raised on his behalf, and he demonstrated that throughout the time that I represented him." (2PCR 15/459).

[16] Notes from the file reflect Judge Bronson talked to Lieutenant Biggs of the Hillsborough Police Department. Biggs was familiar with the family, having known them for 14 years, and provided background information. (2PCR 15/487). Judge Bronson also interviewed Delmar Brown and Hoyt Crabtree, who provided family background. (2PCR 15/488).

[17] DuRocher thought that most of the people who submitted letters on Peede's behalf were of advanced age. (2PCR 15/445). It was established during the evidentiary hearing that one of these individuals, Peede's aunt, would have been willing to come to Florida to testify on Peede's behalf.

The district court faulted counsel for failing to develop information from lay witnesses regarding Peede's allegedly deteriorating mental state. However, the record reveals that some of these individuals were reluctant to cooperate at the time of trial [Delmar Brown, John Bell, Jr.].[18] Moreover, most of this so-called deteriorating mental state evidence simply consists of people being afraid of Peede because he was perceived as violent and aggressive.[19] This is not a case where witnesses simply observed Peede talking to himself or other objective indications of severe mental illness. Thus, this so-called deteriorating mental state evidence, even if available to counsel, at best, presented a double edged sword. Such information certainly would have countered trial counsel's strategy of attempting to portray Peede as a person worth saving. (2PCR 15/437).

As the foregoing illustrates, the fact specific opinion of the state court below finding counsel's performance did not fall below prevailing professional norms does not conflict with any of this Court's precedent or that of any other

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[18] The defense file reflects that Peede's uncle, Delmar Brown, was instructed by Peede not to cooperate. This witness was known to defense counsel at the time of trial, as was his reluctance to cooperate against Peede's wishes. "Mr. Brown was very leery in speaking with this investigator he virtually made me promise that whatever he said would not get back to the defendant." (2PCR 30/163) (quoting the investigator's notes). Similarly, John Bell acknowledged he was laying low at the time of the murder and did not want anything to do with Peede. (2PCR 14/313).

[19] Assuming such hearsay reports are true, it is apparent that Peede's relatives were not describing bizarre or unusual thought or behavior, the relatives were frightened of Peede who was seen as threatening and violent. (2PCR 19/623-24, 626).

court of appeal. Nor did it decide an unsettled question of law which could benefit from this Court's guidance. Consequently, this Court should decline to exercise its certiorari jurisdiction.

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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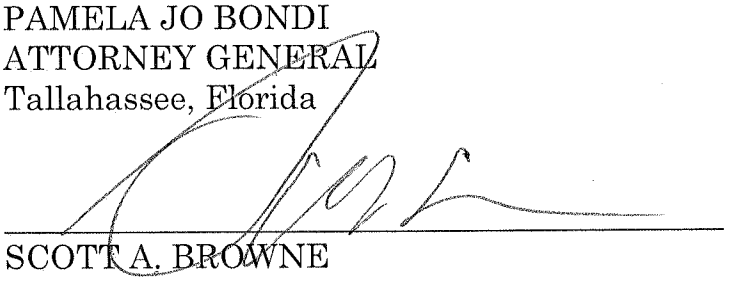

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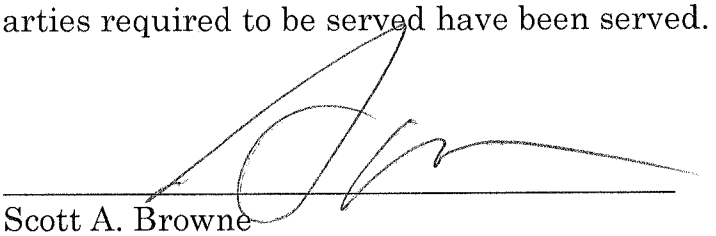
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 16th day of May, 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent by U.S. mail to: Linda McDermott, McClain & McDermott, P.A., 20301 Grande Oak Blvd., Suite 118 – 61, Estero, Florida 33928, lindammcdermott@msn.com. All parties required to be served have been served.



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