No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID VAHLKAMP,
Petitioner,

v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

TABLE OF CONTENTS

	Document	Page
1.	December 19, 2022, Opinion of the Eleventh Circuit Court of Appeals	A-3
2.	October 19, 2021, Order of the Middle District of Florida	A-10
3.	October 19, 2021, Judgment of the Middle District of Florida	A-17
4.	April 14, 2020, Petition for Writ of Habeas Corpus	A-18
5.	October 8, 2020, Affidavit of David Vahlkamp	A-46
6.	August 21, 2014, Order Granting Defendant's Amended State Petition for Writ of Habeas Corpus	A-48

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-14052

Non-Argument Calendar

DAVID VAHLKAMP,

Petitioner-Appellant,

versus

SECRETARY, DOC,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:20-cv-00265-JES-NPM

Before WILLIAM PRYOR, Chief Judge, NEWSOM and GRANT, Circuit Judges.

PER CURIAM:

David Vahlkamp, a Florida prisoner, appeals the dismissal of his petition for a writ of habeas corpus as untimely. 28 U.S.C. § 2254. We issued a certificate of appealability on the issue whether he is entitled to equitable tolling. We affirm.

Vahlkamp is serving a life sentence in Florida for the first-degree murder of his wife. The Second District Court of Appeal affirmed his conviction and denied his motion for rehearing on March 1, 2006.

About two months later, Vahlkamp retained attorney Charles Murray to file a motion for state postconviction relief. *See* Fla. R. Crim. P. 3.850. Murray filed the motion on February 27, 2008, but the state postconviction court struck it because it did not contain the required oath. Several months later, Murray filed a corrected motion and blamed his delay on "misunderstanding, secretarial mistake and . . . computer and docketing problems." In that motion, Vahlkamp alleged that his trial counsel was ineffective for failing to call unspecified witnesses to testify in support of his heat-of-passion defense.

The state postconviction court accepted the belated filing, struck the ineffective-assistance claim as facially deficient, and granted 30 days to amend. It later denied postconviction relief and

stated that Vahlkamp had failed to file an amended motion on the ineffective-assistance claim. Vahlkamp did not immediately appeal, but later retained new counsel. The Second District Court of Appeal permitted a belated appeal and affirmed.

In October 2012, while Vahlkamp's first postconviction motion was pending on appeal, he asked the state postconviction court to allow him to file an amended postconviction motion for his ineffective-assistance claim. He blamed Murray for failing to comply with the order to amend the claim. The state postconviction court held a hearing on whether to allow amendment. Vahlkamp testified that he received and signed a postconviction motion from Murray, but he did not know that the court later struck his ineffective-assistance claim and denied his motion. Murray testified that he filed several motions for Vahlkamp. Murray acknowledged receiving the order striking the ineffective-assistance claim and not filing an amended motion. The state postconviction court found that Murray's failure to file the amended motion was due to neglect and permitted Vahlkamp to file a belated motion on the claim, which he did on November 10, 2014.

In 2016, the state postconviction court held an evidentiary hearing on the ineffective-assistance claim, and in 2018, it denied relief on the merits. The Second District Court of Appeal affirmed and issued its mandate on April 29, 2020.

On April 14, 2020, Vahlkamp, through counsel, petitioned for a federal writ of habeas corpus and repeated his allegation of an ineffective-assistance claim. 28 U.S.C. § 2254. Vahlkamp

acknowledged that his petition was untimely but sought equitable tolling on the ground that Murray's gross negligence in filing his first state postconviction motion two years after his conviction became final amounted to an "extraordinary circumstance."

In an affidavit, Vahlkamp attested that before retaining Murray he received a letter from his trial counsel, Stephen Grogoza, advising that he must file his state postconviction motion within one year to preserve his federal habeas rights. Vahlkamp averred that he told Murray about Grogoza's letter and the federal deadline when he retained Murray who failed to communicate with him before the deadline expired. The State moved to dismiss the petition as untimely.

The district court dismissed the petition as untimely. It determined that the statute of limitations expired on May 30, 2007, before Vahlkamp filed any state postconviction motion that could toll the limitations period. It ruled that Vahlkamp was not entitled to equitable tolling because, regardless of whether Murray's failures amounted to "extraordinary circumstances," Vahlkamp did not exercise reasonable diligence to preserve his rights after retaining Murray. We granted a certificate of appealability to address whether the district court erred in that determination.

We review the dismissal of a petition for a writ of habeas corpus *de novo*. *San Martin v. McNeil*, 633 F.3d 1257, 1265 (11th Cir. 2011). We review legal conclusions regarding equitable tolling *de novo* and factual findings for clear error. *Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1221 (11th Cir. 2017).

Under the Antiterrorism and Effective Death Penalty Act of 1996, the one-year statute of limitations commences on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The limitations period is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2). A state postconviction motion filed after the expiration of the federal deadline does not revive it. *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004).

An otherwise untimely federal petition may be considered if a prisoner can establish that he is entitled to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). "[E]quitable tolling is an extraordinary remedy limited to rare and exceptional circumstances and typically applied sparingly." *Cadet*, 853 F.3d at 1221 (internal quotation marks omitted). A prisoner is entitled to equitable tolling only if he proves that he has been pursuing his rights diligently and that some extraordinary circumstance prevented his timely filing. *Holland*, 560 U.S. at 649. The petitioner bears the burden of proving entitlement to equitable tolling. *San Martin*, 633 F.3d at 1268. We require "reasonable diligence, not maximum feasible diligence." *Id.* at 1267 (internal quotation marks and citation omitted). A prisoner is not required "to exhaust every imaginable option, but rather to make reasonable efforts." *Smith v. Comm'r, Ala. Dep't of Corr.*, 703 F.3d 1266, 1271 (11th Cir. 2012) (citation omitted). A "determination regarding a party's diligence is a finding

of fact that will not be disturbed unless clearly erroneous." *San Martin*, 633 F.3d at 1265 (citation omitted).

The district court did not clearly err in determining that Vahlkamp failed to exercise reasonable diligence. Vahlkamp argues that he exercised reasonable diligence by telling Murray about Grogoza's letter and the one-year deadline to file his state postconviction motion. But after retaining Murray around May 2006, Vahlkamp had nearly a year remaining before the federal limitations period expired. Yet he made no effort to contact Murray or to determine if Murray had timely filed the state postconviction motion. *Smith*, 703 F.3d at 1271.

Vahlkamp's attempt to fault Murray for his delay misunderstands the nature of the diligence required for equitable tolling. Although Murray should have been more responsive, Vahlkamp bore the burden to prove that he, not his counsel, independently exercised reasonable diligence. *See Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005). And Vahlkamp failed to satisfy this burden. He knew when the federal limitations period would expire because Grogoza sent him a letter advising him of the deadline. But, after retaining Murray, Vahlkamp made no effort to communicate about the upcoming deadline or to preserve his rights through other counsel or *pro se* action. *See Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1072 (11th Cir. 2011). Vahlkamp's 13-year delay in filing his federal petition exhibited a lack of reasonable diligence. *See Melson v. Comm'r, Ala. Dep't of Corr.*, 713 F.3d 1086, 1089 (11th Cir. 2013). And Vahlkamp's argument that he is entitled to an

evidentiary hearing is outside the scope of his certificate of appealability. *See Hodges v. Att'y Gen., State of Fla.*, 506 F.3d 1337, 1340-42 (11th Cir. 2007).

We **AFFIRM** the dismissal of Vahlkamp's petition for a writ of habeas corpus.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

DAVID VAHLKAMP,

Petitioner,

v. Case No: 2:20-cv-265-JES-NPM

SECRETARY, DOC,

Respondent.

ORDER

Before the Court is Petitioner David Vahlkamp's Petition Under 28 U.S.C. § 2254 by a Person in State Custody Pursuant to a State Court Judgment (Doc. 1). Vahlkamp challenges his 2004 first-degree murder conviction and resulting sentence of life imprisonment. Respondent moves to dismiss the Petition as untimely.

28 U.S.C. § 2244, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), sets a one-year period of limitations to the filing of a habeas petition by a person in state custody. This limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if

> the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Vahlkamp does not allege, nor does it appear from the pleadings or the record, that the statutory triggers in subsections (B)-(D) apply. Thus, the limitations period began to run on the date Vahlkamp's conviction became final. 28 U.S.C. § 2244(d)(1)(A). The limitation period is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending[.]" 28 U.S.C. § 2244(d)(2).

After a jury found Vahlkamp guilty, the trial court sentenced him on April 12, 2004. (Doc. #9-2 at 24). Vahlkamp appealed, and the Second District Court of Appeal of Florida (2nd DCA) affirmed. (Id. at 131). The 2nd DCA denied Vahlkamp's motion for rehearing on March 1, 2006. (Id. at 136). Vahlkamp's conviction became final 90 days later, when the time to petition the United States Supreme Court for certiorari expired. See Moore v. Sec'y, Fla. Dep't of Corr., 762 F. App'x 610, 617 (11th Cir. 2019). The one-year limitations period ran untolled from May 30, 2006, to May 30, 2007.

Vahlkamp states he hired attorney Charles Murray in April or May 2006 to file a state postconviction motion. Vahlkamp's appellate counsel had advised that he must file a state postconviction motion within one year to preserve his federal habeas rights, and Vahlkamp passed that advise along to Murray. But Murray did not meet the deadline; he filed a motion under Florida Rule of Criminal Procedure 3.850 on February 27, 2008, well after the limitation period had run. (Doc. #9-2 at 138). The postconviction court struck the motion because it did not contain the required oath. (Id. at 163). Murray filed an amended motion on November 6, 2008. (Id. at 166). He blamed the delay on a combination of "misunderstanding, secretarial mistake and…computer and docketing problems." (Id. at 197). The postconviction court denied the amended motion on May 24, 2010. (Id. at 226-27). Vahlkamp did not timely appeal.

On May 23, 2012—through new counsel—Vahlkamp moved for a belated appeal. (Id. at 232). The 2nd DCA granted the motion. (Id. at 245). On December 19, 2012, it affirmed denial of Vahlkamp's 3.850 motion. (Id. at 273). Mandate issued on January 30, 2013. (Id. at 282). Also, on May 23, 2012, Vahlkamp requested leave to file an amended Rule 3.850 motion. (Id. at 284). The postconviction court allowed the amendment but ultimately denied the amended motion. (Id. at 441). Vahlkamp appealed, and the 2nd DCA affirmed and issued its mandate on April 29, 2020. (Id. at

518, 528). None of Vahlkamp's state postconviction motions tolled the AEDPA limitation period because it had already expired. See Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000).

Vahlkamp concedes his Petition is untimely but asserts Murray's conduct entitles him to equitable tolling. A federal habeas petitioner "is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Holland v. Florida, 560 U.S. 631, 649 (2010) (internal quotation marks and citation omitted). "[E]quitable tolling is an extraordinary remedy limited to rare and exceptional circumstances and typically applied sparingly." Cadet v. Fla. Dep't of Corr., 853 F.3d 1216, 1221 (11th Cir. 2017).

Attorney negligence, even gross negligence, is not "enough to meet the extraordinary circumstance requirement for equitable tolling in a habeas case." Id. at 1236. A petitioner must show something more, like abandonment, bad faith, dishonesty, divided loyalty, or mental impairment. Id. Vahlkamp claims Murray abandoned him, and Respondent disagrees. It is a close call. Murray's "negligence in missing the filing deadline does not mean that he abandoned or effectively abandoned" Vahlkamp. Id. at 1234. And Murray did eventually file the Rule 3.850 motion. On the other hand, Vahlkamp claims Murray failed to communicate with

him prior to the AEDPA deadline, did not inform him when the postconviction court denied the motion, and did not file an appeal.

The Court need not decide whether Murray's failures amount to "extraordinary circumstances" for equitable tolling purposes because Vahlkamp fails to establish the other requirement for equitable tolling: reasonable diligence. While a petitioner need not exercise "maximum feasible diligence," he must make some independent effort. Melson v. Comm'r, Ala. Dep't of Corr., 713 F.3d 1086, 1089 (11th Cir. 2013). Even accepting as true every claim made in Vahlkamp's Petition, Reply (Doc. #12), and supporting affidavit (Doc. #13-1), Vahlkamp took no independent action to preserve his rights after retaining Murray and informing him of the AEDPA deadline.[1]

Vahlkamp claims there was "nothing else [he] could do." (Doc. #12 at 4). But that is not true. A petitioner can exercise reasonable diligence by actively communicating with his counsel to ensure his rights are preserved. See Thomas v. Attorney Gen., 992 F.3d 1162, 1179-80 (11th Cir. 2021); see also Brown v. Sec'y, Dep't of Corr., 750 F. App'x 915, 938 (11th Cir. 2018). While Vahlkamp faults Murray for not communicating with him, Vahlkamp does not

[1] It is unclear whether Vahlkamp correctly informed Murray about the AEDPA deadline. His Petition, Reply, and Affidavit consistently and incorrectly state the one-year limitations period expired on May 30, 2006. Whether Vahlkamp knew his AEDPA clock ran in May 2007 or incorrectly believed it ran in 2006, he took no action to preserve his federal habeas rights until years later.

claim he made any attempts to communicate with Murray as the AEDPA deadline approached. A petitioner can also file a pro se habeas petition and ask for a stay as he exhausts his state remedies. See Hutchinson v. Florida, 677 F.3d 1097, 1102 (11th Cir. 2012). "While there is no hard and fast rule regarding what [Vahlkamp] should have done," his years of inaction fall well short of the reasonable diligence required for equitable tolling. See Jackson v. Sec'y, Dep't of Corr., 782 F. App'x 774, 778 (11th Cir. 2019) (finding a lack of diligence when the petitioner failed to explain a two-month delay in filing his federal habeas petition).

Because Vahlkamp failed to show he pursued his rights diligently, he is not entitled to equitable tolling. The Court thus dismisses his Petition as untimely.

Certificate of Appealability

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). "A [COA] may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or

that "the issues presented were adequate to deserve encouragement to proceed further," Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (citations omitted). Vahlkamp has not made the requisite showing here and may not have a certificate of appealability on any ground of his Petition.

Accordingly, it is hereby

ORDERED:

Petitioner David Vahlkamp's Petition Under 28 U.S.C. § 2254 by a Person in State Custody Pursuant to a State Court Judgment (Doc. 1) is **DISMISSED.** The Clerk is **DIRECTED** to terminate all motions and deadlines, enter judgment, and close the case.

DONE and ORDERED at Fort Myers, Florida, this 19th day of October 2021.

JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

SA: FTMP-1

Copies:
All parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

DAVID VAHLKAMP,

Petitioner,

v. Case No.: 2:20-cv-265-JES-NPM

SECRETARY, DOC,

Respondent.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED pursuant to this Court's Order of October 19, 2021, Petitioner David Vahlkamp's Petition Under 28 U.S.C. § 2254 by a Person in State Custody Pursuant to a State Court Judgment (Doc. 1) is DISMISSED. Petitioner is denied a certificate of appealability and not entitled to appeal in forma pauperis.

October 19, 2021

ELIZABETH M. WARREN,
CLERK

s/jlk, Deputy Clerk

copies to parties of record

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

DAVID VAHLKAMP, OKEECHOBEE CORRECTIONAL INSTITUTION, DC# Y19958, Petitioner, v. SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA, Respondent.	Case No.

PETITION UNDER 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY PURSUANT TO A STATE COURT JUDGMENT

1. Name and location of court which entered the judgment of conviction under attack: Florida Twentieth Judicial Circuit Court, Collier County, Florida

2. Date of judgment of conviction: April 14, 2004

3. Length of sentence: life imprisonment

4. Nature of offense involved (all counts): first-degree murder

5. What was your plea? not guilty

6. Kind of trial: jury

7. Did you testify at the trial? No

8. Did you appeal from the judgment of conviction?

   Yes (✓) No (__)

9. If you did appeal, answer the following:

(a) Name of court: Florida Second District Court of Appeal

(b) Result: Conviction affirmed: *Vahlkamp v. State*, 923 So. 2d 506 (Fla. 2d DCA 2005)

(c) Date of result: December 28, 2005

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes (✓)[1] No (__)

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Florida Twentieth Judicial Circuit Court, Collier County, Florida

(2) Nature of proceeding: Florida Rule of Criminal Procedure 3.850 motion

(3) Grounds raised: Ineffective assistance of counsel

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes

(5) Result: Motion denied

(6) Date of result: June 4, 2018

(7) Did you appeal the result? Yes

i. Date of result: February 12, 2020

ii. Court: Florida Second District Court of Appeal

iii. Result: Denial of the motion affirmed: *Vahlkamp v. State*, 2020 WL 704863(Fla. 2d DCA Feb. 12, 2020)

[1] Petitioner Vahlkamp has not previously challenged his conviction in federal court.

(b) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

A. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

David Vahlkamp was the Defendant in the state court proceedings in the State of Florida (Twentieth Judicial Circuit, Collier County, case number 2002-CF-1299). Mr. Vahlkamp will be referred to as "Petitioner Vahlkamp" in this pleading. The prosecution/State of Florida will be referred to as "the State."

In 2002, Petitioner Vahlkamp was charged with killing his wife. (R-813).[2] The incident occurred during the evening of May 30, 2002/morning of May 31, 2002. At trial, the State argued that the killing amounted to first-degree murder and the defense argued that Petitioner Vahlkamp acted in the "heat of passion" and therefore the killing was manslaughter. At the conclusion of the trial, the jury convicted Petitioner Vahlkamp of first-degree murder. (R-930). Petitioner Vahlkamp was sentenced to life imprisonment. (R-982). The Florida Second District Court of Appeal affirmed the conviction and sentence on direct appeal. *See Vahlkamp v. State*, 923 So. 2d 506 (Fla. 2d DCA 2005).

[2] References to the state court postconviction record on appeal (case number 2D18-2633) will be made by the designation "R" followed by the appropriate page number. References to the transcript of the state court postconviction evidentiary hearing will be made by the designation "EH" followed by the appropriate page number. References to the trial transcripts will be made by the designation "T" followed by the appropriate page number.

Petitioner Vahlkamp subsequently filed a state court motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (R-499). In the motion, Petitioner Vahlkamp raised three claims, including the claim that defense counsel (Stephen Grogoza, Esquire) rendered ineffective assistance of counsel by failing to present a mental health expert during the trial in support of Petitioner Vahlkamp's "heat of passion" defense. An evidentiary hearing on this claim was held on June 20, 2016. On June 4, 2018, the state postconviction court denied Petitioner Vahlkamp's state postconviction motion. (R-651). On appeal, the Florida Second District Court of Appeal affirmed the denial of Petitioner Vahlkamp's state postconviction motion. *See Vahlkamp v. State*, 2020 WL 704863(Fla. 2d DCA Feb. 12, 2020).

2. Statement of the facts – the state court postconviction evidentiary hearing.

Doris Vahlkamp. Mrs. Vahlkamp, Petitioner Vahlkamp's mother, testified that Petitioner Vahlkamp and his wife lived with her and her husband (Petitioner Vahlkamp's father) for three months in 2002; Mrs. Vahlkamp stated that the two of them moved out of her house about three months before Petitioner Vahlkamp's wife died. (EH-10). Mrs. Vahlkamp stated that her son's marriage was "toxic," and that her son and his wife "had fights" and "didn't seem to get along at all." (EH-10-11). Mrs. Vahlkamp testified that during the time that the two were living in her house, Petitioner Vahlkamp and his wife had "three gigantic fights." (EH-11). Mrs. Vahlkamp stated that during one of the fights, Petitioner Vahlkamp and his wife were drunk and "yelling so loud" that it woke her up. (EH-11-13). Mrs. Vahlkamp testified that she proceeded to separate the two, but Petitioner Vahlkamp's wife attempted to follow Petitioner Vahlkamp so that she could continue the fight. (EH-12). Mrs. Vahlkamp stated that she observed a second fight between the two, and during the second fight, Petitioner Vahlkamp's wife kicked Petitioner Vahlkamp. (EH-13). Mrs. Vahlkamp

testified that following a third fight, she observed that Petitioner Vahlkamp's wife was drunk and she observed her throw a bottle of alcohol at Petitioner Vahlkamp. (EH-14-15). Mrs. Vahlkamp said that Petitioner Vahlkamp told her after the third fight that he wanted to leave the house and drive his car off of a bridge. (EH-14). Mrs. Vahlkamp testified that she never observed Petitioner Vahlkamp be physically violent toward his wife. (EH-15). Mrs. Vahlkamp stated that after the third fight, she and her husband told Petitioner Vahlkamp that they either needed to separate or move out of the house. (EH-16). Mrs. Vahlkamp testified that her son and his wife moved out the house on approximately April 1, 2002. (EH-16). Mrs. Vahlkamp stated that after her son was charged in this case, she and her husband retained Stephen Grogoza and she subsequently informed him about the three fights that she observed while Petitioner Vahlkamp and his wife were living in her house. (EH-17-18). Mrs. Vahlkamp testified that Mr. Grogoza never asked her if she would be available to be a witness during Petitioner Vahlkamp's trial. (EH-18). Mrs. Vahlkamp stated that had Mr. Grogoza asked her to be a witness during Petitioner Vahlkamp's trial, she would have been willing and available to testify (and she explained that she was present during the entire trial). (EH-18).

Heather Holmes. Dr. Holmes, a clinical and forensic psychologist, testified that she met with and evaluated Petitioner Vahlkamp on two different occasions. (EH-30). Dr. Holmes stated that she also interviewed Petitioner Vahlkamp's mother. (EH-31). Dr. Holmes opined that Petitioner Vahlkamp suffers from obsessive-compulsive personality disorder ("OCPD"). (EH-32). Dr. Holmes stated the following about OCPD:

> A. Well, it is a disorder that develops in late adolescence or early adulthood. It is basically when somebody – the key word that you think of when you think of these individuals is rigidity. These are not people that break routine with any sort of ease. They are very structured. They are very adherent to particular rules. They're very adherent to a schedule. There is a way and manner in which they do things and when those – when that is altered in any way, shape or form, it can cause

> severe anxiety or depression. So, they are very inflexible in how they think. They're also very inflexible with regards to their behaviors.
>
> Q. And so, if the person has that condition, what are the types of problems you see in patients or clients when those difficulties get applied to a person's everyday life?
>
> A. Well, when you have Obsessive-Compulsive Personality Disorder, you have a very difficult time rolling with the punches; that makes you have difficulty in relationships, because as we all know, interpersonal relationships require flexibility. They require – there's fluidity to them, and so these individuals struggle in that realm. If they have employment that has continuity and structure, they can do very well in employment.
>
> So in terms of functioning level, this disorder is in a cluster of personality disorders that actually has fairly decent functionability in every day life; however, the caveat being, when everything gets thrown off in their schedule, in their routine, it can cause anxiety and depression and that's where problems enter.

(EH-33-34).[3] Dr. Holmes opined that Petitioner Vahlkamp had OCPD in 2002 (i.e., at the time of his wife's death). (EH-35) ("If you have a personality disorder now and you were an adult at the

---

[3] Dr. Holmes explained that the following traits of Petitioner Vahlkamp demonstrate his OCPD:

> He's extremely neat. He vacuumed daily. He was in charge of creating making dinner and he adhered to a particular schedule. There was Soprano Sunday, where they had pastas on Sunday. There was Taco Tuesday where they had tacos every Tuesday.
>
> He was very regimented in his day-to-day life. He worked in the same place for nine years. He had very little social outlet. He was obsessive about his cars and he was very protective over his cars. He – they had to be cleaned daily. He tended to them daily. He watched the same shows. He did things at the same particular time. There was no ebb and flow to schedule. He also, even though he didn't own property, rented from the same apartment complex for, I want to say eight years.
>
> There was also interactions with him that were very clear that he very rigidly adheres to a particular way of doing things. There is he would categorize things as there's "a right way" of doing things and there's "a wrong way" of doing things. So there was a rigidity of doing things and not just into his interpersonal presentations but the descriptions of his day to day life. Prior to when he resigned from his job and he and his wife, Margot, relocated to Florida.

(EH-50-51).

time, it was present then as well.").[4] Dr. Holmes further opined that Petitioner Vahlkamp suffered from major depressive disorder in 2002. (EH-36).

Dr. Holmes testified that she performed the MMPI[5] on Petitioner Vahlkamp and the results of the MMPI confirmed her diagnosis that Petitioner Vahlkamp suffers from OCPD. (EH-40-41). Dr. Holmes stated that she also performed the "Ray 15 Item Test" on Petitioner Vahlkamp, and that test confirmed that Petitioner Vahlkamp was not malingering. (EH-41).

Dr. Holmes testified that she talked to Petitioner Vahlkamp about the night that his wife was killed and he told her the following:

> And on the night of the homicide, they were – they had dinner. They watched a movie. They began arguing about finances. It became extremely volatile.
>
> There was throwing of her clothes, mostly by Mr. Vahlkamp. He states she started cutting up her shoes. He then continued to cut up her shoes. At some point in the night, they were both inebriated and at some point in the night, she went into the bathroom with a knife. She started screaming in the bathroom. He grabbed a knife, knocked on the door, she wouldn't let him in. He broke down the door and was in a rage. He refers to himself as being in a rage and he stabbed her several times.

(EH-45). Based on this information, Dr. Holmes formulated the following opinion about Petitioner Vahlkamp's mental state at the time that his wife was killed:

> A. It seems as if he went in a rage. What we know and what research talks about with people who have Obsessive-Compulsive Personality Disorder, when their routines – when their strict adherence to their day-to-day routines and what they do gets challenged, they can fall into a depression. So in and of itself, people with OCPD or Obsessive-Compulsive Personality Disorder are not considered violent people; in fact, we don't come across them a lot in forensic populations. Certainly,

---

[4] On cross-examination, Dr. Holmes explained in detail how she utilized the DSM-5 (the Diagnostic and Statistical Manual of Mental Disorders) in formulating her opinion that Petitioner Vahlkamp suffers from OCPD. (EH-53-61).

[5] Minnesota Multiphasic Personality Inventory.

> I'm sure everybody in the courtroom is aware of other personality disorder that tend to be very frequent flyers.
>
> But for those individuals that become depressed, the combination of depression and rigidity and Obsessive-Compulsive Personality Disorder, there's research studies that talk about how anger and impulsivity and rage –
>
> . . . .
>
> THE WITNESS: So, there's research that's been published in documents how individuals who have Obsessive-Compulsive Personality Disorder, when things are challenging their rigidity or when their routines are taken from them in some way, shape or form, that they can fall into a depression, and it's the individuals who have depression and OCPD that can become very rageful and that can become aggressive, and it was found to be spouses, parents, children, usually in the interpersonal relationships.
>
> BY MR. VILLENEUVE [defense counsel]:
>
> Q. Is that what you believe happened in this case?
>
> A. Yes.
>
> Q. And for the reasons that you've expressed?
>
> A. Yes.
>
> Q. And these are things that Mr. Vahlkamp suffered from at the time this incident happened?
>
> A. Yes.

(EH-46-48). Dr. Holmes further opined that had she been retained by Petitioner Vahlkamp's defense counsel prior to trial, she would have opined that the findings that she made after evaluating Petitioner Vahlkamp were consistent with the "heat of passion" defense (i.e., that Petitioner Vahlkamp "snapped" when he committed the acts that resulted in his wife's death). (EH-51).

Dr. Holmes explained that it is impossible for a mental health expert to form an opinion about another person's mental health without conducting a personal examination:

> Ethically speaking, a psychologist, be it clinical, forensic, school, you don't diagnose and you don't have clinical impressions without meeting somebody. So for me, in

> order to have any sort of opinion in the clinical realm or any sort of ideas as to what is going on with a person, ethically speaking, of course, you would always have to meet with them and evaluate them and at least interview them.

(EH-49).

On redirect examination, Dr. Holmes stated the following:

> Q. Dr. Holmes, I know I read [the "heat of passion" jury instruction[6]] outloud, but I would like to give you just a moment to look at what I read. If you would let me know after you've had a chance to do that.
>
> A. Okay.
>
> Q. Having evaluated Mr. Vahlkamp and identified the mental issues you've discussed at length with this court and counsel, would you believe that your findings with regard to his mental health would lend themselves to that defense in a case like this, as it involves premeditation and the commission of second-degree murder?
>
> A. Yes.
>
> Q. Do you believe that the maladies that you brought would be supportive of that type of defense; a heat-of-passion defense?
>
> A. Yes, from a psychological standpoint, I do believe that would be contributory and would be helpful.
>
> Q. Essentially, because in your opinion, the defendant snapped when he did this and did not plan this like someone that is organized with his maladies, the compulsive disorder, would it?

---

[6] At the conclusion of the trial, the trial judge gave the following "heat of passion" jury instruction:

> A sudden excitement of passion caused by adequate provocation if it suspends the exercise of judgment and dominates one's control can be a partial defense to the element of the premeditation in First Degree Murder or the element of a depraved mind in Second Degree Murder.

(T-664).

A. Correct.

(EH-75-76).

At the conclusion of Dr. Holmes' testimony, the defense rested. (EH-79).

Stephen Grogoza. Mr. Grogoza, Petitioner Vahlkamp's trial lawyer, testified that prior to trial, he contacted a neuropsychologist (Dr. Henry Dee) and he subsequently sent Dr. Dee a letter from Petitioner Vahlkamp explaining what happened at the time of the incident. (EH-85). Mr. Grogoza stated that Dr. Dee later told him that "this is the kind of thing that based on what he's saying, there's really not an issue of heat of passion" and "[i]t's on the fringes of it." (EH-85). Mr. Grogoza said that he also contacted a psychologist (Dr. Paul Kling) and he said that he "called Dr. Kling, too, and I went through the same thing" and that he "got about the same answer from" Dr. Kling. (EH-86).

Mr. Grogoza was asked whether Petitioner Vahlkamp's mother indicated to him that Petitioner Vahlkamp had a mental illness and he stated the following:

> Q. Did Doris Vahlkamp ever indicate to you that she thought the defendant may have a mental illness?
>
> A. *No, but I thought he did*. I mean, you don't just stab your wife numerous times if there's not something wrong.

(EH-103) (emphasis added). Mr. Grogoza said that he did not think "it would be worth it" to present Petitioner Vahlkamp's mother as a witness at trial. (EH-108).[7]

---

[7] Mr. Grogoza acknowledged that it was very difficult for him to handle Petitioner Vahlkamp's case:

> I'm not doing any more murder cases, I don't want to do any more child sex cases, I don't want any of that stuff any more, because they're draining. And it's – doing a murder case is not like you're just dealing with some guy that's dealing with some drug offenses. You're dealing with an extremely unfortunate human circumstance, and in this case, you had a

Moments later, on cross-examination, Mr. Grogoza said he did *not* think Petitioner Vahlkamp had a mental illness:

> Q. You would agree with me that – and I'm just going back through some notes I took while you were testifying – you thought that Mr. Vahlkamp had a mental illness?
>
> A. No. I didn't say I thought he had a mental illness.

(EH-108). Mr. Grogoza conceded that he never had Petitioner Vahlkamp evaluated for mental illness. (EH-108-09). Mr. Grogoza also agreed that neither Dr. Dee nor Dr. Kling ever met Petitioner Vahlkamp. (EH-109-10). Mr. Grogoza testified that he has no memory of receiving a report from either Dr. Dee or Dr. Kling. (EH-112).[8] Mr. Grogoza was asked whether he was aware of whether Petitioner Vahlkamp has now been diagnosed with a mental illness and he responded:

> I have not seen the report. I was just told by the prosecutor that she did some diagnosis and came up with that. Whatever.

(EH-120). Mr. Grogoza gave the following explanation as to why he did not want to present a

---

> woman who was killed needlessly. You have a family on both sides who were horrified by this. David was horrified by what he did.
>
> And I have to go deal with the crime scene pictures, look at the autopsy pictures. The Sheriff's Office actually tore out the wall for blood splatter and brought it over to the evidence section. I went over there and I dealt with them, and they were showing me on the blood splatter, how this and this and this and this.
>
> So I'm dealing with extremely human situation that's very difficult, and you know, I think as human beings, I'm not a robot.

(EH-87).

[8] Mr. Grogoza acknowledged that a bill in the court file establishes that Dr. Dee charged only $200 for the total time he spent talking to Mr. Grogoza about Petitioner Vahlkamp's case (and Dr. Kling did not submit a bill for *any time* that he worked on the case). (EH-112).

mental health expert at trial:

> The issue is, do I want to bring a psychiatrist in to say, "Here's what he did. Here's what he did. He's got a mental deficiency here. He's got a problem." Or do I want to bring in, "He's got an alcohol problem. He's got an alcohol problem, drinking this and this." I don't want that in front of a jury, because to me that's an excuse. Even if it's true, it's still an excuse.

(EH-89).

At the conclusion of Mr. Grogoza's testimony, the State rested. (EH-125).

B. STANDARD OF REVIEW.

Petitioner Vahlkamp's request for federal habeas corpus relief is governed by 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (hereafter "AEDPA"). Under the AEDPA, habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court clarified the nature of habeas review as set out in § 2254(d)(1). Writing for a majority of the Court, Justice O'Connor explained:

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-413.

As to findings of fact under 28 U.S.C. § 2254(d)(2), federal courts determine whether the state court's finding was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A state court's determination of the facts shall be "presumed to be correct," and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). *See Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1323 (11th Cir. 2000). However, the statutory presumption of correctness applies only to findings of fact made by the state court, not mixed determinations of law and fact. *See Parker v. Head*, 244 F.3d 831, 836 (11th Cir. 2001); *McBride v. Sharpe*, 25 F.3d 962, 971 (11th Cir. 1994).

> In *Miller-El v. Cockrell*, 537 U.S. 322, 341-342 (2003), the Supreme Court stated: AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief . . . .

In other words, the "reasonableness" standard does not apply to determinations of factual issues. Petitioner Vahlkamp is not required to prove that the state court's factual findings were unreasonable, only that they were rebutted by clear and convincing evidence. "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id*. at 340.

In Petitioner Vahlkamp's case, the state courts' rulings resulted in an unreasonable application of Petitioner Vahlkamp's constitutional rights and clearly established federal law. Morever, the state courts' rulings and orders were based on unreasonable determinations of the facts in light of the evidence presented in the state court proceedings.

C. ARGUMENT AND CITATIONS TO AUTHORITY

Ground 1. Defense counsel rendered ineffective assistance of counsel by failing to present a mental health expert during the trial in support of Petitioner Vahlkamp's "heat of passion" defense.

In his state postconviction motion, Petitioner Vahlkamp alleged that defense counsel rendered ineffective assistance of counsel by failing to present a mental health expert during the trial in support of Petitioner Vahlkamp's "heat of passion" defense. As a result, Petitioner Vahlkamp was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the Constitution.

During the trial, defense counsel's theory of defense was that Petitioner Vahlkamp was guilty of only manslaughter – not first-degree murder:

> I submit the evidence will produce to you and show to you that this is not First Degree Murder. There was no intent. This was basically someone who lost control, went nuts and committed this act.

(T-210). However, during the trial, the *only witness* presented by defense counsel in support of the "heat of passion" defense was Petitioner Vahlkamp himself. Yet, during the evidentiary hearing, defense counsel conceded that he believed that Petitioner Vahlkamp suffered from a mental illness. (EH-103). Despite this belief, defense counsel *completely failed* to have Petitioner Vahlkamp evaluated by a mental health expert.

The record is clear that Petitioner Vahlkamp was prejudiced as a result of defense counsel's ineffectiveness. During the evidentiary hearing, Petitioner Vahlkamp presented the testimony of Heather Holmes, a clinical and forensic psychologist. After evaluating Petitioner Vahlkamp, Dr. Holmes concluded that Petitioner Vahlkamp suffers from obsessive-compulsive personality disorder ("OCPD"). (EH-32). Dr. Holmes further opined that Petitioner Vahlkamp had OCPD in 2002 (i.e.,

at the time of his wife's death). (EH-35). Ultimately, Dr. Holmes formulated the following opinion about Petitioner Vahlkamp's mental state at the time that his wife was killed:

> A. It seems as if he went in a rage. What we know and what research talks about with people who have Obsessive-Compulsive Personality Disorder, when their routines – when their strict adherence to their day-to-day routines and what they do gets challenged, they can fall into a depression. So in and of itself, people with OCPD or Obsessive-Compulsive Personality Disorder are not considered violent people; in fact, we don't come across them a lot in forensic populations. Certainly, I'm sure everybody in the courtroom is aware of other personality disorder that tend to be very frequent flyers.
>
> But for those individuals that become depressed, the combination of depression and rigidity and Obsessive-Compulsive Personality Disorder, there's research studies that talk about how anger and impulsivity and rage –
>
> . . . .
>
> THE WITNESS: So, there's research that's been published in documents how individuals who have Obsessive-Compulsive Personality Disorder, when things are challenging their rigidity or when their routines are taken from them in some way, shape or form, that they can fall into a depression, and it's the individuals who have depression and OCPD that can become very rageful and that can become aggressive, and it was found to be spouses, parents, children, usually in the interpersonal relationships.
>
> BY MR. VILLENEUVE [defense counsel]:
>
> Q. Is that what you believe happened in this case?
>
> A. Yes.
>
> Q. And for the reasons that you've expressed?
>
> A. Yes.
>
> Q. And these are things that Mr. Vahlkamp suffered from at the time this incident happened?
>
> A. Yes.

(EH-46-48). Dr. Holmes further opined that had she been retained by Petitioner Vahlkamp's defense counsel prior to trial, she would have opined that the findings that she made after evaluating

Petitioner Vahlkamp were consistent with the "heat of passion" defense (i.e., that Petitioner Vahlkamp "snapped" when he committed the acts that resulted in his wife's death). (EH-51). Finally, Dr. Holmes stated the following:

> Q. Dr. Holmes, I know I read [the "heat of passion" jury instruction[9]] outloud, but I would like to give you just a moment to look at what I read. If you would let me know after you've had a chance to do that.
>
> A. Okay.
>
> Q. Having evaluated Mr. Vahlkamp and identified the mental issues you've discussed at length with this court and counsel, would you believe that your findings with regard to his mental health would lend themselves to that defense in a case like this, as it involves premeditation and the commission of second-degree murder?
>
> A. Yes.
>
> Q. Do you believe that the maladies that you brought would be supportive of that type of defense; a heat-of-passion defense?
>
> A. Yes, from a psychological standpoint, I do believe that would be contributory and would be helpful.
>
> Q. Essentially, because in your opinion, the defendant snapped when he did this and did not plan this like someone that is organized with his maladies, the compulsive disorder, would it?
>
> A. Correct.

(EH-75-76). By failing to have Petitioner Vahlkamp evaluated by a mental health expert prior to trial, defense counsel deprived Petitioner Vahlkamp of expert testimony that would have supported his "heat of passion" defense.

[9] (T-664) ("A sudden excitement of passion caused by adequate provocation if it suspends the exercise of judgment and dominates one's control can be a partial defense to the element of the premeditation in First Degree Murder or the element of a depraved mind in Second Degree Murder.").

To further emphasize the prejudice suffered by Petitioner Vahlkamp as a result of defense counsel's failure to present a mental health expert during the trial, undersigned counsel focuses on the closing arguments that were given by the prosecutor and defense counsel during the trial. Had Dr. Holmes testified at trial, the closing arguments would have been *substantially different* than the ones presented at trial. Notably, during his closing argument, defense counsel could not point to anything other than Petitioner Vahlkamp's testimony[10] to support his "heat of passion" theory of defense. Imagine how different defense counsel's argument would have been if he had been able to rely on Dr. Holmes' testimony in support of his argument that Petitioner Vahlkamp acted in a "heat of passion" rather than with premeditated intent.

The Sixth Amendment right to counsel implicitly includes the right to the effective assistance of counsel. *See McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Chatom v. White*, 858 F.2d 1479, 1484 (11th Cir. 1988). "The test to be applied by the trial court when evaluating an ineffectiveness claim is two-pronged: The defendant must show both that trial counsel's performance was deficient and that the defendant was prejudiced by the deficiency." *Bruno v. State*, 807 So. 2d 55, 61 (Fla. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Petitioner Vahlkamp has satisfied both of the *Strickland* prongs in this case.

"An attorney has a duty to make reasonable investigations in his or her cases." *Brown v. State*, 892 So. 2d 1119, 1119 (Fla. 2d DCA 2004). "At the heart of effective representation is the independent duty to investigate and prepare [the client's case.]" *Goodwin v. Balkcom*, 684 F.2d 794,

[10] *See Leonard v. State*, 930 So. 2d 749, 751-52 (Fla. 2d DCA 2006) ("[T]he fact that Leonard was able to introduce some evidence in support of his theory of defense does not negate his claim that his trial counsel was ineffective for failing to seek *expert testimony* that would have *conclusively rebutted the State's theory*.") (emphasis added). In the instant case, Dr. Holmes' testimony would have *conclusively rebutted* the State's theory regarding premeditated intent.

805 (11th Cir. 1982). "Permissible trial strategy can never include the failure to conduct a reasonably substantial investigation." *Douglas v. Wainwright*, 714 F.2d 1532, 1556 (11th Cir. 1983).

In the instant case, defense counsel believed that Petitioner Vahlkamp suffered from a mental illness, yet defense counsel failed to have Petitioner Vahlkamp evaluated by a mental health expert. Based on the foregoing, if defense counsel would have presented a mental health expert such as Dr. Holmes at trial, there is a reasonable probability that the jury would have returned a guilty verdict for the lesser offense of manslaughter.

In its order denying this claim, the state postconviction court held that Dr. Holmes' evidentiary hearing testimony would have been inadmissible at trial. (R-656). In reaching this conclusion, the state postconviction court erroneously found that Petitioner Vahlkamp is attempting to introduce/admit "diminished capacity" evidence. Contrary to the state postconviction court's finding, Petitioner Vahlkamp is not attempting to utilize Dr. Holmes' testimony to establish "diminished capacity"; rather, Petitioner Vahlkamp is asserting that defense counsel was ineffective for failing to utilize an expert such as Dr. Holmes to support the "heat of passion" defense. In support of this argument, Petitioner Vahlkamp relies on the state appellate court's decision in *State v. Mizell*, 773 So. 2d 618 (Fla. 1st DCA 2000). In *Mizell*, the court rejected the State's argument that the defendant could not present an expert witness to testify regarding the defendant's post traumatic stress disorder ("PTSD"), explaining:

> The State advances two arguments in support of its petition. First, the State urges that Mizell improperly seeks to adduce diminished capacity evidence negating any requisite criminal intent. Second, the State argues that, even if the PTSD evidence is not diminished capacity evidence, it is inadmissible because it is irrelevant on the question of self-defense. We reject each of these arguments.
>
> The State correctly notes that Florida law rejects diminished capacity evidence. *See Chestnut v. State*, 538 So. 2d 820, 825 (Fla. 1989) (holding that evidence of an impaired mental condition, that does not rise to Florida's definition

> of insanity, is not admissible to show that the defendant could not have formed the intent necessary to commit the crime). The State is incorrect, however, in its characterization of PTSD as diminished capacity evidence in this case. We view the PTSD evidence offered in this case as state-of-mind evidence, quite analogous to battered spouse syndrome (BSS) testimony that has in fact been approved many times. BSS testimony has been admitted to support a claim of self-defense. *See State v. Hickson*, 630 So. 2d 172, 173 (Fla. 1993) (holding that "an expert can generally describe [BSS] and the characteristics of a person suffering from the syndrome and can express an opinion in response to hypothetical questions predicated on facts in evidence. . . ."). PTSD evidence, as offered in this case, is not inadmissible as diminished capacity evidence.
>
> As to the State's second argument, we hold that PTSD evidence is relevant on the question of self-defense. The standard jury instruction for self-defense, which the trial judge quoted during the hearing, indicates that a defendant's perceptions are relevant when assessing applicability of self-defense. *See* Fla. Std. Jury Instr. (Crim.) 45, 48 ("Based upon appearances, the defendant must have actually believed that the danger was real."). The cases that admit evidence of [battered spouse syndrome] do so to help the jury understand why the victim would subjectively fear increased aggression against her. *See Hawthorne v. State*, 408 So. 2d 801, 806-07 (Fla. 1st DCA 1982) ("The expert testimony would have been in order to aid the jury in interpreting the surrounding circumstances as they affected the reasonableness of her belief . . . that because she suffered from the syndrome, it was reasonable for her to have remained in the home and at the pertinent time, to have believed that her life and the lives of her children were in imminent danger.").

Mizell, 773 So. 2d at 620-21. Pursuant to *Mizell*, the mental health testimony in this case was admissible as "state-of-mind evidence." As in *Mizell*, in the instant case, Dr. Holmes' testimony is relevant to Petitioner Vahlkamp's "heat of passion" defense (and her testimony would have aided the jury in understanding the applicability of the "heat of passion" jury instruction that was given in this case). Based on *Mizell*, Dr. Holmes' testimony is admissible.

In its order denying this claim, the state postconviction court also concluded that defense counsel made a "strategic" decision to not call an expert in support of the "heat of passion" defense. (R-655-656). As explained above, "[p]ermissible trial strategy can never include the failure to conduct a reasonably substantial investigation." *Douglas*, 714 F.2d at 1556. During the state court

evidentiary hearing in this case, defense counsel conceded that he believed that Petitioner Vahlkamp suffered from a mental illness (EH-103), but defense counsel *completely failed* to have Petitioner Vahlkamp evaluated by a mental health expert. By failing to have Petitioner Vahlkamp evaluated by a mental health expert prior to trial, defense counsel deprived Petitioner Vahlkamp of expert testimony that would have supported his "heat of passion" defense. "The relevant question is not whether counsel's choices were strategic, *but whether they were reasonable*." *Putman v. Head,* 268 F.3d 1223, 1244 (11th Cir. 2001) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000)) (emphasis added). In the instant case, *it was not reasonable to fail to have Petitioner Vahlkamp evaluated by a mental health expert*. *See Biagas v. Valentine*, 265 Fed. Appx. 166, 172 (5th Cir. 2008) ("We have recognized the distinction between strategic judgment calls and plain omissions, and we have emphasized that we are not required to condone unreasonable decisions parading under the umbrella of strategy . . . ."); *Wiggins v. Smith*, 539 U.S. 510 (2003) (explaining that the failure to uncover favorable evidence cannot be justified as a "tactical decision" because counsel failed to fulfill the obligation to conduct a thorough investigation).

Accordingly, for all of the reasons set forth above, defense counsel was ineffective for failing to present a mental health expert during the trial in support of Petitioner Vahlkamp's "heat of passion" defense. Defense counsel's failure fell below the applicable standard of performance. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the trial, thereby undermining any confidence in the outcome. *See Johnson v. State*, 921 So. 2d 490, 511-12 (Fla. 2005) (Pariente, C.J., specially concurring). Petitioner Vahlkamp is entitled to a new trial. *See, e.g., Ibar v. State*, 190 So. 3d 1012 (Fla. 2016) (remanding for a new trial due to counsel's failure to

present a facial identification expert at trial); *Lee v. State*, 899 So. 2d 348 (Fla. 2d DCA 2005) (remanding for a new trial due to counsel's failure to investigate circumstances surrounding crime and medical evidence supporting State's theory of events); *Ridenour v. State*, 761 So. 2d 480, 481-82 (Fla. 2d DCA 2000) (remanding for a new trial due to counsel's failure to present witnesses at trial and stating that "[t]his is not the type of trial tactic or strategy which this court will accept as reasonable").

The state courts' rulings in this case were contrary to and an unreasonable application of *Strickland* and Petitioner Vahlkamp's Sixth Amendment right to the effective assistance of counsel. Additionally, the state courts' rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

Ground 2. The state trial court erred by denying Petitioner Vahlkamp's motion to suppress his statements to law enforcement officials.

On direct appeal, Petitioner Vahlkamp alleged that the state trial court erred by denying his motion to suppress his statements to law enforcement officials. Prior to trial, Petitioner Vahlkamp filed a motion to suppress his statements. The state trial court subsequently denied the motion, holding that Petitioner Vahlkamp's invocation of his *Miranda*[11] rights to Corporal Edwards was not valid because it was made spontaneously and not as a direct result of custodial interrogation.

On direct appeal, Petitioner Vahlkamp asserted that the state trial court:

based its ruling on *Ault v. State*, 866 So. 2d 674 (Fla. 2003), which the State argued:

> " ... in the *Ault* case as well as the other cases that follow along the same line of reasoning, defendant cannot invoke unless interrogation has begun." (IV, p.600).

[11] *Miranda v. Arizona*, 384 U.S. 436 (1966).

> "Further, your Honor, interrogation was not imminent. In fact, it was hours before investigators even had any contact with the defendant." (IV, p. 601).

However, the "hours" to which the state referred were less than two. In fact, Sgt. Fox testified that he made contact with the appellant at the scene while the appellant was still in Cpl. Edwards's custody. (III, p. 434-35).

In any respect, the state misapplied the holding of *Ault* to the present situation. *Ault* and the line of cases to which the state was referring involved a different issue than presented here. *Ault* involved a defendant who had invoked *Miranda* on a charged crime and then tried to extend those protections to an uncharged crime when the police subsequently interrogated him and he confessed to the uncharged crime. The court ruled that the defendant could not extend invoked *Miranda* protections to an as of yet uncharged crime because interrogation on that uncharged crime was not imminent when the defendant had invoked *Miranda* on the charged crime.

The state and court misinterpreted *Ault*'s holding and misapplied the word "imminent" to mean in the present case within moments of arrest. Not only does *Ault* not stand for that premise and not fit the present facts, but this application is contrary to common sense. Here, the appellant was arrested for murdering his wife and taken into custody with the investigator at the scene. Common sense dictates that the police planned on questioning him. The supreme court defined "imminent" in *Scholl v. State*, 115 So. 43 (1927) as near at hand; mediate rather than immediate; close rather than touching. (*See* Water's Dictionary of Florida Law, Butterworth Legal Publishers, 1991). Further, in *Correll v. State*, 523 So. 2d 562, (Fla. 1968), the supreme court ruled,

> "a suspect involved in a custodial interrogation by law enforcement officials is entitled to the procedural safeguards of the Miranda warning, the key being that the suspect must be in custody. The ultimate inquiry in determining whether a suspect is in custody is 'whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."*California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275, (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714 (1977)."

Thus, the appellant's questioning here was imminent because there was clearly a restraint on the appellant's freedom of movement of the degree associated with a formal arrest. As such, there is no reason why the appellant could not invoke *Miranda* spontaneously when Cpl. Edwards took him into custody rather than have to wait until he was in direct custodial interrogation with Sgt. Fox as the court ruled.

As a secondary issue, the appellant has a concern relating to the state's reinitiating contact argument, which the court may have been referring to in its order as "spontaneous." If this court finds that the appellant did invoke *Miranda* with Cpl. Edwards, this court could still theoretically affirm under the tipsy coachman doctrine based on the state's argument that the appellant had reinitiated contact after invoking *Miranda*. The appellant submits that the appellant did not reinitiate contact and addresses this issue now to cut it off at the pass, so to speak. The standard of proof for a question of fact is whether the ruling is supported by substantial, competent evidence. *Glatzmayer* at 301.

There are two instances where the state alleges that the appellant reinitiated contact. The first referred to by the state is with Cpl. Edwards where the appellant allegedly stated over and over, "I wouldn't kill anything, not even a squirrel. She gets crazy when she drinks vodka." (III, p. 414). The second is to Dep. Tutt where while being transported to Sgt. Fox's office, the appellant stated that he hoped he could smoke at the office because he probably would never be able to smoke again. (III, p. 437).

The U.S. Supreme Court ruled in *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) that it was not

> "... desirable to build a superstructure of legal refinements around the word 'initiate' in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue. *There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.* Such inquiries or statements, by either an accused or a police officer relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*." 462 US at 1045.

(Emphasis added).

The appellant's spontaneous statements referred to by Cpl. Edwards can be discounted right away for two reasons: First, according to Edwards, the appellant was just rambling on and on and was not talking to anybody in particular, and second, Cpl. Edwards was asked, "Did he ever say anything to you that would give you the idea that he wanted to discuss the case with you?" to which she replied, "No, he did not." (III, p. 431). Thus, per *Bradshaw* there is no substantial, competent evidence that these statements represented "a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation."

The same is true with the statement allegedly made to Dep. Tutt. It was one mere statement, not a question, about hoping to smoke a cigarette at the office and very similar to the asking for a drink of water scenario in *Bradshaw*. Tutt's response was to nod and to continue driving. (III, p. 437). Thus, Tutt's actions did not give

> any indication that he believed that the appellant wished to discuss the incident. As such, there is no substantial, competent evidence for this court to apply the tipsy coachman doctrine in either of these two instances.
>
> The conclusion is that the appellant's unequivocal request to Edwards for an attorney should have been honored by Fox. Since it was not, the appellant's resulting two confessions should have been suppressed and the court erred in admitting these confessions at trial. Since the confessions are dispositive, the appellant's conviction should be set aside.

(Direct Appeal Initial Brief at 30-35).

For all of the reasons argued by Petitioner Vahlkamp on direct appeal, the state trial court erred by denying the motion to suppress. The state trial court's ruling and the state appellate court's affirmance were contrary to and an unreasonable application of Petitioner Vahlkamp's constitutional rights (i.e., his Fifth Amendment and *Miranda* rights). Moreover, the state courts' decisions were based on an unreasonable determination of the facts in light of the evidence presented in the proceeding.

13. If any of the grounds listed in 12 were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

    The grounds raised in this petition were properly presented in state court.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

    Yes (__) No (✓)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

    a. At preliminary hearing: N/A

    b. At arraignment and plea: N/A

    c. At trial: Stephen M. Grogoza, 2500 Airport Road South, Suite 306, Naples, Florida 34112

d. At sentencing Mr. Grogoza

e. On appeal: Mr. Grogoza

f. In any postconviction proceeding: Charles A. Murray, 27499 Riverview Center Boulevard, Suite 112, Bonita Springs, Florida 34134; undersigned counsel

g. On appeal from any adverse ruling in a post-conviction proceeding: undersigned counsel

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes (__) No (✓)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes (__) No (✓)

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition: In April or early May of 2006, Petitioner Vahlkamp retained attorney Charles Murray to file a state postconviction motion on his behalf. Prior to retaining Mr. Murray, Petitioner Vahlkamp's trial/appellate counsel (Stephen M. Grogoza) had sent a letter to Petitioner Vahlkamp informing him that if he wanted to preserve his federal habeas rights, he was required to file his state postconviction motion within one year of his conviction becoming final. When he retained Mr. Murray, Petitioner Vahlkamp informed him of Mr. Grogoza's letter and told him that the state postconviction motion must be filed within the applicable one-year period in order to preserve his federal habeas rights. The one-year deadline expired on May 30, 2006. Mr. Murray, however, did not file the state postconviction motion until 2008. As a result, Petitioner Vahlkamps's § 2254 time period expired before the state postconviction motion was filed. In light of Mr. Murray's actions in failing to timely file the state postconviction motion (as requested by Petitioner Vahlkamp), Petitioner Vahlkamp is entitled to equitable tolling. *See Holland v. Florida*, 560 U.S. 631 (2010). Mr. Murray's gross negligence amounts to an extraordinary circumstance that allows for equitable tolling in the instant case. Petitioner Vahlkamp notes that Mr. Murray has already been found by the state court to be ineffective in his representation of Petitioner Vahlkamp. First, when Mr. Murray finally filed initially filed a state postconviction motion in 2008, one of the claims in the motion (i.e., Ground 1 of the instant petition) was stricken by the state postconviction court with leave to amend. However, Mr. Murray failed to timely amend the state postconviction motion. On August 21, 2014, the

state postconviction court granted Petitioner Vahlkamp's state court habeas petition and allowed Petitioner Vahlkamp to file an amended state postconviction motion. In the order, the court stated:

> After reviewing the motion, the case law and the testimony presented, the Court finds that the Defendant did, in fact, retain counsel to timely file a rule 3.850 motion and counsel through neglect, failed to file the motion as it relates to Ground I.

Second, when the state postconviction court first denied the 2008 state postconviction motion filed by Mr. Murray, Mr. Murray failed to inform Petitioner Vahlkamp of the denial and failed to file a notice of appeal. On June 15, 2012, the Florida Second District Court of Appeal granted Petitioner Vahlkamp a belated appeal due to Mr. Murray's ineffectiveness in failing to advise Petitioner Vahlkamp of his appellate options (case number 2D12-2722).

Wherefore, Petitioner Vahlkamp prays that the Court will grant him the relief to which he is entitled in this proceeding.

Oath

I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed April 14, 2020:

/s/ Michael Ufferman on behalf of David Vahlkamp.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Email: crimapptpa@myfloridalegal.com

by email delivery on April 14, 2020;

Mark S. Inch, Secretary
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

by U.S. mail delivery on April 14, 2020.

Respectfully submitted,

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Petitioner **VAHLKAMP**

IN THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

FORT MYERS DIVISION

DAVID VAHLKAMP, Petitioner, v. SECRETARY, DOC, Respondents.	Case No. 2:20-cv-265-FtM-29NPM

AFFIDAVIT OF DAVID VAHLKAMP

STATE OF Florida,

COUNTY OF Okeechobee.

I, DAVID VAHLKAMP, having been duly sworn, hereby affirm and state the following as true and correct:

1. My name is David Vahlkamp. I am over eighteen years of age.

2. I have read "Petitioner Vahkamp's Reply to the Respondent's Response/Motion to Dismiss," I understand its content, and the facts contained in it are true.

3. I retained attorney Charles Murray to file a state postconviction motion on my behalf.

4. Prior to retaining Mr. Murray, my trial attorney informed me that if I wanted to preserve my federal habeas corpus rights, I was required to file a state postconviction motion within one year of my conviction becoming final.

5. When I retained Mr. Murray, I informed him of my trial attorney's letter and told him that the state postconviction motion must be filed within the applicable one-year period in order to preserve my federal habeas corpus rights. The one-year deadline expired on May 30, 2006.

6. Mr. Murray did not file the state postconviction motion until 2008. As a result, my federal habeas corpus time period expired before the state postconviction motion was filed.

7. Mr. Murray failed to communicate with me. Specifically, despite being retained and being informed about the federal deadline by me, Mr. Murray never spoke to me prior to the AEDPA deadline.

I declare that I have read the above document and that the facts stated therein are true. Executed on this 8th day of Oct, 2020.

State of Florida
County of Okeechobee

David Vahlkamp

Sworn to and subscribed before me by David Vahlkamp, who is personally known to me or who has produced FDL 419458 Vahlkamp David as identification this 8 day of October, 2020.

Notary Public State of Florida
Cathy Patricia Tharp
My Commission GG 935327
Expires 12/01/2023

Notary Public

My commission expires: 12-1-23

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,
Plaintiff,

vs. **Case No. 02-1299CFA**

DAVID VAHLKAMP,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE comes before the Court on Defendant's "Petition for Writ of Habeas Corpus," filed on October 3, 2012. Having reviewed the motion, the Court granted Defendant a hearing to determine whether a belated post conviction motion as to the previously stricken Ground 1 should be permitted pursuant to *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999) and *Lucky v. State*, 84 So. 3d 423 (Fla. 5th DCA 2012). The hearing was conducted on October 23, 2013. The Defendant was present and represented by counsel.

1. The record reflects that the Defendant was convicted of premeditated first degree murder on March 17, 2004. The Defendant was sentenced to life imprisonment on April 12, 2004. The Defendant's conviction and sentence were affirmed by a mandate filed by the Second District Court of Appeal on March 21, 2006.

2. The Defendant filed his post-conviction motion, through counsel, on November 6, 2008, pursuant to Fla. R. Crim. P. 3.850. As Ground 1, the Defendant alleged that his trial attorney provided ineffective assistance by failing to prepare for trial and relied upon the inexperience of the prosecutor and the hope that a plea would be offered. The Defendant further

claimed that counsel failed to call character witnesses and other witnesses to testify on his behalf. By an Order rendered October 20, 2009, this Court found Ground 1 to be legally insufficient and struck Ground 1 with leave to amend within thirty (30) days pursuant to *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007). The record reflects that the Defendant failed to file an amended motion on Ground 1, and therefore, the claim was denied in a final Order rendered May 24, 2010.

3. Subsequently, Defendant, through counsel, filed an Amended Petition for Writ of Habeas Corpus on October 3, 2012. In the Petition, Defendant alleged that his counsel was ineffective for failing to file an amended Ground 1 claim and requested to file a belated rule 3.850 amended claim. This Court conducted a hearing to determine whether a belated post-conviction claim as to the previously stricken Ground 1 claim should be permitted.

4. Defendant testified at the evidentiary hearing that he retained Charles Murray to file a post-conviction motion on his behalf. Defendant also testified that he never met with Mr. Murray, but did receive a motion in the mail and signed it at the request of Mr. Murray. Defendant never received copies of this Court's Order striking Ground 1 or this Court's final order denying his post-conviction motion. Defendant testified that if he had known that Ground 1 was stricken, he would have requested Mr. Murray to file an amended claim.

5. Mr. Murray testified that he did file a motion on Defendant's behalf and several amended motions related to his post-conviction matters. Mr. Murray admitted on cross-examination that he recalls receiving the Court's order striking Ground 1, but did not file an amended claim on behalf of the Defendant.

6. After reviewing the motion, the case law and the testimony presented, the Court finds

that the Defendant did, in fact, retain counsel to timely file a rule 3.850 motion and counsel through neglect, failed to file the motion as it relates to Ground 1. *See Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999).

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Amended Petition for Writ of Habeas Corpus is GRANTED. Defendant shall file an amended motion for post-conviction relief, as it relates **to Ground 1 only**, within forty-five (45) days of rendition of this order.

DONE AND ORDERED in Chambers at Naples, Collier County, Florida, this 21st day of August, 2014.

Ramiro Mañalich
Circuit Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished to: Michael Ufferman, Esq., Counsel for the Defendant, 2022-1 Raymond Diehl Rd., Tallahassee, Florida 32308; Post Conviction Relief Unit, Office of the State Attorney, P.O. Box 399, Ft. Myers, Florida 33902; Office of the State Attorney, 3315 E. Tamiami Trail, Suite 602, Naples, Florida 34112; and Court Administration (XII), 3315 E. Tamiami Trail, Suite 201, Naples, Florida 34112, this 25th day of August, 2014.

DWIGHT E. BROCK
Clerk of Court

By: _____
Deputy Clerk

3