No. _____

IN THE

Supreme Court of the United States

TAI A. PHAM,

Petitioner,

v.

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

Respondents.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals for the Eleventh Circuit Order Denying Application for a Certificate of Appealability, dated September 22, 2023.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 22, 2023

Clerk - Middle District of Florida
U.S. District Court
401 W CENTRAL BLVD
ORLANDO, FL 32801

Appeal Number: 23-11009-H
Case Style: Tai Pham v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 6:15-cv-02100-RBD-EJK

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11009

TAI A. PHAM,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:15-cv-02100-RBD-EJK

ORDER:

Tai Pham is a Florida prisoner serving life imprisonment for first-degree murder of his wife. He moves for a certificate of appealability ("COA"), in order to appeal the district court's denial of his counseled 28 U.S.C. § 2254 petition, which raised four claims related to his trial and appellate counsels' performances.[1] To obtain a COA, Pham must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted).

Here, reasonable jurists would not debate the district court's denial of Pham's § 2254 petition. Specifically, the state courts did not unreasonably apply, nor reach a decision contrary to, *Strickland v. Washington*, 466 U.S. 668 (1984), in rejecting any of his claims. *See* 28 U.S.C. § 2254(d)(1).

To the extent that Pham's first claim alleged that trial counsel failed to introduce prior convictions to impeach his deceased wife's boyfriend, he could not demonstrate prejudice, in light of the state court's finding concerning the overwhelming evidence of guilt. *See Strickland*, 466 U.S. at 694. Although Pham's counseled motion for a COA argues that the state court erred in finding that

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[1] Although Pham raised more than 20 claims in his § 2254 petition, his current, counseled motion for a COA only argues the 4 claims addressed in this order. *See Jones v. Sec'y, Dep't of Corr.*, 607 F.3d 1346, 1353-54 (11th Cir. 2010).

the evidence of guilt was overwhelming, he never raised that argument in the district court proceedings, and there are no circumstances that would warrant entertaining an argument raised for the first time on appeal. *See Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004). Accepting that the evidence at trial overwhelmingly established Pham's guilt, he could not demonstrate a reasonable probability that impeaching his wife's boyfriend would have produced an acquittal. *See Strickland*, 466 U.S. at 694.

Pham likewise could not establish ineffective assistance in his two claims alleging that trial and appellate counsel failed to challenge the state's medical examiner's testimony, on the ground that the medical examiner did not perform the autopsy on his wife. The issue of whether the medical examiner could testify in lieu of the individual who actually performed the autopsy turned on a question of state law, and, thus, the district court had to defer to the state court's finding that there would have been no basis to challenge the testimony. *See Pinkney v. Sec'y, Dep't of Corr.*, 876 F.3d 1290, 1295 (11th Cir. 2017). Accepting that Florida law permitted the medical examiner's testimony, any challenge to that testimony would have lacked merit. *See Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994).

Lastly, to the extent that Pham claimed that the cumulative effect of trial counsel's errors violated his right to a fair trial, he failed to demonstrate harm resulting from either of counsel's errors, and "without harmful errors, there can be no cumulative

effect compelling reversal." *See United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984).

Because the state courts reasonably applied federal law in rejecting Pham's claims, reasonable jurists would not debate the district court's denial of his § 2254 petition. *See* Slack, 529 U.S. at 484. Accordingly, his motion for a COA is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

No. _____

IN THE

Supreme Court of the United States

TAI A. PHAM,

Petitioner,

v.

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

Respondents.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX B

United States Court of Appeals for the Eleventh Circuit Order Denying Motion for Reconsideration, dated November 13, 2023.

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11009

TAI A. PHAM,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:15-cv-02100-RBD-EJK

Before JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

Tai Pham has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 22, 2023, order denying his motion for a certificate of appealability, following the district court's denial of his 28 U.S.C. § 2254 petition. Upon review, Pham's motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

No. _____

IN THE

Supreme Court of the United States

TAI A. PHAM,

Petitioner,

v.

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

Respondents.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX C

Application for a Certificate of Appealability, filed April 13, 2023.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TAI A. PHAM,
Petitioner/Appellant,

Appeal Number: 23-11009-H

v.

District Court Docket Number:
6:15-cv-2100-RBD-EJK

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents/Appellees.

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Tai A. Pham v. Secretary, Department of Corrections, et al.
Appeal No. 23-11009-H

In compliance with 11th Cir. R. 26.1-1, counsel for Petitioner/Appellant hereby certifies that the following persons, partnerships, or firms may have an interest in the outcome of this case:

Alva, Honorable Marlene Michelle (Circuit Court Judge, Eighteenth Judicial Circuit, in and for Seminole County)

Ahmed, Raheela (Former Assistant Capital Collateral Regional Counsel)

Becker, Michael (Attorney for Petitioner/Appellant on Direct Appeal)

Bobek, Patrick A. (Assistant Attorney General, Attorney for Respondents/Appellees)

Bondi, Pam (Former Attorney General, State of Florida)

Bort, Lisa M. (Assistant Capital Collateral Regional Counsel)

Canady, Honorable Charles T. (Florida Supreme Court Justice)

Caudill, Timothy (Attorney for Petitioner/Appellant at Trial)

Dalton, Jr., Honorable Roy B. (United States District Court Judge, Middle District of Florida)

Deliberato, Maria (Former Acting Capital Collateral Regional Counsel-Middle Region)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Tai A. Pham v. Secretary, Department of Corrections, et al.
Appeal No. 23-11009-H

Dixon, Ricky D. (Secretary, Florida Department of Corrections)

Figgatt, James (Attorney for Petitioner/Appellant at Trial)

Feliciani, Eugene (Assistant State Attorney)

Higgins, Christopher (Alleged Victim)

Inch, Mark S. (Former Secretary, Florida Department of Corrections)

Jennings, Bill (Former Capital Collateral Regional Counsel-Middle Region)

Labarga, Honorable Jorge (Florida Supreme Court Justice)

Lawson, Honorable Alan (Former Florida Supreme Court Justice)

Lewis, Honorable R. Fred (Former Florida Supreme Court Justice)

Moody, Ashley (Attorney General, State of Florida)

Pariente, Honorable Barbara J. (Former Florida Supreme Court Justice)

Perinetti, Maria (Former Assistant Capital Collateral Regional Counsel)

Perry, Honorable James E.C. (Former Florida Supreme Court Justice)

Pham, Lana (Alleged Victim)

Pham, Phi Amy (Deceased Victim)

Pinkard, Eric (Capital Collateral Regional Counsel-Middle Region)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Tai A. Pham v. Secretary, Department of Corrections, et al.
Appeal No. 23-11009-H

Polston, Honorable Ricky (Florida Supreme Court Justice)

Purdy, James (Attorney for Petitioner/Appellant on Direct Appeal)

Quince, Honorable Peggy A. (Former Florida Supreme Court Justice)

Rodriguez, Carol (Former Assistant Capital Collateral Regional Counsel)

Shakoor, Ali A. (Assistant Capital Collateral Regional Counsel, Attorney for Petitioner/Appellant)

Shepherd, Adrienne Joy (Assistant Capital Collateral Regional Counsel, Attorney for Petitioner/Appellant)

Stone, Stewart (Assistant State Attorney)

Viggiano, Jr., James Vincent (Former Capital Collateral Regional Counsel-Middle Region)

There are no corporations involved in this case.

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Petitioner/Appellant, Tai A. Pham ("Pham"), by and through undersigned counsel, moves this Court to issue a certificate of appealability pursuant to 28 U.S.C. § 2253 and 11th Cir. R. 22-1, and states as follows:

A grand jury returned an indictment for Pham on November 8, 2005, for one count of first-degree murder, one count of attempted first-degree murder, one count of armed kidnapping, and one count of armed burglary of a dwelling. R1/21-23. The victim for the first-degree murder charge was Pham's wife Phi Amy Pham. R1/21-23. The victim for the attempted first-degree murder charge was Phi's boyfriend, Christopher Higgins. R1/21-23. Pham's guilt-phase trial was conducted from March 3, 2008 to March 7, 2008. R4-11. On March 7, 2008, Pham was found guilty of all counts. R25/1469-70. Pham's penalty-phase trial was conducted from May 20, 2008 to May 22, 2008. R12-14. On May 22, 2008, the jury recommended a death sentence by a vote of ten (10) to (2). R3/501. A *Spencer*[1] hearing was held on August 18, 2008. R18/1100-1272. The trial court entered a judgment and sentence on November 14, 2008, sentencing Pham to death on the count of first-degree murder and life-imprisonment for the other counts. R18/1293-95, R3/569-75. Pham subsequently appealed, and the Florida Supreme Court ("FSC") affirmed Pham's convictions and

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

sentences. *Pham v. State*, 70 So.3d 485, 491 (Fla. 2011). Pham then filed a petition for a writ of certiorari to the United States Supreme Court, which was denied on March 19, 2012. *Pham v. Florida*, 132 S. Ct. 1752 (2012).

Capital Collateral Regional Counsel-Middle Region was subsequently appointed to represent Pham in his post-conviction collateral proceedings on September 26, 2011. Pham timely filed a Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, on February 25, 2013, raising several claims of ineffective assistance of counsel. P1/33-171. The evidentiary hearing on the motion was conducted on October 8, 28, 29, 30, and 31, 2013. P12-16. On December 20, 2013, the post-conviction trial court entered an Order Denying Defendant's Motion to Vacate Judgment and Sentence of Death. P11/2060-74. Pham appealed, and the FSC upheld the denial of post-conviction relief in an opinion rendered November 5, 2015. *Pham v. State*, 177 So. 3d 955 (Fla. 2015).

Pham filed a Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody on December 15, 2015, raising both guilt phase and penalty phase claims. Doc. 1. Pham argued that Florida's death sentencing scheme violated *Ring v. Arizona*[2] and *Apprendi v. New Jersey*[3] in Ground Eight of his

[2] 536 U.S. 584 (2002).
[3] 530 U.S. 466 (2000).

petition. On March 7, 2016, Pham filed a motion to stay his federal proceedings and hold in abeyance pending the Florida state courts' disposition of the issues raised in Ground Eight in light of the United States Supreme Court's decision in *Hurst v. Florida*.[4] Doc. 11. On April 1, 2016, Pham filed a memorandum of law in support of his petition for writ of habeas corpus. Doc. 13. On August 1, 2016, the State Attorney's Office filed a response to Pham's petition for writ of habeas corpus. Doc. 17. The United States District Court for the Middle District of Florida- Orlando Division ("District Court") granted Pham's motion to stay his federal proceedings pending the final disposition of his *Hurst* issues in an order issued August 31, 2016. Doc. 20. On March 30, 2017, the Circuit Court for the Eighteenth Judicial Circuit in and for Seminole County issued an order vacating Pham's death sentence pursuant to *Hurst* and granting a new penalty phase. On August 20, 2019, the State Attorney's Office filed a "Notice of Intent to No Longer Seek the Death Penalty." On September 23, 2019, the trial court resentenced Pham to life in prison.

On October 8, 2019, Capital Collateral Regional Counsel ("CCRC") filed a Notice Regarding Status of the Case, requesting that the District Court allow CCRC to continue to represent Pham in the federal proceedings on his remaining guilt phase claims. Doc. 52. On October 11, 2019, the District Court issued an order reopening

[4] 136 S. Ct. 616 (2016).

the case and granting CCRC's request to continue representing Pham in the litigation on his guilt phase claims. Doc. 53. The District Court issued an order denying Pham's habeas petition on February 27, 2023. Doc. 55. Judgment was entered on February 28, 2023. Doc. 56.

A notice of appeal from the District Court's order denying relief was timely filed on March 27, 2023. Doc. 57. The district court declined to issue a certificate of appealability ("COA") in its order denying relief. Doc. 55 at *17. A COA is a prerequisite to an appeal in this cause. *See* 28 U.S.C. § 2253. Accordingly, Pham timely files this application for a COA.

THE STANDARD FOR GRANTING A COA

The standard for issuing a COA is extremely low. A COA should be issued if the petitioner makes "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *see also* 28 U.S.C. § 2253. "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327 (internal citation omitted). This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *id*. at 336). As the United States Supreme Court has emphasized, the

COA inquiry "is not coextensive with a merits analysis." *Id*. at 115. Thus, "[t]he COA inquiry asks only if the District Court's decision [is] debatable." *Miller-El*, 537 U.S. at 348. A petitioner need not prove that the appeal will succeed. *Id*. at 337

Pham seeks a COA regarding Grounds Two, Three, Four, and Six of his habeas petition. Each ground is debatable among jurists of reason and will be discussed in turn below.

GROUND TWO

THE POST-CONVICTION COURT ERRED IN DENYING TAI PHAM'S MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AFTER CONDUCTING AN EVIDENTIARY HEARING ON CLAIM 7, THUS VIOLATING HIS RIGHTS PURSUANT TO THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

Pham alleged, in part, in Ground Two of his habeas petition and memorandum of law that Pham received prejudicial ineffective assistance of counsel when trial counsel failed to impeach state witness Christopher Higgins ("Higgins") with his convictions for nine felonies and seven crimes of dishonesty. Doc. 1 at *56-59; Doc. 13 at *64-67. Pham further argued that the state courts made an unreasonable determination of the facts in light of the state court evidence under 28 U.S.C. § 2254 (d)(2) when determining that Pham was not entitled to relief on this claim. Doc. 13 at *64-67. The District Court found that Pham was not entitled to relief. Doc. 55 at *7-9. However, Pham has made a substantial showing that he was denied his

constitutional right to effective assistance of counsel. *Strickland v. Washington*, 366 U.S. 668 (1984). Reasonable jurists could disagree with the District Court's resolution of this ineffective assistance of counsel claim. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

There are two prongs to an ineffective assistance of counsel claim:

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is unreliable.

Strickland, 366 U.S. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Higgins' testimony at trial was the most crucial evidence the State used to support the charge for attempted first-degree murder. Higgins testified that on the night of October 22, 2005, Pham attacked and stabbed Higgins with a butcher knife when Higgins entered Phi Amy Pham's ("Phi") apartment after he and Phi had been having dinner at Phi's coworker's house. R8/924-953. Higgins and Phi were dating

at the time. R8/922. Phi entered the apartment first, and then Higgins entered a few minutes later after locking up his motorcycle. R8/927. Higgins testified that he swung his motorcycle helmet at Pham in self-defense after Pham had attacked him with a butcher knife, and that he and Pham then struggled over the knife that was in Pham's hand. R8/932-33. Higgins testified that, at one point during the struggle, he was positioned behind Pham and tried to pull Pham's hand that was still holding the butcher knife up to Pham's throat. R8/933-36.

Pham also testified in his defense at trial, and he told a drastically different story of the altercation that he and Higgins had that night. Pham testified that he arrived at Phi's apartment around 10:00 p.m. R10/1232. Pham's stepdaughter, Lana Pham, let him into the apartment. R10/1232-33. Pham intended to give Phi money from his paycheck and mail for her from their old address. R10/1237. Phi and Higgins arrived at the apartment, and Pham told Higgins to "get the fuck out of here, boy." R10/1242-43. Pham testified that Higgins then came at him with a knife that was on the counter. R10/1244. Pham testified that he grabbed both of Higgins' wrists and tried to flip him. R10/1245. Pham then ran to the kitchen and grabbed the butcher knife while Higgins' followed him with the knife he was holding. R10/1245. Pham and Higgins then struggled in the kitchen for some time, and both were injured. R10/1254-55. The altercation ended when the police arrived at the apartment. R10/1255.

In post-conviction, Pham argued that trial counsel was ineffective under *Strickland* for failing to impeach Higgins at trial with his prior convictions for nine felonies and seven crimes of dishonesty. After holding an evidentiary hearing on the claim, the post-conviction trial court found that the deficient performance prong of the *Strickland* claim had been met. P11/2065. However, the court found that the prejudice prong had not been met, holding that "[i]n light of the fact that the State's evidence was substantially consistent, these is no possibility that the introduction of Higgins' prior convictions for purposes of impeachment would have changed the result of the trial." P11/2065.

On appeal, the FSC stated:

> The postconviction court found that counsel was aware of Higgins' convictions and "could not offer any strategic explanation for failing to ask the witness whether he had been convicted of any felonies or crimes of dishonesty." Nevertheless, the circuit court found that Pham could not establish prejudice because the evidence of his guilt was overwhelming.

Pham, 177 So. 3d at 962. The FSC found that the post-conviction trial court properly denied relief on this claim. *Id.*

The District Court cites to the FSC's finding that Pham could not prove prejudice "because the evidence of his guilt was overwhelming." Doc. 55 at *7 (citing *Pham*, 177 So. 3d at 962). The District Court further cites to the FSC's finding that Lana Pham's testimony at trial corroborated Higgins' account. Doc. 55 at *8.

The District Court concludes that "[c]onsidering Lana's testimony, which was consistent with Higgins's testimony, a reasonable probability does not exist that the outcome of the trial would have been different had counsel impeached Higgins with his prior convictions." Doc. 55 at *9. However, reasonable jurists could disagree with the District Court's finding, and could instead conclude that Pham was prejudiced by trial counsel's failure to impeach Higgins with his previous convictions.

Higgins was a major witness for the prosecution and the most crucial witness for the charge of attempted first-degree murder, as he testified as the alleged victim. The jury never heard that Higgins was convicted of *9 felonies and 7 crimes of dishonesty*. Trial counsel prejudiced Pham by failing to impeach the credibility of this crucial witness. This failure deprived the jury of relevant information that painted Higgins as a dishonest person and a multi-convicted felon. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("[c]rossexamination is the principal means by which the believability of a witness and the truth of his testimony are tested" and a "cross-examiner has traditionally been allowed to impeach, i.e., discredit [a] witness."). Therefore, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" and the jury would have weighed Higgins' credibility differently in comparison to Pham's credibility. *Strickland*, 466 U.S. at 694.

There is sufficient probability to undermine confidence in the outcome of the verdict because Higgins' testimony as a multi-convicted felon would be found to be less credible compared to Pham's testimony. Pham asserted in his testimony that he was defending himself against Higgins, so attacking Higgins' credibility was vital for Pham's defense. A jury would certainly reconsider Higgins' credibility when faced with Higgins' extensive criminal background, especially when determining if Pham acted in self-defense as to the attempted murder charge. Pham and Higgins were still fighting in the kitchen when law enforcement officers arrived, and Pham asserted that Higgins attacked him first. Reasonable jurists could debate whether Pham was prejudiced under *Strickland* by trial counsel's failure to properly impeach Higgins.

The District Court's ruling on Ground Two is debatable among jurists of reason. Reasonable jurists could disagree with the District Court's resolution of these constitutional claims and/or reasonable jurists could conclude the issues presented in this claim are adequate to deserve encouragement to proceed further. This Court should grant a COA.

GROUND THREE

THE POST-CONVICTION COURT ERRED IN DENYING TAI PHAM AN EVIDENTIARY HEARING AS TO CLAIM 3 OF HIS MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851, THUS VIOLATING HIS RIGHTS PURSUANT TO THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

Pham alleged in Ground Three of his habeas petition and memorandum of law that he received prejudicial ineffective assistance of counsel when trial counsel allowed Dr. Predrag Bulic to testify in lieu of Dr. Thomas Parsons, the attending medical examiner who performed the autopsy of Phi Pham. Doc. 1 at *60-64; Doc. 13 at *67-73. Pham further alleged that he was entitled to relief pursuant to 28 U.S.C. § 2254 (d)(2) because the state courts unreasonably determined the facts in light of the state court evidence when finding that Pham is not entitled to relief on this claim. Doc. 13 at *71. The District Court found that Pham was not entitled to relief on this claim. Doc. 55 at *9-12. However, Pham has made a substantial showing that he was denied his constitutional right to effective assistance of trial counsel with regard to this claim. *Strickland v. Washington*, 366 U.S. 668 (1984). Reasonable jurists could disagree with the District Court's resolution of this ineffective assistance of counsel claim. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

Pham's trial counsel had an out-of-court agreement with the prosecution that Dr. Predrag Bulic could testify about the contents of the files, deposition, and

autopsy report of Dr. Thomas Parsons, the attending medical examiner who performed the autopsy of Phi Pham. R9/1171-73. The State was having difficulty securing Dr. Parsons' presence for the guilt phase proceedings, and they were unable to arrange video testimony. R9/1171-72. Trial counsel agreed to allow Dr. Bulic to "review Dr. Parson's file, testify to cause of death, the injuries, [and] type of injuries . . . and nothing beyond that." R9/1171. Trial counsel objected when Dr. Bulic testified that "[w]hat is interesting with this wound is that the right side of the wound--" because Dr. Bulic's testimony went beyond what was agreed upon by the parties. R9/1171. The trial court directed the State to confine Dr. Bulic's testimony to the agreement between the prosecution and defense counsel. R9/1173. Dr. Bulic's testimony continued, and the following exchange took place:

> Assistant State Attorney Stone: Doctor, with respect to number two injury, you were about to say something with – Well, is there anything of note that you observed on that particular wound number two?
>
> Dr. Bulic: Yes, there was. This wound has a contusion on one end, more specifically on the right side of the wound there's a contusion which is usually in stab wounds is made by a hand guard or so-called hilt. It's the handle with the little hand guard at the end where the blade begins. When the force is applied –
>
> Defense Attorney Caudill: Objection, Your Honor. May we approach?
>
> The Court: Yes. (Whereupon, a discussion was had out of the hearing of the jury.)
>
> Mr. Caudill: Judge, this is getting into – now we're into issues of amount of force.

Mr. Stone: That's not – he – he's saying enough force was applied to cause a contusion. He's not going to try to quantify the force.

Mr. Caudill: Well, I don't know. I thought we were going to stick to – that was our understanding, we were going to stick to these injuries that Dr. Parsons noted in the autopsy.

Mr. Stone: That's what he – Excuse me. He noted that in the autopsy report.

The Court: Obviously the Court's not privy to your agreement. Assuming that that is the agreement as you represented, if it's described in the autopsy, he's not going beyond that into his opinions or extrapolations or trying to comment on opinions that Dr. Parsons would have made, then obviously that's not an agreement then.

Mr. Caudill: It starts to get into issues that go to aggravation.

Mr. Stone: It also goes to premeditation.

The Court: I mean, I understand what you're saying, but almost anything regarding the autopsy could, in theory, go to aggravation.

Assistant State Attorney Feliciani: Judge, my intent when I spoke to Mr. Caudill was obviously he may have an opinion as to the resulting pain this injury caused this victim, and we weren't going to go into that because that's inappropriate.

The Court: Those kind of things.

Mr. Caudill: As long as their witness understands that if he starts talking about interesting things and amount of force.

Mr. Stone: Why can't he talk about interesting things?

The Court: He can preface his speech. No one can control his manner of speech as long as the content is confined to your agreement.

R9/1174-76.

Pham argued in Claim Three of his Fla. R. Crim. P. 3.851 motion that trial counsel rendered prejudicial ineffective assistance under *Strickland* when he allowed Dr. Bulic to testify as a "surrogate" for Dr. Parsons during the guilt phase. The legal basis was stated in the motion:

> Trial counsel rendered deficient performance by agreeing to the admission of hearsay testimony by Dr. Bulic regarding the contents and findings of Dr. Parsons' medical examiner files and his deposition. C. Ehrhardt, Florida Evidence §801.2 defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Furthermore, by agreeing to allow Dr. Bulic to testify as a conduit for Dr. Parsons, trial counsel waived Mr. Pham's right to confront the witness pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

P1/49-52&87-91.

The State argued at the post-conviction case management conference that this claim was procedurally barred because it could have been but was not raised on direct appeal. P6/1017-18. The trial court denied a hearing on this claim, finding that this issue "could have been raised on appeal but was not," P6/1018, and stating that "there was no legal basis upon which trial counsel could have successfully objected to Dr. Bulic's testimony because he was qualified to opine on the victim's cause of death . . . Trial counsel objected when he felt that Dr. Bulic strayed into areas where the witness was not qualified to offer an opinion. . . However, as to Dr. Bulic's testimony in general, any objection would have been futile, and counsel cannot be

deemed to be ineffective for failing to make a futile motion." P11/2063 (internal citations omitted).

The FSC affirmed without any analysis, finding only that "[t]he summary denial of a postconviction claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record" and "the circuit court properly summarily denied these claims." *Pham*, 177 So. 3d at 959. Pham maintains that trial counsel provided prejudicial ineffective assistance by allowing Dr. Bulic to testify in lieu of Dr. Parsons.

As to Ground Three, the District Court finds that "[t]rial counsel had no basis to object to the testimony of Dr. Bulic. Under the circumstances, trial counsel did not act deficiently, and there has been no showing of prejudice." Doc. 55 at *12. The District Court further finds that Pham is not entitled to relief under 28 U.S.C. § 2254(d)(2). Doc. 55 at *12. Reasonable jurists could disagree and instead find that Pham was prejudiced by trial counsel's deficient performance because there was a legal basis to object to the testimony of Dr. Bulic under *Crawford v. Washington*, 541 U.S. 36 (2004), and Pham was denied his Sixth Amendment right to confront witnesses when counsel failed to make that objection. Reasonable jurists could also find that the state courts unreasonably determined the facts in light of the state court evidence, contrary to 28 U.S.C. § 2254(d)(2), when finding that trial counsel did not

render prejudicial ineffective assistance when allowing Dr. Bulic to testify in lieu of Dr. Parsons.

Trial counsel never should have agreed to allow Dr. Bulic to testify in lieu of Dr. Parsons in the first place, or alternatively, should have moved to exclude Dr. Bulic's hearsay testimony because it violated *Crawford v. Washington*, 541 U.S. 36 (2004). The Confrontation Clause of the Sixth Amendment provides that "[i]n all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." "Testimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59.

Dr. Bulic's testimony as to the description of Phi's injuries and her cause and manner of death relied on and were directly taken from the findings and conclusions in Dr. Parson's autopsy report. Dr. Bulic's testimony was inadmissible testimonial hearsay that violated the Confrontation Clause. The District Court states in its order that "autopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution." Doc. *55 at 12 (citing *Banmah v. State*, 87 So. 3d 101, 103 (Fla. 3rd DCA 2012)). However, there is conflicting case law stating that autopsy reports are testimonial evidence subject to the Confrontation Clause, and this issue is certainly debatable among jurists of reason. In *U.S. v. Ignasiak*, the Eleventh Circuit Court of Appeals ("Eleventh Circuit") found that

autopsy reports admitted into evidence in conjunction with a medical examiner's testimony, where that specific medical examiner did not personally observe or participate in those autopsies, and where no evidence was presented to show that the coroners who performed the autopsies were unavailable and the accused had a prior opportunity to cross-examine them, violated the Confrontation Clause. 667 F.3d 1217, 1231 (11th Cir. 2012)[5]; see also *Rosario v. State*, 175 So. 3d 843, 854-56 (Fla. 5th DCA 2015) (finding that autopsy report admitted at defendant's trial for aggravated child abuse and first-degree murder was testimonial hearsay under the Confrontation Clause). Pham acknowledges that the actual autopsy report prepared by Dr. Parsons was not entered into evidence during his guilt-phase trial. However, Dr. Bulic's testimony was based on his review of the autopsy report and extensively

[5] When reaching the decision in *U.S. v. Ignasiak*, the Eleventh Circuit relied, in part, on the decisions of the United States Supreme Court ("SCOTUS") in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). In *Melendez-Diaz*, SCOTUS held that an affidavit reporting the results of forensic analysis, which identified evidence that had been seized and connected to the defendant as cocaine, was testimonial. 557 U.S. at 307, 310. SCOTUS subsequently rejected the use of "surrogate testimony" in *Bullcoming*, holding that the Confrontation Clause precludes the prosecution from introducing "a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." 131 S. Ct. at 2710, 2713.

described findings in the autopsy report, including the location and description of Phi's injuries and the cause and manner of death listed in the report. Even though the actual report was not admitted, the testimonial hearsay within the report, particularly the cause and manner of death found by Dr. Parsons, was testified to in front of the jury by Dr. Bulic. Pham was certainly prejudiced by the admission of Dr. Bulic's testimony, as Pham was denied his fundamental Sixth Amendment right to confront the witnesses brought against him at trial.

The FSC offered no analysis and no factual findings regarding this claim, finding only that "the [trial] court properly summarily denied these claims." *Pham*, 177 So. 3d at 959. The trial court's findings of fact were unreasonable. The court cited to R9/1162-90 to support its finding that counsel objected to areas that Dr. Bulic was not qualified to offer an opinion. The first objection in reference to discovery was withdrawn. R9/1166-7. Counsel then objected to Dr. Bulic's opinion testimony as to his use of the term "interesting" and then as to testimony about the "amount of force." R9/1171-6. Counsel next objected to cumulative evidence and to the presence of an inflammatory photograph. R9/1183-85. The final objection was to Dr. Bulic testifying as to the manner of death noted by Dr. Parsons in the autopsy report. R9/11988-89. This objection was overruled, and Dr. Bulic was allowed to testify that the manner of death listed on the autopsy report was "homicide." R9/1190. While trial counsel did object to portions of Dr. Bulic's testimony, at no

point did trial counsel object to Dr. Bulic testifying in lieu of Dr. Parsons. Pham was denied his Sixth Amendment right to confront witnesses when Dr. Bulic testified as a "surrogate" for Dr. Parsons. Dr. Bulic's testimony regarding the contents of Dr. Parsons' autopsy report, particularly Dr. Parsons' conclusion in the report that the manner of death was "homicide," constituted inadmissible testimonial hearsay.

The District Court's ruling on Ground Three is debatable among jurists of reason. Reasonable jurists could disagree with the District Court's resolution of these constitutional claims and/or reasonable jurists could conclude the issues presented in this claim are adequate to deserve encouragement to proceed further. This Court should grant a COA.

GROUND FOUR

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED TAI PHAM OF A FUNDAMENTALLY FAIR TRIAL AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Pham alleged in Ground Four of his habeas petition and memorandum of law that, cumulatively, the combination of procedural and substantive errors during his trial deprived him of a fundamentally fair trial as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Doc. 1 at *65-66; Doc. 13 at *73-85. Pham further alleged that the post-conviction trial court's finding that "all of the individual claims of error are without merit" is the result of an

unreasonable application of clearly established federal law and an unreasonable determination of facts, contrary to 28 U.S.C. § 2254(d)(1) and (2). Doc. 13 at *73-85. The District Court found that Pham was not entitled to relief on this claim. Doc. 55 at *15. However, Pham has made a substantial showing that he was denied his constitutional right to a fair trial as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and reasonable jurists could disagree with the District Court's resolution of this claim. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

Pham raised his cumulative error claim in his Fla. R. Crim. P. 3.851 motion, arguing that the cumulative effect of the errors made during his guilt-phase trial and the overall proceedings deprived him of a constitutionally-guaranteed fundamentally fair trial. P1/64, 96-97, 99-100. Because this claim would not fully accrue until the courts had the opportunity to hear all of Pham's post-conviction claims alleging the ineffective assistance of trial counsel under *Strickland*, Pham could not raise a cumulative error claim at trial or on direct appeal. It is also for this reason that Pham did not request an evidentiary hearing on his claim of cumulative error. However, the evidence demonstrating the errors that contributed to the cumulative effect was offered in support of his other claims, where each error was individually alleged. P1/33-171.

In its order denying Pham's Rule 3.851 motion, the post-conviction trial court found that "[b]ecause all of the individual claims of error are without merit, a claim of cumulative error must fail." P11/2066, 2073 (citing *Kormondy v. State*, 983 So. 2d 418, 441 (Fla. 2007); *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2008); *Vining v. State*, 827 So. 2d 201, 219 (Fla. 2002); and *Downs v. State*, 740 So. 2d 506, 509 (Fla. 2009). On appeal, the FSC found that "where the alleged errors urged for consideration in a cumulative error analysis are individually 'either procedurally barred or without merit, the claim of cumulative error also necessarily fails.'" *Pham*, 177 So. 3d at 962 (internal citations omitted).

The District Court finds that "[t]he state court's denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. Petitioner has not demonstrated that any errors occurred during his guilt phase. Accordingly, Ground Four is denied under § 2254(d)." Reasonable jurists could disagree with the District Court's finding. As explained in detail, *supra* at pp. 5-19, there were multiple errors that occurred during Pham's guilt-phase trial because trial counsel rendered prejudicial ineffective assistance when failing to appropriately impeach State's witness Christopher Higgins and by failing to object to Dr. Bulic's inadmissible hearsay testimony.

The District Court does not specifically address the merits of Pham's argument under 28 U.S.C. § 2254(d)(1) that the FSC unreasonably applied

Strickland during its cumulative error analysis. However, this issue is certainly debatable among jurists of reason, and the issues presented are adequate to deserve encouragement to proceed further. *Miller-El*, 537 U.S. at 327.

Under the "unreasonable application" clause of 28 U.S.C. § 2254(d), a writ of habeas corpus may be granted if the state courts identified the correct governing legal principle established by SCOTUS, but unreasonably applied it to the facts of the case. *Williams v. Taylor*, 529 U.S. 362, 419 (2000).

The FSC affirmed the post-conviction trial court's denial of Pham's cumulative error claim, approving the lower court's application of its precedent and holding:

> As we have previously stated, "where the alleged errors urged for consideration in a cumulative error analysis are individually 'either procedurally barred or without merit, the claim of cumulative error also necessarily fails.'" *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) (quoting *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008)).

Pham, 177 So. 3d at 962. The FSC's nonsensical standard of proof for cumulative error claims directly contradicts every facet of the *Strickland* opinion.

In *Strickland,* SCOTUS was clear that the analysis of prejudice that courts must undertake in evaluating the effectiveness of counsel's assistance is one of cumulative prejudice. 466 U.S. at 694. The Court identified the standard for finding prejudice as "a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different") (emphasis added). This

standard, which requires even less than a showing by a preponderance of the evidence that the "errors of counsel" determined the outcome, does not require a showing that *each error* counsel made *individually impacted* the outcome of the case, such that there is a reasonable probability that without the error, the result would have been different. This is clear from the Court's use, throughout its opinion, of the *plural* form "errors" in relation to the *singular* observation of a change in the result of the proceeding. SCOTUS directly addressed the standard for assessing prejudice in a capital sentencing as follows, leaving no room for the interpretation that individual errors are to be analyzed in a piecemeal fashion in terms of prejudice:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, *absent the errors,* the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury. Some of the factual findings will have been *unaffected by the errors,* and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, *altering the entire evidentiary picture, and some will have had an isolated, trivial effect*. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different *absent the errors.*

Strickland, 466 U.S. at 695-96 (emphasis added); *see also Williams*, 529 U.S. at 397-98 (holding that "the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the *totality of the available mitigation evidence* – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation."). Further emphasizing this point, SCOTUS also set forth the following:

> In making the determination whether *the specified errors* resulted in *the required prejudice*, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

Strickland, 466 U.S. at 694 (emphasis added).

Accordingly, it is clear that the FSC's piecemeal method of analyzing prejudice under *Strickland* directly violates the clearly established federal law set forth by the *Strickland* opinion itself.

The District Court's ruling on Ground Four is debatable among jurists of reason. Reasonable jurists could disagree with the District Court's resolution of these constitutional claims and/or reasonable jurists could conclude the issues presented in this claim are adequate to deserve encouragement to proceed further. This Court should grant a COA.

GROUND SIX

THE SUPREME COURT OF FLORIDA ERRED IN DENYING TAI PHAM'S PETITION FOR WRIT OF HABEAS CORPUS WHEREBY HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A SPECIFIC CLAIM REGARDING THE PRESENTATION OF DR. PREDRAG BULIC'S HEARSAY TESTIMONY IN BOTH THE GUILT AND PENATLY PHASE IN LIEU OF DOCTOR THOMAS PARSONS', THE ATTENDING MEDICAL EXAMINER, THUS VIOLATING HIS RIGHTS PURSUANT TO THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

Pham alleged in Ground Six of his habeas petition and memorandum of law that he received prejudicial ineffective assistance of appellate counsel when appellate counsel failed to raise the issue of Dr. Bulic testifying in lieu of Dr. Parsons during Pham's direct appeal. Doc. 1 at *72-76; Doc. 13 at *67-73. Pham further alleged that he was entitled to relief pursuant to 28 U.S.C. § 2254 (d)(2) because the state courts unreasonably determined the facts in light of the state court evidence when finding that Pham is not entitled to relief on this claim. Doc. 13 at *71. The District Court found that Pham was not entitled to relief on this claim. Doc. 55 at * 12-15. However, Pham has made a substantial showing that he was denied his constitutional right to effective assistance of appellate counsel with regard to this claim. *Strickland v. Washington*, 366 U.S. 668 (1984). Reasonable jurists could disagree with the District Court's resolution of this ineffective assistance of counsel claim. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

To establish that appellate counsel was ineffective, *Strickland* requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. *Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla. 1985).

The underlying facts from Pham's guilt-phase trial that give rise to Ground Six are the same as those articulated in Ground Three. *See supra* at pp. 11-15. On June 26, 2014, Pham filed a Petition for Writ of Habeas Corpus to the FSC in conjunction with his appeal of the post-conviction trial court's denial of his Fla. R. Crim. P. 3.851 motion. Pham argued in his state habeas that appellate counsel provided prejudicial ineffective assistance in violation of the Sixth Amendment when counsel failed to raise the issue of Dr. Bulic testifying in lieu of Dr. Parsons during Pham's direct appeal. The FSC found that the claim was "without merit," but made no specific findings on the merits of the claim. *Pham*, 177 So. 3d at 963. The District Court states in its order: "As discussed with regard to Ground Three, there was no basis upon which to raise an objection with regard to Dr. Bulic's testimony. Thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal." Doc. 55 at *13. Reasonable jurists could disagree with the District Court's

finding and instead find that appellate counsel was ineffective for failing to raise this issue on direct appeal. As explained in detail, *supra* at pp. 16-18, there was a basis upon which to raise an objection to Dr. Bulic's testimony- his testimony concerning the findings of Phi's autopsy was inadmissible testimonial hearsay that violated *Crawford v. Washington* and the Confrontation Clause. Appellate counsel provided prejudicial ineffective assistance in violation of the Sixth Amendment when counsel failed to raise this issue on direct appeal. This error is not harmless. Confidence in the outcome of the appellate process is undermined because had appellate counsel raised this issue on appeal, there is a reasonable probability that Pham's convictions would have been reversed and he would have been granted a new trial.

The District Court's ruling on Ground Six is debatable among jurists of reason. Reasonable jurists could disagree with the District Court's resolution of these constitutional claims and/or reasonable jurists could conclude the issues presented in this claim are adequate to deserve encouragement to proceed further. This Court should grant a COA.

CONCLUSION

Pham has made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2). The statute also requires that a COA specify the issue or issues for which the required showing has been made. *Id*. That has been done. A COA should issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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Dated: April 13, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2023, a true copy of the foregoing has been filed electronically with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to Patrick Bobek, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, at patrick.bobek@myfloridalegal.com and at capapp@myfloridalegal.com.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing was mailed to Tai A Pham, DOC # 953712, Wakulla Correctional Institution Annex, 110 Melaleuca Drive Crawfordville, FL 32327, a non-CM/ECF participant, on this 13th day of April, 2023.

/s/ Adrienne Joy Shepherd
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No. _____

IN THE

Supreme Court of the United States

TAI A. PHAM,

Petitioner,

v.

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

Respondents.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX D

Motion to Reconsider, Vacate, or Modify Order, filed October 12, 2023.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TAI A. PHAM,
Petitioner/Appellant,

Appeal Number: 23-11009-H

v.
District Court Docket Number:

6:15-cv-2100-RBD-EJK

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents/Appellees.

MOTION TO RECONSIDER, VACATE, OR MODIFY ORDER

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Tai A. Pham v. Secretary, Department of Corrections, et al.
Appeal No. 23-11009-H

In compliance with 11th Cir. R. 26.1-1, counsel for Petitioner/Appellant hereby certifies that the following persons, partnerships, or firms may have an interest in the outcome of this case:

Alva, Honorable Marlene Michelle (Circuit Court Judge, Eighteenth Judicial Circuit, in and for Seminole County)

Ahmed, Raheela (Former Assistant Capital Collateral Regional Counsel)

Becker, Michael (Attorney for Petitioner/Appellant on Direct Appeal)

Bobek, Patrick A. (Assistant Attorney General, Attorney for Respondents/Appellees)

Bondi, Pam (Former Attorney General, State of Florida)

Bort, Lisa M. (Assistant Capital Collateral Regional Counsel)

Canady, Honorable Charles T. (Florida Supreme Court Justice)

Caudill, Timothy (Attorney for Petitioner/Appellant at Trial)

Dalton, Jr., Honorable Roy B. (United States District Court Judge, Middle District of Florida)

Deliberato, Maria (Former Acting Capital Collateral Regional Counsel-Middle Region)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Tai A. Pham v. Secretary, Department of Corrections, et al.
Appeal No. 23-11009-H

Dixon, Ricky D. (Secretary, Florida Department of Corrections)

Figgatt, James (Attorney for Petitioner/Appellant at Trial)

Feliciani, Eugene (Assistant State Attorney)

Higgins, Christopher (Alleged Victim)

Inch, Mark S. (Former Secretary, Florida Department of Corrections)

Jennings, Bill (Former Capital Collateral Regional Counsel-Middle Region)

Labarga, Honorable Jorge (Florida Supreme Court Justice)

Lawson, Honorable Alan (Former Florida Supreme Court Justice)

Lewis, Honorable R. Fred (Former Florida Supreme Court Justice)

Moody, Ashley (Attorney General, State of Florida)

Pariente, Honorable Barbara J. (Former Florida Supreme Court Justice)

Perinetti, Maria (Former Assistant Capital Collateral Regional Counsel)

Perry, Honorable James E.C. (Former Florida Supreme Court Justice)

Pham, Lana (Alleged Victim)

Pham, Phi Amy (Deceased Victim)

Pinkard, Eric (Capital Collateral Regional Counsel-Middle Region)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Tai A. Pham v. Secretary, Department of Corrections, et al.
Appeal No. 23-11009-H

Polston, Honorable Ricky (Florida Supreme Court Justice)

Purdy, James (Attorney for Petitioner/Appellant on Direct Appeal)

Quince, Honorable Peggy A. (Former Florida Supreme Court Justice)

Rodriguez, Carol (Former Assistant Capital Collateral Regional Counsel)

Shakoor, Ali A. (Assistant Capital Collateral Regional Counsel, Attorney for Petitioner/Appellant)

Shepherd, Adrienne Joy (Assistant Capital Collateral Regional Counsel, Attorney for Petitioner/Appellant)

Stone, Stewart (Assistant State Attorney)

Viggiano, Jr., James Vincent (Former Capital Collateral Regional Counsel-Middle Region)

There are no corporations involved in this case.

MOTION TO RECONSIDER, VACATE, OR MODIFY ORDER DENYING APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Petitioner/Appellant, Tai A. Pham ("Pham"), by and through undersigned counsel, moves this Court to reconsider, vacate, or modify its September 22, 2023 Order. (Doc. 13-2) and issue a certificate of appealability pursuant to 28 U.S.C. § 2253 and 11th Cir. R. 22-1, and states as follows:

PROCEDURAL HISTORY

Pham is currently serving a life sentence for one count of first-degree murder, one count of attempted first-degree murder, one count of armed kidnapping, and one count of armed burglary of a dwelling. Pham was convicted and originally sentenced to death by the state trial court on November 14, 2008. Pham subsequently appealed, and the Florida Supreme Court ("FSC") affirmed Pham's convictions and sentences. *Pham v. State*, 70 So.3d 485, 491 (Fla. 2011). Pham then filed a petition for a writ of certiorari to the United States Supreme Court, which was denied on March 19, 2012. *Pham v. Florida*, 132 S. Ct. 1752 (2012).

Pham was originally sentenced to death for the count of first-degree murder. However, on March 30, 2017, the Circuit Court for the Eighteenth Judicial Circuit in and for Seminole County issued an order vacating Pham's death sentence pursuant to *Hurst v. Florida,* 136 S. Ct. 616 (2016). On September 23, 2019, the trial court resentenced Pham to life in prison.

Capital Collateral Regional Counsel-Middle Region was originally appointed to represent Pham in his post-conviction collateral proceedings on September 26, 2011. Pham timely filed a Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, on February 25, 2013, raising several claims of ineffective assistance of counsel. P1/33-171. The evidentiary hearing on the motion was conducted on October 8, 28, 29, 30, and 31, 2013. P12-16. On December 20, 2013, the post-conviction trial court entered an Order Denying Defendant's Motion to Vacate Judgment and Sentence of Death. P11/2060-74. Pham appealed, and the FSC upheld the denial of post-conviction relief in an opinion rendered November 5, 2015. *Pham v. State*, 177 So. 3d 955 (Fla. 2015).

Pham filed a Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody on December 15, 2015, raising both guilt phase and penalty phase claims. Doc. 1. On April 1, 2016, Pham filed a memorandum of law in support of his petition for writ of habeas corpus. Doc. 13. On August 1, 2016, the State Attorney's Office filed a response to Pham's petition for writ of habeas corpus. Doc. 17. The District Court issued an order denying Pham's habeas petition on February 27, 2023. Doc. 55. Judgment was entered on February 28, 2023. Doc. 56.

A notice of appeal from the District Court's order denying relief was timely filed on March 27, 2023. Doc. 57. The District Court declined to issue a certificate

of appealability ("COA") in its order denying relief. Doc. 55 at *17. A COA is a prerequisite to an appeal in this cause. *See* 28 U.S.C. § 2253. Pham's application for a COA was filed on April 13, 2023. Doc. 4. On September 22, 2023, this Court issued an Order denying Pham's application for a COA. Doc 13-2. This motion follows.

INTRODUCTION

Pham submits that he has satisfied the requirements under 28 U.S.C. § 2253 and Fed. R. App. P. 22(b)(1) and this Court should reconsider its denial of a COA. A COA should issue if the petitioner makes "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The standard for issuing a COA is more lenient than the standard for granting a writ of habeas corpus. "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

The "threshold question" of whether to grant a COA should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *id*. at 336). "In fact, the statute forbids it." *Miller-El*, 537 U.S. at 336. Similar to *Buck*, Pham submits that

although this Court "phrased its determination in proper terms," "it reached that conclusion only after essentially deciding the case on the merits." *Buck*, 580 U.S. at 115-16. As the Supreme Court has emphasized, the COA inquiry "is not coextensive with a merits analysis." *Id*. at 115. Thus, "[t]he COA inquiry asks only if the District Court's decision [is] debatable." *Miller-El*, 537 U.S. at 348. A petitioner need not prove that the appeal will succeed. *Id*. at 337. "[A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief" because "a COA will issue in some instances where there is no certainty of ultimate relief." *Id*. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id*. at 338.

Pham respectfully requests that this Court reconsider its denial of a COA without deciding his case on the merits and grant him a COA.

GROUND TWO

Pham alleged in Ground Two that he received prejudicial ineffective assistance of counsel when trial counsel failed to impeach state witness Christopher Higgins ("Higgins") with his convictions for nine felonies and seven crimes of dishonesty. Doc. 1 at *56-59; Doc. 13 at *64-67. Pham further argued that the state courts made an unreasonable determination of the facts in light of the state court

evidence under 28 U.S.C. § 2254 (d)(2) when determining that Pham was not entitled to relief on this claim. Doc. 13 at *64-67.

This Court states that "Although Pham's counseled motion for a COA argues that the state court erred in finding that the evidence of guilt was overwhelming, he never raised that argument in the district court proceedings, and there are no circumstances that would warrant entertaining an argument raised for the first time on appeal." Doc. 13-2 at *2-3. However, Pham did raise the issue of the state court's determination of the sufficiency of the evidence of his guilt in his district court proceedings, and this Court should grant him a COA on Ground Two. Pham argued under Ground Two in his April 1, 2016 Memorandum of Law in Support of his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus that "relief should be granted as in post-conviction it became clear that Higgins' criminal history is extensive and that ***the state courts unreasonably determined that the evidence of guilt was sufficient when the credibility of a multi-convicted felon and multi-convicted dishonest criminal directly impacted Tai's conviction as to the attempted murder charge."*** Doc. 13 at *67. The memorandum of law further highlighted evidence that weighed against Pham's guilt, stating: "Tai asserted in his testimony that he was defending himself against Higgins, so attacking Higgins' credibility was vital for Tai's defense. A jury would certainly reconsider Higgins' credibility when faced with Higgins' extensive criminal background, especially when determining if

Tai acted in self-defense as to the attempted murder charge. Tai and Higgins were still fighting in the kitchen when law enforcement officers arrived. Higgins' testimony was important as to the elements of the attempted murder charge." Doc 13 at *66.

Further, the District Court addressed the argument concerning the state court's determination of Pham's guilt, explaining that the state court found that Pham had failed to show prejudice concerning his ineffective assistance of counsel claim "because the evidence of his guilt was overwhelming." Doc. 55 at *7 (citing *Pham II*, 177 So. 3d at 962). Pham specifically cited this portion of the District Court's order in the application for a COA when arguing that reasonable jurists could disagree with the District Court's finding on Ground Two. Doc. 4 at *8-9. It is clear that the issue of the state court's determination of the sufficiency of the evidence of Pham's guilt was raised in the District Court proceedings and was addressed to some extent by the District Court. This issue has not been raised for the first time on appeal.

Reasonable jurists could disagree with the District Court's finding on Ground Two and could instead conclude that Pham was prejudiced by trial counsel's failure to impeach Higgins with his previous convictions. Higgins was a major witness for the prosecution and the most crucial witness for the charge of attempted first-degree murder, as he testified as the alleged victim. The jury never heard that Higgins was

convicted of *9 felonies and 7 crimes of dishonesty*. Trial counsel prejudiced Pham by failing to impeach the credibility of this crucial witness. This failure deprived the jury of relevant information that painted Higgins as a dishonest person and a multi-convicted felon. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("[c]rossexamination is the principal means by which the believability of a witness and the truth of his testimony are tested" and a "cross-examiner has traditionally been allowed to impeach, i.e., discredit [a] witness."). Therefore, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" and the jury would have weighed Higgins' credibility differently in comparison to Pham's credibility. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

There is sufficient probability to undermine confidence in the outcome of the verdict because Higgins' testimony as a multi-convicted felon would be found to be less credible compared to Pham's testimony. Pham asserted in his testimony that he was defending himself against Higgins, so attacking Higgins' credibility was vital for Pham's defense. A jury would certainly reconsider Higgins' credibility when faced with Higgins' extensive criminal background, especially when determining if Pham acted in self-defense as to the attempted murder charge. Pham and Higgins were still fighting in the kitchen when law enforcement officers arrived, and Pham asserted that Higgins attacked him first. Reasonable jurists could debate whether

Pham was prejudiced under *Strickland* by trial counsel's failure to properly impeach Higgins.

Pham has made a substantial showing that he has been denied his right to effective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984) and the Sixth Amendment. This Court should reconsider and grant a COA.

GROUNDS THREE AND SIX

In Grounds Three and Six, Pham raised the ineffective assistance of trial counsel and appellate counsel related to the claim that Dr. Predrag Bulic was erroneously allowed to testify at trial in lieu of Dr. Thomas Parsons, the attending medical examiner who performed the autopsy of Phi Pham. Doc. 1 at *60-64; Doc. 13 at *67-73; Doc. 1 at *72-76; Doc. 13 at *67-73. As to Grounds Three and Six, this Court states that "[a]ccepting that Florida law permitted the medical examiner's testimony, any challenge to that testimony would have lacked merit." Doc. 13-2 at *3 (internal citation omitted). However, a challenge to that testimony would not have lacked merit because there was a legal basis to object to the testimony of Dr. Bulic under *Crawford v. Washington*, 541 U.S. 36 (2004), and Pham was denied his Sixth Amendment right to confront witnesses against him when counsel failed to make that objection.

Trial counsel never should have agreed to allow Dr. Bulic to testify in lieu of Dr. Parsons in the first place, or alternatively, should have moved to exclude Dr.

Bulic's hearsay testimony because it violated *Crawford v. Washington*, 541 U.S. 36 (2004). The Confrontation Clause of the Sixth Amendment provides that "[i]n all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." "Testimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59. Dr. Bulic's testimony as to the description of Phi's injuries and her cause and manner of death relied on and were directly taken from the findings and conclusions in Dr. Parson's autopsy report. Dr. Bulic's testimony was inadmissible testimonial hearsay that violated the Confrontation Clause.

In *U.S. v. Ignasiak*, the Eleventh Circuit Court of Appeals found that autopsy reports admitted into evidence in conjunction with a medical examiner's testimony, where that specific medical examiner did not personally observe or participate in those autopsies, and where no evidence was presented to show that the coroners who performed the autopsies were unavailable and the accused had a prior opportunity to cross-examine them, violated the Confrontation Clause. 667 F.3d 1217, 1231 (11th Cir. 2012). Pham acknowledges that the actual autopsy report prepared by Dr. Parsons was not entered into evidence during his guilt-phase trial. However, Dr. Bulic's testimony was based on his review of the autopsy report and extensively described findings in the autopsy report, including the location and description of

Phi's injuries and the cause and manner of death listed in the report. Even though the actual report was not admitted, the testimonial hearsay within the report, particularly the cause and manner of death found by Dr. Parsons, was testified to in front of the jury by Dr. Bulic. Pham was certainly prejudiced by the admission of Dr. Bulic's testimony, as Pham was denied his fundamental Sixth Amendment right to confront the witnesses brought against him at trial.

Reasonable jurists could disagree with the District Court's determination of Grounds Three and Six. Pham has made a substantial showing that he has been denied his right to effective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984) and the Sixth Amendment and his right to confront the witnesses brought against him under *Crawford v. Washington*, 541 U.S. 36 (2004) and the Sixth Amendment. This Court should reconsider and grant a COA.

CONCLUSION

Pham has made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2). Pham has also specified the issues for which the required showing has been made. *Id*. Therefore, a COA should issue on each ground.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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Dated: October 12, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of October, 2023, a true copy of the foregoing has been filed electronically with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to Patrick Bobek, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, at patrick.bobek@myfloridalegal.com and at capapp@myfloridalegal.com.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing was mailed to Tai A Pham, DOC # 953712, Wakulla Correctional Institution Annex, 110 Melaleuca Drive Crawfordville, FL 32327, a non-CM/ECF participant, on this 12th day of October, 2023.

/s/ Adrienne Joy Shepherd
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No. _____

IN THE

Supreme Court of the United States

TAI A. PHAM,

Petitioner,

v.

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

Respondents.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX E

United States District Court for the Middle District of Florida Order Denying Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, dated February 27, 2023.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TAI A. PHAM,

Petitioner,

v. Case No. 6:15-cv-2100-RBD-EJK

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

Respondents.
_____/

ORDER

THIS CAUSE is before the Court on Tai A. Pham's Petition for Writ of Habeas Corpus ("Petition," Doc. 1) and Memorandum of Law (Doc. 13) filed by counsel pursuant to 28 U.S.C. § 2254. Respondents filed a Response to the Petition for Writ of Habeas Corpus ("Response," Doc. 17). Petitioner was provided an opportunity to file a Reply to the Response but did not do so. For the reasons set forth below, the Petition is denied.

I. PROCEDURAL HISTORY

The State charged Petitioner by indictment with the first-degree murder of Phi Pham (Count One), the attempted first-degree murder of Christopher Higgins ("Higgins") (Count Two), armed kidnapping (Count Three), and armed burglary

of a dwelling (Count Four). (Ex. A-1 at 21-23.)[1] On November 22, 2005, the State filed a notice of intent to seek the death penalty. (*Id.* at 26.) Petitioner proceeded to trial, and a jury found him guilty as charged. *See* Ex. A-3 at 453-57.

On May 22, 2008, the jury recommended a sentence of death for Count One by a vote of ten to two. (*Id.* at 501.) The trial court sentenced Petitioner to death as to Count One and to life in prison for Counts Two, Three, and Four. (*Id*. at 558-68.)

The Supreme Court of Florida affirmed Petitioner's convictions and sentences. (Ex. E); *see also Pham v. State,* 70 So. 3d 485, 490 (Fla. 2011) ("*Pham I*"). Petitioner filed a petition for writ of certiorari with the Supreme Court of the United States, which was denied on October 3, 2011. (Ex. F-3); *see also Pham v. Fla.,* 565 U.S. 1266 (2012).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure. (Ex. G-1 at 33-171.) The circuit court denied the motion after an evidentiary hearing. (Ex. G-11 at 2060-73.) Petitioner also filed a state habeas petition. (Ex. K.) The Supreme Court of Florida affirmed the denial of the Rule 3.851 motion and denied the petition. (Ex. K); *see also Pham v. State,* 177 So. 3d 955, 959 (Fla. 2015) ("*Pham II*").

After the initiation of this action, Petitioner sought relief in the state court

[1] References to the record will be made by citing to the particular volume and page of the advanced appendix. For example, "Ex. A-1 at 1" refers to page one of the volume labeled Exhibit A-1.

pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). The state court vacated Petitioner's death sentence and granted a new sentencing hearing. (Doc. 52 at 3.) The State chose not to seek the death penalty on resentencing, and the state court sentenced Petitioner to life in prison as to Count One. (*Id.*) Subsequently, Petitioner notified the Court that Grounds One, Five, Seven, and Eight of the Petition are moot in their entirety and the action should proceed only as to the guilt phase portions of Grounds Two, Three, Four, and Six. (*Id.*)

II. STATEMENT OF FACTS

The facts adduced at trial, as set forth by the Supreme Court of Florida, are as follows:

> On March 7, 2008, Tai Pham (Pham) was convicted in Seminole County for the first-degree murder of his estranged wife Phi Pham (Phi), the attempted first-degree murder of her boyfriend Christopher Higgins (Higgins), the armed kidnapping of his stepdaughter Lana Pham (Lana), and armed burglary. Pham entered Phi's apartment where her oldest daughter, his stepdaughter Lana, was alone and awaiting Phi's return. After binding Lana, Pham hid in her bedroom for an hour, then stabbed Phi at least six times as she entered the room. Prior to returning to the apartment, Phi and Higgins were together at a party and returned in different vehicles. Phi's stabbing occurred while Higgins secured his motorcycle outside. Once Higgins entered the apartment, he struggled with Pham. During the struggle, Lana was able to get free and call the police. Higgins was severely injured during the struggle, but was able to subdue Pham until the police arrived.

Pham I, 70 So. 3d at 491.

III. GOVERNING LEGAL PRINCIPLES

A. Standard Of Review Under The Antiterrorism Effective Death Penalty Act ("AEDPA")

Under the AEDPA, federal 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). The phrase "clearly established Federal law," encompasses only the holdings of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A federal habeas court must identify the last state court decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). Where the state court's adjudication on the merits is unaccompanied by an explanation, the habeas court should "look through" any unexplained decision "to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption may be rebutted by showing that the higher state court's adjudication most likely relied on different grounds than the lower state court's reasoned decision, such as

persuasive alternative grounds briefed or argued to the higher court or obvious in the record it reviewed. *Id.* at 1192–93, 1195–96.

For claims adjudicated on the merits, "section 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005).

> 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 [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme 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 [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). "For a state-court decision to be an 'unreasonable application' of Supreme Court precedent, it must be more than incorrect—it must be 'objectively unreasonable.'" *Thomas v. Sec'y, Dep't of Corr.*, 770 F. App'x 533, 536 (11th Cir. 2019) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). If a state judge fails to resolve the merits of a claim, however, no deference is warranted under § 2254(d)(1). *Calhoun v. Sec'y, Fla. Dep't of Corr.*, 607 F. App'x 968, 970–71 (11th Cir. 2015) (citing *Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003)).

Under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court is presumed correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

Where the state court applied the correct Supreme Court precedent, the federal court must consider whether the state court unreasonably applied that precedent or made an unreasonable determination of the facts. *Whatley v. Warden*, 927 F.3d 1150, 1181 (11th Cir. 2019). "'[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.'" *Id.* at 1175 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Federal courts may review a claim *de novo* only if the state court's decision was based on an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *Id.*

B. Standard For Ineffective Assistance Of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief because his counsel provided ineffective assistance. 466 U.S. 668, 687-88 (1984). To prevail under *Strickland*, a petitioner must demonstrate "(1) that his trial 'counsel's performance

was deficient' and (2) that it 'prejudiced [his] defense.'" *Whatley*, 927 F.3d at 1175 (quoting *Strickland*, 466 U.S. at 687).

Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

IV. ANALYSIS

A. Ground Two

Petitioner asserts trial counsel rendered ineffective assistance by failing to impeach Higgins with his prior convictions. (Doc. 1 at 56-58.) In support of this ground, Petitioner notes that Higgins had nine felony convictions and seven crimes of dishonesty. (*Id.* at 57.)

Petitioner raised this ground in his Rule 3.851 motion. The state court denied relief after an evidentiary hearing. (Ex. G-11 at 2065.) The Supreme Court of Florida affirmed, reasoning that Petitioner failed to show prejudice because the evidence of his guilt was overwhelming. *Pham II*, 177 So. 3d at 962. The court reasoned that the victim's daughter witnessed the events, and her testimony was corroborated by Higgins, the first responding law enforcement officers, the 911

tape, and the physical evidence. *Id.*

The state court's denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. Lana Pham, the victim's daughter, testified that on the date of the offenses, her mother and Higgins went to a party, leaving her alone in the apartment. (Ex. A-8 at 848.) According to Lana, Petitioner broke into her apartment carrying two knives, dragged her to her bedroom, and tied her up. (*Id.* 852-53.) Approximately an hour later, her mother came back to the apartment and entered Lana's room at which time Petitioner jumped out of the closet and stabbed her. (*Id,* at 856-59.) Lana said that Higgins was not in the apartment when her mother first entered it. (*Id*. at 859.) Thereafter, Lana called 911 while Petitioner and Higgins fought in the kitchen while her mother was laying in the hallway. (*Id.* at 860.) Lana's 911-call was played for the jury. (*Id.* at 994-96.)

Consistent with Lana's testimony, Higgins testified that upon arriving at the victim's apartment, the victim entered the apartment before him while he parked his motorcycle. (*Id*. at 927-28.) Higgins said that as he approached the victim's apartment, he heard screaming coming from inside. Upon entering the apartment, he saw Lana kneeling over the victim who was laying on the floor. (*Id.* at 928-30.) According to Higgins, Petitioner came toward him swinging a knife and attacked him. (*Id.* at 931-32.) Higgins struggled with Petitioner, ending up in the kitchen. (*Id.* at 933, 936-39.)

Considering Lana's testimony, which was consistent with Higgins's testimony, a reasonable probability does not exist that the outcome of the trial would have been different had counsel impeached Higgins with his prior convictions. Accordingly, Ground Two is denied under § 2254(d).

B. Grounds Three and Six

1. Ground Three

Petitioner argues in Ground Three that trial counsel rendered ineffective assistance by allowing Dr. Predrag Bulic to testify in lieu of Dr. Thomas Parsons, who was the attending medical examiner. (Doc. 1 at 5-6.) According to Petitioner, trial counsel "had an out-of-court agreement with the prosecution that Dr. Predrag Bulic was to testify as to the contents of the files and deposition of Dr. Thomas Parsons, who was the attending medical examiner who performed the autopsy on the victim." (*Id*. at 60.)

This ground was raised in Petitioner's Rule 3.851 motion and was denied based on the following:

> There was no legal basis upon which trial counsel could have successfully objected to Dr. Bulic's testimony because he was qualified to opine on the victim's cause of death. *See Schoenwetter v. State* , 931 So. 2d 857, 870-71 (Fla. 2006). Trial counsel objected when he felt that Dr. Bulic strayed into areas where the witness was not qualified to offer an opinion. (See ROA Vol. 9, p. 1162-90). However, as to Dr. Bulic's testimony in general, any objection would have been futile, and counsel cannot be deemed to be ineffective for failing to make a futile motion. *Gordon v. State*, 863 So. 2d 1215, 1223 (Fla. 2003).

(Ex. G-11 at 2063.) The Supreme Court of Florida affirmed, reasoning that the trial court "properly summarily denied" the claim. *Pham II*, 177 So. 3d at 959.

Dr. Bulic was the associate medical examiner for Volusia and Seminole County and testified that he "reviewed thoroughly" the medical examiner's file, which included the photographs, the body diagram, Dr. Parsons' deposition, Dr. Parsons' notes associated with the file, and the autopsy report.[2] (Ex. A-9 at 1162, 1165-66.) Dr. Bulic had performed more than six hundred autopsies and performed autopsies on a daily basis. (*Id*. at 1162-63.)

Dr. Bulic formed his opinion on the manner and cause of death on the basis of his review of the autopsy report, the file, the notes and documents created by Dr. Parsons, the photographs, and the diagram. (*Id*. at 1167, 1192.) When the State asked Dr. Bulic, "what, based upon your review of the file related to Phi [Amy] Pham, what was the cause of Phi Pham's death," he answered, "[m]ultiple sharp force injuries or multiple stab injuries." (*Id*. at 1188.)

The record reveals that trial counsel objected to Dr. Bulic's testimony relating to the manner of death, having argued that it "[g]oes to an ultimate fact and issue that's to be decided by [the] jury and should not come from the mouth of this witness." (*Id*. at 1189). Further, trial counsel objected to Dr. Bulic giving his

[2] At the time of the trial, Dr. Parsons was in Texas, where he was "acting as associate medical examiner." (*Id*. at 1165.) The State was unable to obtain Dr. Parsons' presence at trial or video testimony of Dr. Parsons. (*Id*. at 1171-72.)

opinion based on matters outside of Dr. Parsons' report: "I can't tell whether that's an opinion, that doesn't sound like something Dr. Parsons wrote. It sounds like his own opinion. It sounds like beyond anything that we were advised this doctor would be testifying to." (*Id*. at 1172.) On cross-examination, trial counsel elicited that Dr. Bolic did not perform the autopsy, that Dr. Bolic was not with the medical examiner's office for Seminole and Volusia Counties at the time of the autopsy, and that his testimony was based solely from the review of the file. (*Id*. at 1190.)

The Supreme Court in *Williams v. Illinois*, 567 U.S. 50 (2012), discussed expert witness opinion testimony:

> It has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue even if the expert lacks first-hand knowledge of those facts.
>
> At common law, courts developed two ways to deal with this situation. An expert could rely on facts that had already been established in the record. But because it was not always possible to proceed in this manner, and because record evidence was often disputed, courts developed the alternative practice of allowing an expert to testify in the form of a "hypothetical question." Under this approach, the expert would be asked to assume the truth of certain factual predicates, and was then asked to offer an opinion based on those assumptions. The truth of the premises could then be established through independent evidence, and the factfinder would regard the expert's testimony to be only as credible as the premises on which it was based.

Id. at 67-68. Here, Dr. Parsons performed an autopsy on the victim. He documented his findings in a report. Dr. Bulic reviewed that report and testified as to his own, independent, expert opinion. Dr. Bulic was cross-examined at trial.

The autopsy report, which was not admitted at trial, was not prepared for the primary purpose of accusing Petitioner; rather, it was prepared to determine the victim's cause and manner of death. In fact, Dr. Bulic stated "[a]n autopsy… is a medical procedure . . . in order to determine the cause and manner of death." (Ex. A-9 at 1163.) "Florida cases explicitly hold that it is proper to permit a substitute medical expert to testify as to cause of death despite the fact that the expert did not perform the autopsy, when the substitute medical expert relies on the autopsy report." *Banmah v. State*, 87 So. 3d 101, 103 (Fla. 3rd DCA 2012). Moreover, "autopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution." *Id*.

Trial counsel had no basis to object to the testimony of Dr. Bulic. Under the circumstances, trial counsel did not act deficiently, and there has been no showing of prejudice. The state court's denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, Ground Three is denied under § 2254(d).

2. Ground Six

Petitioner argues in Ground Six that appellate counsel rendered ineffective assistance by "failing to raise a specific claim regarding the presentation of Dr. Predrag Bulic's hearsay testimony . . . in lieu of Dr. Thomas Parsons' the attending medical examiner . . . ." (*Id*. at 72). This ground was raised in the petition for writ

of habeas corpus filed with the Supreme Court of Florida. (Ex. K.) The Supreme Court of Florida denied the claim. *Pham II*, 955 So. 3d at 963.

It is well-established that a defendant has the right to effective counsel on appeal. *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984). The standard for analyzing ineffective assistance claims is the same for trial and appellate counsel, *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987), and the Eleventh Circuit Court of Appeals has applied the Supreme Court's test for ineffective assistance at trial to guide its analysis of ineffective assistance of appellate counsel claims. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991).

As discussed with regard to Ground Three, there was no basis upon which to raise an objection with regard to Dr. Bulic's testimony. Thus, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

Moreover, the record reflects that Petitioner's appellate counsel raised several claims on direct appeal. Petitioner's appellate counsel submitted an initial brief which was comprehensive, thorough, and well-argued. Certainly, the record clearly evinces the thoroughness and reasonableness of appellate counsel's work. *Cf. Thomas v. Scully*, 854 F. Supp. 944 (E.D.N.Y. 1994) (the appellate brief submitted by counsel clearly showed the thoroughness of counsel's work). The fact that this claim might have succeeded "does not lead automatically to the conclusion that [Petitioner] was deprived of a constitutional right when his lawyer failed to assert

such a claim." *Woodfork v. Russell*, No. 92-4301, 1994 WL 56933, at *4 (6th Cir. February 24, 1994) (unpublished opinion). As discussed by the district court in *Richburg v. Hood*, 794 F. Supp. 75 (E.D.N.Y. 1992),

> [T]he court simply notes that the decision of appellate counsel to choose among plausible options of appellate issues is preeminently a strategic choice and is "virtually unchallengeable." The petitioner has not even undertaken to demonstrate that the decision of his attorney not to raise this issue constituted an "unprofessional error" or that such error prejudiced his appeal.

Id. at 78.

In this case, the Court finds that appellate counsel's decision not to pursue this claim was consistent with reasonable appellate strategy that, under the deferential standard of review articulated in *Strickland*, should not be second-guessed. *See Gray v. White*, No. C-94-2434 EFL, 1997 WL 16311, at *9 (N.D. Cal. January 6, 1997) ("appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. The weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy.") (citations omitted).

Accordingly, in light of (1) the discretion afforded to appellate counsel in selecting those claims most promising for review, and (2) Petitioner's failure to demonstrate that this claim would have been viable on appeal, the Court finds that

appellate counsel's performance was not deficient and that Petitioner has not shown prejudice. Hence, Ground Six must fail.[1]

C. Ground Four

Petitioner contends that that the cumulative effect of counsel's errors deprived him of a fair trial. (Doc. 1 at 65.) Petitioner raised this ground in his Rule 3.851 motion. The Supreme Court of Florida affirmed the circuit court's denial of this ground because Petitioner failed to demonstrate any errors occurred. *Pham* II, 177 So. 3d at 962.

The state court's denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. Petitioner has not demonstrated that any errors occurred during his guilt phase. Accordingly, Ground Four is denied under § 2254(d).

Any allegations not specifically addressed lack merit.

V. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must

[1] Further, the Court finds that this ground is precluded by section 2254(d). The Supreme Court of Florida's denial of this ground was not contrary to, or an unreasonable application of, clearly established federal law.

demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. But a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not shown that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby **ORDERED** and **ADJUDGED**:

1. The Petition (Doc. 1) is **DENIED**, and this case is **DISMISSED with prejudice**.

2. Petitioner is **DENIED** a Certificate of Appealability.

3. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on February 27, 2023.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Counsel of Record

No. _____

IN THE

Supreme Court of the United States

TAI A. PHAM,

Petitioner,

v.

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

Respondents.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX F

Petition Under 28 U.S.C.§ 2254 for Writ of Habeas Corpus by a Person in State Custody, filed December 15, 2015.

PETITION UNDER 28 U.S.C. §2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	**District:** Middle District of Florida, Orlando Division
Name (under which you were convicted) TAI A. PHAM	**Docket or Case No.** 6:15-CV-2100-ORL-37-TBS
Place of Confinement: Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026	**Prisoner No.:** DOC # 953712
Petitioner **(include the name under which you were convicted)** **TAI A. PHAM** **v.**	**Respondent** **(authorized person having custody of petitioner)** **JULIE L. JONES** **Secretary,** **Florida Department of Corrections**
The Attorney General of the State of FLORIDA	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida, 101 Bush Boulevard, Sanford, Florida 32773.

(b) Criminal docket or case number(s) (if you know): **2005CF4717A**

2. (a) Date of the judgment of conviction (if you know): **March 7, 2008.**

(b) Date of sentencing: **November 14, 2008.**

3. Length of sentence: **Sentenced to death as to count one of the indictment for first degree murder and to life on counts two to four of the indictment for attempted murder, armed burglary of a dwelling, and kidnapping, to run concurrently.**

4. In this case, were you convicted on more than one count or of more than one crime?
☒**Yes** ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case:
One count of First Degree Murder in violation of Fla.Stat. §§§782.04(1)(a)(2005); one count of Attempted First Degree Murder in violation of Fla.Stat. §§§777.04(1)(4)(b),782.04(1)(a)1, and 775.087(1)(2005); one count of Armed Kidnapping in violation of Fla.Stat. §§787.01(1)(a)(2) and 775.087(1)(2005); and one count of Armed Burglary of a Dwelling in violation Fla.Stat. §810.02(1)(b) and 2(b) and 810.07(2005).

6. (a) What was your plea? (Check one)

☒ **(1) Not guilty** ☐ (3) Nolo contendere (no contest)
☐ (2) Guilty ☐ (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ **Jury** ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☒ Yes ☐ **No**

8. Did you appeal from the judgment of conviction?

☒**Yes** ☐ No

9. If you did appeal, answer the following:

DIRECT APPEAL:

(a) Name of court: **Florida Supreme Court.**

(b) Docket or case number (if you know): **SC08-2355.**

(c) Result: **Affirmed.**

(d) Date of result (if you know): **June 16, 2011.**

(e) Citation to the case (if you know): ***Pham v. State*, 70 So. 3d 485 (Fla. 2011).**

(f) Grounds raised:

I. In violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, sections 9, 16, 17, and 11 of the Florida Constitution, Appellant is entitled to a new trial because of improper comments by the prosecutor in his closing arguments.

II. **In violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, sections 9 and 22 of the Florida Constitution, the trial court erred in denying the appellant's motion for mistrial and motion for new penalty phase where the evidence revealed that there was clear juror misconduct.**

III. **In violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, sections 9 and 22 of the Florida Constitution, the trial court erred in taking testimony regarding appellant's prior battery on a law enforcement office conviction and in relying on such conviction to support a finding of prior violent felony in aggravation.**

IV. **Appellant's death sentence is invalid under the State and Federal Constitutions because the facts that must be found to impose it were not alleged in the charging document nor were they unanimously found to exist beyond a reasonable doubt by a 12-person jury.**

V. **In violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the Florida Constitution, the trial court imposed the death penalty upon an erroneous finding that the murder was committed in a heinous, atrocious, and cruel manner.**

VI. **In violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the Florida Constitution, the trial court imposed the death penalty upon an erroneous finding that the murder was committed in a cold, calculated and premeditated manner.**

VII. **In violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 17 of the Florida Constitution, the imposition of the death penalty is proportionately unwarranted in this case.**

(g) Did you seek further review by a higher state court? ☐ Yes ☒ **No**

The Florida Supreme Court is the highest State reviewing court.

If yes, answer the following:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Result:

(4) Date of result (if you know):

(5) Citation to the case (if you know):

(6) Grounds raised:

(h) Did you file a petition for certiorari in the United States Supreme Court?

☒**Yes** ☐ No

If yes, answer the following:

(1) Docket or case number (if you know): **11-8281**

(2) Result: **Denied**

(3) Date of result (if you know): **March 19, 2012.**

(4) Citation to the case (if you know): ***Pham v. Florida*, 132 S. Ct. 1752 (2010).**

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

☒**Yes** ☐ No

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

(a) (1) Name of court: **Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida.**

(2) Docket or case number (if you know): **2005CF4717A**

(3) Date of filing (if you know): **February 25, 2013.**

(4) Nature of the proceeding: **Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851.**

(5) Grounds raised [**as titled in the Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851**]:

CLAIM 1 [1]

TRIAL COUNSEL FAILED TO CONSULT WITH AN EXPERT SUCH AS A FORENSIC SPECIALIST TO ASSESS THE FORENSIC BLOOD EVIDENCE IN MR. PHAM'S CASE WAS INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THIS EXPERT WOULD HAVE AIDED TRIAL COUNSEL IN CHALLENGING THE PROSECUTION'S VERSION OF THE EVENTS. FURTHERMORE, TRIAL COUNSEL FAILED TO PUT ON THE DNA ANALYSIS OF THE BLOOD EVIDENCE THROUGH CRIME LABORATORY ANALYST VICKI LEE BELLINO. THIS FAILURE PREJUDICED MR. PHAM BECAUSE IT DEPRIVED HIM OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING OF THE PROSECUTION'S EVIDENCE DURING HIS TRIAL WITHOUT OBJECTION. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 2

TRIAL COUNSEL FAILED TO ENSURE A CONSTITUTIONAL JURY FOR MR. PHAM BY FAILING TO QUESTION EVERY JUROR EMPANELED REGARDING THE RACIAL BIAS THAT WAS IMPLICATED DURING DELIBERATIONS. THIS PREJUDICED MR. PHAM BECAUSE IT UNDERMINED THE CONFIDENCE IN THE OUTCOME OF THE TRIAL PROCEEDINGS. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 3

TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE AGREED TO ALLOW DOCTOR PREDRAG BULIC TO TESTIFY IN LIEU OF DOCTOR THOMAS PARSONS, THE ATTENDING MEDICAL EXAMINER. THIS PREJUDICED MR. PHAM BECAUSE TRIAL COUNSEL EFFECTIVELY PERMITTED THE PROSECUTION TO BE RELEASED OF THEIR BURDEN. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS

[1] This Claim was subsequently dropped by the Petitioner Tai Pham at the Case Management Conference.

AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 4

TRIAL COUNSEL FAILED TO MOVE TO DISQUALIFY THE CIRCUIT COURT JUDGE FROM MR. PHAM'S CASES DUE TO JUDICIAL BIAS TOWARDS DEPUTY OLLIANDER CSISKO WHO TESTIFIED TO A STATUTORY AGGRAVATOR. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 5

TRIAL COUNSEL FAILED TO PRESENT THE WISHES OF THE VICTIM'S MOTHER THAT MR. PHAM NOT RECEIVE A SENTENCE OF DEATH TO THE OFFICE OF THE STATE ATTORNEY FOR PURPOSES OF PLEA NEGOTIATIONS. MR. PHAM WAS PREJUDICED AS THE OFFICE OF THE STATE ATTORNEY DID NOT HEAR OF THE VICTIM'S MOTHER'S WISHES. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 6

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY ALLOWING IN ALLEGED EVIDENCE OF MR. PHAM'S PROPENSITY FOR VIOLENCE AND BAD CHARACTER EVIDENCE. THIS PREJUDICED MR. PHAM BECAUSE TRIAL COUNSEL UNNECESSARILY COLORED MR. PHAM AS A PERSON WHO IS VIOLENT AND A HARSH DISCIPLINARIAN. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE

STATE OF FLORIDA.

CLAIM 7

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBTAIN AND TO IMPEACH WITNESS CHRISTOPHER DALE HIGGINS WITH HIS PRIOR FELONY CONVICTIONS AND CRIMES OF DISHONESTY. THIS FAILURE PREJUDICED MR. PHAM BECAUSE TRIAL COUNSEL COULD NOT ARGUE THAT WITNESS CHRISTOPHER DALE HIGGINS WAS A MULTI-CONVICTED FELON WITH CREDIBILITY ISSUES. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 8

CUMULATIVELY, THE COMBINATION OF THE PROCEDURAL AND SUBSTANTIVE ERRORS DURING THE GUILT PHASE PROCEEDINGS DEPRIVED MR. PHAM OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 9

TRIAL COUNSEL FAILED TO CONDUCT A REASONABLE AND COMPETENT MITIGATION INVESTIGATION OF MR. PHAM'S INFANTHOOD AND CHILDHOOD IN VIETNAM AND PRESENT THIS MITIGATION TO THE JURY. TRIAL COUNSEL FAILED TO CONTACT AND INTERVIEW MR. PHAM'S MOTHER AND SIBLINGS REGARDING MR. PHAM'S LIFE FROM BIRTH UNTIL HE ESCAPED FROM VIETNAM AND TO PRESENT THIS WEIGHTY MITIGATION TO THE JURY. TRIAL COUNSEL ALSO FAILED TO PROVIDE THIS EVIDENCE TO THEIR EXPERTS IN ASSESSING MR. PHAM'S MENTAL AND BEHAVIORAL ISSUES THAT EXISTED IN HIS INFANTHOOD AND CHILDHOOD. MR. PHAM'S JURY WAS DEPRIVED OF WEIGHTY MITIGATING EVIDENCE THAT SHOWED FIRST-HAND KNOWLEDGE OF MR. PHAM'S PROBLEM THROUGHOUT HIS EARLIER YEARS WHICH PREJUDICED MR. PHAM. MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE

UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 10

TRIAL COUNSEL FAILED TO INVESTIGATE OR OBTAIN RECORDS FROM THE ILLINOIS DEPARTMENT OF CHILDREN AND FAMILIES THAT SHOWED EVIDENCE OF MR. PHAM'S CONSISTENT PROBLEMS FROM A YOUNG CHILD WHILE AS A WARD OF THE STATE OF ILLINOIS. TRIAL COUNSEL FURTHER FAILED TO CONTACT WITNESSES TAM DANG WEI, PH.D. AND VERL JOHNSON-VINSTRAND, B.S., REGARDING MR. PHAM'S BACKGROUND WHEN HE ENTERED THE UNITED STATES AND HIS BEHAVIOR ISSUES WHILE FOSTER CARE. TRIAL COUNSEL ALSO FAILED TO PROVIDE THIS VITAL INFORMATION TO THEIR EXPERTS. MR. PHAM'S JURY WAS DEPRIVED OF WEIGHTY MITIGATING EVIDENCE THAT SHOWED FIRST-HAND KNOWLEDGE OF MR. PHAM'S DIFFICULT AND TROUBLED CHILDHOOD, WHICH PREJUDICED MR. PHAM AS HIS JURY DID NOT HAVE A COMPLETE PICTURE OF HIS CHILDHOOD. MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 11

TRIAL COUNSEL FAILED TO OBTAIN RECORDS FROM THE FLORIDA STATE HOSPITAL, WHICH CONTAINED MR. PHAM'S SUBSTANCE ABUSE REPORTS AND REPORTS OF HIS MENTAL HEALTH PROBLEMS AND TO PROVIDE THEM TO HIS EXPERTS PRIOR TO THE RENDERING OF THEIR OPINIONS. MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 12

TRIAL COUNSEL FAILED TO ENSURE THAT MR. PHAM RECEIVED A REASONABLY COMPETENT MENTAL HEALTH EVALUATION. TRIAL COUNSEL FAILED TO PRESENT COMPETENT AND CREDIBLE STATUTORY AND NON-STATUTORY MITIGATING EVIDENCE OF MR. PHAM'S MENTAL ILLNESS AND POTENTIAL BRAIN

DAMAGE TO THE JURY. TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE OF COUNSEL PREJUDICED MR. PHAM BECAUSE HIS JURY LACKED THE KNOWLEDGE AS TO THE EXISTENCE OF THESE MITIGATING CIRCUMSTANCES THUS UNDERMINING THE RECOMMENDATION FOR DEATH. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 13

TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATING EVIDENCE OF MR. PHAM'S SUBSTANCE ABUSE HISTORY WAS INEFFECTIVE ASSISTANCE OF COUNSEL AND PREJUDICED MR. PHAM BECAUSE HIS JURY LACKED THE KNOWLEDGE AS TO THE EXISTENCE OF THIS NON-STATUTORY MITIGATOR THUS UNDERMINING THE RECOMMENDATION FOR DEATH. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 14

TRIAL COUNSEL'S FAILURE TO BE AN ADVERSARY FOR HIS CLIENT BY AGREEING TO ALLOW DOCTOR PREDRAG BULIC TO TESTIFY IN LIEU OF DOCTOR THOMAS PARSONS, THE ATTENDING MEDICAL EXAMINER, AS TO STATUTORY AGGRAVATORS. THIS PREJUDICED MR. PHAM BECAUSE TRIAL COUNSEL EFFECTIVELY PERMITTED THE PROSECUTION TO BE RELEASED OF THEIR BURDEN. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 15

TRIAL COUNSEL FAILED TO PRESENT AT THE PENALTY PHASE OR AT THE *SPENCER* HEARING THE VICTIM'S MOTHER'S TESTIMONY THAT SHE HAD FORGIVEN MR. PHAM AND THAT SHE KNOWS HE IS REMORSEFUL. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 16

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO THEIR FAILURE TO MAKE SPECIFIC OBJECTIONS TO PREJUDICIAL VICTIM IMPACT EVIDENCE PRESENTED AT THE PENALTY PHASE, SPECIFICALLY THE TESTIMONY OF MR. CHRISTOPHER HIGGINS, THE SHORT-TERM BOYFRIEND OF THE VICTIM. AS A RESULT OF TRIAL COUNSEL'S DEFICIENT PERFORMANCE MR. PHAM WAS DEPRIVED OF HIS RIGHTS AFFORDED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 17

CUMULATIVELY, THE COMBINATION OF THE PROCEDURAL AND SUBSTANTIVE ERRORS DURING THE PENALTY PHASE PROCEEDINGS DEPRIVED MR. PHAM OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 18

TRIAL COUNSEL FAILED TO CHALLENGE THE STATE OF FLORIDA'S ALLEGED VIOLATION OF VIENNA CONVENTION ON CONSULAR RELATIONS, APRIL 24, 1963, ART. 36, 21 U.S.T. 77, 101, 596 U.N.T.S. 261, WHICH REQUIRES THAT UNITED STATES AUTHORITIES "INFORM THE [DEFENDANT] WITHOUT DELAY OF HIS RIGHTS" TO COMMUNICATE WITH CONSULAR OFFICERS FROM HIS COUNTRY OF CITIZENSHIP, IN DEALING WITH MR. PHAM WHO IS A VIETNAMESE CITIZEN.

CLAIM 19

CUMULATIVELY, THE COMBINATION OF THE PROCEDURAL AND SUBSTANTIVE ERRORS DURING THE GUILT PHASE AND PENALTY PHASE PROCEEDINGS DEPRIVED MR. PHAM OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 20

FLORIDA STATUTE SECTION 945.10 PROHIBITS MR. PHAM FROM KNOWING THE IDENTITY OF THE EXECUTION TEAM MEMBERS THUS DEPRIVING MR. PHAM OF HIS RIGHTS GUARANTEED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

CLAIM 21

MR. PHAM MAY BE INCOMPETENT AT THE TIME OF THE EXECUTION THUS DEPRIVING HIM OF HIS RIGHTS GUARANTEED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS PURSUANT TO THE DECLARATION OF RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒**Yes** ☐ No

The post-conviction court granted an evidentiary hearing as to the claims numbered four, five, six, seven, nine, ten, eleven, twelve, thirteen, and fifteen of Tai Pham's Motion to Vacate Judgment of Conviction and Sentence. The post-conviction court reserved ruling on the legal claims numbered eight, sixteen, seventeen, nineteen, twenty, and twenty-one. The post-conviction court orally announced its denial of an evidentiary hearing as to claims two, three, fourteen, and eighteen.

(7) Result: **All Claims were denied.**

(8) Date of result (if you know): **The post-conviction court issued a written order dated December 20, 2013.**

(b) If you filed any second petition, application, or motion, give the same information: **No**

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ **No**

(7) Result:

(8) Date of result (if you know):

(c) If you filed any third petition, application, or motion, give the same information: **No.**

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ **No**

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion? Yes, to the Supreme Court of Florida.

(1) First petition: ☒**Yes** ☐ No **[Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851.]**

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: **Not applicable.**

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE

THE POST-CONVICTION COURT ERRED IN DENYING TAI PHAM'S MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AFTER CONDUCTING AN EVIDENTIARY HEARING ON PENALTY PHASE CLAIMS 9, 10, 11, 12, AND 13, THUS VIOLATING HIS RIGHTS PURSUANT TO THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *WIGGINS V. SMITH*, 539 U.S. 510, 123 S.Ct. 2527, 156 L. Ed. 2d 471 (2003), *PORTER V. MCCOLLUM*, 558 U.S. 30, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009), & *ROBERTS V. LOUISIANA*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The post-conviction court in its Order denying relief found that

> "Trial counsel *did not provide a satisfactory explanation for the failure to obtain much of this evidence*. While it is unclear whether a trip to Vietnam for face-to-face interviews would have been necessary or approved, there was certainly no impediment to making telephone calls to the family. The witnesses from the Illinois Department of Children and Families testified that they were available and willing to testify and that their records would have been provided had such a request been made. Similarly, there is little doubt that the records from the Florida State Hospital would have been provided."

(emphasis added).

A grand jury returned an indictment for the Petitioner, Tai Pham ("Tai"), on November 8, 2005, for one [1] count of First Degree Murder in violation of Fla.Stat. §782.04(1)(a)(2005), for one [1] count of Attempted First Degree Murder in violation of Fla.Stat.

§§§777.04(1)(4)(b),782.04(1)(a)1, and 775.087(1)(2005), for one [1] count of Armed Kidnapping in violation of Fla.Stat. §§787.01(1)(a)(2) and 775.087(1)(2005); and for one [1] count of Armed Burglary of a Dwelling in violation Fla.Stat. §§810.02(1)(b) and 2(b) and 810.07(2005). R1/21-23. The victim as to count one [1] is Phi Amy Pham ("the victim"). Tai was tried in the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County. The Office of the Public Defender in and for the Eighteenth Judicial Circuit was appointed to represent Tai, specifically Attorneys James Earl Figgatt and Timothy Dale Caudill.

The trial court found the following statutory aggravators and corresponding assigned weights:

> (1) Florida Statutes, Section 921.141(5)(b): The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person [great weight].
> (2) Florida Statutes, Section 921.141(5)(d): The capital felony was committed while the defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb [moderate weight].
> (3) Florida Statutes, Section 921.141(5)(h): The capital felony was especially heinous, atrocious, or cruel [great weight].
> (4) Florida Statutes, Section 921.141(5)(i): The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. This Court found that no evidence of any moral or legal justification was presented and argued.

The trial court made the following findings with regard to the statutory and non-statutory mitigators and corresponding assigned weights:

> (1) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. This Court did not find "extreme" mental or emotional disturbance and gave moderate weight to this mitigator as a non-statutory mitigator.

(2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. This Court gave moderate weight to this mitigator as a non-statutory mitigator.
(3) The existence of any other factor in the Defendant's background. This Court gave great weight to this mitigator.
(4) The defendant had a stable employment history. This Court gave this mitigator some weight.
(5) The defendant was a good father and caring husband. This Court found that this was not established.
(6) The defendant cared for his sister's children for two weeks while their parents recuperated from a car accident. This Court found it not to be a mitigator.

At the post-conviction hearing the following evidence was presented at the evidentiary hearing in support of Tai's claims 9, 10, 11, 12,and 13, which are intertwined:

Tai's mother, Nho Thi Nguyen ("Mama"), his sisters, Kim Oanh Pham ("Kim") & Thuy Thi Nga Hang Pham ("Hang"), and his brother, Anh Tuan Pham ("Tuan"), all live in Vietnam and testified at the hearing[2]. Tai's sister, Thi Ngoc Anh Pham ("Ngoc") who lives in Paris, France, also testified. Mama, Kim and Hang met Phi and her mother after Zena's birth in Vietnam. Tai paid for their trip, but he did not come so that he could work and buy a house. In 2005, the family learned about Tai's arrest from Thuy, who called Mama. The family could have been reached by telephone from 2005 to 2008, but none of them were contacted. All of the family members would have spoken to counsel, investigators, or experts.

Kim is 12 years older than Tai and was born in the same house as Tai. Kim took care of her siblings because her father was in the military and Mama was away selling vegetables. She described the family and Tai's frightful experiences in Vietnam. Their father fought in the South Vietnam Army against the Communists and would leave home and periodically return. As children of a South Vietnamese soldier, they were in danger of being killed by the Communists. The Pham

[2] The siblings are Hang, Tuan, Thuynga ("Thuy"), Anh Tu ("Tu"), Ngoc, Anh Vu Thuy, and Thi Vu Vi.

children were "very scared" of the Communists. Their grandfather died while in a North Vietnamese jail/ prison. Kim testified

> "[a]t the time, near our house, there's cathedral and on top there's people . . . surveying. And if there's Communists coming or something happen, they will ring the bell we all go to the neighbor to go under the basement. Whenever come down, we will go back and it's like that continuing over and over."

She was "afraid of gun" and she saw people being killed. Mama corroborated that Tai was with them "when they were fighting we run to our neighbor, there's a basement, we run over there. When everything calm down, we get back home and we got to bed." They were frightened and "shaken."

Tai had several problems as a newborn. He weighed 2 kilograms at birth and was the smallest baby among all of the siblings. Mama corroborated that Tai weighed about 2 kilos while her others weighed over 3 kilos. Tai had a "real big" tumor on the right side of his head when he was a few months old. They tried to treat it with a patch but it burst and bled "on the pillows." He was taken to the emergency room where he was treated with a band aid and a pill for the fever. Mama was frightened that he would die. Tai was the only child to suffer from this and it took a long time for him to recover. He cried every night for Mama, who kept carrying him.

Kim detailed problems from Tai's infanthood and childhood, which included "lots of fever," "nose bleeds," falling more often than other children, and problems defecating and urinating in appropriate places. Kim cleaned up after her brother, who despite being told how to go properly to the bathroom, kept "forgetting" and defecated "all over." This happened even when he was 4 or 5 years old. Tai wet his bed until he left Vietnam. Tai wet his pants when he was at school. Tuan and Mama corroborated this. Tai cried a lot and he "used to bang his head on the floor" when he cried.

In comparison to his siblings, Tai was "a little bit slower." He did not start talking until he

was "around fourteen, fifteen months" and he did not start walking until he was "around two years old." Mama corroborated this. Kim testified about problems that Tai had at school and with other children. He was very slow in school, he "can't study that well," "[h]e has ugly handwriting," and he was not really good at reading. He was teased at school and called a "dummy" or "a stupid dummy." He had to repeat a grade "sometime three years in one grade." These failures made him "sad" and the children made fun of him. He did not have a lot of friends, and preferred to stay at home a lot. Tuan and Mama confirmed this.

Kim detailed memory problems that Tai had from the age of 5 or 6 to about 9. Tai was quite forgetful and he would forget "whatever [they] taught him the day, the next day he would go to school and he couldn't remember. Like the house work, like we say please do this and he just couldn't remember." Tai would "sometimes [he] remember, sometime [he] not" remember to change his clothes. Tai forgot his books and to do things in school. He skipped school occasionally[3] because "he couldn't remember the lessons." Their father disciplined Tai by whipping him on the butt with a long stick that he kept in the corner.

Kim detailed that from a young age Tai had an innate ability to fix things. Tai "usually go to the next door neighbor that man he work on the auto and he watch him to put the light in and he would go home and try to do it." She recalled that Tai "used to get the stick, tie together and put the battery and then he would put it down and make it like a boat. He used to buy the cover and he like to do the flashing light for Christmas." Tai was better at fixing things than he was at school.

As military children, they were not allowed to move up to the next grade in school thus people left "to find the freedom." All of the Pham family tried to escape. Families left in small groups to avoid detection by "the undercover." They had to travel far to the closest port of Vung

[3] This behavior was commonplace for Tai and continued in foster care in Illinois.

Tran. Tai was about 8 or 9 years old when he was forced to escape. Tai's first failed attempt was with his older sister Hang. Hang was imprisoned for 3 years while Tai was imprisoned for 3 months because he was a child. Kim was present when Tai returned home from prison. Tai was "very scared" and "[v]ery happy" to be home. Tai told her that he "never want to escape again." However, unbeknownst to him, in about 2 or 3 days, Tai was tricked again to escape with Thuy. This was the last time that he saw his home and Kim. Despite the promise of freedom, Tai never wanted to leave; he "just want to stay home with mom."

During this time, Tai suffered the tragic loss of his brother, Tu. Tai and Tu were very close and loved each other. Tu was killed on the way back from dropping off their youngest sister at school. While on a bicycle, Tu "tried to move over and another car came up, ran over him, ran over his throat." Tai was frightened when he saw Tu's body in a casket. He was told to go up to the casket and apologize for what he bad he had done.

Mama was 17 when she married Tai's father, who passed away in about 1997. The father fought in the battlefield until a surgery for his intestines forced him to leave, but he continued to work in the office. Tai's father was "always on the go" and Mama would "stay home by [her]self." Tai's father was fighting in the war when he was born. At the time, there was an armed military presence in their village, and they heard gunshots and saw dead bodies and guns all over the streets. It was dangerous for the family that the Communists knew Tai's father was Anti-Communist.

Mama detailed her difficult pregnancy with Tai. He was her 6th child and pregnancy with him was "the most complicated." Mama testified that she was very weak, sick, and threw up. Tai was the most difficult child to carry of all of her children under the same health care conditions. There were problems with the delivery. Mama delivered most of her children in a day but it took 3 days to deliver Tai. Mama testified that:

> "[a]fter the three days, [she] was in pain and they wanted to transfer [her] into a hospital in Saigon, okay. [She] was laying there is pain and the two nurses keep talking that should move me in a bigger hospital to Saigon, but then finally, he came out, [she] was bleeding, and they never transport [her] to the other hospital."

Mama believed her baby was going to die.

Mama gave additional details about Tai's schooling problems. Mama and her husband had to go see Tai's teachers to discuss the problems he had at school. They begged the teachers to not to kick him out. Tai failed all the time and he could not study. Mama testified that "it was too difficult to teach him." Unlike school, her son was good with "electricals." Tai was bullied by the other children and was called "dumb" and made fun of because he failed at school. Mama loved Tai the most and she protected him from the children who picked on him. They had a very close relationship. Tai wanted to grow up to be a soldier like his father. Tai heard from the maternal grandmother about the death of his maternal grandfather at the hand of the North Vietnam Communists because he was Catholic. Tuan corroborated this traumatic event.

Mama detailed the discipline that Tai received from his father. She testified that this is how "[t]he good family" disciplined their children. Mama confirmed that when Tai would get angry and he would "cover his head to the ear and bang down on the floor until his forehead all scratched."

Mama detailed her family's experiences trying to escape from Vietnam. Mama and her husband "thought was because of the children of the military person, they didn't get to be treated good, so we told them to let them go, escape to another country, that way they will have their future and freedom." She was afraid for her boys because they could get drafted. Also, there was gun fighting "[p]retty close to their home and they were "pretty scared."

Their family's intention was to build a boat so that the whole family could escape but when the owner of the boat went to jail, they had to send their children separately. They had to pay "two

sticks of gold" to someone to take their children separately. Tuan tried several times to escape but was captured. Kim tried to escape once with the family. Hang tried to escape with Tai but they were captured. Hang was afraid to try to escape again. Ngoc and Tuan also unsuccessfully tried to escape.

Mama had to lie to Tai twice because he did not want to leave her. Before the first escape, Mama lied to Tai and told him to go play with his sister. He did not want to go and he "couldn't understand why [she] kept wanting him to go far away." Three months after his capture, Tai returned home and was "shocked but happy. And he kept holding [Mama] and cry." Tai was "afraid that [she] abandoned him." He was happy to be home and he held Mama as they both cried. However, Mama made the difficult decision to send Tai away again because she wanted him to have a future. Tai was sent away in less than a week. She lied to him again told him that he was going to the zoo because he did not want to go. This was the last time that she saw her son.

Tuan is 8 years older than Tai. The children of anti-Communist fighters were treated differently and were not allowed to go to college. Around the age of 18, the boys would be drafted into the Communist Army. Tuan witnessed Tai being bullied by other children and being called "moc, moc" which meant "a little crazy." Tai reacted angrily to being bullied. He recalled when a child threw a rock at Tai's forehead causing it to bleed. The children stole Tai's marbles.

At the age of 4 or 5, Tai smoked cigarettes that he stole from his father. His father disciplined Tai by tying him up because he would not listen. It was normal to discipline children by hitting them with sticks.

Tuan tried to escape at least 7 or 8 times but was caught each time. He tried to escape because "in Vietnam the life was pretty tough business or anything so we just want to escape a better future, education and everything." He was arrested and imprisoned for 3 to 4 months when

Tai escaped with Hang. The last time he saw his brother was at Tu's funeral.

Prior to France, Ngoc lived in Vietnam. Ngoc tried to escape around the same time. She was not successful in her escape and was captured with Tuan. She was released early because of her age. Ngoc was 8 or 9 years old, when her family convinced her to go to another country because they were scared. Ngoc testified there "was no food, no good life in Vietnam so they wanted to leave the country, go to another one, a better education, the better life."

Ngoc and Tuan left home and went by bus to Vung Tau. Once they got there, the police spotted them and they all scattered and went through the woods to hide for a while. They made their way to a small boat to take them to a big boat. There was a leader who directed them. They were eventually captured a week later on the big boat along with 63 people. They were all stuffed "underneath of the boat and they shut the top" and she could not breathe. She cried and was looking for her brother. Two days later, they were out in the open water and the top was opened and they had air. For a week "they had no drink, no food, no toilet, nothing." The people were on top of each other in the boat. During a storm at night, the boat was turned upside-down and she was hanging on the side of the boat when she heard someone say they were going to die if they continued. So, they decided to all go back to an island. Then, they were captured and were divided into two groups, male and female. She lost her brother at the time and was really scared. She ended up in a prison, where she met a woman who took her in as a daughter and let her sleep next to her on the floor. She recalled that there was some water on the island and each day they got a half-bowl of rice. Ngoc was very hungry and picked leaves and fruit. Ngoc was imprisoned for 2 months and then was able to go back home and she "never again" tried to escape. She got married and her husband provided her with emotional and familial support.

Hang and Tai grew up in the same house. She testified about the harsh poverty conditions

that they grew up in. It was very hard to get food and the government gave them a certain ration a month. They had to stand in long lines to get their food, which included Tai who helped carry food back. Hang described the food as "terrible." They also stood in line for 1 meter of clothing material a year for each family member. They obtained their water from a well which they had to boil. Hang was present when Tai saw dead bodies all over in the village.

Unlike Tai, Hang wanted to leave Vietnam because she wanted "to move up to college, but because [she was] a daughter of an ex-military, so they wouldn't let [her] go to college." Hang asked her father so that she could "come to the states to study." It was Tai's parents who made the decision that Tai was to leave with her.

Hang provided a first-hand account of the attempted escape and all of the harrowing details of the suffering that she and Tai endured. Hang testified that they left in July of 1982. Mama gave Hang "a little money" and "a gold ring" and told her to take Tai into town. Hang was about 19 or 20 years old and Tai was 9. They lied to Tai and told him that they were going out to play. He had no idea that they were going to leave home and he never said good-bye. They left at 4 a.m. and walked to a bus station. There was a leader who directed them and others. Hang recalled there were 7 or 8 people with them. They got on to the bus headed to town where they arrived at 7 p.m. The leader took them to a house to hide from the soldiers. There were a total of about 20 people. They were instructed to stay and that later they would be taken to the boat.

Unfortunately, the soldiers found them hiding. The soldiers "first came in with the gun, they said, you all stand against the wall and throw all the money, all the gold, whatever valuable thing you have, put them down on the floor." They pointed the guns at all of them including Tai. The soldiers were screaming at them when they first came in about being escapees. They took the valuables and moved them into a temporary cell where they interrogated them about their ages and

names. They tied about "ten-ish" prisoners to each other and transported them to the cell. Tai was with her throughout this ordeal and he was "so scared" that "he just hang on to [her], grab [her] sleeve, [her] blouse." Hang told Tai, who turned pale from fear, "don't worry, just stand right here with me."

The jeep transported them to another house, where they were held captive for a month. There were about 20 people in a divided room. It was crowded and they slept on the floor. Neither Hang nor Tai wanted to eat the little food that was provided. They had a pot of unclean water to drink from. If they wanted to go to the bathroom, they had to go in a pot "right there." Two persons had to share the pot. Tai was very sad and kept crying. Hang tried to comfort him and tell him that when their parents find out that they will come and take them home. She tried to tell Tai to go to sleep. He usually closed his eyes, not completely, and he always looked down because he was scared and sad. Hang did the best she could do to calm Tai.

A month later, they were transported to a prison in Ca Mau. Hang and Tai were transported in a car with the other 20 people. Armed soldiers were present during the transport. Hang described Ca Mau "like a house they build by the bamboo around there and we just laid there. And they have the wall around the camp and we just sit around there." Hang and Tai were in the same cell. There were soldiers with guns and weapons who walked around the prison. Since Hang was older, she had to walk out into the field at 4 or 5 a.m. They gave her a small handful bowl of rice, but they would not give Tai any food, so she gave her ration to him because she would get another handful out in the field. Tai would not get any. In the evening, Hang got a whole bowl and Tai only got a half bowl. Hang was fed more to give her energy to work. Hang encouraged Tai to get burned rice from the kitchen, but he never did and would just go hungry. Water came from the rainwater that was dirty and had mosquitoes. She and Tai got sick at the prison. In the evening, when Hang

returned from work, Tai "usually go try to collect water so [she] can take a bath." He tried to look after his sister. He slept halfway in the bed so to make space for her.

Hang was forced to work in the rice paddy fields bare foot on the rainy day and during the dry days they made them work until they fainted. Hang almost drowned a few times. When she came back she had swollen feet and would tell Tai sometimes what happened. Hang knew that Tai did not like the soldiers because they encouraged the children to fight. Hang suffered injuries from working in the fields from when she was beat up. Her elbow was broken, she had a bruise on the side of her leg, and she has a problem with her right arm to this day. Eventually, Tai was separated from her and she was alone. This was the last time that she saw her brother. Once Hang was released in 1984, she returned home and she never tried to escape again because she was "so scared." Unlike Tai, Hang had her family's support when she returned from prison.

Next, the Illinois Department of Children and Family Services ("Illinois DCF") records for Child Tai, Tai's FSH records, and certified copies of Christopher Higgins' ("Higgins") convictions from the Office of the Clerk of the Superior Court for Rutherford County, North Carolina were introduced. All of these records were readily available from 2005 to 2008.

Dawn Saphir-Pruett ("Dawn") has worked since July of 2004, as an Illinois DCF closed file information search and connection program supervisor at Midwest Adoption Center in Des Plaines, Illinois. She explained that "Midwest Adoption Agency is a small agency that contract with the State of Illinois to provide closed file information and search and connection services to adopted, non-adopted and current former wards." Dawn received a request for services from collateral counsel for Tai's closed file information. Upon receipt of the request and an e-mailed signed release, Dawn sent the redacted records to collateral counsel in less than a month. These records could have been requested back in 2005 to 2008.

Susan Otteson ("Otteson") is currently a teacher in Louisiana, and was a school psychologist in Illinois. She worked for Catholic Social Services in Peoria for four and a half years and then worked for them on a continuing contract for another 9 years as a public school psychologist. Otteson exclusively evaluated children which included Vietnamese unaccompanied minors. She has evaluated approximately 75 to 100 children from 1983 to 1986. Soon after the Vietnamese unaccompanied minors arrived in the U.S., Otteson would evaluate the child's level of education, needs, social, and emotional development.

Otteson had access to her evaluation report of Tai that was in the Illinois DCF records and that was written *shortly after the evaluation in 1984. It was important for Otteson to provide as much detail as possible*. She evaluated Tai on December 21, 1984, when he was 12 years and 3 months old. It was approximately a 90 minute evaluation. In coming to her recommendations, Otteson not only conducted an interview with Tai, she also relied on collateral information from case worker, Mr. Sundo, and Dr. Tam Thi Dang Wei's ("Dr. Wei") evaluation of Tai, and a school report. She testified that collateral sources are important because "it gives [her] a basis for, if [she] see[s] a particular pattern of behavior, it gives [her] something to confirm or deny what people have said to get a better picture of the individual." Furthermore, "[m]any times children have a different understanding of circumstances than what adults might. So the collateral information is helpful to see what other people have observed about a child."

At the time of the evaluation, Tai was living at Tha Huong, which "was a program for unescorted minors coming into the United States from either the Philippines or from other sources after they left their countries. [The minors] came into the program to provide them acculturation to get them ready to go into the foster care and into the family homes." It was also a temporary placement for Vietnamese children. The goal was to prepare the children to either go into a

relative's home or foster care. The goal was generally not for the child to remain.

Tai was evaluated at the Catholic Social Services facilities. Otteson observed Tai to "be easily frustrated when he was trying tasks that were difficult for him" and she "felt that he was somewhat unengaged in some of the activities that we did. Somewhat hesitant, somewhat tense at times." He was described by school people "as having difficulty with getting along with the other children" and that "[h]e had been aggressive." Tai was reported as a runaway, as engaging in hiding, and as having outbursts of anger, temper tantrums in conflict situations. Tai received counseling, but "he still had great difficulty getting along."

Otteson looked into Tai's academic performance "[a]s part of the school programs so they could better meet his needs." Tai was "described as, at time he could be an enthusiastic student and would do what he was assigned to do. At other times, he would be very easily frustrated and avoidant of his work, didn't want to do the work." Otteson conducted a number of tests on Tai. Tai's academic skills ranged from a second to fifth grade level, with reading being lower than math. Tai did well in non-verbal tasks, but did poorly in expressive vocabulary, possibly due to the language barrier. It was also difficult for Tai to make eye contact and to converse.

Otteson noted that the problems that Tai was suffering were not typical of other Vietnamese unaccompanied minors. She testified that "[from] her experience in working with the children, they were very often very eager to please, they would be compliant and would be motivated seemingly to do the best they could to please the examiner, the person working with them." She noted that Tai "seemed to have a difficult time accepting" praise from others. The school people "described that once [Tai] was given praise he seemed to do better even though he seemed not to know how to accept the praise." Otteson opined that Tai had low self-esteem.

Otteson made recommendations that included keeping Tai at Tha Huong "until he can learn

to work cooperatively with his peer and with authority figures." This was not generally the goal for the program. She also recommended that Tai continue to be involved in individual counseling "to help him identify his feelings about himself and others and to deal effectively with his anger and frustration." She recommended that once Tai was ready to enter the public school that he should be placed in sixth grade with supportive ESL services and tutoring. This is so that he could be "most comfortable when he's placed with peers of his own age" than if he was placed lower. She recommended "that once Tai is ready to leave Tha Huong, he and his foster family may benefit from family counseling to facilitate communication among family members and to help Tai to make a successful transformation into the new living arrangement." Finally, Otteson recommended that Tai should be involved in non-competitive peer activities to help his self-confidence and social skills because "he seemed to have a low frustration tolerance and if it were to be non-competitive that would allow him to engage with others without feeling that he had to compete against someone else for attention or any kind of, reward of any kind." This concluded her job responsibility.

Verl Johnson-Vinstrand ("Verl") is a case worker for the Center for Youth and Family Solutions in Galesburg, Illinois, which was formerly Catholic Social Services. It is a private agency that is contracted with Illinois DCF. Verl is familiar with Tha Huong that was developed for Vietnamese refugee minors. She has worked with unaccompanied refugee minors from 1984 to 1991. She gets involved when the child is in foster care, and her goal is to make sure the child is safe and is stable. Verl documented her observations in handwritten case note form and she also wrote a client service plan every 6 months. The notes and client service plans for Tai's case were part of the Illinois DCF records. The hand-written notes were created contemporaneously with the events (within 24 hours). These notes were submitted to the court in Peoria.

Verl recalled Tai and she "just remember[s] spending a lot of time with him and his aunt

and uncle and sister" in Rock Island, Illinois. Verl noted that in comparison to the other children that she worked with, Tai "*was the worst*" within the unaccompanied refugee minor population. She started supervising Tai in September of 1985, when he was about 14 years old, until May or June of 1990. When Verl first met Tai, he was living with his aunt, uncle, and cousins and they were doing okay. Eventually, she realized there were problems and conflicts in the home. Tai got upset when he was unfavorably compared to his cousins and he "would become angry and he would do one of two things. He would tense up and have some kind of an angry outburst like pushing something, running away or whatever or he would hide and not come out. Like he would hide in the closet or something and not come out." She witnessed a consistent behavior of outburst of anger, running away, and hiding. Tai eventually opened up to Verl approximately in 1989.

Verl recalled that Tai would not look at her and she did not look at it as disrespect but as a cultural thing. She had no problems being a female around him. Tai opened up about his escape from Vietnam and he seemed very sad when he spoke about it. She remembered seeing the sadness in his eyes. Eventually Tai became part of the Upward Bound summer program that helped children with interactions with their peers along with an educational component. He did well in the program but did not return the following summer because he chose to work instead at an auto garage, which he enjoyed and "[h]e seemed to do well at it." Tai was never aggressive towards his case worker, other children or adults. Tai had a few criminal incidents; where he stole a battery from a drug store; where he stole his aunt's car to run away to North Carolina; and where he and another child from the program stole an older model agency vehicle.

Unfortunately, things started to get bad at the relative placement. There "were more confrontations, a lot of yelling. Tai started to run away from home. He had a couple of events where he ran away and then he was placed with another relative and then in a traditional foster

home after that, and it just, it progressively went bad." Tai was eventually removed from his relative placement on August 31, 1988, into a non-relative foster home because the confrontations were becoming more frequent and disruptive.

The new placement was "okay" at first but then there were confrontations about school attendance. Tai was going to school, but then he did not want to go to school or do his chores. There was a confrontation about this that led to Tai running away. On December 29, 1988, Tai called Verl and asked her to stop by because he wanted to talk about some problems. Verl witnessed Tai being confronted by his foster mother about not doing his chores and not attending school. The foster mother was blocking the doorway. Tai tensed up and became angry and took a trophy and slammed it on a table and broke it exposing a rod that he then slammed on a desk. He then turned and punched a window with his hand and he went out the window and refused to come back. Verl ran after Tai outside and asked him why he was so upset, to which Tai responded that "he felt *trapped* because he couldn't get out. The door was blocked and he felt like maybe she didn't want him to leave, so *he just felt trapped and reacted to that.*" Verl tried to get medical attention for Tai's hand but he refused and ran away. She contacted the police and made an incident report because of the runaway situation. Tai eventually called his foster mother and said he was okay but he would not say where he was. Verl recommended counselling after the incident, but it was it was not given until a later time.

Tai was eventually located and placed back with his uncle in Illinois. He did okay for a while but all of the problems started again. Tai ran away to North Carolina to be with another uncle in October of 1989. He was eventually returned back to Illinois and Verl worked on placing him with his North Carolina uncle. He was placed in North Carolina in February 1990, but Tai then called to say he wanted to come back to his aunt and uncle. A determination was made that the

placement was no longer positive. Tai was returned to his aunt and uncle's home but the placement fell through because of truancy and because he was not relating well with the family and was not fitting in with the siblings.

Tai continued to have moments where he would get upset and tense up. Eventually, he was returned to Tha Huong in March of 1990, and it was agreed that "it would be more positive for Tai not to have to make family commitments." This went against her goal not to return him to Tha Huong, but to find him a stable family and environment. They were never able to establish stability in Tai's case. Upon his return, Verl stopped being his case worker because he was with Peoria.

Dr. Wei's lengthy career, expertise, and education were presented at the hearing. The State agreed that Dr. Wei "has more expertise than the average layman on the street" and she was able to render expert opinion as to school psychology. With regard to Tha Huong, Dr. Wei would *only* be contacted "when they needed counseling or they need some kind of help how to manage a difficult child." Upon being called, Dr. Wei would "usually talk to the staff before to know the background of the child, of the person. Then [she] would go spend the whole day with that child because [she] trained as a clinical observations, so [she did] a lot of [her] observation and see that child in as many situation as [she] can, then suggestion what think is the best." She puts her observations, evaluation, and conclusions in writing, which she provides to the Tha Huong case workers.

Dr. Wei saw Tai, who was 12, on November 10, 1984, two months after he came to Tha Huong and she wrote a report for his case. She was called to see Tai because "he had problem with dealing with frustration situation. He had much anger by sometime he run away or he hiding. He doesn't adjust too well with the program." Dr. Wei spent the whole day at Tha Huong, where she met with the staff, his teacher, two older boys from the program, counselors, case worker, the

education coordinator, and she interviewed Tai in Vietnamese. This background information is important "to understand the problem. Especially with refugee. There's so many problems, so many things that can happen in the past that affect the behavior of the person." Dr. Wei learned that "Tai have many, many difficulty and very traumatic experience." Dr. Wei reported in 1984, Tai's experience of escaping from Vietnam. She reported that during one incident at the Malaysia prison, Tai got in trouble with authorities when he tried to "get some food ration for his sister who was sick." Tai was put in jail and his hair was cut short, "which is probably very humiliating to him." Dr. Wei opined that

> "in Malaysia, when he [Tai] do some good thing, he try to do something to save his sister and he really strongly punished. So think that he remember very strong if right or wrong, going good thing and receive bad thing that may affect his behavior and his frustration to a new situation."

Dr. Wei learned that Tai "really doesn't want to leave his family, doesn't want to leave Vietnam so that's why he have a hard time to adjust to new situation." Dr. Wei opined this contributed to his inability to adjust.

During her interview, Dr. Wei "first notice[d] his frustration, his anger." Dr. Wei opined that this was not normal, but understandable. Dr. Wei tried to address Tai's feelings of anger and frustration and she tried to explain to him why he was sent away by his parents. Dr. Wei noted that Tai usually would not look at her. Dr. Wei tried to talk to Tai about changing the way he looks at people so that he can assimilate into the U.S. culture. *Dr. Wei told Tai that he had to change everything he knew in Vietnam so that he could assimilate in the U.S.*

Dr. Wei laid out a number of goals and recommendations for Tai. The short term goal was to help Tai control his anger with the help of his friends. The long term goal was to help Tai make a life for himself in the U.S. Dr. Wei opined that "Tai is at a very young age he goes through so many traumatic experience that escape, twice fail, the stay in the camp, the jail, the hair cut." In

particular, "the escape in the boat is a tremendous traumatic experience." Dr. Wei made the following recommendations to the staff:

> "to give counseling and support by all means, by whatever means they have, they have at the program."
>
> "we need to try to not get back like refugee center. We have a newsletter come out telling the different rules in the U.S. that you need to follow. That I furnish. Need to explain to them what is expect of the society that the children need to know."
>
> "to make a chart with Tai to see to have his good behavior and try to show evaluation, what he do good and he maybe get encouragement and try to kind of support for that."
>
> "general recommendation because [Tai] had a lot of tension, a lot of anger, so I would ask that maybe some outlet of that by sport or something physical. . . . I think that one priest there asked him to do something to bring him self-confidence up at that time."
>
> "Because Tai is twelve years old, peers are very important, so I think I learned by reach him by peer to get to him quicker. So I remember I asked to all the boy to kind of keep an eyes on Tai and prevent his anger and do something to support him."

She does not know if these were followed, but she hoped so.

Otteson (lived in Shreveport, Louisiana, from 2005 to 2008), Verl (worked at Catholic Charities in 2005 to 2008), and Dr. Wei (lived in Champaign-Urbana, Illinois, from 2005 to 2008) were all available to speak to counsel, experts, and to testify in Tai's case. None of them were contacted by counsel.

Chief investigator McGuinness testified next. McGuinness testified that the initial investigator on Tai's case was Douglas Harris ("Harris"), who concluded his employment in early 2007. It is unknown what work was done by Harris as he shredded his work product. Thereafter, Geller was hired as an investigator. There was a period of time of about 2 to 3 months where there

was no investigator assigned to Tai's case.

McGuinness explained that it was the office's policy that all investigative requests must be in writing from the attorneys. There were investigator logs created by each investigator, as a regular course of business, and generated by a computer. McGuinness testified that Geller "was very meticulous and he really, really did a great job. He's got a great background, great experience and he was very, very anal about his cases and he kept paperwork and kept paperwork and kept paperwork and more paperwork." These logs were "very, very important because of, you know, days like today" McGuiness confirmed that investigator logs existed in Tai's case.

McGuinness recalled that they did not receive or do an investigation in Tai's case because of financial constraints. McGuinness testified that

> "Mr. Geller and I believed that somebody should go to Chicago and if it's some people there that were developed throughout the case. Also thought that a trip to Vietnam to speak with Mr. Pham's mother and brother, sister, and also he had a sister in Paris that we wanted to be able to talk to. And Mr. Geller was under the same opinion I am as far as you don't investigate somebody on the telephone because they don't know you, you don't know them. You can't read body language, you can't, you know, interview them successfully by telephone as you can in person."

McGuinness was "[a]bsolutely" sure that they knew about the family in Vietnam and France before the trial. McGuiness recalled conversations with the counsel about the travel and he was told "[b]asically that we couldn't afford it. Bottom line." Counsel did not enlist the help of the investigators to determine the costs in Tai's case for the cost approval process. McGuinness testified that Geller "told Mr. Caudill in one of the meetings that if he can get approval for two weeks vacation, paid vacation that he would go to Vietnam on his own dime." Geller had spent some time in Vietnam when he was in the Army.

McGuinness testified about the importance of interviewing people from client's childhood,

teachers, schoolmates, principals, employers, co-workers, family members for mitigation investigations. He confirmed that sometimes travel is involved to conduct the interviews. He confirmed that they had the capability to make long distance phone calls. He did not recall obtaining the Illinois DCF records, the FSH records, or Higgins' certified criminal convictions. They had access to out-of-state criminal records. Tai never gave them difficulty in signing releases.

Caudill, the second chair counsel, testified next. Caudill distinguished his role versus Figgatt's as follows:

> "*First chair always made the ultimate decisions about the case*, what our actions were in a case, *defense strategies*, how we would present them. First chair was the primary lawyer that the Court would address when we got to trial or in pretrial hearings. And beyond that whoever was first chair in a case would - - there never was a formal kind of telling each other you're going to do this, there was always conversation, but *ultimately first chair made final decisions* and would often ask other person to do certain things in a case."

In a disagreement, the first chair made the ultimate decision. They worked on both phases and they "would just discuss the cases as they went along and before trial and during trial." Caudill was not familiar with any "particular investigations that [the initial investigator Harris] did on this case." *Caudill acknowledged that most of the penalty phase investigations took place after Tai returned from the hospital.* There were no financial constraints and the office had the capability to make international calls. Caudill *does not take* notes in capital cases and he is relying on his memory.

Caudill had very little contact with Tai prior to his going to the FSH, *Figgatt had most of the contact*. Caudill *could not "say that there was anything in particular that continued in the way of investigations while he was at the state hospital."* He felt that "*the case was sort of fast tracked*" to trial after Tai came back from the hospital. Caudill testified that after Tai returned that he was not very cooperative because of the shame he felt. *However, Caudill specifically could not recall a specific instance of "Mr. Pham saying, I'm going to tell those people to not talk to you."*

Caudill testified about the importance of obtaining collateral sources, looking for family witnesses in particular, and obtaining institutional records, especially when it comes to expert opinion. Caudill knew about Tai's sister in France *before* Tai went to the hospital. He acknowledged that he may have gotten that information from Tai. Caudill did not meet with Thuy, who lived in Orlando, until *after Tai returned from the hospital.* Thuy provided him with information about Tai's family in France and Vietnam and that Tai was a ward of Illinois and had an uncle there. Yet, Caudill did not know if they ever asked an investigator or made any efforts to locate the sister in France. He acknowledged that at some point they had the names of the family members in Vietnam. Caudill did not recall if he asked Thuy for contact information for the family. Caudill did not "know that *we actually ever made an effort* to contact the family that was still in Vietnam." He did not recall any attempts to get the Illinois DCF records or the complete FSH records.

Caudill testified that the CBC video that was introduced at trial was found by him on the internet at the website depicted in Defense Exhibit 6. Caudill was looking for a video that showed information about Saigon at the time of the fall and the experience of boat people leaving Saigon and also including the experience of *those people* once they got to other places such as refugee camps. *He acknowledged that he never found a video depicting the camp Tai was at.* He did not recall finding anything on the internet "*that was specifically about Mr. Pham's background and experience*." Caudill tried to get a cultural expert to give the jury "*broader information* that didn't just come from family about that experience which was our client's experience." The cultural expert, Foshee, did not have any personal knowledge of Tai's life before he came to Orlando. Caudill believed they tried to get a Vietnamese mental health expert, but never found or contacted one.

Caudill did some internet research on Angel's Trumpet flowers that Tai mentioned to him, and he had records about Tai's possession of cocaine charge from July 2005. Yet, he never considered hiring Dr. Daniel Buffington ("Dr. Buffington"), a forensic pharmacologist, to look into substance abuse. Caudill was present during his expert, Day's deposition on April 4, 2008, and he acknowledged that *she testified that she was not aware of Tai's history of drug or alcohol abuse*. After the deposition, Caudill did not provide her with additional information regarding substance abuse. *Caudill acknowledged that Day suspected Tai suffered from bipolar disorder and that that Tai may qualify for a Diagnosis of Post-Traumatic Stress Disorder* ("PTSD"). Day testified in that same deposition that *she did not have enough information again to make a formal diagnosis of PTSD*. Caudill did not recall providing additional information to aid her to make definitive diagnoses. Caudill reiterated that *Figgatt was ultimately responsible for making decisions on how to proceed in penalty phase* and all he knows is that they didn't use it.

Caudill testified that part of their mitigation theory was that Tai was not intelligent. The State during its cross had Caudill analyze the records provided by collateral counsel and pull out only some of the bad information or information that was inconsistent with the lack of intelligence theory of mitigation. *It should be clearly noted that this analysis was never done by Caudill because he never even tried to get these records*. Caudill said he wanted a more substantial prior criminal record, but later clarified that he would have *liked* convictions for more serious or substantial crimes but that he was not saying that Higgins should not be impeached. Caudill acknowledged that you cannot go into the nature of the crimes so long as the person gets the number right. Upon being confronted with the lengthy criminal history of Higgins, he acknowledged it was significant.

Caudill had information that Tai did not have a good relationship with the uncle in Illinois

or North Carolina, but he never even called them. Caudill *believed* that Tai stole of the uncle's vehicles but offered nothing about the circumstances. *Caudill acknowledged that a strategic decision could not be made if he did not have the information at the time. So, the Illinois DCF and complete FSH records did not play into his strategic decision making because he did not have them.*

Caudill clarified that Thuy and Tai were separated at the camp and once they came to the U.S, they were again separated. He acknowledged that he did not have information about Tai's time as a ward of Illinois. *He also acknowledged that it is important to humanize the client and that the source of the witness information is important as well. He relies on his experts to make diagnoses and it is important to provide them with as much information to come to an accurate diagnosis.*

Dr. Buffington, an expert in the field of clinical pharmacology, testified next. He was retained in Tai's case to investigate his substance abuse history and psychiatric history as it relates to *mitigation*[4]. Dr. Buffington reviewed several expert reports, depositions, Tai's medical records from Orlando Medical Center, and interviewed Tai, Thuy, and Ngoc. Tai consumed alcohol and cigarettes at an early age and that he abused alcohol, crack cocaine and Angel's Trumpet as an adult. Tai was introduced to the highly addictive cocaine and Angel's Trumpet by other inmates in 2005. Tai self-medicated with these drugs to cope with the pain and depression. Tai abused drugs from July 2005 until October of 2005. In brief, Dr. Buffington opined that Tai suffered from substance abuse[5].

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[4] Dr. Bruce Goldberger's testimony is not relevant in this case and will not be addressed because there is no claim that Tai was voluntarily intoxicated at the time of the crime. Claim 13 of the Motion only referred to substance abuse. It the Appellant's position that at the time of the crime Tai was under the influence of extreme mental or emotional disturbance (PTSD and Bipolar II).

[5] Dr. McClaren also found a history of substance abuse.

Next, Figgatt testified that he was the lead counsel in the case and made the final decisions in terms of trial strategy, what would be investigated, the theory of defense, final legal decisions, and final decisions as to what mitigation would be put on. Figgatt testified that *Thuy contacted his office very early on, within 6 to 8 weeks after they were appointed.* She even showed up at their office but they needed an interpreter to effectively understand her. Eventually with the aid of a proper interpreter, Figgatt learned "about a number of different siblings [Tai] had, one of whom was in France." Unlike Caudill, Figgatt had notes from his computer that he referred to. Figgatt had the names of Tai's parents, Si Pham and Nho Nguyen; the names of his siblings Oanh Pham, Hang Pham, Tuan Pham, Anh Pham from France, Thu'y Pham, Vi or Vl Pham, and the deceased brother Tu Pham. Figgatt's notes were confusing as to the circumstances surrounding Tu Pham's death. *Figgatt did not know if he asked Thuy or Tai for any contact information for the family. Figgatt clearly stated that it appears that after he received the information about the family that he did not do anything. He did not make a strategic or informed decision not to contact the family and he stated "why would one make an informed decision not to contact a potential witness."*

Figgatt testified that Tai was cooperative for the most part and he never hindered them in their investigations, and Thuy was extremely cooperative. Figgatt had no concerns that Tai would tell his family not to cooperate and they were never rebuffed by any family members. Figgatt testified as to the importance of collateral evidence, family interviews, and other records because *"there's no way that a client can provide a history that's accurate and complete even as an adult" and "reliance upon historical records is often more reliable than relying upon current information about what historical record say."* There were no financial constraints on getting out-of-state records, making international calls, or bringing relevant witnesses to Florida. In capital cases, Figgatt has to "humanize an individual who has committed in most situations a very bad crime in

the eyes of the jury. We're at a point where we were deciding whether he lives or dies. Nothing that he's provided is necessarily going to be useful as something that was recorded decades before this offense happened." Figgatt testified that regardless of whether records contained good or bad information, he would have given them to his experts because they are valuable to them and they can get more out of them. He testified that records that he may see as bad may be seen by an expert as an indication of an emotional problem early on in a client's life.

Figgatt knew that Tai was a foster child in Illinois, and he may have learned this information possibly from Tai. He did not make any requests to the State of Illinois or to Catholic Social Services and in effect did nothing with this information. Figgatt has requested records in other capital cases and has even gone to other states to obtain records. Figgatt knew that Tai and his sister were in Peoria. Figgatt did not make a decision not to get any records in this case and he could not explain why he waited so long to get the Florida DCF records in late 2007, or early 2008.

Figgatt looked over the Illinois DCF records, provided by collateral counsel. He learned new information about Tai from the records that he did not know before the trial. Figgatt would have given these records to his experts. Figgatt testified that the fact that these records were written close to the event was important because Tai had not killed anyone and he was only twelve and that sympathetic figure was not on trial nor was the jury truly aware of it. Figgatt looked over the complete FSH records that he had not requested either. There was no decision to not get the records. Figgatt testified that he needed the records to follow-up on Tai's conduct of hiding under a bed like a child. Figgatt was aware from Day's deposition that she suspected Tai was bipolar and suffered from PTSD, and he was aware that she did not have enough information regarding Tai's history to make a diagnosis, but no additional information was provided to her.

Figgatt agreed that the records had some information that is good and some information

that is not so good, but he testified "[t]hat's always true of those records." The simple fact that the records contained bad information would "[a]bsolutely not" stop him from giving it to the expert. He explained that

> there's a theory in the defense bar that's held by a very small minority, that you need to work your expert in a certain way. I really think that's professionally disingenuous. I've practiced with attorneys who are not with the Office of the Public Defender, who actually exclude stuff in their transmissions to the - - I mean, they go through material and they delete pieces. I think that's just ethically wrong. If you're going to have an expert, an expert can take things I think that are awful and make them into something that's mitigation valuable.

Furthermore, he would rather know about bad information rather than learn about it from the prosecutor and that is why he got the Florida DCF records. When cross-examined about facts from the records that would have contradicted his trial theory of mitigation, Figgatt stated that Tai's issues with authority or juvenile criminal behavior could be a sign of an undiagnosed mental illness such as schizophrenia or bipolar disorder. He testified that the traumas in the records and even the bad stuff could have helped him understand Tai, who had acted out in some way or another since he came to the U.S. He needed all of the information in the records, but he failed to get them. Figgatt also stated that he did not search outside of Central Florida for a Vietnamese mental health expert.

Thuy could never tell Tai's complete story because she was not there for most of it.. Figgatt knew about the first failed escape attempt but he did not contact the sister who was with him. Figgatt put on general information about the boat people and the experience of his sister. The purpose of Foshee was to put a human face to a TV show that was presented. Figgatt acknowledged that the CBC documentary and Foshee's life were not Tai's life. Foshee was not a boat person or a refugee.

Figgatt admitted that he did not ask Higgins about his prior felony convictions or arrests

and that there was no strategic decision behind it. Figgatt agreed that Higgins' credibility was at issue at trial and the fact that he had 9 or 10 felony convictions would be of importance.

The guilt phase was conducted from March 3, to March 7, 2008. The penalty phase was initially set for *March 31, 2008*, but was reset to April 28, 2008, because Figgatt's mother was gravely ill and then it was continued to May 20, 2008, when she passed away. The basis of the continuations was not that they needed more time to do the investigations.

Next, Geller testified that he has worked as an investigator in death penalty cases for a total of 20 years. Geller became involved in Tai's case when he just read his case file, late 2007. He was not officially assigned to the case. Geller spoke to counsel about some investigative areas of importance. Geller relayed to counsel that he wanted to find the sister who attempted to escape with Tai and the sister who he escaped with. Geller contacted Thuy at her home and asked her to come to the office which she did almost immediately. Geller was aware that there was a sibling in France and some still in Vietnam. Per the office's policy, Geller never contacted any of the out-of-state siblings because he was never assigned the task. He requested to visit Illinois when he was not having luck trying to find someone or records about the orphanage but he was never given authorization. Geller tried to double up a trip to Indiana and Illinois as presented in a memo dated April 8, 2008, but he was not authorized. He offered to go to Vietnam to speak to Tai's family on his own dime, but nothing came of that request.

Geller testified about his personal voluminous investigator logs, his memos, and e-mails that were kept in the course of his business and were introduced as Defense Exhibits 10 to 30. These logs, emails, and notes clearly show a lack of due diligence. This is a case where the investigation did not begin until shortly before the initially scheduled penalty phase proceedings. The timeline of the case is as follows:

- Date of Indictment: November 8, 2005.
- Tai was found incompetent: August 29, 2007.
- Tai was found competent: December 6, 2007.
- Guilt phase: March 3, to 7, 2008.
- Tai convicted: March 7, 2008.
- Penalty phase initially set: March 31, 2008.
- Penalty phase continued to: April 28, 2008.
- Penalty phase continued again to: May 20, 2008.
- Penalty phase of trial: May 20, to 22, 2008.
- Jury recommendation: May 22, 2008.
- *Spencer* hearing: August 18, 2008.
- Sentencing hearing: November 14, 2008.

Prior to Geller's involvement, no investigations were done[6]. The timeline of the investigations in Tai's case is as follows:

- November-December, 2007: No investigations.
- January 16, 2008: Investigative meeting called by Geller where the investigators were assigned to determine Tai and Phi's marital status at time of the incident; to conduct background investigation on Higgins and civilian witnesses; to *locate and interview Thuy for mitigation interview*; conduct Autotrack; and to locate and interview potential cultural expert.
- February, 2008: Computer work attempting to locate boat people or cultural witnesses.
- March 3-7 2008: Attended portions of the guilt phase.
- March 10-31, 2008[7]: Researching Catholic Charities, Tha Huong, refugee camps, and interviews with Thuy, Xuan Nguyen, Foshee, Diamond, Ngan Nguyen, serving subpoenas, and ordering research books.
- April, 2008: Researching video clips and newspaper articles about Vietnamese boat people[8], locate Tai's vehicle in impound, and locating witnesses for mitigation.
- *April 3, 2008: Email request by Caudill to obtain the CBC video.*
- May, 2008: Relocating mitigation witnesses so they can testify and serving subpoenas.
- June, 2008-August, 2008: No investigations.
- September19, 2008: Search for N and Q Nguyen.
- October, 2008: No investigations.
- November 14, 2008: Attending sentencing.
- November 19, 2008: Obtained sentencing order.

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[6] Caudill was not familiar with any "particular investigations that [Harris] did on this case." He acknowledged that most of the penalty phase investigations took place *after Tai returned from the hospital.*

[7] The bulk of the investigations were begun after the guilty verdict.

[8] It was the first time he was doing "sort of the boat people investigation."

Dr. Daniel Lee ("Dr. Lee") is a Vietnamese licensed psychologist specialized in clinical psychology, neuropsychology and forensic psychology. His extensive experience includes the treatment and diagnosis of Vietnamese unaccompanied children refugees and adult refugees. He has testified in 12 death penalty cases that all involved Vietnamese refugee defendants and he has been involved in over 20 civil cases involving Vietnamese refugees. Dr. Lee does not always diagnose every Vietnamese refugee with a mental illness.

Dr. Lee was retained to consult with Dr. Francis Abueg ("Dr. Abueg"). In coming to his opinion, Dr. Lee relied on records from Illinois DCF, FSH, jail, and other experts. Dr. Lee learned about the traumas and their effects on Tai, when he came to the U.S. as a child, through his interviews with Dr. Wei and Otteson. He interviewed Mama, Tai's older and younger sisters, and oldest brother over the phone and again in person. He interviewed Tai over the phone and also in person. Even though Dr. Abueg conducted interviews, Dr. Lee wanted to personally interview the witnesses because of his ethics and so that he can formulate his own opinion and not totally depend on another professional.

Based on his interviews and record research Dr. Lee had a number of opinions. He opined that Tai suffered from perinatal anoxia due to lack of oxygen during his birth and delivery and that can affect brain functioning[9], which led to many problems during the early years. He opined that the evidence of the boil on the head, the fevers, the toilet-problems, the angry outbursts, and the learning problems all are evidence of brain impairment onset from early infanthood which affected Tai's growth and behavior. He opined[10] that Tai suffered from PTSD, which is a severe mental health condition.

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[9] Brain impairment indicates that the person's brain is not functionally normally.
[10] Dr. McClaren, the State's expert, and Dr. Abueg all agree that Tai suffered from PTSD.

Tai suffered from numerous traumatic experiences in his young life, which included seeing the horrific bloody dead body of his brother Tu; learning about the decapitation of his grandfathers at the hands of the Communists because they were Catholics[11]; exposure to the bombing and shouting when he and his family rushed to an underground shelter in fear for their lives; his severely traumatic experience at the age of nine without his family in a prison camp during the first escape; suffering from physical and emotional abuse from the guards at the prison camp; his fearful journey from the prison to his home; the punishment he received for trying to steal food for his sister; the second forced escape which again severed Tai from his family at a young age; his harrowing experience on the boat[12] during the second escape with severe lack of food, water, jam-packed with a hundred and fifty people, and the lack of oxygen when he was underneath; his fear of the darkness while in the middle of the high sea or ocean; his feeling of loneliness in the high seas; his fear for his life and not being able to return to his family; separation from his sister when they reached the refugee camp which led to depression, loneliness, and other emotional problems; and almost drowning at the refugee camp[13]. These traumatic experiences caused Tai to have recurring nightmares. The fact that Tai went through these traumas at a young ago is significant because he faced his fears alone, the traumas were severe, and there was no familial support at the time.

Dr. Lee testified that Tai's PTSD did not just go away. PTSD when untreated becomes

[11] Dr. Abueg testified that the vicarious knowledge of a close loved one or friend also qualifies as a traumatic stressor under the DSM-IV-TR and DSM-V definitions.

[12] Dr. Abueg testified that it does not matter how long Tai was on the boat for one night or ten nights, what matters is whether there is some "real objective threat to life." Evidence of this was in the records from Illinois that were written close in time to when Tai entered into the U.S.

[13] Dr. Abueg testified that drowning scared Tai the most and that he rather be shot than drown. Dr. Abueg elaborated that Tai almost drowned in Vietnam at the beach, and then almost twice in Malaysia at the camp.

worsens until a person can no longer cope with the condition and becomes psychotic. Tai's childhood traumatic experiences contributed to Tai's abnormal behavior and criminal behavior. PTSD is triggered by stress and environmental factors. *A person with PTSD can hold a job and can function in his family until some unusual severe event or stressful event triggers the whole thing.* This causes the person to lose control and impairs the person, insight, judgment and reasoning.

Based on what he learned about Tai's life in Illinois, Dr. Lee found traumas and stressors due to Tai being uprooted, transferred to different environments, and living in different homes. Tai's angry outbursts and acting out throughout his time in foster care are symptomatic of PTSD. Dr. Lee has seen similar cases of unstable foster case lifestyles involving Vietnamese children. Dr. Lee opined that Tai first suffered PTSD when he escaped from Vietnam by boat and that he continued to suffer from PTSD when he came to the U.S. Tai suffered from PTSD while in foster care and he suffered from PTSD in Florida because he had never received any treatment. In comparison to his other cases involving unaccompanied minors, Dr. Lee found that Tai's case is the "*worse case among the cases [he] have (sic) seen.*"

Dr. Lee in his lengthy experience has seen PTSD reactions that are violent, suicidal, and homicidal. Dr. Lee has seen Vietnamese unaccompanied minors suffering from PTSD, like Tai, who in their adulthood have violent reactions towards others and themselves. Dr. Lee talked about a case in Santa Barbara where a Vietnamese defendant suffering from PTSD, very similar to Tai, stabbed his wife 17 times because he believed she was leaving him. Dr. Lee has examined several former prisoners of war, who killed their wives as a result of untreated PTSD. Dr. Lee testified that the treatment of PTSD is a lengthy process and can take a lifetime.

With respect to the day of the crime, Dr. Lee opined that Tai was suffering from PTSD.

Dr. Lee opined that Tai's PTSD was triggered by his fear of losing his family and seeing no future. This began when Florida DCF became involved in his family's life. Tai began abusing drugs that included Angel's Trumpet and cocaine weeks or months before the crime as a coping mechanism for his depression, anxiety, and PTSD. Dr. Lee stated that the drugs did not help but worsened the PTSD. Dr. Lee opined that Tai was under the effect of his PTSD at the time of the murder. Dr. Lee opined that Tai's mental condition was severe and that he was suffering from extreme mental disturbances/illness at the time. He opined that Tai's criminal behavior was a result of PTSD.

Dr. Abueg is an experienced clinical psychologist who diagnoses and treats PTSD as part of his practice. His work includes Asian-American PTSD patients. Dr. Abueg has also contributed to the DSM-V as a collaborator, whereby he offered up his practice in 2012, for many months and took consecutive intakes in his practice, since he mostly sees patients with PTSD. He was retained in Tai's case to render a psychological evaluation for mitigation purposes.

In reaching his opinions, Dr. Abueg consulted with Dr. Lee; he looked at the Illinois DCF records, the complete FSH records, and jail records; he conducted interviews with Tai, Dr. Wei, Otteson, Verl , Mama and siblings, Tai's employer, and Deputy Csisko; and conducted testing. Dr. Abueg found all of the collateral sources, not previously obtained by counsel, helpful in coming to his opinions and diagnoses. Dr. Abueg conducted a number of tests to determine an objective manner of testing for PTSD. Dr. Abueg detailed the tests and their results. The tests included the Wechsler Adult Intelligence Scale – Fourth Edition[14], the Personality Assessment Inventory (akin to MMPI-2), Trauma Symptom Inventory (traumas specific instrument), and the Morel Emotional Numbing test (parallel to the TOMM). Based on the above, Dr. Abueg diagnosed Tai with Axis

[14] McClaren also administered this test and found Tai to be in the mild range of retardation, which in effect was consistent with Dr. Abueg's finding that Tai was intellectually compromised.

I[15]: PTSD with the dissociative subtype and Axis I: Bipolar II ("bipolar") referring to the current episode as being depressed severe with mood congruent psychotic features. Dr. Abueg's diagnosis is the same under the DSM-IV-TR and DSM-V.

Dr. Abueg detailed all of the criteria for PTSD under the DSM-IV-TR and the DSM-V and how Tai met those criteria. It is clear from Abueg's analysis of each criterion for his PTSD diagnosis that he used the information from the above listed interviews and the records from Illinois and FSH[16]. Dr. Abueg testified that patients with PTSD can hold jobs and that it is not unusual that Tai could fix televisions. Dr. Abeug went through all of the symptoms that supported his diagnosis for bipolar. He confirmed that Day suspected PTSD and bipolar, but she did not have enough evidence and historical background information.

Dr. Abueg testified as to Tai's substance abuse use of Angel's Trumpet and cocaine, in particular after work hours and over the weekends. He testified that it is very common for people with severe presentations of PTSD to get into self-medication. The short-term effect is a relief from the suffering, but long term abuse worsens to addiction.

Dr. Abueg is "certain" that Tai had severe PTSD during the days prior to the offense. He opined that on the day of the offense, "[n]ot only was [Tai] suffering from severe PTSD and hypomanic part of the bipolar, but it was highly exaggerated." He opined that Tai was suffering from his PTSD at the time of the offense and he described it as an extreme emotional disturbance. He testified that Tai's account of the events leading up to the event showed "an extreme level of agitation that no matter how the story unfolded, you knew it was going to be not good." He opined that some of the triggering affects were the purchase of the condoms and the phone call to the

[15] It refers to a major mental disorder under DSM-IV-TR.
[16] Drs. Lee and McClaren reviewed the same collateral sources and came to the diagnosis of PTSD.

house when he found out that his younger daughter were not home, thus he speeds to the scene. Dr. Abueg testified that the "Bipolar is really driving [Tai]. PTSD alone can account for this behavior, but bipolar, hypomanic perhaps manic at the moment is so, so driving in its intensity, it's, to me more adding dissociation to frenetic energy and so something awful is about to happen."

Dr. Harry McClaren ("Dr. McClaren") is a forensic psychologist presented by the State. He opined that based on his interview with Tai and hearing the testimony of the family, Tai "*does meet the criteria for post-traumatic stress disorder, which I think was detected, suspected the very least by Dr. Day during the sentencing phase of his trial.*" He testified that he "*can't make*" a diagnosis for bipolar II because he *could not be sure* that Tai ever had a hypomanic episode. He acknowledged that one of the doctors during the competency hearing suspected bipolar. As to whether or not Tai suffered from an extreme mental or emotional disturbance when he killed his wife, Dr. McClaren testified that it is "ultimately for the Court" and when asked again, he opined that Tai "*had a degree of emotional disturbance*" but that he did not think it was extreme.

Dr. McClaren testified that in 2005, Tai's depression worsened, as he was unhappy almost every day and having trouble sleeping. He opined the presence of Florida DCF was a stressor that was aggravating Tai. On the date of the offense the phone call between Tai and Lana upset Tai because Lana was home alone and Zena and Kimmie were not with Vietnamese kids.

Dr. McClaren agreed that the Illinois DCF records were *helpful in coming to his opinion* and *understanding Tai as a child.* He agreed that Tai did not have stability when he was in the custody of Illinois. He made several attempts until he got the complete FSH records that he reviewed. He also requested contact information from collateral counsel for Dr. Wei and for Tai's family, but due to time constraints of getting an interpreter, he thought it would be better to hear the family's testimony. It was important to Dr. McClaren to see the family live. He would not have

asked collateral counsel for all of this information if was not important to his *investigation to come to an opinion. Dr. McClaren testified that the detailed information he heard from the family was something he did not have before*. He obtained information about the traumas suffered from Tai and his family. Dr. McClaren learned that Tai "clearly did not like the idea of being separated from his mother." He testified that the fevers suffered by Tai and his developmental delay were important facts, and this information again came from the family. He was able to get information of the traumas from Tai because of the questions he asked during his interview and by going through the criteria for PTSD. Dr. McClaren agreed with Drs. Lee and Abeug, that Tai satisfied the criteria for PTSD. He testified that Tai was being medicated at prison so he could sleep because he would have nightmares if the lights were off, which stemmed from his traumatic experience from the being on the boat in the darkness of the sea and the tipping and capsizing motion of the boat.

In comparison to the available, voluminous, and compelling evidence presented at the evidentiary hearing that focused on Tai, the trial evidence was not particularized to Tai and was generalized. The post-conviction court summarized the mitigation presented at the penalty phase in its Order denying relief. The post-conviction court stated that Thuy's "testimony was the most pertinent to the specific issues the Defendant faced because she encountered those same hardships contemporaneously, although she and the Defendant *were physically separated for much of the time*." In contrast, this same court at the hearing stated that "[t]he *psychological makeup of one individual and another can be totally different in their response to identical circumstance*." This statement is in stark contrast to the court's finding that Xuan Nguyen's ("Xuan") time at the refugee camp "although *predating* the Defendant's, were relevant because his treatment *would have been* similar to theirs." Moreover, the court sustained the State's relevance objections

whenever a family member testified as to their experiences that were contemporaneous with Tai's.

The court attributed the penalty phase witnesses' experiences to Tai when in fact the jury never heard Tai's story. Tai requests that this Court look carefully at the testimony of the penalty phase witnesses presented and it will find that it is not as substantial or detailed as the court portrays. Thuy testified generally as to life in Vietnam and Tai's early years:

- She and Tai were born in Vietnam; they were two of nine children;
- Her father was a soldier with the South Vietnamese Army and served the "whole way." Their father was put in prison but he escaped, and he would try to visit them when he was in hiding. Her mother was a housewife.
- Tai was born in 1972 during the war when Vietnam fell to the Communists;; the Communists took their land;
- Their family tried to escape because the Communists would not allow the children to go to school/higher education unless they followed them;
- In 1975, she recalled seeing people die on the street and that her father carried her on his shoulders because she was too young; she *thinks* Tai may have seen the people die;
- The family tried to escape several times and the one time they got a boat but were getting shot at and so they turned around;
- They had to secretly leave town and go to another town and live with somebody that you paid and they would get them to a canoe to the ocean and every time they had to come back because there was no boat[17]; parts of the family was caught and put in camps or prison;
- Tai and one of their sisters was caught and put in prison; she *believed* Tai was in prison for a year but she was not on this trip; and then one day Tai returned with the help of somebody on the street and that is when they got the story from Tai, who was eight, that all the adults went to work in the field and Tai had to do "a lot of thing" and "had to do labor work for them"[18]; the children were "just sort of released on the street in this town";
- Tai came home for a week and then the whole family who was not in jail tried to escape together[19];
- She, Tai and a cousin made it out only and she testified that on the boat that they had no food, water or bathroom, that the boat was packed with people, she and her brother were underneath, she sat next to a machine, her body was all white and oily;
- She was sick and she passed out later and she woke up in a home/hospital; she stated she was on the boat for probably two to three weeks and she ended up in Palau Bidong, Malaysia, a refugee camp which was like a prison with barbed wires;
- Tai got caught eating meat and was taken away by Thai force;
- The cousin stayed with her for a month and then was taken by Thailand people, while Thuy

[17] "I don't know. I'm just a kid to follow, you know, everybody." It is obvious that Thuy has limited information due to her young age.

[18] The testimony of Hang gave more accurate and more graphic details about the journey, the capture, and what happened to Tai and her at the prison camp.

[19] This is not accurate as testified to by Mama and the siblings.

was accepted by the French people;

- She and Tai *were not living together* at the camp because women and men were separated; later she found out that Tai was taken to the hospital but she "*didn't know where he was or what happened*";
- She guessed there were 170 to 180 people on the boat; she said the CBC video fairly and accurately depicted the camp's conditions;
- She occasionally saw her brother at the camp but they were *separated*;
- Tai was crying and kept asking for his parents;
- She met up with Tai two years later on the last flight to Illinois; she did not know to eat on the plane because they did not have money;
- She and Tai spoke Vietnamese and she tried to learn to speak English; no real schooling in the camp; for six or seven years she and Tai did not know what happened to their family; the Communists would not allow contact;
- Catholic Services ran the orphanage and she and Tai stayed at different places and she saw him when they would eat;
- They were given schooling in the orphanage and eventually she was accepted by a foster family and she left Tai at the orphanage.

After this testimony, Thuy talks about her life, reuniting with Tai, and his adulthood.

The post-conviction court found that "substantial evidence about the conditions in the prison and the refugee camps in Vietnam and Malaysia *in that era*" was presented at the penalty phase through the testimony of Xuan, Foshee and a CBC video. Again, the court said "[t]he *psychological makeup of one individual and another can be totally different in their response to identical circumstance*." Xuan testified as to *his* plight when he wilfully escaped from Vietnam as follows:

He lived in Vietnam before he left in 1979.

- In 1975, he was in his early to mid-twenties when he was first arrested by the Communists. It took his family 4 years to raise money to get him out of jail. He witnessed executions by the Communists. He was very scared in the jail/prison
- He served the South Vietnamese Navy for six years. He took care of electronics and security. He went to Catholic school from first to fifth grade and the he studied at a technical school in 1964/1965.
- He continued to work in electronics until he escaped on a boat, in 1979. He arrived in Washington, D.C./Virginia in 1980. Once there, he started to working in electronics.
- The boat he escaped on had 49 people. They all arrived to Malaysia and were robbed 6 times during the trip.
- He arrived at Palau Bidong, a refugee camp, where he stayed for 9 months. The "conditions were harsh" and they had to rely on aid from different organizations. They stayed behind some sort of wooded/wooden structure and not behind a fence. The YMCA sponsored him to go to the U.S.

- He was not in Palau Bidong at the same time as Thuy and he "left way before."

Then, Xuan testified as to his life. Unlike Tai, Xuan was an adult when he willfully left Vietnam.

Foshee gave a very general insight into Vietnamese refugees[20] and there were no specific details as to Tai and the camp he was at in Malaysia. Foshee testimony is summarized as follows:

- Foshee *is not a boat person.* She left Vietnam in 1969, after she married an American serviceman.
- She returned in 1976, to a refugee camp in Philippines and Thailand, but she "didn't get a chance to go to all of the other camps, like Malaysia." She learned *from other refugees* that Palau Bidong was one of the worst camps. She went to the camps to help the Vietnamese try to settle in countries that accepted them.
- Her brother escaped from Vietnam in 1984, and he was in the Philipines' Palawan camp for 4 or 5 years. He has been in the U.S. since 1990 and he has difficulty with employment. She went to Palawan where the conditions were very bad and she bought a well and pump so they could get water.
- She has come into contact with Vietnamese refugees from mid to late 1980s and she has worked to help them cope with their new life in the U.S. She came to know different Vietnamese refugees' stories and not all of them were lucky to have their whole family come to shore. Some of the refugees had family sponsors and some came through church sponsorship, or are sponsored by the Buddhist temple. She found people who had family in the U.S. were mentally better and the others live in foster homes or sponsors. They are confused between the two cultures. Not everyone who has come from Vietnam has done well in U.S.; most of them have done well. She does not "have much time to spend with them, only when they need [her]."
- She talked about difference in discipline between the U.S. and Vietnam and that it is stricter in Vietnam and she was beaten by her mother for failing a grade. Most of the Vietnamese people are still strict in the U.S. and try to maintain their culture.
- She does not know anyone who has been violent crimes or killed someone.

When Foshee was asked about her experience in prison when she was captured, the court held that testimony regarding her experience was not relevant to Tai's case. The court stated as follows:

> "And I would have no problem if she was testifying as to conditions of a e(sic) camp that he [Tai] was in, but to testify as her conditions in Vietnam in a prison twenty plus years later, there's no nexus that they're the same as to the conditions that he was imprisoned in in Malaysia, and absent some nexus to show that those

[20] Caudill testified that Foshee did not have any personal knowledge of Tai's life before Orlando.

> conditions are identical or very similar, I'll sustain the objection.
> . . .
> And there was no objection to her testifying that she was imprisoned for terrorism. The objection then, which was the question, which was sustained as to relevance were the conditions of the prison which she was in in 2005 in Vietnam and your client was in prison in the '70s in Malaysia in a refugee camp."

Therefore, there was no first-hand account testimony as to the conditions of the prisons that Tai would have been exposed to. Foshee admitted that she was not very involved in the community and that she helps when she can. Her description of the Malaysian camp was from hearsay.

Finally, the CBC video that was played did not depict Tai's plight. It did not give substantial evidence of Tai's prison experience like Hang's testimony. The video depicted the refugee camps and the stories of other refugees from 1979 (aired on September 11, 1979). Tai was forced out of Vietnam about 2 or 3 years after this video. Caudill never found a video depicting the camp Tai was at and he could not find anything on the internet "that was specifically about Mr. Pham's background and experience."

(b) If you did not exhaust your state remedies on Ground One, explain why: Not applicable.

(c) **Direct Appeal of Ground One:**
(1) If you appealed from the judgment of conviction, did you raise this issue?
☐ Yes ☒ **No**

(2) If you did not raise this issue in your direct appeal, explain why: **It could not be raised in the direct appeal because it pertains to the denial of relief of Tai's post-conviction motion based on ineffective assistance of trial counsel.**

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☒ **Yes** ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: **Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851.**

Name and location of the court where the motion or petition was filed: **Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida.**

Docket or case number (if you know): **2005CF4717A**

Date of the court's decision: **December 20, 2013.**

Result (attach a copy of the court's opinion or order, if available): **Denied.**
Attached as *Appendix A.*

(3) Did you receive a hearing on your motion or petition? ☒ **Yes** ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ **Yes** ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
☒ **Yes** ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: **Supreme Court of Florida, 500 South Duval Street, Tallahassee Florida 32399.**

Docket or case number (if you know): **SC14-142**

Date of the court's decision: **November 5, 2015.**

Result (attach a copy of the court's opinion or order, if available): **Denied**
Attached as *Appendix B.*

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: **Not applicable.**

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: **There are no other available procedures.**

GROUND TWO

THE POST-CONVICTION COURT ERRED IN DENYING TAI PHAM'S MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AFTER CONDUCTING AN EVIDENTIARY HEARING ON CLAIM 7 AND AS TO LEGAL CLAIM 16, THUS VIOLATING HIS RIGHTS PURSUANT TO THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The post-conviction court found that the first prong of deficiency in violation of *Strickland* was met as to claim 7. However, the court erred in finding that the prejudice prong was not met and holding that "[i]n light of the fact that the State's evidence was substantially consistent, these is *no possibility* that the introduction of Higgins' prior convictions for purposes of impeachment would have changed the result of the trial." The Supreme Court of Florida found the following facts as to the trial:

> On March 7, 2008, Tai Pham was convicted in Seminole County for the first-degree murder of his estranged wife Phi Pham, the attempted first-degree murder of her boyfriend Christopher Higgins, the armed kidnapping of his stepdaughter Lana Pham, and armed burglary. Pham entered Phi's apartment where her oldest daughter, his stepdaughter Lana, was alone and awaiting Phi's return. After binding Lana, Pham hid in her bedroom for an hour, then stabbed Phi at least six times as she entered the room. Prior to returning to the apartment, Phi and Higgins were together at a party and returned in different vehicles. Phi's stabbing occurred while Higgins secured his motorcycle outside. *Once Higgins entered the apartment, he struggled with Pham. During the struggle, Lana was able to get free and call the police. Higgins was severely injured during the struggle, but was able to subdue Pham until the police arrived. Both Lana and Higgins testified at trial.* Pham was the sole witness for the defense.

At the evidentiary hearing Tai entered into evidence the certified copies of Christopher Higgins' ("Higgins") convictions from the Office of the Clerk of the Superior Court for Rutherford

County, North Carolina. The records of Higgins numerous convictions showed as follows:

1) Convicted for seven [7] separate counts of Felony Obtaining Property under False Pretense on or about October 27, 1997. These were charged under separate case numbers. The victims were Hal Greene or Glen Harmon.

2) Convicted of one [1] count of Felony Forgery of an Instrument on or about October 27, 1997. The victim was Roger Maxwell.

3) Convicted of one [1] count of Felony Uttering a Forged Instrument on or about October 27, 1997. The victim was Roger Maxwell.

4) Convicted of five [5] separate counts of Misdemeanor Worthless Check on or about July 1, 1997.These were charged under separate and consecutive case numbers and the victim was Country Crossroads.

5) Convicted of one [1] count of Misdemeanor Larceny on or about October 27, 1997. The victim was Don Huckabee.

6) Convicted of one [1] count of Misdemeanor Worthless Check on or about October 27, 1997. The victim was Greenhill Store.

Higgins was a major witness for the prosecution and also the alleged victim as to count two (attempted murder). All of these certified conviction records were readily available from 2005 to 2008. The jury never heard that Higgins was convicted of *9 felonies and 7 crimes of dishonesty* because trial counsel failed to obtain the convictions.

Moreover, Higgins' numerous convictions were not used by trial counsel to impeach and further discredit his victim impact statement as argued in legal Claim 16. During the guilt phase, Mr. Higgins testified during direct examination that he knew he victim because he had been dating her for about two [2] months. He testified that he had only met the victim's children only once

about a couple of weeks before October 22, 2005. He had only been to the victim's home twice before October 22, 2005. Trial counsel had no specific objection to Mr. Higgins' written victim impact statement which was later read by Mr. Higgins to the jury. Mr. Higgins provided the following victim impact statement:

> Since the events have happened, I'm still single, all I do is work. When I met Amy it was the happiest time I had in my life. I believe we had a potential for a long term relationship, not just with Amy, but with the girls as well. I think of her often and still hear the sound of her voice. We had a wonderful relationship and now everything is gone.
> Certain things still remind me of Amy, like a song on the radio, or maybe a drive in the car. I had to come to terms that she is gone, and I have to go on with my life, which is extremely difficult to do. That's the biggest challenge I've faced in my life. I know what I need to do, but it will take a very long time for me to move on. And Amy will always be with me.

(b) If you did not exhaust your state remedies on Ground Two, explain why: Not applicable.

(c) **Direct Appeal of Ground Two**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☒ **No**

(2) If you did not raise this issue in your direct appeal, explain why: **It could not be raised in the direct appeal because it pertains to the denial of relief of Tai's post-conviction motion based on ineffective assistance of trial counsel.**

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☒ **Yes** ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: **Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851.**

Name and location of the court where the motion or petition was filed: **Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida.**

Docket or case number (if you know): **2005CF4717A**

Date of the court's decision: **December 20, 2013.**

Result (attach a copy of the court's opinion or order, if available): **Denied.**
Attached as *Appendix A.*

(3) Did you receive a hearing on your motion or petition? ☒ **Yes** ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ **Yes** ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
☒ **Yes** ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: **Supreme Court of Florida, 500 South Duval Street, Tallahassee Florida 32399.**

Docket or case number (if you know): **SC14-142**

Date of the court's decision: **November 5, 2015.**

Result (attach a copy of the court's opinion or order, if available): **Denied**
Attached as *Appendix B.*

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: **Not applicable.**

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: **There are no other available procedures.**

GROUND THREE

THE POST-CONVICTION COURT ERRED IN DENYING TAI PAHM AND EVIDENTIARY HEARING AS TO CLAIMS 3 AND 14 HIS MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851, THUS VIOLATING HIS RIGHTS PURSUANT TO THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

As to Claims 3 and 14, trial counsel had an out-of-court agreement with the prosecution that Dr. Predrag Bulic ("Dr. Bulic") was to testify as to the contents of the files and deposition of Dr. Thomas Parsons ("Dr. Parsons"), who was the attending medical examiner who performed the autopsy on the victim. Trial counsel knew that the prosecution was having difficulty in securing Dr. Parsons' presence for the guilt phase proceedings and that a video testimony could not be accomplished. Trial counsel agreed to allow Dr. Bulic to be a conduit for Dr. Parsons.

The problems with this out-of-court agreement are evident from the following side bar conferences:

> Mr. Caudill: I had conversation with Mr. Feliciani where he told me about their intent, and their intent was to -- that they would use Dr. Parsons if there had to be a penalty phase hearing to testify as to any matters that would go to aggravation.[21] Their intend (sic) was to have this doctor review Dr. Parsons (sic) file, testify to cause of death, the injuries, type of injuries.
> When this doctor starts – and nothing beyond that. when the doctor, when this particular witness starts saying things like it is interesting, *I can't tell whether that's an opinion, that doesn't sound like something that Dr. Parsons wrote. It sounds like his own opinion.* It sounds like beyond anything that we were advised this doctor would be testifying to.
> . . .

[21] It should be noted that Dr. Bulic also testified during penalty phase regarding the aggravators and not Dr. Parsons as indicated to trial counsel by the prosecution.

The Court: Well, in order to ensure that there's no strain of consciousness, why don't you interject the question and avoid any other observations.
Mr. Stone: Okay.

The Court: *Keep it confined to what you all agreed to.*

Mr. Stone: Okay. I will. *I'm not sure what we agreed to.*
. . .

Mr. Caudill: Objection, Your Honor. May we approach?

The Court: Yes.
. . .

Mr. Caudill: Judge, this is getting into – now we're into issues of amount of force.

Mr. Stone: That's not -- he – he's saying enough force was applied to cause a contusion. He's not going to try to quantify the force.

Mr. Caudill: Well, I don't know. *I thought we were going to stick to -- that was our understanding*, we were gonna stick to these injuries that Dr. Parsons noted in the autopsy.

Mr. Stone: That's what he -- Excuse me. He noted that in the autopsy report.

The Court: Obviously the Court's not privy to your agreement. Assuming that that is the agreement as you represented, if it's described in the autopsy, he's not going beyond that into his opinions or extrapolations or trying to comment on opinions that Dr. Parsons would have made, *then obviously that's not an agreement then.*
. . .

The Court: He can preface his speech. No one can control his manner of speech as long as the content is confined to your agreement.

Furthermore, the statements by trial counsel Caudill indicated that the prosecution "would use Dr. Parsons if there had to be a penalty phase hearing to testify as to any matters that would go to aggravation." This out of court agreement continued into penalty phase. At the penalty phase proceedings, Dr. Bulic again testified in lieu of Dr. Parsons as to the statutory

aggravators, specifically that the capital felony was especially heinous, atrocious, or cruel. The trial court gave great weight to this aggravator that was presented by Dr. Bulic.

The post-conviction court denied an evidentiary hearing as to these claims and stated as follows:

> There was no legal basis upon which trial counsel could have successfully objected to Dr. Bulic's testimony because he was qualified to opine on the victim's cause of death . . . Trial counsel objected when he felt that Dr. Bulic strayed into areas where the witness was not qualified to offer an opinion[22]. . . However, as to Dr. Bulic's testimony in general, any objection would have been futile, and counsel cannot be deemed to be ineffective for failing to make a futile motion.

(internal citations omitted). It should be noted that the legal basis stated in the motion was as follows:

> Trial counsel rendered deficient performance by agreeing to the admission of *hearsay* testimony by Dr. Bulic regarding the contents and findings of Dr. Parsons' medical examiner files and his deposition. C. Ehrhardt, Florida Evidence §801.2 defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Furthermore, by agreeing to allow Dr. Bulic to testify as a conduit for Dr. Parsons, trial counsel waived Mr. Pham's *right to confront the witness* pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

(b) If you did not exhaust your state remedies on Ground Three, explain why: Not applicable.

[22] It should be noted that the court cited to R9/1162-90 to support that counsel objected to areas that Bulic was not qualified to testify to. The first objection in reference to discovery was withdrawn. Counsel then objected to Bulic's opinion testimony as to using term "interesting" and then as to testimony about the "amount of force." Counsel next objected to cumulative evidence and to the presence of an inflammatory photograph. The final objection was as to the manner of death which counsel stated was an ultimate issue for a jury. These objections are irrelevant to Dr. Bulic being a conduit for hearsay testimony.

(c) **Direct Appeal of Ground Three**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☒ **No**

(2) If you did not raise this issue in your direct appeal, explain why: **It could not be raised in the direct appeal because it pertains to the denial of relief of Tai's post-conviction motion based on ineffective assistance of trial counsel.**

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☒ **Yes** ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: **Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851.**

Name and location of the court where the motion or petition was filed: **Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida.**

Docket or case number (if you know): **2005CF4717A**

Date of the court's decision: **December 20, 2013.**

Result (attach a copy of the court's opinion or order, if available): **Denied. Attached as *Appendix A*.**

(3) Did you receive a hearing on your motion or petition? ☒ **Yes** ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ **Yes** ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☒ **Yes** ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: **Supreme Court of Florida, 500 South Duval Street, Tallahassee Florida 32399.**

Docket or case number (if you know): **SC14-142**

Date of the court's decision: **November 5, 2015.**

Result (attach a copy of the court's opinion or order, if available): **Denied**
Attached as *Appendix B*.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: **Not applicable.**

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: **There are no other available procedures.**

GROUND FOUR

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED TAI PHAM OF A FUNDAMENTALLY FAIR TRIAL AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

As raised in Claims 8, 17, and 19, the number and types of errors in Tai's trial, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each error individually, addressing these errors in isolation will not necessarily afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and an unconstitutional process significantly tainted petitioner's capital proceedings. These errors cannot be harmless. The cumulative effect of these errors denied petitioner his fundamental rights under the Constitution of the United States.

(b) If you did not exhaust your state remedies on Ground Four, explain why: Not applicable.

(c) **Direct Appeal of Ground Four**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☒ **No**

(2) If you did not raise this issue in your direct appeal, explain why: **It could not be raised in the direct appeal because it pertains to the denial of relief of Tai's post-conviction motion based on ineffective assistance of trial counsel.**

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☒ **Yes** ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: **Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal**

Procedure 3.851.

Name and location of the court where the motion or petition was filed: **Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida.**

Docket or case number (if you know): **2005CF4717A**

Date of the court's decision: **December 20, 2013.**

Result (attach a copy of the court's opinion or order, if available): **Denied.**
Attached as *Appendix A.*

(3) Did you receive a hearing on your motion or petition? ☒ **Yes** ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ **Yes** ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
☒ **Yes** ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: **Supreme Court of Florida, 500 South Duval Street, Tallahassee Florida 32399.**

Docket or case number (if you know): **SC14-142**

Date of the court's decision: **November 5, 2015.**

Result (attach a copy of the court's opinion or order, if available): **Denied**
Attached as *Appendix B.*

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: **Not applicable.**

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: **There are no other available procedures.**

GROUND FIVE

THE SUPREME COURT OF FLORIDA ERRED IN DENYING TAI PHAM'S PETITION FOR WRIT OF HABEAS CORPUS WHEREBY TAI PHAM'S APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A SPECIFIC CLAIM REGARDING TAI PHAM'S MOTION TO INTERVIEW JURORS, THUS VIOLATING HIS RIGHTS PURSUANT TO THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

On May 21, 2008, in the morning of the second day of the penalty phase trial, an alternate juror, Andrew Valenti, handed Deputy Kelty a letter for the court. The letter indicated that Mr. Valenti overheard some of the other jurors discussing the case during a time when the court had instructed them not to speak about the case. Defense counsel moved for a mistrial on the grounds that the jury would not give Tai a fair determination as to sentence and did not give him a fair determination as to guilt because they were not willing to follow the court's orders or the law.

Mr. Valenti was brought before the court and questioned about the contents of his letter. Mr. Valenti informed the court that he heard at least two other jurors make comments. One juror said something about "the sad story stuff." The other juror made a comment about "all verdicts being emotional decisions." He did not know the names of the two jurors, but he described their physical appearance and where they sat. He heard other comments that were made in a group under the breath, but he could not tell who made those comments. Regarding the guilt phase, he reported that "the general consensus was the Defendant committed the act", and the jurors were talking casually about intent and speculating about what evidence was and was not introduced. Following the inquiry of Mr. Valenti, the trial court asked counsel if they would like to individually inquire of each individual juror or try to identify the two individuals referred to by Mr. Valenti. At that

time, counsel opted for the latter approach.

The court next inquired of the two jurors Mr. Valenti seemed to be describing. Juror Kristen Appleman (the foreperson) informed the court that she heard another juror make the following comment:

> [E]veryone has a rough life in some case, but you are – this is the law, this is – there is right and wrong, and, you know, if you wanted to come to America, you have to live by American standards, American law.

She could not remember who made the comment. She also recalled comments about why the jurors were being taken in and out of the courtroom, speculation about the point of certain witnesses, and "everyone has a sob story." Juror Peter Perkins stated that he heard "idle chitchat", and somebody said, "[I]t's too bad to hear those kind of stories, but, you know, a lot of people have tough luck."

After speaking with the three jurors, the court asked whether either side wished to inquire further, and counsel declined the offer. Defense counsel renewed the motion for mistrial, and the court reserved ruling. Prior to jury deliberations in the penalty phase, defense counsel provided the court with case law in support of his motion for mistrial. The court denied the motion for mistrial, stating that based on the inquiry of the three jurors, while there may have been a lack of compliance with the court's instructions, it did not inure to the verdict.

Defense counsel filed a Motion for New Sentencing Hearing and for Interviews of Jurors on May 30, 2008, eight days after the jury returned a death recommendation. The motion was filed within the ten days following the jury verdict, which is required by Florida Rule of Criminal Procedure 3.575. Defense counsel argued to the trial court that the jury's unusually short penalty phase deliberation, and well as the inappropriate demeanor of some of the jurors following the deliberation warranted further juror interviews. On June 18, 2008 the court denied the motion, stating:

> The Court has previously conducted an in depth inquiry in response to Mr. Valenti, who was an alternate juror, in response to his letter which was dated May the 20th. The inquiry was conducted on May the 21st. An inquiry was made by the Court.
>
> The Court allowed opportunity for the State to question Mr. Valenti and for the Defense to question Mr. Valenti. The two individuals that were identified as having made comments, and those individuals were Mr. Peter Perkins and Ms. Kristen Appleman, were brought in and questioned.
>
> The comments that Mr. Valenti indicated were made by those individuals were, it's a sad story and verdicts are emotional decisions. Again, both the State and the Defense made inquiries of these individuals.
>
> Once that – those inquiries were concluded, the Court offered the opportunity for individual inquiry to me made of each of the remaining jurors. That opportunity was declined.
>
> For the reasons previously stated on the record and based on the responses of Mr. Valenti in court, the response of Ms. Appleman and the response of Peter Perkins, the Court at that time found no basis to grant a mistrial as far as the penalty phase and finds no basis to grant a new penalty phase.
>
> Again, as to the opportunity for jury inquiry that Court had previously offered that opportunity. That opportunity was declined. There has been nothing new that has occurred since that time that would justify further inquiry.
> The Court would deny both motions.

On direct appeal appellate counsel raised the denial of Tai's motion for mistrial and motion for new penalty phase, but not the denial of Tai's motion to interview jurors. The Supreme Court of Florida denied Tai's claim regarding the denial of the motion for mistrial and the motion for new penalty phase "[b]ecause it is not apparent on the record that the comments affected the verdict or sentence recommendation in any way." It was known from the trial court's interviews of only three jurors, there was clearly cause for concern that Tai's jurors were not following the court's instructions or the law; enough so that the trial court initially offered to individually inquire of each of the jurors. If the trial court had these concerns on May 21, 2008, there is no reason why

the court would not have had those same concerns eight days later. Furthermore, because Tai was born in Vietnam, the comment from an unknown juror that "if you wanted to come to America, you have to live by American standards, American law", is particularly troubling in light of the jurors' racial biases and inability to consider mitigation, which would have affected their penalty phase verdict.

(b) If you did not exhaust your state remedies on Ground Five, explain why: Not applicable.

(c) **Direct Appeal of Ground Five**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☒ **No**

(2) If you did not raise this issue in your direct appeal, explain why: **It could not be raised in the direct appeal because it pertains to the denial of relief of Tai's post-conviction motion based on ineffective assistance of appellate counsel.**

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☐ **Yes** ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): **N/A**

Date of the court's decision: **N/A**

Result (attach a copy of the court's opinion or order, if available): **N/A**

(3) Did you receive a hearing on your motion or petition? ☐ **Yes** ☒ No

(4) Did you appeal from the denial of your motion or petition? ☐ **Yes** ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ **Yes** ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

The ineffective assistance of appellate counsel claims were appropriately raised in Tai Pham's Petition for Habeas Corpus filed before the Supreme Court of Florida, 500 South Duval Street, Tallahassee Florida 32399, Case No. SC 14-1248. It was filed simultaneously with the Initial Brief to the Supreme Court of Florida, Case No. SC14-142. It was denied in the same opinion and is found in *Appendix B*.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Five: **There are no other available procedures.**

GROUND SIX

THE SUPREME COURT OF FLORIDA ERRED IN DENYING TAI PHAM'S PETITION FOR WRIT OF HABEAS CORPUS WHEREBY HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A SPECIFIC CLAIM REGARDING THE PRESENTATION OF DR. PREDRAG BULIC'S HEARSAY TESTIMONY IN BOTH THE GUILT AND PENALTY PHASE IN LIEU OF DOCTOR THOMAS PARSONS', THE ATTENDING MEDICAL EXAMINER, THUS VIOLATING HIS RIGHTS PURSUANT TO THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Tai's trial counsel had an out-of-court agreement with the prosecution that Dr. Predrag Bulic could testify about the contents of the files and deposition of Dr. Thomas Parsons, the attending medical examiner who performed the autopsy of the victim. Apparently, the State was having difficulty securing Dr. Parsons' presence for the guilt phase proceedings, and they were unable to arrange video testimony. Defense counsel agreed to allow Dr. Bulic to "review Dr. Parson's file, testify to cause of death, the injuries, [and] type of injuries . . . and nothing beyond that."

Defense counsel objected when Dr. Bulic testified that "[w]hat is interesting with this wound is that the right side of the wound - -" because Dr. Bulic's testimony went beyond what was agreed upon by the parties. The court directed the State to confine Dr. Bulic's testimony to the agreement. Dr. Bulic's testimony continued, and the following exchange took place:

> Assistant State Attorney Stone: Doctor, with respect to number two injury, you were about to say something with – Well, is there anything of note that you observed on that particular wound number two?
>
> Dr. Bulic: Yes, there was. This wound has a contusion on one end, more specifically on the right side of the wound there's a contusion which is usually in

stab wounds is made by a hand guard or so-called hilt. It's the handle with the little hand guard at the end where the blade begins. When the force is applied –

Defense Attorney Caudill: Objection, Your Honor. May we approach?

The Court: Yes.

(Whereupon, a discussion was had out of the hearing of the jury.)

Mr. Caudill: Judge, this is getting into – now we're into issues of amount of force.

Mr. Stone: That's not – he – he's saying enough force was applied to cause a contusion. He's not going to try to quantify the force.

Mr. Caudill: Well, I don't know. I thought we were going to stick to – that was our understanding, we were going to stick to these injuries that Dr. Parsons noted in the autopsy.

Mr. Stone: That's what he – Excuse me. He noted that in the autopsy report.

The Court: Obviously the Court's not privy to your agreement. Assuming that that is the agreement as you represented, if it's described in the autopsy, he's not going beyond that into his opinions or extrapolations or trying to comment on opinions that Dr. Parsons would have made, then obviously that's not an agreement then.

Mr. Caudill: It starts to get into issues that go to aggravation.

Mr. Stone: It also goes to premeditation.

The Court: I mean, I understand what you're saying, but almost anything regarding the autopsy could, I theory, go to aggravation.

Assistant State Attorney Feliciani: Judge, my intent when I spoke to Mr. Caudill was obviously he may have an opinion as to the resulting pain this injury caused this victim, and we weren't going to go into that because that's inappropriate.

The Court: Those kind of things.

Mr. Caudill: As long as their witness understands that if he starts talking about interesting things and amount of force.

Mr. Stone: Why can't he talk about interesting things?

The Court: He can preface his speech. No one can control his manner of speech as long as the content is confined to your agreement.

Dr. Bulic again testified in place of Dr. Parsons during the penalty phase trial. Dr. Bulic testified that the victim would have been conscious for a period after the wounds were inflicted and prior to losing consciousness, and that she experienced extreme pain. The State used Dr. Bulic's testimony to support the heinous, atrocious, and cruel aggravator, which was found by the trial court and given great weight.

In Claim 3 of Tai's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Fla. R. Crim. P. 3.851, Tai argued that trial counsel provided prejudicial ineffective assistance when he agreed to allow Dr. Bulic to testify in the guilt phase of Tai's trial in lieu of Doctor Parsons. Similarly, in Claim 14 of Tai's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Fla. R. Crim. P. 3.851, he argued that trial counsel provided prejudicial ineffective assistance when he allowed Dr. Bulic to testify in lieu of Dr. Parsons. The State argued at the post-conviction case management conference that these claims were procedurally barred because they could have but were not raised on direct appeal. The circuit court agreed with the State, summarily denying these claims and finding that this issue "could have been raised on appeal but was not." This issue has been raised in Tai's appeal of the circuit court's denial of his 3.851 motion (Ground three of this Petition). Tai maintains that trial counsel provided prejudicial ineffective assistance by allowing Dr. Bulic to testify in lieu of Dr. Parsons.

(b) If you did not exhaust your state remedies on Ground Six, explain why: Not applicable.

(c) **Direct Appeal of Ground Six**
(1) If you appealed from the judgment of conviction, did you raise this issue?
☐ Yes ☒ **No**

(2) If you did not raise this issue in your direct appeal, explain why: **It could not be raised in the direct appeal because it pertains to the denial of relief of Tai's post-conviction motion based on ineffective assistance of appellate counsel.**

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☐ **Yes** ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): **N/A**

Date of the court's decision: **N/A**

Result (attach a copy of the court's opinion or order, if available): **N/A**
(3) Did you receive a hearing on your motion or petition? ☐ **Yes** ☒ No

(4) Did you appeal from the denial of your motion or petition? ☐ **Yes** ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
☐ **Yes** ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

The ineffective assistance of appellate counsel claims were appropriately raised in Tai Pham's Petition for Habeas Corpus filed before the Supreme Court of Florida, 500 South Duval Street, Tallahassee Florida 32399, Case No. SC 14-1248. It was filed simultaneously with the Initial Brief to the Supreme Court of Florida, Case No. SC14-142. It was denied in the same opinion and is found in *Appendix B*.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Six: **There are no other available procedures.**

GROUND SEVEN

IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *RING V. ARIZONA*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), THE TRIAL COURT ERRED IN TAKING TESTIMONY REGARDING APPELLANT'S PRIOR BATTERY ON A LAW ENFORCEMENT OFFICER CONVICTION AND IN RELYING ON SUCH CONVICTION TO SUPPORT A FINDING OF PRIOR VIOLENT FELONY IN AGGRAVATION.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Subsequent to the commission of the instant offense, appellant was charged with committing an aggravated battery on a law enforcement officer and went to trial and was convicted of the lesser included offense of battery on a law enforcement officer. The conviction occurred after the penalty phase in the instant case. At the ***Spencer*** hearing, the state was permitted, over objection, to present the testimony of the alleged victim of the battery on a law enforcement officer to prove the aggravating factor of prior violent felony. The trial court found this battery on a law enforcement officer qualified and referenced it in its findings of fact in regard to this aggravating circumstance. This statutory aggravator was not found by a jury and therefore improperly referenced and found by only the trial judge.

(b) If you did not exhaust your state remedies on Ground Seven, explain why: **Not applicable.**

(c) **Direct Appeal of Ground Seven:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes ☐ **No**

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☐ Yes ☒ **No**

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ **Yes** ☒ No

(4) Did you appeal from the denial of your motion or petition? ☐ **Yes** ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
☐ **Yes** ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: **It was raised on direct appeal.**

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Seven: **There are no other available procedures.**

GROUND EIGHT

FLORIDA'S DEATH SENTENCING SCHEME IS A VIOLATION OF *RING V. ARIZONA*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000) AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BECAUSE THE FACTS THAT MUST BE FOUND TO IMPOSE IT WERE NOT ALLEGED IN THE CHARGING DOCUMENT NOR WERE THEY UNANIMOUSLY FOUND TO EXIST BEYOND A REASONABLE DOUBT BY A 12-PERSON JURY.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

A grand jury returned an indictment for Tai on November 8, 2005, for one [1] count of First Degree Murder in violation of Fla.Stat. §§§782.04(1)(a)(2005), for one [1] count of Attempted First Degree Murder in violation of Fla.Stat. §§§777.04(1)(4)(b),782.04(1)(a)1, and 775.087(1)(2005), for one [1] count of Armed Kidnapping in violation of Fla.Stat. §§787.01(1)(a)(2) and 775.087(1)(2005); and for one [1] count of Armed Burglary of a Dwelling in violation Fla.Stat. §810.02(1)(b) and 2(b) and 810.07(2005). This indictment did not contain any allegations of facts or language that would qualify Tai for the imposition of the death penalty. Specifically, Count I of the indictment only stated as follows:

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

> In the Circuit Court of the Eighteenth Judicial Circuit of the State of Florida for Seminole County, at the Fall Term thereof, in the year of our Lord, two thousand five, the Grand Jurors of the State of Florida, inquiring in and for the body of the County of Seminole, upon their oaths do charge that:
> Count I: IN THE COUNTY OF SEMINOLE, STATE OF FLORIDA, on or about October 22, 2005, TAI A. PHAM did unlawfully kill a human being, Phi Pham, by cutting or stabbing Phi Pham with a weapon, to wit: a knife; and said killing was perpetrated by TAI A. PHAM from a premeditated design to effect the death of Phi Pham, contrary to Section 782.04(1)(a), Florida Statutes.

On March 7, 2008 Tai was found guilty of all counts. Thereafter, the penalty phase of the trial proceedings was conducted from May 20, 2008, to May 22, 2008. On May 22, 2008, the jury recommended a death sentence by a majority vote of ten [10] to two [2]. The trial court conducted a *Spencer* hearing on August 18, 2008. The trial court entered a judgment and sentence on November 14, 2008 sentencing Tai to death on the murder count, to life on the attempted murder count, to life on the armed burglary of a dwelling count, and to life on the kidnapping count, all sentences to run concurrently. It was the trial court and not the jury that found the statutory aggravators as follows:

> (1) Florida Statutes, Section 921.141(5)(b): The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person [great weight].
> (2) Florida Statutes, Section 921.141(5)(d): The capital felony was committed while the defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb [moderate weight].
> (3) Florida Statutes, Section 921.141(5)(h): The capital felony was especially heinous, atrocious, or cruel [great weight].
> (3) Florida Statutes, Section 921.141(5)(i): The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. This Court found that no evidence of any moral or legal justification was presented and argued.

There was no finding by a jury, albeit a unanimous jury, regarding the aggravators. The sentencing of Tai was solely in the premise of the trial court.

(b) If you did not exhaust your state remedies on Ground Eight, explain why: **Not applicable.**

(c) **Direct Appeal of Ground Eight:**

(1) If you appealed from the judgment of conviction, did you raise this issue?
☒ Yes ☐ **No**

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ☐ Yes ☒ **No**

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ **Yes** ☒ No

(4) Did you appeal from the denial of your motion or petition? ☐ **Yes** ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
☐ **Yes** ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: **It was raised on direct appeal.**

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Eight: **There are no other available procedures.**

13. Please answer these additional questions about the petition you are filing:
(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☒ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them: No.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☒ No
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: (1) James Figgatt, Esquire,
316 Seminole Avenue,
Lake Mary, Florida 32746.

(2) Timothy Caudill,
Assistant Public Defender,
Office of the Public Defender,
101 Bush Boulevard,
Sanford, Florida 32773.

(b) At arraignment and plea: (1) James Figgatt, Esquire,
316 Seminole Avenue,
Lake Mary, Florida 32746.

(2) Timothy Caudill,
Assistant Public Defender,
Office of the Public Defender,
101 Bush Boulevard,
Sanford, Florida 32773.

(c) At trial:

(1) James Figgatt, Esquire,
316 Seminole Avenue,
Lake Mary, Florida 32746.

(2) Timothy Caudill,
Assistant Public Defender,
Office of the Public Defender,
101 Bush Boulevard,
Sanford, Florida 32773.

(d) At sentencing:

(1) James Figgatt, Esquire,
316 Seminole Avenue,
Lake Mary, Florida 32746.

(2) Timothy Caudill,
Assistant Public Defender,
Office of the Public Defender,
101 Bush Boulevard,
Sanford, Florida 32773.

(e) On appeal:

(1) James S. Purdy, the Public Defender,
Law Office of the Public Defender for the 7th Judicial Circuit,
251 N Ridgewood Avenue,
Daytona Beach, Florida 32114-3275.

(2) Michael S. Becker, Esquire,
444 Seabreeze Boulevard, Suite 210,
Daytona Beach, Florida 32118-3941.

(f) In any post-conviction proceeding:

(1) Raheela Ahmed,
Assistant Capital Collateral Counsel,
Law Office of the Capital Collateral
Regional Counsel-Middle Region,
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.

(2) Carol Contreras Rodriguez,
[former Assistant Capital Collateral Counsel],
P.O. Box 4895,
Tampa, Florida 33677-4895.

(3) Maria Christine Perinetti,
Assistant Capital Collateral Counsel,
Law Office of the Capital Collateral
Regional Counsel-Middle Region,
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.

(g) On appeal from any ruling against you in a post-conviction proceeding:

(1) Raheela Ahmed,
Assistant Capital Collateral Counsel,
Law Office of the Capital Collateral
Regional Counsel-Middle Region,
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.

(2) Maria Christine Perinetti,
Assistant Capital Collateral Counsel,
Law Office of the Capital Collateral
Regional Counsel-Middle Region,
12973 North Telecom Parkway,
Temple Terrace, Florida 33637-0907.

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No, Tai Pham is under a sentence of death.

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: Not Applicable.

(b) Give the date the other sentence was imposed: Not Applicable.

(c) Give the length of the other sentence: Not Applicable.

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☒ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.**

** The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall

This Petition under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody, is filed timely. Tai Pham timely filed his Motion for Postconviction Relief pursuant to Fla. R. Crim. P. 3.850 with the state court, which tolled the time that Tai Pham had to file this Petition. *See* 28 U.S.C. §2254(d)(2).

Therefore, the Petitioner respectfully asks that this Honorable Court grant the following relief:

That this Honorable Court vacate Tai Pham's sentence of death and grant him a new sentencing or other relief to which petitioner may be entitled.

Respectfully submitted,

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us
Secondary Email: support@ccmr.state.fl.us

s/ Maria Christine Perinetti
Maria Christine Perinetti

---

run 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.

(E) The 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 shall not be counted toward any period of limitation under this subsection.

Florida Bar Number 13837
Email: perinetti@ccmr.state.fl.us
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s/ Donna Ellen Venable
Donna Ellen Venable
Florida Bar Number 100816
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TAI A. PHAM,
Petitioner,

v.

JULIE L. JONES,
Secretary,
Florida Department of Corrections
Respondent,

DEATH PENALTY CASE

CASE NO: _____

&

PAMELA JO BONDI,
Attorney General,
State of Florida,
Additional Respondent.
_____/

VERIFICATION

STATE OF FLORIDA

COUNTY OF UNION,

ON this 10 day of Dec., 2015 I, **TAI A. PHAM**, personally appeared before the undersigned authority after first being duly sworn and say that I am the Petitioner in the above-styled case, that I have read the FEDERAL PETITION UNDER 28 U.S.C. §2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY, and that I have personal knowledge of the facts and the matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

FURTHER AFFIANT SAYETH NAUGHT.

TAI A. PHAM,
DOC# 953712,
Union Correctional Institution
7819 NW 228th Street,
Raiford, Florida 32026-4460

SWORN TO AND SUBSCRIBED TO before me this 10 day of DEC., 2015, by **TAI A. PHAM, DOC # 953712**, who is personally known to me or who provided the following identification:

Anna R. Dixon ANNA R. DIXON

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires: 17 NOV 2019

ANNA R. DIXON
Commission # FF 936930
Expires November 17, 2019
Bonded Thru Troy Fain Insurance 800-385-7019

No. _____

IN THE

Supreme Court of the United States

TAI A. PHAM,

Petitioner,

v.

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

Respondents.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX G

Petitioner's Memorandum of Law in Support of his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, filed April 1, 2016.

UNITED STATES DISTRICT COURT
Middle District of Florida
Orlando Division

TAI A. PHAM,
Petitioner,

v.

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

Respondents.
_____/

DEATH PENALTY CASE
CASE NO: 6:15-cv-2100-Orl-37TBS

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HIS PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The Petitioner, Tai A. Pham ("Tai"), by and through his undersigned counsel, respectfully submits the following memorandum of law in support of his Petition Under 28 U.S.C.§ 2254 For Writ of Habeas Corpus By A Person In State Custody (Doc. 1), which was timely filed on December 15, 2015 ("Petition"). *See* 28 U.S.C. § 2244(d) (1996). Tai is currently incarcerated at Union Correctional Institution in the State of Florida under a sentence of death. The relevant facts were presented in the Petition under each Ground and will be incorporated in the following memorandum in support of a grant of relief. Furthermore, interrelated Grounds will be argued below in concert. This case heavily relies on the correct facts found in the record below to meet its clear and convincing burden; the citations to the record will be in accordance with the Supreme Court of Florida's record on appeal[1].

PROCEDURAL PREREQUISITES

Tai's Petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Section §2254(d) of the AEDPA provides that this Court can grant a writ of habeas corpus to a state prisoner on a claim that was "adjudicated on the merits" in state court. Specifically, relief shall be granted if this Court concludes that the adjudication of the claim by state court (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. *See* 28 U.S.C. § 2254(d).

[1] The record on appeal for the trial proceedings consists of 18 volumes. The record on appeal of the post-conviction proceedings also consists of 18 volumes. References to the record on appeal will be referred to as "(R ___)" followed by the appropriate volume number and then page number(s). The post-conviction record on appeal will be referred to as "(P ____)" followed by the appropriate volume number and then page number(s).

Under the "contrary to" clause, this Court may grant the writ if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decided a case differently than that Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 412-413, 120 S .Ct. 1495, 146 L. Ed. 2d 389 (2000). Under the "unreasonable application" clause, this Court may grant the writ if the state court identified the correct governing legal principle[2] established by the Supreme Court, but it unreasonably applied that principle to the facts of the prisoner's case." *Id*. at 413. In addition, "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Id.* at 382.

This Court may also grant the writ if the state court's decision was based upon an unreasonable determination of the facts in light of the evidence presented. The determination of factual issues made by a state court "shall be presumed to be correct," and Tai "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e) (1). Tai submits to this Court that the limited factual findings by the lower state courts are not only unreasonable but incorrect in light of the evidence presented at trial and in post-conviction. *See* 28 U.S.C. § 2254(d). This Court must look at the record below in determining whether the Petitioner has met the clear and convincing standard as presented below.

All of the habeas claims in Tai's Petition and discussed herein meet the procedural prerequisites and can be considered by this Court. *See* 28 U.S.C. § 2254(c). The state courts had full and fair opportunities to address and resolve the habeas claims, thus Tai has met the exhaustion requirement. *See* 28 U.S.C. § 2254(b); *see, e.g., Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9-10, 112

[2] In post-conviction cases involving ineffective assistance of counsel claims, the governing Supreme Court case is *Strickland v. Washington*, 466 U.S. 668. There are no procedural bar issues pursuant to *Teague v. Lane*, 489 U.S. 288 (1989).

S. Ct. 1715, 118 L. Ed. 2d 318 (1992). Furthermore, the factual and theoretical bases of Tai's habeas claims were presented in state court and are the same before this Court. *See* 28 U.S.C. § 2254(c); *see Vazquez v. Hillery*, 474 U.S. 254, 257-260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (Supplementation and clarification of a factual record in federal habeas court is permitted and does not defeat the exhaustion rule of 28 U.S.C. § 2254(c)).

This Court may presume the absence of an independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long,* 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 77 L .Ed. 2d 1201 (1983); *see Judd v. Haley*, 250 F. 3d 1308, 1313 (11th Cir. 2001) (citing *Card v. Dugger*, 911 F. 2d 1494 (11th Cir. 1990) ("[T]he last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim," … "the state court's decision must rest solidly on state law grounds, and may not be 'intertwined with an interpretation of federal law,'" … and "the state procedural rule must be adequate; *i.e.,* it must not be applied in an arbitrary or unprecedented fashion")).

A petitioner seeking to raise a claim as a federal issue in state court does so by "citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004). Petitioners are required to fairly present their federal claims to the state courts. *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995). In terms of fair presentment, the petitioner must identify the specific constitutional right that has been violated. *Gray v. Netherland*, 518 U.S. 152, 162–63, 116 S. Ct.

2074, 135 L. Ed. 2d 457 (1996). "[I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id.* at 162. If the state court applies federal law to resolve the claim, the state court must issue a decision that addresses and adjudicates the Petitioner's actual habeas claim on the merits. *See Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). The claim raised in federal court must then be the "substantial equivalent" of the claim presented in state court. *Picard v. Connor*, 404 U.S. 270, 278, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). Tai's habeas grounds have been appropriately federalized and are suitable for this Court's review.

Tai will demonstrate below, as to each habeas ground, that his conviction and sentence of death are based on state court decisions that are contrary to, or involved an unreasonable application of, clearly established federal law, and/or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(1) & (2); *see Williams*, 529 U.S. at 362. Tai will also demonstrate the actual prejudice he suffered as to each ground. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

GROUND ONE

As raised in Ground One of Tai's Petition, the state courts incorrectly and unreasonably determined facts in light of the evidence presented in state court proceedings, contrary to 28 U.S.C. § 2254(d)(2). The state courts also incorrectly and objectively unreasonably applied clearly established federal law as set forth by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), *Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), *Porter v. McCollum*¸ 558 U.S. 30, 130 S.Ct. 447, 175 L. Ed. 2d 398 (2009), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L. Ed. 2d 974 (1976). The state

post-conviction court denied Claims 9, 10, 11, 12, and 13 of Tai's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 ("3.851 Motion"). Its order was devoid of fact-finding as to either prong of the *Strickland* analysis for claims of ineffective assistance of counsel despite the plethora of evidence presented at the evidentiary hearing held on the motion. The Florida Supreme Court ("FSC") then simply reiterated the post-conviction court's order denying relief without any analysis.

The state courts unreasonably applied the clearly established *Strickland* precedent, which sets forth the following:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

Claims 9, 10, 11, 12, and 13 of Tai's 3.851 Motion concerned trial counsel's ineffectiveness in failing to investigate and present mitigation evidence during the penalty phase of Tai's trial. A review of the post-conviction record on appeal reveals that the state courts thoroughly failed to review, analyze, or compare the mitigation evidence presented in post-conviction to that presented at trial. The state courts' denial of post-conviction relief under the *Strickland* standard should be of grave concern for this Court, as the evidence clearly showed that trial counsel failed to pursue available and fruitful avenues of mitigation investigation that were specific to Tai as an individual, choosing instead to rush through the process and put before the court and jury whatever they could find. Tai did not receive the constitutionally-mandated individualized sentencing to which he was entitled, nor can his counsel's inactions be ever deemed reasonable. Tai submits to the Court that

upon review of the actual evidence, it is clear that the FSC did not just unreasonably determine the facts; it wholly failed to review them.

Tai was represented at trial by James Figgatt ("Figgatt") and Timothy Caudill ("Caudill") of the Public Defender's Office. Figgatt was lead trial counsel and made all the decisions with regard to strategy. Caudill served as second chair. They were minimally assisted by investigators Jeff Geller ("Geller") and Chief Investigator Dave McGuinness ("McGuinness"). All four men testified at the evidentiary hearing held on Tai's 3.851 Motion.

The record below clearly shows that that Figgatt and Caudill's performance fell well below "[t]he proper measure of attorney performance [which] remains simply reasonableness under prevailing professional norms." *Id*. at 688. According to *Porter*, "[i]t is ***unquestioned*** that under the prevailing professional norms . . . counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" 558 U.S. at 39 (quoting *Williams,* 529 U.S. at 396)) (emphasis added). Tai's counsel failed to attempt even rudimentary tasks such as making phone calls to his family and requesting readily available public records. When Tai was admitted to the Florida State Hospital ("FSH") due to competency issues, his counsel completely abandoned his case. This resulted in a scramble by counsel, upon Tai's return to competency, to cobble together a case in mitigation. The case presented was generic, the result of counsel's hollow attempts to gain any readily-available information on Vietnamese "boat people." There was no meaningful, diligent, or reasonable investigation into Tai's background. Counsel's conduct never fall within "the wide range of reasonable professional assistance" or be considered "sound strategy." *Strickland*, 466 U.S. at 689.

A. This Court is Not Bound by the State Courts' Findings of Effective Assistance.

According to the Supreme Court,

> in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance *is not a finding of fact binding on the federal court* to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," *Townsend v. Sain*, 372 U.S. 293, 309, n. 6, 83 S.Ct. 745, 755, n. 6, 9 L.Ed.2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is *a mixed question of law and fact*. *See Cuyler v. Sullivan*, 446 U.S., at 342, 100 S.Ct., at 1714. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry *are mixed questions of law and fact*.

Id. at 698 (emphasis added).

No special standards apply to ineffectiveness claims under habeas review. *Id.* at 697-98.

> An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus . . . no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Id. at 697-98 (internal citation omitted).

This Court can and should right the wrongs perpetuated by the Florida state courts in this case, detailed throughout the remainder of this memorandum.

B. Tai's Trial Counsel Rendered Deficient Performance under the First Prong of *Strickland.*

With regard to the first prong of *Strickland*, the FSC did not unanimously determine there was no deficiency. *See Pham v. State*, 177 So. 3d 955, 960-61 (Fla. 2015). The majority held the following:

> First, Pham alleges that trial counsel failed to thoroughly investigate possible mitigation. During the postconviction evidentiary hearing, Pham presented testimony from his mother, Nho Thi Nguyen; his sisters, Kim Oanh Pham, Thuy Thi Nga Hang Pham, and Thi Ngoc Anh Pham; and his brother, Anh Tuan Pham.

They testified to the conditions into which Pham was born and from which he escaped. Additionally, Pham presented the records from the Illinois Department of Children and Family Services (DCF) as well as testimony from Dawn Saphir - Pruett, a DCF closed record specialist; Susan Otteson, a school counselor who evaluated Pham; Verl Johnson–Vinstrand, a case worker familiar with Pham; and Dr. Tam Thi Dang Wei, a psychologist who was called in because Pham was having trouble adapting. The family members, social workers, and mental health professionals all testified regarding Pham's difficult childhood as a "boat person." The circuit court found that Pham "demonstrated at the evidentiary hearing that trial counsel failed to contact the members of [his] family who lived outside the United States, failed to obtain records from the Illinois Department of Children and Families, and failed to obtain complete records from the Florida State Hospital [(FSH)]." ***Further, the circuit court found that "counsel did not provide a satisfactory explanation for the failure to obtain much of this evidence."*** However, the court found that counsel's decision not to obtain the FSH records "because of his[3] knowledge of negative information contained therein was reasonable." Likewise, the court found that counsel's failure to provide the materials to mental health experts was not found to be ineffective assistance "simply because collateral counsel has discovered witnesses who gave more favorable diagnoses...." . . .

During the penalty phase, Pham presented the testimony of his older sister, Thuy, as well as other character evidence from his niece, brother-in-law, and former employers. However, it was Thuy's testimony about their difficult childhood, imprisonment, escape, and time as refugees, in addition to the Canadian Broadcasting Corporation's documentary about "boat people" and the testimony of Thuog Foshee, that prompted the trial court to find and give great weight to the mitigation of "existence of any other factor in the Defendant's background." The evidence adduced at the evidentiary hearing from Pham's family members and Illinois social workers was merely cumulative to that heard at trial: that Pham's childhood was—in a word—inauspicious[4]. Because we have "repeatedly held that counsel is not ineffective for failing to present cumulative evidence," *Jones v. State,* 998 So. 2d 573, 586 (Fla. 2008), Pham has not demonstrated prejudice in this regard. *See McLean v. State,* 147 So. 3d 504, 513 (Fla.2014) ("McLean has not established prejudice because '[t]he mitigating evidence adduced at the evidentiary hearing combined with the mitigating evidence presented at the penalty phase would not outweigh the evidence in aggravation[.]'*Tanzi v. State,* 94 So. 3d 482, 491 (Fla. 2012).

[3] It is important to note that the FSC refers here to counsel Caudill and not lead counsel Figgatt. Furthermore, there is no reference to the Illinois DCF records here. *See infra*.

[4] There was no mention of Tai's youth at trial because his sister, Thuy, was separated from him after they arrived to the Orphanage. They did not meet up until later in their lives. *See infra*. It is unreasonable to say the penalty phase evidence revealed that Tai's childhood was inauspicious (unpromising) when the evidence from the Illinois professionals provided real time and credible evidence of his difficulties, feelings of abandonment, and inability to belong that led to the uncontroverted PTSD diagnosis made in post-conviction. Tai's life experiences should not be dismissed; his childhood is important in particular because DCF failed him as a child and was later also involved in removing his children from him. *See infra*.

> Likewise, Pham is unable to demonstrate that counsel was ineffective for failing to obtain the records from his confinement at the Florida State Hospital (FSH). Counsel[5] testified that the reports included incidents of violence against the staff and that the decision[6] not to obtain the records was based on the negative information contained within them. This was a reasonable strategic decision. *See Nelson v. State,* 43 So. 3d 20, 32 (Fla.2010) ("[I]t is reasonable for trial counsel to forego evidence that, if presented in mitigation, could damage a defendant's chances with the jury...."). Moreover, the experts who testified during the *Spencer* hearing did review these records[7]. Pham thus cannot demonstrate that he was prejudiced by counsel's failure to obtain the FSH records.
>
> Last, Pham's contention that counsel was ineffective for failing to present additional[8] mental health evaluations is without merit. As we have repeatedly stated, trial counsel is not deficient simply because postconviction counsel can find a more favorable expert. *See Hoskins v. State,* 75 So. 3d 250, 255 (Fla.2011) ("'This Court has repeatedly held that counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert.'")(quoting *Card v. State,* 992 So. 2d 810, 818 (Fla.2008)).

Id. at 960-62 (original footnote omitted; footnotes added). The FSC's opinion contrasts the evidence presented at trial against the evidence presented at post-conviction and finds, inconceivably, that the post-conviction evidence was cumulative. The opinion is simply an abridged version of the post-conviction court's order and does not benefit from any independent review of the evidence from the trial or post-conviction proceedings. The FSC rests its holding mainly upon the flawed determination that the evidence presented in post-conviction was cumulative to that presented during the penalty phase trial; however, where the FSC speaks to the issue of deficient performance, as noted within the footnotes added to the portion of the opinion quoted above, it affirms without even the minimal review required the post-conviction court's

[5] Again, the FSC refers to counsel Caudill and not lead counsel Figgatt. *See infra*.
[6] There was no such decision made. *See infra*.
[7] This fact is incorrect and refuted by the record. *See infra*.
[8] This assertion is wrong. Tai did not argue that trial counsel was ineffective for not presenting additional mental health evaluations. In fact, Tai argued that due to trial counsel's failure to conduct a competent mental health investigation (interviewing the family, the Illinois professionals, and obtaining the Illinois DCF and complete FSH records) that the mental health evaluation that was done was inaccurate. This is clearly evident where the defense and state experts in post-conviction all diagnosed Tai with PTSD, a severe mental illness.

erroneous factual determinations. The FSC makes a conclusory determination that the post-conviction court's findings are supported by competent and substantial evidence without reviewing the accuracy of the facts asserted. This is unreasonable because the post-conviction court's order was haphazard and failed to squarely address the evidence. The post-conviction court neglected to identify what evidence supported its unreasonable conclusions, and the FSC followed suit. The state courts unreasonably discounted the voluminous compelling post-conviction mitigation investigation and evidence. *See Porter*, 558 U.S. at 42-43.

Writing in concurrence, Justices Pariente and Quince recognized the clearly inconsistent findings of the majority as to the performance prong of *Strickland*. *See Pham*, 177 So. 3d at 964-65. Specifically, the concurrence stated as follows:

> [T]he majority states that trial counsel's failure to obtain records from Florida State Hospital (FSH) "was a reasonable strategic decision"—thus apparently concluding that there was no deficiency—but then concludes that Pham "cannot demonstrate that he was prejudiced by counsel's failure to obtain the FSH records." Majority op. at 961–62. The majority is similarly internally inconsistent as to Pham's claim that trial counsel was ineffective for failing to present additional mental health evaluations, stating on the one hand that "trial counsel is not deficient simply because postconviction counsel can find a more favorable expert," while also stating, on the other hand, that "Pham cannot establish that he was prejudiced by counsel's alleged omission." *Id.* at 962.
>
> While I agree that Pham has not established prejudice and is therefore not entitled to relief, if the majority is going to address deficiency***, it should clearly conclude that trial counsel's failure to investigate mitigation did in fact constitute deficient performance.*** *See, e.g., Hardwick v. Sec'y, Fla. Dep't of Corr.,* 803 F.3d 541, 551 (11th Cir.2015) ("[A] decision not to put on mitigating evidence is only reasonable, and thus due deference, to the extent it is based on a professionally reasonable investigation."). In its order, the postconviction court found that Pham "demonstrated at the evidentiary hearing that trial counsel failed to contact the members of [Pham's] family who lived outside the United States, failed to obtain records from the Illinois Department of Children and Family Services, and failed to obtain the complete records from the Florida State Hospital." The postconviction court further found that "[t]rial counsel did not provide a satisfactory explanation for the failure to obtain much of this evidence."

Id. at 964 (emphasis added). The concurrence found that that "there was no valid excuse for

counsel's failure to explore this very fruitful avenue of mitigation." *Id*. at 965. Through a more careful evaluation of the post-conviction court's order, the concurrence correctly and reasonably finds that the majority opinion is inconsistent and unclear. Regardless, it is clear in light of *Strickland*, *Wiggins, Williams*, and *Porter* that Tai's counsel was deficient and there was no reasonable strategy supporting their inaction in terms of mitigation evidence.

C. No Reasonable Strategic Decision Exists to Justify Counsel's Failure to Investigate and Present Individualized Mitigation Evidence.

The Supreme Court in *Wiggins* addressed strategic decisions not to investigate or present potential mitigation evidence. 539 U.S. at 521-22. Specifically, the Court's clearly established precedent defined the deference owed to capital counsels' strategic decisions in terms of the "adequacy of the investigation supporting those judgments." *Id.* at 521.

> "[S]trategic choices made ***after*** thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and ***strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation***. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Id. at 521-22 (quoting *Strickland*, 466 U.S. at 690-91) (emphasis added). Capital trial counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. *See Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986) ("Counsel's failure to request discovery, again, was not based on 'strategy,' but on counsel's mistaken beliefs . . . ").

A reasonable strategic decision is based on an informed judgment, and the principal concern "is not whether counsel should have presented a mitigation case. Rather, [the] focus

[should be] on whether the investigation supporting counsel's decision to not introduce mitigating evidence of [the capital defendant's] background was *itself reasonable*." *Wiggins*, 539 U.S. at 522-23. In making this assessment, a reviewing Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence *would lead a reasonable attorney to investigate further*." *Id*. at 527. Trial counsel must do the investigative work before he can make an informed decision as to trial strategy. *See Williams*, 529 U.S. at 415. Counsel cannot make decisions that affect whether his clients lives or dies on a whim.

Tai's counsel failed their duty to conduct a reasonable mitigation investigation prior to making any decisions. In fact, an objective review of the record will demonstrate that in this case, counsel was ignorant of and offered no reasonable explanation for failing to follow up on obvious avenues for investigation. The post-conviction court found deficiency and a lack of strategic justification in its order on Tai's 3.851 Motion:

> Trial counsel ***did not provide a satisfactory explanation for the failure to obtain much of this evidence.*** While it is unclear whether a trip to Vietnam for face-to-face interviews would have been necessary or approved, there was certainly no impediment to making telephone calls to the family. The witnesses from the Illinois Department of Children and Families testified that they were available and willing to testify and that their records would have been provided had such a request been made. Similarly, there is little doubt that the records from the Florida State Hospital would have been provided.

P11/2066 (emphasis added). The court further held that

> "[e]ven if it is concluded by this Court that trial counsel was deficient in failing to obtain the evidence contained in grounds 9-12, that does not entitle the Defendant to relief. The Defendant must still establish the prejudice prong of *Strickland*."

P11/2066. On the issue of deficiency, even the post-conviction court appeared to agree that counsel was deficient. The issue of strategic justification emerges with regard to counsel's failure to obtain the FSH records and the post-conviction court's erroneous finding that counsel did not obtain them because of certain information contained within them. There was no strategic justification for

failure to obtain these records; counsel neglected to obtain them for the same reason they did not pursue the other readily available avenues of mitigation – they failed to appreciate their necessity.

This Court must determine based on the evidence "whether counsel conducted a reasonable background investigation *or* made a reasonable decision that made conducting a background investigation unnecessary." *Johnson v. Sec'y, Dept. of Corr.,* 643 F.3d 907, 931 (11th Cir.2011) (quotation marks omitted). Lead counsel Figgatt testified that he made the final decisions in terms of trial strategy, what would be investigated, the theory of defense, legal issues, and what mitigation would be put on. P14/471-474. He testified as to the importance of collateral evidence, family interviews, and other records because "there's no way that a client can provide a history that's accurate and complete even as an adult" and "reliance upon historical records is often more reliable than relying upon current information about what historical records say." P14/491-92. In capital cases, Figgatt has to "humanize an individual who has committed in most situations a very bad crime in the eyes of the jury. We're at a point where we were deciding whether he lives or dies. Nothing that he's provided is necessarily going to be useful as something that was recorded decades before this offense happened." P14/492. There were no financial constraints on getting out-of-state records, making international calls, or bringing relevant witnesses to Florida. P14/505-6 & 560. Figgatt testified that regardless of whether records contained good or bad information, he would have given them to his experts because they are valuable and experts can get more out of them. P14/493. He testified that records that he may see as "bad" might be seen by an expert as an indication of an emotional problem early on in a client's life. P14/493.

Figgatt knew that Tai was a foster child in Illinois. P14/493-5. He did not make any requests to the State of Illinois or to Catholic Social Services and, in effect, did nothing with this information. P14/496. Figgatt has requested records in other capital cases and has even gone to

other states to obtain records. P14/496. He did not make a decision not to get records in this case, and he could not explain why he waited so long to get the Florida DCF records, in late 2007 or early 2008. P14/499-500. When Figgatt looked over the Illinois DCF records provided by collateral counsel, he learned new information about Tai. P14/503-4. He testified that he would have given these records to his experts. P14/504-5. He further testified that these records were important because of the potential impact of their information on the jury. P14/563-4.

Figgatt also looked over the complete FSH records, which he had not requested. P14/506-7. There was no decision made not to get the records. P14/507. Figgatt testified that he needed the records to follow-up on Tai's conduct of hiding under a bed like a child. P14/507-8. Figgatt was aware from defense expert Dr. Day's deposition that she suspected Tai was bipolar and suffered from Post-Traumatic Stress Disorder ("PTSD"), and he was aware that she did not have enough information regarding Tai's history to make a diagnosis, but no additional information was provided to her. P14/537-9.

Figgatt agreed that the records had some information that is good and some information that is not so good, but he testified "[t]hat's always true of those records." P14/509. The simple fact that the records contained bad information would "[a]bsolutely not" stop him from giving them to the experts. He explained that

> there's a theory in the defense bar that's held by a very small minority, that you need to work your expert in a certain way. I really think that's professionally disingenuous. I've practiced with attorneys who are not with the Office of the Public Defender, who actually exclude stuff in their transmissions to the - - I mean, they go through material and they delete pieces. I think that's just ethically wrong. If you're going to have an expert, an expert can take things I think that are awful and make them into something that's mitigation valuable.

P14/509. Furthermore, he would rather know about "bad" information than learn about it from the prosecutor, and that is why he obtained the Florida DCF records. P14/510. When cross-examined

about facts from the records that would have contradicted his trial theory of mitigation, Figgatt stated that Tai's issues with authority or juvenile criminal behavior could be a sign of an undiagnosed mental illness such as schizophrenia or bipolar disorder. P14/547-8. He testified that the traumas in the records and even the so-called "bad" information could have helped him understand Tai. P14/561. He needed all of the information in the records, but he failed to get them. P14/561. Figgatt also stated that he did not search outside of Central Florida for a Vietnamese mental health expert. P14/510-1.

It is disconcerting that the state courts completely disregarded Figgatt's testimony in justifying the failure to obtain records in terms of a "strategic decision. Inexplicably, even though Figgatt was the lead attorney and made all of the final strategic decisions, the state courts relied on a few of second chair Caudill's statements to conclude a reasonable strategic decision supported trial counsels' failures. Figgatt's testimony alone demonstrates that this is objectively unreasonable. Caudill's role as counsel was limited and in deference to Figgatt. Caudill testified:

> ***First chair always made the ultimate decisions about the case,*** what our actions were in a case, ***defense strategies*****,** how we would present them. First chair was the primary lawyer that the Court would address when we got to trial or in pretrial hearings. And beyond that whoever was first chair in a case would - - there never was a formal kind of telling each other you're going to do this, there was always conversation, but ***ultimately first chair made final decisions*** and would often ask other person to do certain things in a case."

P13/337-8 (emphasis added). In a disagreement, the first chair made the ultimate decision. P13/338.

Caudill was not familiar with any "particular investigations that [the initial investigator Harris] did on this case." P13/339-40. He acknowledged that most of the penalty phase investigations took place after Tai returned from the hospital. P13/347. He also confirmed that there were no financial constraints. P13/341.

Caudill does not take notes in capital cases and his testimony relied only on his memory. P13/334. He recalled having very little contact with Tai prior to his going to the FSH; Figgatt had most of the contact. P13/341. Caudill could not "say that there was anything in particular that continued in the way of investigations while he was at the state hospital." P13/342. He felt that "the case was sort of fast tracked" to trial after Tai came back from the hospital. P13/343. He testified about the importance of obtaining collateral sources, looking for family witnesses in particular, and obtaining institutional records, especially when it comes to expert opinion. P13/348-50. He did not know if they "actually ever made an effort to contact the family that was still in Vietnam," and he did not recall any attempts to get the Illinois DCF records or the complete FSH records. P13/356-363.

Caudill acknowledged that Dr. Day suspected Tai suffered from bipolar disorder and that he might qualify for a diagnosis of PTSD. P13/367-8. Dr. Day testified in her deposition on April 4, 2008 that she did not have enough information to make a formal diagnosis of PTSD. P13/368. Caudill did not recall providing additional information to aid her in making definitive diagnoses. P13/368. Caudill testified that part of their mitigation theory was that Tai was not intelligent. P13/379. The State, during its post-conviction cross-examination, had Caudill view the records provided by collateral counsel and selectively pull out information that was inconsistent with the "lack of intelligence" theory of mitigation. This sort of hindsight analysis is impermissible for a *Strickland* analysis because a mitigation investigation is insufficient where its limitations are not supported by reasonable professional judgments. *Wiggins*, 539 U.S. at 521-22. Caudill never tried to obtain the records and therefore could not have determined their content was unfavorable. P13/397-99. If he had obtained the records, he clearly could have gone with a theory that Tai suffered from PTSD rather than a theory that he lacked intelligence, if he had determined that

theory was unsupported by the records.

To give counsel the option to refrain from obtaining mental health records because they *might* contain information inconsistent with a theory counsel has developed *without the benefit of the records* invites capital trial counsel to neglect his or her duty to develop mental health mitigation that is particular to the client. It is on this unreasonable application of *Strickland* that the state courts' finding of a reasonable strategic decision with regard to the FSH records rests, and this unreasonable application of clearly-established law exists in addition to the unreasonable determination of the facts, considering the post-conviction testimony that Caudill was not even *responsible* for any strategic decisions and that Figgatt, who *was* the person responsible had no strategic reason for failing to obtain the records. Caudill reiterated during his testimony that Figgatt was ultimately responsible for making decisions on how to proceed in penalty phase and all he knew was that they did not use the PTSD theory. P13/368, 384. Tai has been deprived of a constitutional sentencing by the ineffective assistance of counsel and the state courts' refusal to recognize counsel's ineffectiveness.

To add to the egregiousness of the facts, this is a case in which the mitigation investigations had not even commenced until shortly before the initially scheduled penalty phase proceedings. *See Porter*, 558 U.S. at 39; *see Williams*, 529 U.S. at 415. Uncontroverted evidence from the investigator logs, notes, and e-mails[9], clearly demonstrated that the investigation done prior to trial was minimal and only by the grace of a continuance was counsel was able to buy time to put whatever mitigation could be easily found.

Caudill did some internet research on Angel's Trumpet flowers that Tai mentioned to him, and he had records about Tai's possession of cocaine charge from July 2005. P13/364. Yet, he

[9] The logs and testimonies of Geller and McGuinness' were not referenced and were ignored by the state courts. This evidence showed how that counsel was not diligent.

never considered hiring Dr. Daniel Buffington, a forensic pharmacologist, or having any other expert look into substance abuse. P13/364. Caudill was present during Dr. Day's deposition on April 4, 2008, and he acknowledged that she testified that she was not aware of Tai's history of drug or alcohol abuse. P13/366-367. After the deposition, however, Caudill did not provide her with additional information regarding substance abuse. P13/367.

Caudill further testified that he found the CBC video on the subject of Vietnamese "boat people" that was introduced at trial on the internet. He was looking for a video that showed information about Saigon at the time of the fall and the experience of "boat people" leaving Saigon, which also included the experience of *those people* once they got to other places such as refugee camps. He acknowledged that he never found a video depicting the camp where *Tai* was. P13/357-358. He did not recall finding anything on the internet "*that was specifically about Mr. Pham's background and experience*." P13/378. Caudill hired a cultural expert to give the jury "*broader information* that didn't just come from family about that experience which was our client's experience." P13/358. However, the cultural expert, Foshee, *did not have any personal knowledge* of Tai's life before he came to Orlando. P13/360. Caudill believed they tried to get a Vietnamese mental health expert, but never found or contacted one. P13/360.

McGuinness testified that the initial investigator on Tai's case was Douglas Harris, who concluded his employment in early 2007. P13/313. It is unknown what work was done by Harris as he shredded his work product. P13/313. Thereafter, Geller was hired as an investigator, but there was a period of time of about 2 to 3 months where there was no investigator assigned to Tai's case. P13/313-4. McGuinness explained that it was the office's policy that all investigative requests must be in writing from the attorneys. P13/314-5. In contrast to trial counsel's testimony regarding the lack of financial obstacles, *McGuinness recalled that they did not receive or do an*

investigation in Tai's case because of financial constraints. P13/318. McGuinness testified that

> Mr. Geller and I believed that somebody should go to Chicago and if it's some people there that were developed throughout the case. Also thought that a trip to Vietnam to speak with Mr. Pham's mother and brother, sister, and also he had a sister in Paris that we wanted to be able to talk to. And Mr. Geller was under the same opinion I am as far as you don't investigate somebody on the telephone because they don't know you, you don't know them. You can't read body language, you can't, you know, interview them successfully by telephone as you can in person.

P13/318-9. McGuinness was "[a]bsolutely" sure that they knew about the family in Vietnam and France before the trial. P13/320-1. McGuiness recalled conversations with the counsel about the travel and he was told "[b]asically that we couldn't afford it. Bottom line." P13/322. Counsel did not enlist the help of the investigators to determine the costs in Tai's case for the cost approval process. P13/322. McGuinness testified that Geller "told Mr. Caudill in one of the meetings that if he can get approval for two weeks' vacation, paid vacation, that he would go to Vietnam on his own dime." P13/322-323.

Geller, who has worked as an investigator in death penalty cases for a total of twenty years, became involved in Tai's case in late 2007 and just read his case file. P14/568; P15/622 & 626-7. He was not officially assigned to the case. P14/568. Geller spoke to counsel about some investigative areas of importance, relaying to counsel that he wanted to find the sister who attempted to escape with Tai and the sister who he escaped with. P14/569-570. Geller contacted Thuy at her home and asked her to come to the office, which she did almost immediately. P14/571. Geller was aware that there was a sibling in France and some still in Vietnam. P14/571. Per the office's policy, Geller never contacted any of the out-of-state siblings because he was nots assigned the task. P14/572-3. He requested to visit Illinois when he was not having luck trying to find someone or records about the orphanage but he was never given authorization. P14/574 &599 & P15/608&618-9. Geller tried to double up a trip to Indiana and Illinois as presented in a memo

dated April 8, 2008, but he was not authorized. P15/608-9. He offered to go to Vietnam to speak to Tai's family on his own dime, but nothing came of that request. P15/618. Tai's counsel ignored all of Geller's suggestions as to obvious potential avenues for mitigation investigation as to Tai's background.

Geller testified about his personal voluminous investigator logs, his memos, and e-mails that were kept in the course of his business clearly show a lack of due diligence and were introduced as Defense Exhibits 10 to 30. P14/575-578, P8/1413-1557 & P9/1558-1648. Prior to Geller's involvement, no investigations were done. P13/339-340 & P14/568. The timeline of the investigations in Tai's case was as follows:

- November-December, 2007: No investigations. P14/580 & P8/1413-73.
- January 16, 2008: Investigative meeting called by Geller where the investigators were assigned to determine Tai and Phi's marital status at time of the incident; to conduct background investigation on Higgins and civilian witnesses; **to *locate and interview Thuy for mitigation interview***; conduct Autotrack; and to locate and interview potential cultural expert. P14/580-588 & P9/1641-42.
- February, 2008: Computer work attempting to locate boat people or cultural witnesses. P14/89-590 & P8/1492-1500.
- March 3-7 2008: Attended portions of the guilt phase. P14/590 & P8/1501.
- March 10-31, 2008[10]: Researching Catholic Charities, Tha Huong, refugee camps, and interviews with Thuy, Xuan Nguyen, Foshee, Diamond, Ngan Nguyen, serving subpoenas, and ordering research books. 8/1501-1511.
- April, 2008: Researching video clips and newspaper articles about Vietnamese boat people[11], locate Tai's vehicle in impound, and locating witnesses for mitigation. P15/610 & p8/1512-29.
- ***April 3, 2008: Email request by Caudill to obtain the CBC video***. P15/610-1 & P9/1646.
- May, 2008: Relocating mitigation witnesses so they can testify and serving subpoenas. P15/614 & P8/1530-9.
- June, 2008-August, 2008: No investigations. P15/615-6 & P8/1540-57 & P9/1558-97.
- September19, 2008: Search for N and Q Nguyen. P15/616-7 &P9/1607.
- October, 2008: No investigations. P9/1611-29.
- November 14, 2008: Attending sentencing. P9/1634.
- November 19, 2008: Obtained sentencing order. P9/1636.

[10] The bulk of the investigations were begun after the guilty verdict.
[11] It was the first time he was doing "sort of the boat people investigation."

(emphasis added). For comparison, the timeline of the trial proceedings was as follows:

- Date of Indictment: November 8, 2005.
- Tai was found incompetent: August 29, 2007.
- Tai was found competent: December 6, 2007.
- Guilt phase: March 3, to 7, 2008.
- Tai convicted: March 7, 2008.
- Penalty phase initially set: March 31, 2008.
- Penalty phase continued to: April 28, 2008.
- Penalty phase continued again to: May 20, 2008.
- Penalty phase of trial: May 20, to 22, 2008.
- Jury recommendation: May 22, 2008.
- *Spencer* hearing: August 18, 2008.
- Sentencing hearing: November 14, 2008.

R1/21-23, R4/11, R25/1469-70, R12-14, R18/1100-1272, R18/1293-95, R3/569-575 & P14/516-18. In comparing the foregoing timelines, it is clear that counsel failed to diligently investigate mitigation evidence. Counsel had the case since October of 2005, and inexplicably waited until two months before the guilt phase to begin the investigation process.

What is even more alarming is that counsel *would not have completed the mitigation investigation ahead of the initial penalty phase date of March 31, 2008*. The U.S. Supreme Court in *Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158 (1932), emphasized the importance of effective assistance of counsel in that period from arraignment to the beginning of trial "when consultation, thorough-going investigation and preparation were vitally important." The duty lies on counsel to make sure that the investigation is timely completed. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins*, 539 U.S. 510; *Williams*, 529 U.S. 362. The timeline shows a lack of diligence, the inadequacy, and lack of thoroughness of counsel's mitigation investigation. Counsel was ineffective for failing to conduct an investigation sufficient to support a professionally reasonable decision as to whether to put it on or to make any reasonable strategic and informed decisions as to mitigation presentation. *See Wiggins*, 539 U.S. 510. There has to be investigation before trial counsel can delve into the decision-making process.

Tai's case has a striking resemblance to *Porter*, where counsel's failure to uncover voluminous evidence of Porter's familial, mental health, and historical background was found by the habeas court and the United States Supreme Court to be unreasonable professional judgment. 558 U.S. at 39-40. As in *Porter*, the FSC in Tai's case "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing" and also completely dismissed uncontroverted evidence of PTSD discovered only after a meaningful mitigation investigation. *Id*. at 42-3. The PTSD diagnosis came to light after the evidence to support was investigated to support the symptomology in post-conviction. One cannot exist without the other.

In *Gregg v. Georgia*, 428 U.S. 153, 206, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court emphasized the importance of focusing the sentencer's attention on "*the particularized characteristics of the individual defendant*." (emphasis added); *see also Roberts*, 428 U.S. 325; *Williams*, 529 U.S. at 415 ("The consequence of counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and ***unique*** personal circumstances manifested itself during his generic, unapologetic closing argument, which provided the jury with no reasons to spare petitioner's life."). In fact, "[t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant." *Cunningham v. Zant,* 928 F.2d 1006, 1019 (11th Cir. 1991) (citing *Armstrong v. Dugger*, 833 F. 2d 1430, 1433 (11th Cir. 1987) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S. Ct. 869, 875, 71 L.Ed.2d 1 (1982))). "By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s] [a petitioner's] ability to receive an individualized sentence." *Id.*

The hastily presented mitigation before the jury in Tai's case was a predominantly a general presentation of Vietnamese "boat people" devoid of first-hand, detailed, and specific evidence of

Tai's difficult childhood, his forced escape, his torment while in captivity, his severe difficulties as a child in the orphanage and foster care system, and the traumas that he suffered along the way. Tai's counsel admitted that they failed to tell Tai's story and the record shows this clearly. The state courts were objectively unreasonable in finding that the mitigation evidence in post-conviction was cumulative to that presented at trial; they were objectively unreasonable in imputing knowledge to second chair counsel and trial experts; and they were objectively unreasonable in finding that the PTSD diagnosis was just a "more favorable" diagnosis because they failed to recognize how all the information discovered after a meaningful investigation, which the trial experts were missing, led to the diagnosis. Tai's story was not told until post-conviction, much like in *Porter*, *Wiggins*, and *Williams*.

D. The State Courts Misapplied the *Strickland* Prejudice Standard.

With regard to the prejudice standard, *Strickland* states

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the ***factfinder*** would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it ***independently reweighs the evidence*** - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim ***must*** consider the totality of the evidence before ***the judge or jury***. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. ***Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect***. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695-96 (emphasis added). The state courts in Tai's case misapplied the

Strickland prejudice prong by trivializing the effect of the mitigation presented in post-conviction on Tai's sentencing profile and relying heavily upon the trial court's sentencing determinations in assessing prejudice when the jury's recommendation under the sentencing scheme carried great weight.

The FSC heavily anchored its opinion upon the findings made solely by the trial court judge, who was also the post-conviction judge, as to the aggravators and mitigators. In its opinion, the FSC simply quoted the post-conviction order as follows:

> However, the circuit court reasoned that Pham was unable to establish prejudice, finding, "While this information could easily have been discovered, there is no possibility that it would have altered the jury's recommendation or [the court's] weighing of the aggravating and mitigating circumstances." Additionally, the court noted that the sentencing court "already gave great weight to mitigation from [Pham's] background as it related to his escape from Vietnam and his upbringing in Illinois."
> . . .
> The trial court found and gave moderate weight to the mitigating factor that Pham was experiencing an emotional disturbance at the time of the crime. Accordingly, Pham cannot establish that he was prejudiced by counsel's alleged omission and the circuit court properly denied relief on this claim.

Pham, 177 So. 3d at 961-62. There was no analysis as to the presentation before the jury or how it Tai's individualized story would have affected those 12 individuals.

To rely in post-conviction only on a sentencing court's finding of the aggravators and mitigators and its subsequent weighing renders the role of a jury moot. Supreme Court precedent clearly requires a jury role in capital sentencing. *See Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2006); *see also Hurst v. Florida*, 136 S. Ct. 616, 620, 193 L.Ed.2d 504 (2016). *Strickland* requires a prejudice analysis that follows the sentencing jurisdiction's capital sentencing scheme. 466 U.S. at 695 ("When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it ***independently reweighs the***

evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.") Because of Florida's case law requiring the sentencing judge to give great weight to the jury's recommendation in favor of death, the sentencing judge is limited in his or her ability to reweigh the evidence. *See Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). Therefore a prejudice analysis that looks only to the trial judge's conclusions cannot be a reasonable application of *Strickland.*

E. Tai Was Prejudiced in Sentencing by Trial Counsel's Deficient Performance.

In Tai's case, because there was minimal fact finding by the state courts, it is thrust upon this Court to look at the facts presented at sentencing and in post-conviction. Upon closer review of the facts, this Court cannot help but find that there is a reasonable probability that a jury vote would have tipped the scale in favor of a life recommendation. Tai's case has strong evidence of juror bias against foreigners; in particular, the inaccurate notion that Tai came to the United States on his own pervaded the proceedings. It is clear, however, that he was ripped from his home, and the jury heard only a generalized account of Vietnamese "boat people." The jury heard nothing specific to Tai's experiences. In addition, counsel's failures resulted in an inaccurate mental health profile being presented to the jury and a dearth of information regarding Tai's childhood experiences and developmental difficulties.

i. The testimony of the familial witnesses in post-conviction was not simply "cumulative."

Tai is entitled to an individualized sentencing. *See Gregg*, 428 U.S. 153; *see also Roberts*, 428 U.S. 325. When a jury is given the solemn task of recommending whether a person lives or dies based upon that person's culpability, those jurors must learn about that individual person. A generalized account of the population or demographic he is from is not sufficient. A capital sentencing at which mitigation for an African-American, Hispanic, or Caucasian United States

citizen consisted of a video about the identified group of people generally and the testimony of an unrelated member of that group (Xuan Nguyen) and a "cultural expert" would not be constitutional. The limited testimony of one family member and an inaccurate and uninformed mental health presentation would not cure the constitutional defects because the defects would arise from the fact that such a sentencing proceeding gives the factfinder zero opportunity to assess the particular circumstances of the defendant. Tai's sentencing simply was not constitutional.

The state courts ignored this clearly established federal law, which Tai raised below, by deciding that the post-conviction evidentiary presentation was "merely cumulative" to the generalized presentation at trial. *Pham*, 177 So. 3d at 961. The post-conviction court stated that Tai's sister Thuy's trial penalty phase "testimony was the most pertinent to the specific issues the Defendant faced because she encountered those same hardships contemporaneously, although she and the Defendant *were physically separated for much of the time*." P11/2067. Thuy and Tai are different people. Thuy ***did not have*** the personal knowledge to describe Tai's traumatic experiences in the prison, at the camp, and at the orphanage.

Furthermore, despite its finding that "*[t]he psychological makeup of one individual and another can be totally different in their response to identical circumstance*," the post-conviction court found the post-conviction evidence cumulative because "substantial evidence about the conditions in the prison and the refugee camps in Vietnam and Malaysia in that era" was presented at the penalty phase through the testimony of Xuan Nguyen, the cultural expert Foshee, and the CBC video. P11/2067. Thus, even though the post-conviction court recognized that different people respond differently in the same circumstances, it failed to follow its own logic in its order denying relief. P12/124. For example, its statement regarding different responses stands in stark contrast to its finding that Xuan's time at the refugee camp "although *predating* the Defendant's,

[was] relevant because his treatment *would have been* similar." P11/2067. Another example of the post-conviction court's inconsistency is the fact that the court would sustain the State's relevance objections whenever a family member testified as to their experiences, which were contemporaneous with Tai's, at the evidentiary hearing. The state court's actions were clearly inconsistent because, at times, the court allowed other "boat people's" experiences to be akin to Tai's experience and at other times, it deemed other people's contemporaneous experiences irrelevant. What is clear is that, instead of doing an in-depth comparison of the testimony deduced at trial versus what was presented in post-conviction, the state court just generalized the experiences of all "boat people" and determined they were the same as Tai's and that he would be affected in the same way.

The life of a general population can never serve to provide an individualized sentencing. The state courts' determination that the evidence was cumulative because there was general evidence about "boat people" is absolutely unreasonable. Tai was not just a "boat person"; he already suffered from developmental problems at a young age and was then ripped from his mother, not once, but twice. He was forced away from his home and thrown into horrific and traumatic conditions. He faced a DCF system that could not help him with his childhood problems. The individualized evidence presented in post-conviction was not cumulative because it provided details of an entire period in Tai's life that was referenced only in passing during the trial. *See Sowell v. Anderson*, 663 F.3d 783, 789 (6th Cir. 2011) & *Neal v. Puckett*, 286 F.3d 230, 243-244 (5th Cir. 2002).

The court attributed the penalty phase witnesses' experiences to Tai when in fact the jury never heard Tai's story. P11/2067. However, in looking at the actual testimony of each trial witness versus the post-conviction family witnesses, it is clear that what was presented was a generalized

rendition neither substantial nor detailed. R12/77-118. Here, Tai will lay out a detailed summary of the penalty phase evidence followed by the familial post-conviction evidence.

Thuy testified generally as to life in Vietnam and Tai's early years at trial:

- She and Tai were born in Vietnam; they were two of nine children.
- Their father was a soldier with the South Vietnamese Army who was put in prison but tried to visit them in hiding. Their mother was a housewife.
- Tai was born in 1972 during the war when Vietnam fell to the Communists; the Communists took their land.
- Their family tried to escape several times from Communist rule. Once they were able to get to a boat but had to turn around because they got shot at. Once they lived with someone in another town so that they could access a boat. Parts of the family was caught and put into camps or prison.
- Tai and a sister got caught and put in prison. He returned with help from someone on the street as he was only eight years old. He was forced to do labor while in prison and she thought he was there for a year.
- After Tai was home for only one week, the family tried to escape together but only she, Tai, and a cousin made it out. They were on a boat with no food, water, or bathroom; the boat was packed with people and she and Tai were underneath. She guessed there were 170 to 180 people on the boat.
- She got sick and when she woke up they were in a camp in Palau Bidong, Malaysia, which was like a prison with barbed wires. She and Tai were not living together at the camp because men and women were separated. She saw him only occasionally. She said that the CBC video fairly and accurately depicted the camp's conditions.
- Tai was crying and kept asking for his parents;
- Tai got caught eating meat and was taken away by Thai force.
- She later found out that Tai was taken to the hospital but she did not know where he was or what happened.
- She met up with Tai two years later on the last flight to Illinois; she did not know to eat on the plane because they did not have money.
- She and Tai spoke Vietnamese and she tried to learn to speak English; there was no real schooling in the camp. For six or seven years she and Tai did not know what happened to their family; the Communists would not allow contact.
- Catholic Services ran the orphanage where they wound up, and she and Tai stayed at different places. She saw him when they would eat.
- They were given schooling in the orphanage and eventually she was accepted by a foster family. She left Tai at the orphanage.

R12/77-102. After this testimony, Thuy talked about her life, reuniting with Tai, and his adulthood. R12/102-15.

At the trial, Xuan testified as to *his* plight when he willfully escaped from Vietnam as

follows:

- He lived in Vietnam before he left in 1979.
- In 1975, he was in his early to mid-twenties when he was first arrested by the Communists. It took his family 4 years to raise money to get him out of jail. He witnessed executions by the Communists. He was very scared in the jail/prison
- He served the South Vietnamese Navy for six years. He took care of electronics and security. He went to Catholic school from first to fifth grade and the he studied at a technical school in 1964/1965.
- He continued to work in electronics until he escaped on a boat, in 1979. He arrived in Washington, D.C./Virginia in 1980. Once there, he started to working in electronics.
- The boat he escaped on had 49 people. They all arrived to Malaysia and were robbed 6 times during the trip.
- He arrived at Palau Bidong and stayed there for 9 months. The "conditions were harsh" and they had to rely on aid from different organizations. They stayed behind some sort of wooded/wooden structure and not behind a fence. The YMCA sponsored him to go to the U.S.
- He was not in Palau Bidong at the same time as Thuy and he "left way before."

R12/145-159. Then, Xuan testified as to his life. R12/151-3. Unlike Tai, Xuan was an adult when he willfully left Vietnam. The psychological effects on Tai versus Xuan would be vastly different. Unlike Hang's powerful and accurate postconviction testimony, Xuan's testimony failed to depict the prison conditions that Tai faced. Xuan's testimony did not provide evidence as to Tai's escape or his traumas. Furthermore, Xuan did not give substantial evidence as to the conditions of the camp, short of the fact that it was "harsh." The jury heard about Xuan's experience and fears, which cannot take the place of the experience of Tai as a child.

Foshee gave a very general insight into Vietnamese refugees[12] and there were no specific details as to Tai or Palau Bidong. A summary of Foshee's testimony follows:

- Foshee ***is not a boat person***. She left Vietnam in 1969, after she married an American serviceman.
- She returned in 1976, to a refugee camp in Philippines and Thailand, but she "didn't get a chance to go to all of the other camps, like Malaysia." She learned *from other refugees* that Palau Bidong was one of the worst camps. She went to the camps to help the Vietnamese try to settle in countries that accepted them.
- Her brother escaped from Vietnam in 1984, and he was in the Philippines'' Palawan camp

[12] Caudill testified that Foshee did not have any personal knowledge of Tai's life before Orlando. P13/360.

for 4 or 5 years. He has been in the U.S. since 1990 and he has difficulty with employment. She went to Palawan where the conditions were very bad and she bought a well and pump so they could get water.

- She has come into contact with Vietnamese refugees from mid to late 1980s and she has worked to help them cope with their new life in the U.S. She came to know different Vietnamese refugees' stories and not all of them were lucky to have their whole family come to shore. Some of the refugees had family sponsors and some came through church sponsorship, or are sponsored by the Buddhist temple. She found people who had family in the U.S. were mentally better and the others live in foster homes or sponsors. They are confused between the two cultures. Not everyone who has come from Vietnam has done well in U.S.; most of them have done well. She does not "have much time to spend with them, only when they need [her]."
- She talked about difference in discipline between the U.S. and Vietnam and that it is stricter in Vietnam and she was beaten by her mother for failing a grade. Most of the Vietnamese people are still strict in the U.S. and try to maintain their culture.
- She does not know anyone who has been violent crimes or killed someone.

R13/260-281 (emphasis added). When Foshee was asked about her experience in prison when she was captured, the court held that testimony regarding her experience was not relevant to Tai's case. The court stated as follows:

> And I would have no problem if she was testifying as to conditions of a e(sic) camp that he [Tai] was in, but to testify as her conditions in Vietnam in a prison twenty plus years later, there's no nexus that they're the same as to the conditions that he was imprisoned in in Malaysia, and absent some nexus to show that those conditions are identical or very similar, I'll sustain the objection.
> . . .
> And there was no objection to her testifying that she was imprisoned for terrorism. The objection then, which was the question, which was sustained as to relevance were the conditions of the prison which she was in in 2005 in Vietnam and your client was in prison in the '70s in Malaysia in a refugee camp.

R13/271-272. Therefore, there was no first-hand account testimony as to the conditions of the prisons that Tai would have been exposed to. Foshee admitted that she was not very involved in the community and that she helps when she can. Her description of the Malaysian camp was from hearsay. Once again, this was not Tai's story.

Finally, the CBC video that was played did not depict Tai's plight. It did not give substantial evidence of Tai's prison experience like Hang's post-conviction testimony. The video

depicted the refugee camps and the stories of other refugees from 1979 (it aired on September 11, 1979). P7/1353-1355. Tai was forced out of Vietnam about two or three years after this video. Caudill never found a video depicting the camp Tai was in, and he could not find anything on the internet "that was specifically about Mr. Pham's background and experience." P13/358&378.

In contrast to the generalized and cursory presentation done in the trial penalty phase, Tai presented at the post-conviction evidentiary hearing his mother, Nho Thi Nguyen ("Mama"), his sisters, Kim Oanh Pham ("Kim") & Thuy Thi Nga Hang Pham ("Hang"), and his brother, Anh Tuan Pham ("Tuan"), who all live in Vietnam[13]. Tai's sister, Thi Ngoc Anh Pham ("Ngoc") who lives in Paris, France, also testified. In 2005, the family learned about Tai's arrest from Thuy, who lived in Florida. P12/37, 79, 103-4, 109&129. The family could have been reached by telephone from 2005 to 2008, but none of them were contacted. P12/37-8, 104, 109-10 & 129. All of the family members would have spoken to counsel, investigators, or experts. P12/39, 79-80, 111-12 & 130. It is clear they were available.

Kim is 12 years older than Tai and was born in the same house as Tai. P12/41 & 17. Kim took care of her siblings because her father was in the military and Mama was away selling vegetables. P12/17 & 50. She described the family and Tai's frightful experiences in Vietnam. Their father fought in the South Vietnam Army against the Communists and would leave home and periodically return. P12/17-9. As children of a South Vietnamese soldier, they were in danger of being killed by the Communists. P12/17-9. The Pham children were "very scared" of the Communists. P12/19. Their grandfather died while in a North Vietnamese jail/prison. P12/42. Kim testified

> [a]t the time, near our house, there's cathedral and on top there's people . . . surveying. And if there's Communists coming or something happen, they will ring

[13] The siblings are Hang, Tuan, Thuynga ("Thuy"), Anh Tu ("Tu"), Ngoc, Anh Vu Thuy, and Thi Vu Vi. P12/15-6. Figgatt had some their names, but and failed to even make a single phone call.

> the bell we all go to the neighbor to go under the basement. Whenever come down, we will go back and it's like that continuing over and over.

P12/29. She was "afraid of gun" and she saw people being killed. P12/29. Mama corroborated that Tai was with them and "when they were fighting we run to our neighbor, there's a basement, we run over there. When everything calm down, we get back home and we got to bed." They were frightened and "shaken." P12/51-2.

Tai had several problems as a new born. He weighed two kilograms at birth and was the smallest baby among all of the siblings. P12/21-2. Mama corroborated that Tai weighed about two kilos while her others weighed over three kilos. P12/56. Tai had a "real big" tumor on the right side of his head when he was a few months old. P12/21. They tried to treat it with a patch but it burst and bled "on the pillows." P12/22. He was taken to the emergency room where he was treated with a band aid and a pill for the fever. P12/21-2. Mama was frightened that he would die. P12/58. Tai was the only child to suffer from this and it took a long time for him to recover. He cried every night for Mama, who kept carrying him. P12/58-9.

Kim detailed problems from Tai's infanthood and childhood, which included "lots of fever," "nose bleeds," falling more often than other children, and problems defecating and urinating in appropriate places. P12/22-3. Kim cleaned up after her brother, who despite being told how to go properly to the bathroom, kept "forgetting" and defecated "all over." P12/22-23. This happened even when he was 4 or 5 years old. P12/23. Tai wet his bed until he left Vietnam. P12/23. Tai wet his pants when he was at school. P12/23. Tuan and Mama corroborated this. P12/60-2. Tai cried a lot and he "used to bang his head on the floor" when he cried. P12/23-4.

In comparison to his siblings, Tai was "a little bit slower." He did not start talking until he was "around fourteen, fifteen months" and he did not start walking until he was "around two years old." P12/24. Mama corroborated this. P12/57. Kim testified about problems that Tai had at school

and with other children. He was very slow in school, he "can't study that well," "[h]e has ugly handwriting," and he was not really good at reading. P12/24-5. He was teased at school and called a "dummy" or "a stupid dummy." P12/23&26. He had to repeat a grade "sometime three years in one grade." P12/25. These failures made him "sad" and the children made fun of him. P12/25. He did not have a lot of friends, and preferred to stay at home a lot. P12/24. Tuan and Mama confirmed this.

Kim detailed memory problems that Tai had from the age of 5 or 6 to about 9. P12/26. Tai was quite forgetful and he would forget "whatever [they] taught him the day, the next day he would go to school and he couldn't remember. Like the house work, like we say please do this and he just couldn't remember." P12/25. Tai would sometimes not remember to change his clothes. P12/25. Tai forgot his books and to do things in school. P12/26. He skipped school occasionally[14] because "he couldn't remember the lessons." P12/26. Their father disciplined Tai by whipping him on the butt with a long stick that he kept in the corner. P12/27.

Kim detailed that from a young age Tai had an innate ability to fix things. P12/28. Tai would visit a neighbor who worked on automobile and watch him do things, then go home and try to do them. P12/28. Kim recalled that Tai "used to get the stick, tie together and put the battery and then he would put it down and make it like a boat. He used to buy the cover and he like to do the flashing light for Christmas." P12/28. Tai was better at fixing things than he was at school. P12/28.

As military children, they were not allowed to move up to the next grade in school; thus, people left "to find the freedom." P12/32. All of the Pham family tried to escape. Families left in small groups to avoid detection by "the undercover." P12/31-2. They had to travel far to the closest

[14] This behavior was commonplace for Tai and continued in foster care in Illinois.

port of Vung Tau. P12/32. Tai was about eight or nine years old when he was forced to escape. P12/32. Tai's first failed attempt was with his older sister Hang. P12/32. Hang was imprisoned for three years while Tai was imprisoned for three months because he was a child. P12/32. Kim was present when Tai returned home from prison. P12/32-3. Tai was "very scared" and "[v]ery happy" to be home. P12/34. Tai told her that he "never want[ed] to escape again." P12/34-5. However, unbeknownst to him, in about two or three days, Tai was tricked again to escape with Thuy. P12/35. This was the last time that he saw his home and Kim. P12/35-6. Despite the promise of freedom, Tai never wanted to leave; he "just want to stay home with mom." P12/35.

During this time, Tai suffered the tragic loss of his brother, Tu. P12/30-1. Tai and Tu were very close and loved each other. P12/30. Tu was killed on the way back from dropping off their youngest sister at school. P12/31. While on a bicycle, Tu "tried to move over and another car came up, ran over him, ran over his throat." P12/31. Tai was frightened when he saw Tu's body in a casket. P12/31. He was told to go up to the casket and apologize for what he bad he had done. P12/31-2.

Mama was 17 when she married Tai's father, who passed away around 1997. P12/46-7. The father fought in the battlefield until a surgery for his intestines forced him to leave, but he continued to work in the office. P12/87-8. Tai's father was "always on the go" and Mama would "stay home by [her]self." P12/50. Tai's father was fighting in the war when Tai was born. P12/50&55. At the time, there was an armed military presence in their village, and they heard gunshots and saw dead bodies and guns all over the streets. P12/51. It was dangerous for the family that the Communists knew Tai's father was Anti-Communist. P12/52.

Mama detailed her difficult pregnancy with Tai. He was her sixth child and pregnancy with him was "the most complicated." P12/52-3. Mama testified that she was very weak, sick, and she

threw up. Tai was the most difficult child to carry of all of her children under the same health care conditions. P12/53-4. There were problems with the delivery. P12/54. Mama delivered most of her children in a day but it took three days to deliver Tai. P12/54. Mama testified that:

> [a]fter the three days, [she] was in pain and they wanted to transfer [her] into a hospital in Saigon, okay. [She] was laying there is pain and the two nurses keep talking that should move me in a bigger hospital to Saigon, but then finally, he came out, [she] was bleeding, and they never transport [her] to the other hospital.

P12/54. Mama believed her baby was going to die. P12/54.

Mama gave additional details about Tai's schooling problems. P12/62. They had to go see Tai's teachers to discuss the problems he had at school. P12/62. They begged the teachers to not to kick him out. P12/62. Tai failed all the time and he could not study. P12/62. Mama testified that "it was too difficult to teach him. "P12/63. Unlike school, her son was good with "electricals." P12/64. Tai was bullied by the other children and was called "dumb" and made fun of because he failed at school. P12/62-3. Mama loved Tai the most and she protected him from the children who picked on him. P12/64. They had a very close relationship. P12/64. Tai wanted to grow up to be a soldier like his father. P12/64-5. Tai heard from his maternal grandmother about the death of his maternal grandfather at the hand of the North Vietnam Communists because he was Catholic. P12/65. Tuan corroborated this traumatic event. P12/94.

Mama detailed the discipline that Tai received from his father. P12/65-66. She testified that this is how "[t]he good family" disciplined their children. P12/66. Mama confirmed that when Tai would get angry and he would "cover his head to the ear and bang down on the floor until his forehead all scratched." P12/67.

Mama detailed her family's experiences trying to escape from Vietnam. She and Tai's father "thought was because of the children of the military person, they didn't get to be treated good, so we told them to let them go, escape to another country, that way they will have their

future and freedom." P12/69. She was afraid for her boys because they could get drafted. P12/70. Also, there was gun fighting "[p]retty close to their home and they were "pretty scared." P12/85. Their family's intention was to build a boat so that the whole family could escape but when the owner of the boat went to jail, they had to send their children separately. P12/70. They had to pay "two sticks of gold" to someone to take their children separately. Tuan tried several times to escape but was captured. P12/70. Kim tried to escape once with the family. P12/70. Hang tried to escape with Tai but they were captured. P12/71. Hang was afraid to try to escape again. P12/71-2. Ngoc and Tuan also unsuccessfully tried to escape. P12/73.

Mama had to lie to Tai twice because he did not want to leave her. Before the first escape, Mama lied to Tai and told him to go play with his sister. P12/74. He did not want to go and he "couldn't understand why [she] kept wanting him to go far away." P12/74. Three months after his capture, Tai returned home and was "shocked but happy. And he kept holding [Mama] and cry." P12/74-5. Tai was "afraid that [she] abandoned him." P12/75. He was happy to be home and he held Mama as they both cried. P12/75-6. However, Mama made the difficult decision to send Tai away again because she wanted him to have a future. P12/76. Tai was sent away in less than a week. P12/76. She lied to him again told him that he was going to the zoo because he did not want to go. P12/76. This was the last time that she saw her son. P12/77.

Tuan is eight years older than Tai. P12/82&90-1. He witnessed Tai being bullied by other children and being called "moc, moc" which meant "a little crazy." P12/96-7. Tai reacted angrily to being bullied. P12/98. Tuan recalled when a child threw a rock at Tai's forehead causing it to bleed. P12/97-8. The children stole Tai's marbles. P12/98. At the age of four or five, Tai smoked cigarettes that he stole from his father. P12/98. Their father disciplined Tai by tying him up because he would not listen. P12/98. It was normal to discipline children by hitting them with sticks.

P12/99.

Tuan tried to escape at least seven or eight times but was caught each time. P12/100-1. He tried to escape because "in Vietnam the life was pretty tough business or anything so we just want to escape a better future, education and everything." P12/100. He was arrested and imprisoned for 3 to 4 months when Tai escaped with Hang. P12/100-1. The last time he saw his brother was at Tu's funeral. P12/102.

Prior to France, Ngoc lived in Vietnam. P12/108-9. Ngoc tried to escape around the same time as Tai. She was not successful in her escape and was captured with Tuan. P12/112. She was released early because of her age. P12/112-3. Ngoc was eight or nine years old, when her family convinced her to go to another country because they were scared. P12/114. Ngoc testified there "was no food, no good life in Vietnam so they wanted to leave the country, go to another one, a better education, the better life." P12/114-5.

Ngoc and Tuan left home and went by bus to Vung Tau. P12/116-7. Once they got there, the police spotted them and they all scattered and went through the woods to hide for a while. P12/117. They made their way to a small boat which would take them to a big boat. P12/117-118. There was a leader who directed them. P12/118. They were eventually captured a week later on the big boat along with 63 other people. P12/117-118. They were all stuffed "underneath of the boat and they shut the top" and she could not breathe. P12/119. She cried and looked for her brother. P12/119. Two days later, they were out in the open water and the top was opened and they had air. P12/119. For a week "they had no drink, no food, no toilet, nothing." P12/119. The people were on top of each other in the boat. P12/119. During a storm at night, the boat was turned upside-down and she was hanging on the side of the boat when she heard someone say they were going to die if they continued. P12/120. So, they decided to all go back to an island. P12/120. Then, they

were captured and were divided into two groups, male and female. P12/121-2. She lost her brother at the time and was really scared. P12/121-2. She ended up in a prison, where she met a woman who took her in as a daughter and let her sleep next to her on the floor. P12/122. She recalled that there was some water on the island and each day they got a half-bowl of rice. P12/123. Ngoc was very hungry and picked leaves and fruit. P12/123. Ngoc was imprisoned for two months and then was able to go back home and she "never again" tried to escape. P12/123. She got married, and her husband provided her with emotional and familial support. P12/124-5.

Hang and Tai grew up in the same house. P12/128&130. Hang testified about the harsh poverty conditions that they grew up in. P12/131. It was very hard to get food and the government gave them a certain ration each month. P12/131. They had to stand in long lines to get their food, which included Tai who helped carry food back. P12/131. Hang described the food as "terrible." P12/132. They also stood in line for one meter of clothing material a year for each family member. P12/132-3. They obtained their water, which they had to boil, from a well. P12/133. Hang was present when Tai saw dead bodies all over in the village. P12/158. Unlike Tai, Hang wanted to leave Vietnam because she wanted "to move up to college, but because [she was] a daughter of an ex-military, so they wouldn't let [her] go to college." P12/133. Hang asked her father so that she could "come to the states to study." P12/134. It was Tai's parents who made the decision that Tai was to leave with her. P12/134.

Hang provided a first-hand account of the attempted escape and all of the harrowing details of the suffering that she and Tai endured. Hang testified that they left in July of 1982. P12/134. Mama gave Hang "a little money" and "a gold ring" and told her to take Tai into town. P12/134-6. Hang was about 19 or 20 years old and Tai was nine. P12/135. They lied to Tai and told him that they were going out to play. P12/135. He had no idea that they were going to leave home and

he never said good-bye. P12/135-6. They left at 4:00 a.m. and walked to a bus station. P12/135-7. There was a leader who directed them and others. P12/136. Hang recalled there were seven or eight people with them. P12/136-7. They got on to the bus headed to town where they arrived at 7:00 p.m. P12/137. The leader took them to a house to hide from the soldiers. P12/137-38. There were a total of about 20 people. P12/137. They were instructed to stay and that later they would be taken to the boat. P12/137.

Unfortunately, the soldiers found them hiding. P12/138. The soldiers "first came in with the gun, they said, you all stand against the wall and throw all the money, all the gold, whatever valuable thing you have, put them down on the floor." P12/138. They pointed the guns at all of them including Tai. P12/138. The soldiers were screaming at them when they first came in about being escapees. P12/139. They took the valuables and moved them into a temporary cell where they interrogated them about their ages and names. P12/139. They tied about "ten-ish" prisoners to each other and transported them to the cell. P12/140. Tai was with Hang throughout this ordeal, and he was "so scared" that "he just hang on to [her], grab [her] sleeve, [her] blouse." P12/137-9. Hang told Tai, who turned pale from fear, "Don't worry, just stand right here with me." P12/140.

A jeep transported them to another house, where they were held captive for a month. P12/141. There were about 20 people in a divided room. P12/141. It was crowded and they slept on the floor. P12/141-142. Neither Hang nor Tai wanted to eat the little food that was provided. P12/142. They had a pot of unclean water to drink from. P12/142. If they wanted to go to the bathroom, they had to go in a pot "right there." P12/143. Two persons had to share the pot. Tai was very sad and kept crying. P12/143. Hang tried to comfort him and told him that when their parents found out they would come and take them home. P12/143. She tried to tell Tai to go to sleep. P12/143. He usually closed his eyes, not completely, and he always looked down because

he was scared and sad. P12/143-4. Hang did the best she could do to calm Tai. P12/144.

A month later, they were transported to a prison in Ca Mau. P12/144. Hang and Tai were transported in a car with the other 20 people. P12/144. Armed soldiers were present during the transport. P12/144. Hang described Ca Mau "like a house they build by the bamboo around there and we just laid there. And they have the wall around the camp and we just sit around there." P12/145. Hang and Tai were in the same cell. P12/145. There were soldiers with guns and weapons who walked around the prison. P12/152-153. Since Hang was older, she had to walk out into the field at 4:00 or 5:00 a.m. P12/145. They gave her a small handful bowl of rice, but they would not give Tai any food, so she gave her ration to him because she would get another handful out in the field. P12/145-6. Tai would not get any. In the evening, Hang got a whole bowl and Tai only got a half bowl. P12/146. Hang was fed more to give her energy to work. P12/146. Hang encouraged Tai to get burned rice from the kitchen, but he never did and would just go hungry. P12/147. Their water was dirty rainwater that had mosquitoes. P12/147. She and Tai got sick at the prison. P12/148. In the evening, when Hang returned from work, Tai "usually go try to collect water so [she] can take a bath." P12/148. He tried to look after his sister. P12/148. He slept halfway in the bed so to make space for her. P12/148.

Hang was forced to work in the rice paddy fields bare foot on rainy days and during the dry days they made them work until they fainted. P12/148-9. Hang almost drowned a few times. P12/149. When she came back she had swollen feet and would tell Tai sometimes what happened. P12/150. Hang knew that Tai did not like the soldiers because they encouraged the children to fight. P12/156. Hang suffered injuries from working in the fields from when she was beat up. 12/155. Her elbow was broken, she had a bruise on the side of her leg, and she has a problem with her right arm to this day. P12/155. Eventually, Tai was separated from her and she was alone.

P12/155-6. This was the last time that she saw her brother. P12/156. Once Hang was released in 1984, she returned home and she never tried to escape again because she was "so scared." P12/156. Unlike Tai, Hang had her family's support when she returned from prison. P12/159-60.

Tai's jury was presented with general testimony of the conditions of the refugee camps. There was no evidence at trial about the prison that Tai was in. The evidence presented at the hearing was not cumulative as there was no testimony as to the horrors of the first escape and what happened in Ca Mau. Moreover, the post-conviction experts questioned Tai about his experience on the boat and in the refugee camp and determined he had PTSD based upon the traumatic experiences. The family witnesses presented in post-conviction would have altered Tai's sentencing profile before the jury by giving the jury and individualized account and by providing the experts necessary information to give an accurate picture of Tai's mental health.

It matters in a presentation when a client's life lies in the balance, who tells the story and how it is told. *See Cooper*, 646 F.3d at 1353 (concluding that post-conviction testimony was not cumulative of testimony presented during the penalty phase where penalty phase testimony by the defendant's mother "did not begin to describe the horrible abuse testified to by [the defendant's] brother and sister" during post-conviction proceedings). The presence of Tai's mother and his siblings puts a human face to Tai's story. The detailed and emotional testimony from Hang of that first escape was never heard by the jury and could never be captured by any of the penalty phase witnesses for the simple reason that they were not there. Hang described in harrowing details, their journey, their capture, Tai's fear, the emotional and physical torture they suffered, and the kindness that Tai showed to her while they were held captive. This is not cumulative but it is "additional information about specific challenges she and the Defendant faced." P11/2069.

The jury never hear the powerful details of was Tai's unwillingness to escape from

Vietnam[15]. Tai was torn from his mother's bosom and his home not once but twice. He did not care for a better life; he was a nine year-old child who wanted to be with his mother. The jury never heard Tai's mother's poignant description of her son's emotions. This evidence is powerful and humanizes Tai as a child who was abandoned. It explains his anger and outbursts later in the United States. Kim corroborated the fact that Tai's demeanor upon his return as "very scared" and "[v]ery happy" to be home and that he "never want to escape again." P12/32-35. This fact is very important in light of Juror Kristen Appleman's testimony which is as follows:

> I think just the comment of, you know, yes, everyone has a rough life in some cases, but you are - - this is the law, this is - - there is right and wrong, and, *you know, if you wanted to come to America, you have to live by American standards, American law*."

R13/241. Tai never wanted to leave home. *See Griffin v. Pierce*, 622 F.3d 831, 845 (7th Cir. 2010) (evidence introduced after sentencing is not cumulative if it corrects of rebuts an assumption of which the jury was inaccurately led to believe during sentencing) & *Johnson v.* Bagley, 544 F.3d 592, 603-604 (6th Cir. 2008).

Thuy's testimony to the jury was *not Tai's story*. It was *her* story and any sympathy from a jury would be towards her. The environment in Vietnam was similar, but their experiences were not similar. Unlike Tai, Thuy was successfully adopted by a family in Illinois. They did not suffer from the same traumas. *See Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1354 (11th Cir. 2011) ("In the penalty phase of a capital trial, the major requirement . . . is that the sentence be individualized by focusing on the particular characteristics of the individual . . . Therefore, it is unreasonable to discount to irrelevance the importance of [a defendant's] abusive childhood . . . Background and character evidence is relevant because of the belief, long held by this society, that

[15] There is a brief reference by Dr. Day that she learned that from Tai that he was told he was going to the zoo. R13/317.

defendants who commit criminal acts that are attributable to disadvantaged backgrounds . . . may be less culpable than those who have no such excuse."). The fact that Tai, before the age of 12, had suffered so many traumatic experiences is compelling mitigation. The information from the family was instrumental to the *defense and state experts who all found, in contrast to the trial penalty phase experts, that Tai suffered from PTSD*.

The post-conviction court's finding that testimony relating to Tai's toddler years prior to the escape attempts were of minimal probative value and would not have made a difference in Tai's moral culpability is unreasonable because it absolutely mattered to the experts. Drs. Daniel Lee ("Dr. Lee"), Francis Abueg ("Dr. Abueg"), and Harry McClaren ("Dr. McClaren") all opined that Tai suffered from PTSD. The court recognized that "*additional* areas of delayed development" were presented at the hearing but considered it "cumulative" even though it was additional. P11/2069. The court listed eleven bullet points[16] that was considered additional information from the family, all of which were probative to the experts at the post-conviction hearing. P11/2068-69. The court failed to recognize the invaluable information that the family provided which led to the PTSD diagnosis and for Dr. Abueg, also a bipolar diagnosis. P16/907-8. The following additional information from the family was probative to the experts:

- They learned about the traumatic experience of hearing gunshots from the family's testimony.
- They learned that Tai did not want to leave home and to be separated from his mother.
- Dr. McClaren thought that the fevers suffered by Tai and the developmental delay were important facts.
- Dr. Lee opined that Tai suffered from perinatal anoxia due to lack of oxygen during his birth and delivery, and that can affect brain functioning which led to many problems during the early years.
- Dr. Lee opined that the evidence of the boil on Tai's head, the fevers, the toilet-problems, the angry outbursts, and the learning problems all are evidence of brain impairment onset from early infanthood which in turn affected his growth and behavior.
- Tai suffered from numerous traumatic experiences in his young life, which included seeing

[16] The court noted that "this information could easily have been discovered." P11/2069.

the horrific bloody dead body of his brother[17]; learning about the decapitation of his grandfathers at the hands of the Communists because they were Catholics; and exposure to the bombing and shouting when he and his family would rush to an underground shelter in fear for their lives.

- Tai suffered trauma from near drowning experiences.
- Tai still cannot sleep in the dark due to his experience in the darkness he saw on the boat. It leads to nightmares and he had to be medicated for it.

P15/678-685&786-99 & P16/808-12&905-921. It is clear from the experts that once they learned about Tai's early traumatic experiences, it led them to perform objective tests and to ask Tai questions related to the diagnoses of PTSD and bipolar disorder. Dr. Day was concerned about relying on childhood memories of Tai and Thuy, thus the family interviews would have been invaluable. Tai was prejudiced by counsel's failure to contact his family members to testify in mitigation. He is entitled to relief under *Strickland.*

ii. The testimony of the Illinois mental health professionals and social workers was not merely "cumulative." The experts who testified in post-conviction were not just experts who gave "more favorable diagnoses."

With regard to the Illinois mental health professionals and social workers, the state courts unreasonably found their testimony "merely cumulative." *Pham*, 177 So. 3d at 960-62. The evidence provided by the Illinois professionals was not investigated or presented in any manner, as indicated by the testimonies of the investigators and Tai's counsel; therefore, it is inexplicable to find the evidence to be cumulative. The testimonies from the readily available professional witnesses and their records and reports was invaluable to not only the defense experts, but also the state's expert, Dr. McClaren. The testimonies of the experts at trial demonstrated that they did not have certain information necessary to make specific diagnoses; the Illinois professionals and Tai's family members would have provided that very information. The diagnoses of bipolar disorder

[17] Dr. Day testified at trial that "no one [could] give the details" of the death of one of the brothers who dies in an accident. R13/313. The family testimony in post-conviction gave the details of Tu's death and funeral. This was a recognized traumatic event in Tai's life.

and PTSD are not just "more favorable diagnoses"; they are an ***accurate portrayal*** of the severe mental illnesses that inflicted Tai and were never treated. This point was either lost on or deliberately ignored by the state courts. If trial counsel does not conduct a competent investigation and then provide his or her experts with complete information, the experts' opinions become severely degraded. The great constitutional atrocity in this case is that counsel did not even try to adhere to his strict duty to investigate reasonable avenues of mitigation investigation. Tai's counsels' conduct was deficient and Tai was prejudiced by the deficiency.

In support of his post-conviction claims, Tai presented the testimony of a number of professionals who had contact with him. Susan Otteson, Verl Johnson-Vinstrand ("Verl"), and Dr. Tam Thi Dang Wei all gave credible testimony through their contemporaneous reports about all of the difficulties that Tai suffered as an orphan and in the foster care system. Their reports and names were in the records which were easily located and available through Midwest Adoption Center in Des Plaines, Illinois. P12/167-175. All of these witnesses were all available to speak to counsel and experts, and to testify in Tai's case, but trial counsel never contacted them. P12/197-8, 239-40&302-6. Their testimonies and reports along with the FSH records and the Illinois DCF records were critical in providing evidence to the defense and state experts in coming to the consistent and correct diagnosis of PTSD.

Otteson is currently a teacher in Louisiana, and was a school psychologist in Illinois. P12/180-1. She worked for Catholic Social Services in Peoria for four and a half years and then worked for them on a continuing contract for another 9 years as a public school psychologist. P12/181. Otteson exclusively evaluated children, which included Vietnamese unaccompanied minors. P12/181. She evaluated approximately 75 to 100 children from 1983 to 1986. P12/182. Soon after the Vietnamese unaccompanied minors arrived in the United States, Otteson would

evaluate the child's level of education, needs, social, and emotional development. P12/182.

Otteson had access to her evaluation report of Tai that was in the Illinois DCF records and that was written shortly after the evaluation in 1984. P12/183-4. It was important for Otteson to provide as much detail as possible. P13/209-10. She evaluated Tai on December 21, 1984, when he was 12 years and 3 months old. P12/183. It was approximately a 90 minute evaluation. P12/198. In coming to her recommendations, Otteson not only conducted an interview with Tai, she also relied on collateral information from case worker Mr. Sundo, Dr. Tam Thi Dang Wei's evaluation of Tai, and a school report. P12/185. She testified that collateral sources are important because they give her "a basis for, if [she] see[s] a particular pattern of behavior, it gives [her] something to confirm or deny what people have said to get a better picture of the individual." P12/186. Furthermore, "[m]any times children have a different understanding of circumstances than what adults might. So the collateral information is helpful to see what other people have observed about a child." P12/186.

At the time of the evaluation, Tai was living at Tha Huong, which "was a program for unescorted minors coming into the United States from either the Philippines or from other sources after they left their countries. [The minors] came into the program to provide them acculturation to get them ready to go into the foster care and into the family homes." P12/186-7. It was also a temporary placement for Vietnamese children. P12/187. The goal was to prepare the children to either go into a relative's home or foster care. P12/194. The goal was generally not for the child to remain. P12/194.

Tai was evaluated at the Catholic Social Services facilities. P12/187. Otteson observed Tai to "be easily frustrated when he was trying tasks that were difficult for him" and she "felt that he was somewhat unengaged in some of the activities that we did. Somewhat hesitant, somewhat

tense at times." P12/187. He was described by school people "as having difficulty with getting along with the other children" and that "[h]e had been aggressive." P12/187. Tai was reported as a runaway, as engaging in hiding, and as having outbursts of anger, temper tantrums in conflict situations. P12/188. Tai received counseling, but "he still had great difficulty getting along." P12/189.

Otteson looked into Tai's academic performance "[a]s part of the school programs so they could better meet his needs." P12/190. Tai was "described as, at time he could be an enthusiastic student and would do what he was assigned to do. At other times, he would be very easily frustrated and avoidant of his work, didn't want to do the work." P12/190-191. Otteson conducted a number of tests on Tai. P12/191. Tai's academic skills ranged from a second to fifth grade level, with reading being lower than math. P12/191. Tai did well in non-verbal tasks, but did poorly in expressive vocabulary, possibly due to the language barrier. P12/192. It was also difficult for Tai to make eye contact and to converse. P12/192.

Otteson noted that the problems that Tai was suffering were not typical of other Vietnamese unaccompanied minors. P12/188; 199. She testified that "[from] her experience in working with the children, they were very often very eager to please, they would be compliant and would be motivated seemingly to do the best they could to please the examiner, the person working with them." P12/188. She noted that Tai "seemed to have a difficult time accepting" praise from others. P12/191. The school people "described that once [Tai] was given praise he seemed to do better even though he seemed not to know how to accept the praise." P12/191.Otteson opined that Tai had low self-esteem. P12/197.

Otteson made recommendations that included keeping Tai at Tha Huong "until he can learn to work cooperatively with his peer and with authority figures." P12/193-4. This was not generally

the goal for the program. P12/194. She also recommended that Tai continue to be involved in individual counseling "to help him identify his feelings about himself and others and to deal effectively with his anger and frustration." P12/194-5. She recommended that once Tai was ready to enter the public school that he should be placed in sixth grade with supportive ESL services and tutoring. P12/195. This was so that he could be "most comfortable when he's placed with peers of his own age" than if he was placed lower. P12/195-6. She recommended "that once Tai is ready to leave Tha Huong, he and his foster family may benefit from family counseling to facilitate communication among family members and to help Tai to make a successful transformation into the new living arrangement." P12/196. Finally, Otteson recommended that Tai should be involved in non-competitive peer activities to help his self-confidence and social skills because "he seemed to have a low frustration tolerance and if it were to be non-competitive that would allow him to engage with others without feeling that he had to compete against someone else for attention or any kind of, reward of any kind." P12/196-7. This concluded her job responsibility. P12/189.

Verl is a case worker for the Center for Youth and Family Solutions in Galesburg, Illinois, which was formerly Catholic Social Services. P13/211-2. It is a private agency that is contracted with Illinois DCF. P13/213. Verl is familiar with Tha Huong. P13/214. She worked with unaccompanied refugee minors from 1984 to 1991. P13/215. She got involved when the child was in foster care, and her goal was to make sure the child was safe and stable. P13/215&218. Verl documented her observations in handwritten case note form, and she also wrote a client service plan every 6 months. P13/213-4. The notes and client service plans for Tai's case were part of the Illinois DCF records. P13/237-9. The hand-written notes were created contemporaneously with the events (within 24 hours). P13/237-9. These notes were submitted to the court in Peoria. P13/214.

Verl recalled Tai and she "just remember[s] spending a lot of time with him and his aunt and uncle and sister" in Rock Island, Illinois. P13/215-6. Verl noted that in comparison to the other children that she worked with, Tai "was the worst" within the unaccompanied refugee minor population. P13/236-7. She started supervising Tai in September of 1985, when he was about 14 years old, until May or June of 1990. P13/216. When Verl first met Tai, he was living with his aunt, uncle, and cousins and they were doing okay. P13/216. Eventually, she realized there were problems and conflicts in the home. P13/216-7. Tai got upset when he was unfavorably compared to his cousins and he "would become angry and he would do one of two things. He would tense up and have some kind of an angry outburst like pushing something, running away or whatever or he would hide and not come out. Like he would hide in the closet or something and not come out." P13/217-8 & 222. She witnessed a consistent behavior pattern of outburst of anger, running away, and hiding. P13/220. Tai eventually opened up to Verl approximately in 1989. P13/218-9.

Verl recalled that Tai would not look at her, and she did not see it as disrespect but as a cultural thing. P13/219. She had no problems being a female around him. P13/219-20. Tai opened up about his escape from Vietnam and he seemed very sad when he spoke about it. P13/222. She remembered seeing the sadness in his eyes. P13/222. Eventually Tai became part of the Upward Bound summer program that helped children with interactions with their peers and also had an educational component. P13/222-3. He did well in the program but did not return the following summer because he chose to work instead at an auto garage, which he enjoyed and "[h]e seemed to do well at it." P13/223. Tai was never aggressive towards his case worker, other children, or adults. P13/240-1&245-6. Tai had a few criminal incidents – he stole a battery from a drug store, he stole his aunt's car to run away to North Carolina; and once, he and another child from the program stole an older model agency vehicle. P13/235-6.

Unfortunately, things started to get bad where he was placed with relatives. P13/223-4. There "were more confrontations, a lot of yelling. Tai started to run away from home. He had a couple of events where he ran away and then he was placed with another relative and then in a traditional foster home after that, and it just, it progressively went bad." P13/223-4. Tai was eventually removed from his relative placement on August 31, 1988, into a non-relative foster home because the confrontations were becoming more frequent and disruptive. P13/224-5. The new placement was "okay" at first but then there were confrontations about school attendance. P13/225. Tai did not want to go to school or do his chores. P13/225. There was a confrontation about this that led to Tai running away. P13/ 225.

On December 29, 1988, Tai called Verl and asked her to stop by because he wanted to talk about some problems. P13/225-6. Verl witnessed Tai being confronted by his foster mother about not doing his chores and not attending school. P13/226. The foster mother blocked the doorway. P13/226. Tai tensed up and became angry, and he broke a trophy by slamming it on the table, exposing a rod that he then slammed on a desk. P13/226. He then turned and punched a window with his hand, went out the window, and refused to come back in. P13/226. Verl ran after Tai outside and asked him why he was so upset, to which Tai responded that "he felt trapped because he couldn't get out. The door was blocked and he felt like maybe she didn't want him to leave, so he just felt trapped and reacted to that." P13/227-8. Verl tried to get medical attention for Tai's hand but he refused and ran away. P13/228-9. She contacted the police and made an incident report because of the runaway situation. P13/229. Tai eventually called his foster mother and said he was okay, but he would not say where he was. P13/229. Verl recommended counselling after the incident, but it was it was not given until a later time. P13/230-1.

Tai was eventually located and placed back with his uncle in Illinois. P13/229. He did okay

for a while, but all of the problems started again. Tai ran away to North Carolina to be with another uncle in October of 1989. P13/229-30. He was eventually returned back to Illinois and Verl worked on placing him with his North Carolina uncle. P13/232. He was placed in North Carolina in February 1990, but Tai then called to say he wanted to come back to his aunt and uncle in Illinois. P13/233. The placement was determined no longer positive. P13/233. Tai was returned to his aunt and uncle's home but the placement fell through because of truancy and because he was not relating well with the family and was not fitting in with the siblings. P13/233-234.

Tai continued to have moments where he would get upset and tense up. P13/234. Eventually, he was returned to Tha Huong in March of 1990, and it was agreed that "it would be more positive for Tai not to have to make family commitments." P13/234. This went against Verl's goal not to return him to Tha Huong, but to find him a stable family and environment. P13/234-5. They were never able to establish stability in Tai's case. P13/235. Upon his return, Verl stopped being his case worker because he was with Peoria. P13/249-250.

Dr. Wei's lengthy career, expertise, and education were presented at the hearing. P13/269-72&280-4. The State agreed that Dr. Wei "has more expertise than the average layman on the street" and she was able to render expert opinion as to school psychology. P13/284. With regard to Tha Huong, Dr. Wei would *only* be contacted "when they needed counseling or they need some kind of help how to manage a difficult child." P13/273. Upon being called, Dr. Wei would "usually talk to the staff before to know the background of the child, of the person." P13/273-74. Then, she would spend the whole day with the child because she was trained to conduct clinical observations by observing the child in as many situations as she could. She would then make a suggestion as to what she thought was best, putting her observations, evaluation, and conclusions in writing for the Tha Huong case workers. P13/274-275.

Dr. Wei saw Tai, who was 12, on November 10, 1984, two months after he came to Tha Huong, and she wrote a report for his case (Defense Exhibit 2). P13/275-7&294-5. She was called to see Tai because of his problems dealing with frustrating situations. He had a lot of anger and sometimes ran away and hid. He did not adjust well to the program. P13/277. Dr. Wei spent the whole day at Tha Huong, where she met with the staff, his teacher, two older boys from the program, counselors, case worker, and the education coordinator; she also interviewed Tai in Vietnamese. P13/278 & 289-90. This background information was important "to understand the problem. Especially with refugee. There's so many problems, so many things that can happen in the past that affect the behavior of the person." P13/278.

Dr. Wei learned that "Tai have many, many difficulty and very traumatic experience." P13/285. Dr. Wei reported in 1984, Tai's experience of escaping from Vietnam. P13/284-5. She reported that during one incident at the Malaysia prison, Tai got in trouble with authorities when he tried to "get some food ration for his sister who was sick." P13/287. Tai was put in jail and his hair was cut short, "which is probably very humiliating to him." P13/287-88. Dr. Wei opined that

> in Malaysia, when he do some good thing, he try to do something to save his sister and he really strongly punished. So think that he remember very strong if right or wrong, going good thing and receive bad thing that may affect his behavior and his frustration to a new situation."

P13/289. Dr. Wei learned that Tai "really doesn't want to leave his family, doesn't want to leave Vietnam so that's why he have a hard time to adjust to new situation." P13/288-9. Dr. Wei opined that this contributed to his inability to adjust. P13/289.

During her interview, Dr. Wei "first notice[d] his frustration, his anger." P13/291. She opined that this was not normal, but understandable. P13/291. Dr. Wei tried to address Tai's feelings of anger and frustration, and she tried to explain to him why he was sent away by his parents. P13/291. Dr. Wei noted that Tai usually would not look at her. P13/291. Dr. Wei tried to

talk to Tai about changing the way he looks at people so that he can assimilate into the United States culture. P13/291-2. *Dr. Wei told Tai that he had to change everything he knew in Vietnam so that he could assimilate in the United States.* P13/292.

Dr. Wei laid out a number of goals and recommendations for Tai. The short term goal was to help Tai control his anger with the help of his friends. P13/292-3. The long term goal was to help Tai make a life for himself in the United States. P13/292-293. Dr. Wei made the following recommendations to the staff:

> to give counseling and support by all means, by whatever means they have, they have at the program.

P13/298.

> we need to try to not get back like refugee center. We have a newsletter come out telling the different rules in the U.S. that you need to follow. That I furnish. Need to explain to them what is expect of the society that the children need to know."

P13/298-9.

> to make a chart with Tai to see to have his good behavior and try to show evaluation, what he do good and he maybe get encouragement and try to kind of support for that.

P13/299.

> general recommendation because [Tai] had a lot of tension, a lot of anger, so I would ask that maybe some outlet of that by sport or something physical. . . . I think that one priest there asked him to do something to bring him self-confidence up at that time.

P13/299-300.

> Because Tai is twelve years old, peers are very important, so I think I learned by reach him by peer to get to him quicker. So I remember I asked to all the boy to kind of keep an eyes on Tai and prevent his anger and do something to support him.

P13/301-2.

She did not know if these recommendations were followed, but she hoped so. P13/297.

The post-conviction proceedings provided a complete first-hand accurate account of Tai's youth as well as an accurate mental health profile, all of which was absent from trial. The Illinois professionals gave real time observations of Tai's instability when he came to the United States. This was would have been exceedingly more effective before a jury than trial counsel's strategy having their experts give hearsay testimony from Tai's interviews. Tai's family and Illinois DCF professionals told Tai's story. The jury never heard about Tai's tumultuous journey through the foster care system in Illinois from those who were there. Once Thuy was adopted, Tai had no contact with anyone from home. Tai was a sad and troubled child throughout his adolescence. He had great difficulty assimilating. He believed that his family had abandoned him. Tai's angry outburst, running away and hiding behavior continued into his adulthood. P13/217-8&222. Verl described Tai as "the worst" she has seen within the unaccompanied refugee minor population. P13/236-7. Illinois DCF was never able to attain stability for Tai. P16/920. This is non-cumulative information and should have been presented to the jury during the penalty phase of Tai's trial as well as to the trial experts to assist them in forming their opinions.

With regard to the records, the post-conviction court found there was "very little information in those independent records that was not discovered by the experts from either the Defendant or Thuy." P11/2071. Dr. Riebsame, who testified during the *Spencer*[18] hearing, reported that Tai described his childhood as idyllic, which the testimony at the post-conviction hearing showed was inaccurate[19]. R13/324. *See Griffin*, 622 F.3d at 845. Furthermore, Dr. Riebsame's testimony concerning Tai's cognitive impairment indicted that he did not have information to suggest that Tai did poorly in school or any evidence from other mental health professionals about

[18] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).
[19] Dr. Day testified that "[t]here was *no collateral information* to suggest his childhood was idyllic." R13/325. If counsel had provided her with the Illinois records and access to the family, there would have been sufficient compelling and credible evidence that Tai's childhood into adolescence was not idyllic.

Tai's schooling or what kind of school he attended. Dr. Riebsame did not have evidence of poor behavior (such as problems with law enforcement, authority figures, and family members[20]); he did not have evidence of long periods of instability; and he did not have disciplinary or counseling records. R18/125,129-30&141-4. Dr. Riebsame testified that if Tai had cognitive deficits from the age of 10, that "the Illinois mental health professionals would have recognized it." 18/1228. The testimony of the Illinois professionals, Dr. Wei, Otteson, and Verl, and the Illinois DCF records showed credible evidence of concerns about Tai's behavior, schooling, instability in foster care, and issues with the authorities. The family's post-conviction testimony also showed early onset trouble at school. These are factors that Dr. Riebsame showed interest in and he simply did not have the information he needed due to counsel's failures.

Dr. Riebsame relied on Tai for vague information regarding his difficulties and behavioral problems in Illinois, but there was no detailed corroborative collateral evidence as to the accurate nature and extent of those difficulties; thus, he did not find evidence of cognitive impairment. R18/143&153. In contrast, Drs. Lee, Abueg and McClaren all found evidence that Tai suffered from some degree of brain dysfunction and cognitive difficulties as supported by the records and witness testimony. P15/678-84 & P16/895-6. It is clear that the records and the family's testimony were important in providing an accurate historical background for performing a competent mental health evaluation. Dr. Riebsame's testimony is a testament to how something that can be perceived as negative may actually be an indication of mental health problems.

With regard to the complete FSH records, the FSC, again just quoting the post-conviction court's order without any analysis, simply stated that there can be no prejudice because "the experts

[20] This evidence was in the Illinois DCF records and presented through Verl that the Court found to be "incorrigible behavior" that would have detracted from the picture painted by counsel. P11/2071. However, it is clear that based on Riebsame's testimony, that same behavior and long periods of instability can be attributed to cognitive deficits.

who testified during the *Spencer* hearing did review these [FSH] records." *Pham*, 177 So. 3d at 961-62. The record clearly refutes this incorrect and speculative factual assertion. P11/2071. Counsel testified that ***they did not request*** the complete FSH records. When asked about the FSH records, Dr. Riebsame testified he reviewed "[t]he competency evaluation that was carried out there, yes, in 2007." R13/398. The court cited to R18/145 to support its finding as to what Dr. Riebsame reviewed, but the testimony there referred to Tai's employment information "only in the report from the state hospital" or the "state hospital report." R18/145. This does not indicate a review of the complete FSH records. It is unclear from the trial record whether Dr. Olander reviewed any FSH records at all. When asked about whether she reviewed the FSH records, specifically the report by Dr. D'Agostino, Dr. Olander responded, "No." R18/1210. The post-conviction court also cited to R18/118 to support its inaccurate finding, but the exact testimony was as follows:

> Q. And that's the only additional information that you reviewed?
> A. I *briefly looked that the report this morning*.
> Q. Okay. The police report?
> A. No, the one from the hospital.
> Q. Oh, I see. The one from Dr. D'Agostino?
> A. I *believe so*.

R18/1217. The testimonies of Drs. Riebsame and Olander do not support the court's finding that they considered any records or reports outside the FSH competency evaluation in their opinion. In contrast, Drs. Lee, Abueg and McClaren (who particularly sought out the complete records) all reviewed the complete records and all diagnosed Tai with PTSD.

The post-conviction court attempted to justify the failure to obtain the complete FSH records as a strategic decision and, as discussed, *supra*, that finding is an unreasonable determination of the facts. If the records contained "bad" information, that fact might also go to the issue of prejudice, but such a "double-edge sword" argument by the court does not end the

prejudice argument. P11/2071. In *Sears v. Upton*, 561 U.S. 945, 130 S. Ct. 3259, 3264, 177 L.Ed.2d 1025 (2010), the Supreme Court found that the fact that collateral counsel uncovered some apparently adverse evidence is unsurprising, "given that [trial] counsel's initial mitigation investigation was constitutionally inadequate." Furthermore, the *Sears* Court held that

> [c]ompetent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a cognitive deficiency mitigation theory. . . This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts-especially in light of his purportedly stable upbringing. Because they failed to conduct an adequate mitigation investigation, ***none*** of this evidence was known to Sears' trial counsel. It emerged only during state postconviction relief.

Id. (internal citations omitted; emphasis in original); *see also Porter*, 555 U.S. 30 (holding that evidence that defendant was AWOL was consistent with defendant's theory of mitigation and did not diminish the evidence of his military service). It is not rare for records to contain good and bad information and bad information does not automatically render the records useless.

The prejudice here is evident because all of the experts diagnosed Tai with PTSD, only after a complete and adequate investigation and only after considering the so-called "bad" information in the FSH records. Due process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. *See Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53(1985). Meaningful assistance of counsel in capital cases requires that counsel pursue and investigate all reasonably available mitigating evidence. *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003). Prejudice is established when counsel fails to investigate and present evidence of mental illness. *Porter*, 14 F.3d at 557. The bases of all of the experts' opinions came after an adequate investigation into all reasonably available mitigating evidence. The multiple diagnoses of PTSD and Dr. Abueg's diagnosis of bipolar disorder cannot be explained away as a simple case of a "more favorable diagnosis."

Dr. Day could not make a conclusive PTSD diagnosis because she did not have enough information. P11/2072. Even though counsel was aware of this, they failed to investigate and provide the requisite information. P13/367-8 & P14/537-9. In fact, the State's closing remarks appropriately criticized Dr. Day's poor mental health evaluation and compared it to a work of fiction. R14/520-1. The deficiencies in Dr. Day's ability to provide an accurate diagnosis were due directly to counsels' failure to provide her with reports of other trial experts, records from Illinois DCF, records from the FSH, access to the family witnesses and access to the Illinois witnesses. Dr. Day did not do any testing or analysis for the symptoms of PTSD. The State highlighted the grave deficiencies in Day's testimony as follows:

> She talked to the Defendant. That's pretty much all she did in basing her opinion. She didn't perform testing, she didn't do a report. He's seen by other doctors, she comes up with this opinion well before her deposition in April of 2008, and at that point in time hadn't looked at the reports from Dr. Danziger or Dr. Ballentine, hadn't looked at the report from the Florida State Hospital where the Defendant spent some time, hadn't reviewed any of the testing that was performed, and so she's relying on what the Defendant tells her to base her opinion.
>
> And basically what the Defendant told her is what he told everybody in the courtroom when he testified and when he told Riebsame, and we all know that that's not true. She talks about the fact that the Defendant is suffering from a major depressive disorder. Doesn't talk to any of his employers to see how he was doing before he committed the murder. . . So there's a contradiction between the two experts. And I'd submit to you that if you want to lace credibility on one expert over the other, you should place it on the expert that did the most work in the case.

R14/521-3. This is clearly due to counsel's failure to provide her with the necessary information.

Counsel even recognized their poor mental health presentation to the jury and retained Dr. Olander to perform neuropsychological testing and record review ***after*** the jury's death recommendation. Dr. Olander's testimony was *not beneficial* as mitigation as she never opined that Tai suffered from an extreme mental or emotional disturbance. R3/558-568. Her opinion was limited to evidence of cognitive deficiencies and a borderline IQ. R3/558-568. There was no need

to present Dr. Day at the hearing because her work was so severely criticized at the penalty phase. P11/2070. The collective testimonies of Drs. Lee, Abueg, and McClaren demonstrated that there was substantial long-term historical information available to support the diagnoses of PTSD and bipolar. The evidence in post-conviction is indisputable that Tai suffered from PTSD and this diagnosis came to be because a competent and reasonable investigation was done.

The post-conviction court unreasonably found that the diagnoses were based:

> not only on the additional records and interviews with family members, but also on multiple intensive interviews with the Defendant, who had become more open and forthcoming since trial. This is in contrast with the Defendant's reluctance at times to cooperate with the experts who visited him before trial and the penalty phase. Even without the Defendant's cooperation, Dr. Day testified that the Defendant has traits of these disorders, but felt she could not make a conclusive DSM IV diagnosis. Under the circumstances of this case, counsel was not ineffective simply because collateral counsel has discovered witnesses who gave more favorable diagnoses than Dr. Day.

P11/2072. The trial record does not support the court's finding that Tai was more forthcoming in post-conviction than at trial. Furthermore, in *Porter*, the Supreme Court held that even if "Porter may have been fatalistic or uncooperative, [this did] not obviate the need for defense counsel to conduct *some* sort of mitigation investigation." 558 U.S. at 40 (emphasis in original).

At trial, Tai started to open up to Dr. Day over the course of time and the only time there was difficulty was when he was going through competency issues. Tai was "unable to effectively communicate" right after the arrest because of suicide concerns[21]. Less than a month later, Tai was "bit more responsive" and "[h]e was able to relay a little bit more information" and so they started gathering some additional information. R13/302. Tai relayed that "[h]e was *experiencing nightmares, flashbacks*, and was still very much in distress." R13/303. On July 2, 2006, Dr. Day was "able to communicate" with Tai and "get some family background" which included some

[21] Day went to the jail "to check on" Tai and to "assure him what was going on and make sure that suicide precautions were in place for him." R12/300-1.

information about his family, Malaysia, his marriage, his wife, and his escape.[22] R13/304-5. Tai interacted with Dr. Day and asked her to repeat questions. R13/306. In January 2007, Tai had a manic episode and was unable to communicate which led to the subsequent competency proceedings. R13/307-8. Dr. Day learned from Thuy and Tai collectively some information about life in Vietnam, the escapes, the boat trip, Malaysia, his entry into the United States,[23] being in a foster/group home, and their reunion. R13/311-22. Tai was able to relay his feelings to Dr. Day. R13/311-22. Tai never inhibited the mitigation investigation.

Tai was uncooperative with Dr. Riebsame only during the competency proceedings; in preparation for the penalty phase he cooperated with Dr. Riebsame's testing. R14/404-6. Dr. Olander was also able to interview Tai and conduct testing. R18/1144-67. The defense trial experts' diagnoses and testimony were not competent because counsel failed to conduct a reasonable investigation of Tai's biological, social and psychological history and to provide it to them. Tai was not a bar to the experts' work except when he was going through his manic phase. Furthermore, if counsel had obtained the available collateral information, the experts would have had credible and detailed information of Tai's historical background.

Prejudice due to counsel's failure is evident from the testimonies of Drs. Lee and Abueg. Their collective vast experience diagnosing and treating PTSD in unaccompanied Vietnamese minors and adults was presented[24]. P15/633-60&665-6, P9/1649-54, P15/759-65 & P9/1655-68. In their experience, people with PTSD can hold a job and can live a normal life *until their PTSD is triggered*. P15/703-4&710 & P16/813. Dr. Abueg testified that it was not unusual that Tai could

[22] If counsel followed up on this information and attempted to locate the family and get the records, they could have given Dr. Day a full background.
[23] Dr. Day was unclear as to where Tai entered when he came to the U.S. This testimony is problematic as counsel knew that Tai was in foster care in Illinois. The Illinois DCF records would have been invaluable to Dr. Day.
[24] Caudill believed that they tried to get a Vietnamese mental health expert but they never found one or contacted one. P13/360.

fix televisions.[25] P16/813. Dr. Lee has seen cases similar to Tai's of unstable foster care lifestyles. P15/713-4. Dr. Lee has seen similar reactions caused by PTSD in Vietnamese unaccompanied refugee minors, who as adults had violent reactions towards others and themselves. P15/704-9. Dr. Lee has examined former prisoners of war who killed their wives as a result of untreated PTSD. P15/709-12. Drs. Lee and Abueg's extensive experience clearly contradicted the State's implication that there are no cases of refugees or "boat people" who commit violent crimes or murder. Drs. Lee and Abueg were in a unique position due to compare and contrast Tai's case to other PTSD patient/defendants. Significantly, Dr. Lee found that Tai's case is the "worst case among the cases [he has] seen." P15/715-6.

The only point of contention between the State and defense experts was whether Tai suffered from an extreme mental or emotional disturbance at the time of the crime. The post-conviction court's order was silent as to this issue. Both Drs. Lee and Abueg testified, based on their evaluations and experience, that Tai was under the extreme influence of extreme mental or emotional disturbance. Dr. Abueg opined that on the day of the offense, Tai "[n]ot only was suffering from severe PTSD and hypomanic part of the bipolar, but it was highly exaggerated." P16/823&829. He opined that Tai was suffering from an extreme emotional disturbance. P16/823&839. Dr. Lee concurred with Dr. Abueg. P15/719&738. There is a reasonable probability that a jury would have found that Tai's PTSD and bipolar was triggered on the night of the incident. These mental illnesses have a nexus to the events that led up to the crime. The testimonies of Drs. Lee and Abueg hold great credibility, as unlike the trial defense experts and the State experts, their careers focused on situations similar to Tai's. The evidence at the hearing would have reasonably established this compelling statutory mitigator pursuant to Fla.Stat. §921.141(6)(b).

[25] It should be noted that Tai has been working with electronics since he was a child and it was the one function he seemed to enjoy and be able to do.

There was credible evidence that Tai had substance abuse problems.[26]The evidence of substance abuse is not irrelevant or speculative as to have no probative value. P11/2072. Evidence relating to a defendant's own long-standing substance abuse and addiction has been found to be an important non-statutory mitigator. Drs. Buffington and McClaren both found that Tai had a history of substance abuse. P14/439-40&453-6 & P16/898-899&913-916. Tai used the drugs to cope with his PTSD and stressors but they only made things worse. P14/445-8&450 & P15/717-8. The prevalent substance abuse was another aspect of the downward spiral of Tai from 2005, which is compelling non-statutory mitigation and should have been presented in concert with the mitigation.

It is clear that there was substantial mitigating evidence which was available but undiscovered due to Tai's counsel's failure. It is "[u]ltimately, the focus of our inquiry is the fundamental fairness of the sentencing proceeding." *Hardwick*, 803 F.3d at 556 *citing Strickland,* 466 U.S. at 696. Tai's case was a precipitation of a complete breakdown in the adversarial process, thus rendering his sentencing unreliable. *See Strickland*, 466 U.S. at 696; *see Hardwick*, 803 F.3d at 556; *see Collier,* 177 F.3d at 1203-04 ("In evaluating the probability that Collier's jury would have rejected the death penalty, we must not forget to balance the aggravating and mitigating factors that would have been before the jury in the absence of his counsels' errors."). Counsel's deficiency in failing to investigate and present the foregoing mitigation deprived Tai of a reliable penalty proceeding such that this Court's confidence in the outcome must be undermined. But for counsel's deficiency in their investigation, there is a reasonable probability that when considering the totality of the available mitigation adduced at trial and at post-conviction and reweighing it against the aggravators, there is *reasonable probability*[27] that Tai would have received a life

[26] Caudill knew that Dr. Day was not aware of Tai's history of drug or alcohol abuse. P13/366-367.

[27] The post-conviction court in assessing prejudice held "there is *no possibility* that it would have altered the jury's

recommendation and sentence. *See Porter*, 558 U.S. at 41 & *Strickland*, 466 U.S. at 694. A probability that is sufficient to undermine confidence in the outcome of the penalty phase. The new mitigating evidence discussed above greatly altered the sentencing profile of Tai that was presented to the decision-maker and provided a powerful, sorrowful, and compelling story of his childhood, youth, and the severity of his mental illness. *See Sears*, 561 U.S. at 954; *see Hardwick*, 803 F. 3d at 564.

It is clear that the state courts failed to review the records below and in particular the FSC simply followed the post-conviction's inconsistent order and issued a haphazard opinion denying relief. Tai's counsel failed to even attempt basic tasks necessary to learn about his client's life that are a matter of course for capital attorneys. Counsels' inactions can only be defined as deficient. Furthermore, looking at the totality of the evidence in mitigation at trial and in post-conviction, Tai sentencing story and sentencing profile drastically changed. This was not a trivial change. It is rare to find experts who agree completely upon a severe mental illness diagnosis; this is one of those rare cases. Due to the sparse analysis contained within the post-conviction court's order and the FSC's opinion, a close review of the records on appeal is necessary and will reveal that the state courts ignored much of the testimony and generalized the remainder to support denial. The FSC did this very thing in *Porter*, and the federal habeas court and the Supreme Court granted relief. Tai would ask this Court to grant him relief.

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recommendation or this Court's weighing of the aggravating or mitigating circumstance" with regard to the additional information presented. This is not the correct standard. The court held "there is not a reasonable probability that the result of the penalty phase would have changed as a result of her [Hang's] testimony." This is not the correct analysis in assessing prejudice and, in light of the compelling mitigation presented, demonstrates the post-conviction court's lack of care in carrying out its analysis. P11/2069.

GROUND TWO

As raised in Ground Two of Tai's Petition, the state courts incorrectly and unreasonably determined facts in light of the evidence presented in state court proceedings, contrary to 28 U.S.C. § 2254(d)(2) as it related to claims 7 and 16 of his 3.851 Motion. The state courts also unreasonably applied clearly established federal law as set forth by the Supreme Court in *Strickland.*

The post-conviction court found that the first prong of deficiency in violation of *Strickland* was met as to Claim 7, a claim that counsel was ineffective for failing to impeach State witness Christopher Higgins with his prior felony convictions. P11/2065. However, the court erred in finding that the prejudice prong was not met and holding that "[i]n light of the fact that the State's evidence was substantially consistent, these is *no possibility* that the introduction of Higgins' prior convictions for purposes of impeachment would have changed the result of the trial."

The FSC found the following facts as to the trial:

> On March 7, 2008, Tai Pham was convicted in Seminole County for the first-degree murder of his estranged wife Phi Pham, the attempted first-degree murder of her boyfriend Christopher Higgins, the armed kidnapping of his stepdaughter Lana Pham, and armed burglary. Pham entered Phi's apartment where her oldest daughter, his stepdaughter Lana, was alone and awaiting Phi's return. After binding Lana, Pham hid in her bedroom for an hour, then stabbed Phi at least six times as she entered the room. Prior to returning to the apartment, Phi and Higgins were together at a party and returned in different vehicles. Phi's stabbing occurred while Higgins secured his motorcycle outside. *Once Higgins entered the apartment, he struggled with Pham. During the struggle, Lana was able to get free and call the police. Higgins was severely injured during the struggle, but was able to subdue Pham until the police arrived. Both Lana and Higgins testified at trial.* Pham was the sole witness for the defense.

Pham v. State, 70 So. 3d at 485, 491 (Fla. 2011). The FSC in affirming the post-conviction court's denial once again just reiterated the post-conviction court's order as follows:

> The postconviction court found that counsel was aware[28] of Higgins' convictions and "could not offer any strategic explanation for failing to ask the witness whether he had been convicted of any felonies or crimes of dishonesty." Nevertheless, the

[28] The record does not support this "awareness" at all. Trial counsel did not know about Higgins' prior convictions.

> circuit court found that Pham could not establish prejudice because the evidence of his guilt was overwhelming:
>
> The victim's daughter was an eyewitness to the events and her testimony was corroborated not only by Higgins' testimony, but also by the first responding law enforcement officers, the 911 tape, and the physical evidence.

Pham, 177 So. 3d at 962. The FSC only addressed guilt phase prejudice; it failed to address Tai's claim that counsel's failure to impeach Higgins' testimony resulted in *penalty phase* prejudice related to Higgins' victim impact statement and the effect it had on the judge and jury in terms of reaching the decision to sentence Tai to death. The FSC failed to address this issue because the post-conviction court failed to address it in its order, further demonstrating that the FSC did not engage in the level of review required to protect Tai's constitutional rights.

At the post-conviction hearing, Tai entered into evidence the certified copies of Higgins' convictions from the Office of the Clerk of the Superior Court for Rutherford County, North Carolina. (Doc. 1, p.56-57). Higgins was a major witness for the prosecution and also the alleged victim as to count two (attempted murder). The jury never heard that Higgins was convicted of *9 felonies and 7 crimes of dishonesty*. Counsel prejudiced Tai by failing to be an advocate and impeaching the credibility of a prominent witness. This failure deprived the jury of the relevant and damning knowledge that painted Higgins as a dishonest person and a multi-convicted felon. *See Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) ("[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested" and a "cross-examiner has traditionally been allowed to impeach, i.e., discredit [a] witness."). Therefore, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" and the jury would have weighed Higgins credibility differently in comparison to Tai's. *Strickland*, 466 U.S. at 694. There is a sufficient probability to undermine the confidence in the outcome of the verdict because

a multi-convicted felon would be found to be less credible. *See id*. Furthermore, the post-conviction court's finding of "no possibility" fails to use the correct standard. P11/2065.

This is a case in which the State's main witness' credibility is greatly diminished when he is accurately revealed as a nine time convicted felon and seven time dishonest criminal. Tai asserted in his testimony that he was defending himself against Higgins, so attacking Higgins' credibility was vital for Tai's defense. A jury would certainly reconsider Higgins' credibility when faced with Higgins' extensive criminal background, especially when determining if Tai acted in self-defense as to the attempted murder charge. Tai and Higgins were still fighting in the kitchen when law enforcement officers arrived. Higgins' testimony was important as to the elements of the attempted murder charge, which was also the contemporaneous crime aggravator applied by the trial court.

Furthermore, Higgins' convictions play a crucial role in discrediting his victim impact testimony. The post-conviction court unreasonably held that Higgins' victim impact testimony was proper. P11/2063. Fla.Stat. §921.141(7) states:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence *shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death*. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Higgins knew the victim because he had been dating her for about two months, and he had met her children only once about a couple of weeks before October 22, 2005. R8/922-3. He had been to the victim's home only twice before October 22, 2005. R8/927. Counsel made no specific objections to Higgins' victim impact statement which was read by Higgins to the jury. R12/6&75. Higgins provided the following victim impact statement:

> Since the events have happened, I'm still single, all I do is work. When I met Amy it was the happiest time I had in my life. I believe we had a potential for a long term relationship, not just with Amy, but with the girls as well. I think of her often and still hear the sound of her voice. We had a wonderful relationship and now everything is gone. Certain things still remind me of Amy, like a song on the radio, or maybe a drive in the car. I had to come to terms that she is gone, and I have to go on with my life, which is extremely difficult to do. That's the biggest challenge I've faced in my life. I know what I need to do, but it will take a very long time for me to move on. And Amy will always be with me.

R12/75. Counsel failed to move to exclude this testimony as Higgins did not demonstrate the victim's uniqueness as a human being and the resultant loss to the community. Higgins had a very brief relationship with the victim prior to her death and only met her children once. Higgins' statement focuses on the effect on him and what he speculated would happen in the future. This testimony is not relevant and is highly prejudicial as it provides sympathetic testimony of a life that could have been. Counsel's failure undermined the outcome of the penalty phase. Once again, it changes the profile of Higgins before the jury.

Tai submits that relief should be granted as in post-conviction it became clear that Higgins' criminal history is extensive and that the state courts unreasonably determined that the evidence of guilt was sufficient when the credibility of a multi-convicted felon and multi-convicted dishonest criminal directly impacted Tai's conviction as to the attempted murder charge, which was also the contemporaneous felony aggravator. Higgins' credibility also directly impacted the victim impact used against Tai before the jury. This Court should grant relief.

GROUNDS THREE AND SIX

Tai's trial counsel had an out-of-court agreement with the prosecution that Dr. Predrag Bulic could testify about the contents of the files and deposition of Dr. Thomas Parsons, the attending medical examiner who performed the autopsy of the victim. R9/1171-73. Apparently, the State was having difficulty securing Dr. Parsons' presence for the guilt phase proceedings, and

they were unable to arrange video testimony. R9/1171-72. Defense counsel agreed to allow Dr. Bulic to "review Dr. Parson's file, testify to cause of death, the injuries, [and] type of injuries . . . and nothing beyond that". R9/1171.

Defense counsel objected when Dr. Bulic testified that "[w]hat is interesting with this wound is that the right side of the wound--" because Dr. Bulic's testimony went beyond what was agreed upon by the parties. R9/1171. The court directed the State to confine Dr. Bulic's testimony to the agreement. R9/1173. Dr. Bulic's testimony continued, and the following exchange took place:

> Assistant State Attorney Stone: Doctor, with respect to number two injury, you were about to say something with – Well, is there anything of note that you observed on that particular wound number two?
>
> Dr. Bulic: Yes, there was. This wound has a contusion on one end, more specifically on the right side of the wound there's a contusion which is usually in stab wounds is made by a hand guard or so-called hilt. It's the handle with the little hand guard at the end where the blade begins. When the force is applied –
>
> Defense Attorney Caudill: Objection, Your Honor. May we approach?
>
> The Court: Yes.
>
> (Whereupon, a discussion was had out of the hearing of the jury.)
>
> Mr. Caudill: Judge, this is getting into – now we're into issues of amount of force.
>
> Mr. Stone: That's not – he – he's saying enough force was applied to cause a contusion. He's not going to try to quantify the force.
>
> Mr. Caudill: Well, I don't know. I thought we were going to stick to – that was our understanding, we were going to stick to these injuries that Dr. Parsons noted in the autopsy.
>
> Mr. Stone: That's what he – Excuse me. He noted that in the autopsy report.
>
> The Court: Obviously the Court's not privy to your agreement. Assuming that that is the agreement as you represented, if it's described in the autopsy, he's not going beyond that into his opinions or extrapolations or trying to comment on opinions that Dr. Parsons would have made, then obviously that's not an agreement then.

> Mr. Caudill: It starts to get into issues that go to aggravation.
>
> Mr. Stone: It also goes to premeditation.
>
> The Court: I mean, I understand what you're saying, but almost anything regarding the autopsy could, in theory, go to aggravation.
>
> Assistant State Attorney Feliciani: Judge, my intent when I spoke to Mr. Caudill was obviously he may have an opinion as to the resulting pain this injury caused this victim, and we weren't going to go into that because that's inappropriate.
>
> The Court: Those kind of things.
>
> Mr. Caudill: As long as their witness understands that if he starts talking about interesting things and amount of force.
>
> Mr. Stone: Why can't he talk about interesting things?
>
> The Court: He can preface his speech. No one can control his manner of speech as long as the content is confined to your agreement.

R9/1174-76.

Dr. Bulic again testified in place of Dr. Parsons during the penalty phase trial. R12/56-66. Dr. Bulic testified that the victim would have been conscious for a period after the wounds were inflicted and prior to losing consciousness, and that she experienced extreme pain. R12/57-59. The State used Dr. Bulic's testimony to support the "heinous, atrocious, and cruel" aggravator, which was found by the trial court and given great weight. R12/36.

Tai argued in Claims Three and Fourteen of his 3.851 Motion that trial counsel rendered prejudicial ineffective assistance under *Strickland* when he allowed Dr. Bulic to testify as a "surrogate" for Dr. Parsons in both penalty phase and guilt phase. The legal basis was stated in the motion:

> Trial counsel rendered deficient performance by agreeing to the admission of hearsay testimony by Dr. Bulic regarding the contents and findings of Dr. Parsons' medical examiner files and his deposition. C. Ehrhardt, Florida Evidence §801.2 defines hearsay as a "statement, other than one made by the declarant while

> testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Furthermore, by agreeing to allow Dr. Bulic to testify as a conduit for Dr. Parsons, trial counsel waived Mr. Pham's right to confront the witness pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

P1/49-52&87-91.

The State argued at the post-conviction case management conference that these claims were procedurally barred because they could have been but were not raised on direct appeal. P6/1017-18. The circuit court denied a hearing as to these claims, finding that this issue "could have been raised on appeal but was not," P6/1018, and stating that

> There was no legal basis upon which trial counsel could have successfully objected to Dr. Bulic's testimony because he was qualified to opine on the victim's cause of death . . . Trial counsel objected when he felt that Dr. Bulic strayed into areas where the witness was not qualified to offer an opinion. . . However, as to Dr. Bulic's testimony in general, any objection would have been futile, and counsel cannot be deemed to be ineffective for failing to make a futile motion.

P11/2063 (internal citations omitted). The FSC affirmed without any analysis, finding only that "[t]he summary denial of a postconviction claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record" and "the circuit court properly summarily denied these claims." *Pham*, 177 So. 3d at 959.

Tai maintains that trial counsel provided prejudicial ineffective assistance by allowing Dr. Bulic to testify in lieu of Dr. Parsons. In the alternative, Tai argued in his Petition for Writ of Habeas Corpus in the FSC that if, as the circuit court and the State believe, the issue was preserved and could have been raised on direct appeal, appellate counsel provided prejudicial ineffective assistance in violation of the Sixth Amendment when they failed to raise it. The FSC found that Tai's claim of ineffective assistance of appellate counsel was without merit because it did not find any of Tai's claims procedurally barred. While Tai agrees with the FSC that none of his claims were procedurally barred, and maintains that this claim was properly raised in his 3.851 Motion as

a claim of ineffective assistance of trial counsel, either the claim was preserved for direct appeal or it was not. Thus, either the circuit court was wrong or the FSC was wrong on this point. Whichever is the case, Tai has preserved this claim for federal habeas review, and he is entitled to relief.

The state courts unreasonably determined facts in light of the evidence presented in state court proceedings, contrary to 28 U.S.C. § 2254(d)(2). The FSC offered no analysis and no factual findings regarding this claim, finding only that "the circuit court properly summarily denied these claims." *Pham*, 177 So. 3d at 959. The circuit court's findings of fact are unreasonable. The court cited to R9/1162-90 to support its finding that counsel objected to areas that Dr. Bulic was not qualified to offer an opinion. The first objection in reference to discovery was withdrawn. R9/1166-7. Counsel then objected to Dr. Bulic's opinion testimony as to using term "interesting" and then as to testimony about the "amount of force." R9/1171-6. Counsel next objected to cumulative evidence and to the presence of an inflammatory photograph. R9/1183-85.The final objection was as to the manner of death which counsel stated was an ultimate issue for a jury. R9/1188-9. These objections are irrelevant to Dr. Bulic being a conduit to hearsay testimony. At no point did trial counsel object to Dr. Bulic testifying in lieu of Dr. Parsons.

The state courts also unreasonably applied clearly established federal law as set forth in *Strickland*, where the post-conviction court found that "as to Dr. Bulic's testimony in general, any objection would have been futile, and counsel cannot be deemed to be ineffective for failing to make a futile motion." Tai was denied his Sixth Amendment right to confront witnesses when Dr. Bulic testified as a "surrogate" for Parsons in both the penalty phase and the guilt phase. Dr. Bulic's testimony regarding the contents of Parsons' files and deposition constituted inadmissible testimonial hearsay. Counsel inexplicably agreed to allow Dr. Bulic to "review Dr. Parsons' file,

testify to cause of death, the injuries, [and] type of injuries" without subjecting the State to its burden to prove unavailability. R9/1171. Counsel must subject the State to its burden, especially in the circumstances in this case where the State was having difficulty securing Dr. Parsons' presence. Counsel should have objected or moved to exclude Dr. Bulic's hearsay testimony because it violated *Crawford*. It was the State's burden to prove unavailability of its witness and the admissibility of Dr. Bulic's testimony pursuant to Fla.Stat. §90.704.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." "Testimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59. Autopsy reports are testimonial evidence subject to the Confrontation Clause. *See U.S. v. Ignasiak*, 667 F.3d 1217, 1229 (11th Cir. 2012) & *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (holding that a forensic laboratory report constitutes testimonial evidence, which is subject to the Confrontation Clause). *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), rejected the use of "surrogate testimony", holding that when introducing testimonial forensic evidence, the Sixth Amendment requires the prosecution to present testimony from a scientist who was actually involved in the testing. In *Ignasiak*, 667 F.3d at 1220, the Court relying on *Crawford*, *Melendez-Diaz*, and *Bullcoming*, reversed the convictions

> because the admission of autopsy reports and testimony about those reports, without live in-court testimony from the medical examiners who actually performed the autopsies (and where no evidence was presented to show that the coroners who performed the autopsies were unavailable and the accused had a prior opportunity to cross examine the witness) violated the Confrontation Clause.

The above case law shows that counsel's objection to Dr. Bulic's testimony would not have been futile and had a valid legal basis. Counsel's compliance effectively released the State of its burden

to prove the circumstances surrounding the victim's death. This error was so serious that counsel stopped functioning as the 'counsel' guaranteed by the Sixth Amendment and prejudiced Tai by depriving him of a fair adversarial trial. *See Strickland*, 466 U.S. at 687.

GROUND FOUR

In Ground Four of his Petition, Tai asserts that cumulatively, the combination of procedural and substantive errors deprived him of a fundamentally fair trial and sentencing as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. Tai raised the issue asserted under Ground Four at his first opportunity in state court, in his post-conviction 3.851 Motion. In the motion, Tai claimed that the cumulative effect of the errors made during the guilt phase (Claim 8), penalty phase (Claim 17) and the overall proceeding (Claim 19), deprived him of a constitutionally-guaranteed fundamentally fair trial. P1/64, 96-97, 99-100. Because these claims would not fully accrue until the courts had the opportunity to hear all of Tai's post-conviction claims alleging the ineffective assistance of trial counsel under *Strickland*, Tai could not raise these cumulative error claims at trial or on direct appeal. It is for this reason too that Tai did not request an evidentiary hearing specifically on these claims in his 3.851 Motion. P1/64, 97, 100. The evidence demonstrating the errors that contributed to the cumulative effect was offered in support of his other claims, where each error was individually alleged. P1/33-171.

In its order denying Tai's 3.851 Motion, the post-conviction court found with regard to Claims 8, 17, and 19 that, "[b]ecause all of the individual claims of error are without merit, a claim of cumulative error must fail." P11/2066, 2073 (citing *Kormondy v. State*, 983 So. 2d 418, 441 (Fla. 2007); *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2008); *Vining v. State*, 827 So. 2d 201, 219 (Fla. 2002); and *Downs v. State*, 740 So. 2d 506, 509 (Fla. 2009). For the reasons alleged under Grounds One through Three of this Petition, the post-conviction court's finding that "all of the individual

claims of error are without merit" is the result of the unreasonable application of clearly established federal law and the unreasonable determination of facts, contrary to 28 U.S.C. § 2254(d)(1) and (2). Furthermore, and the focus of this ground for relief, is the fact that the post-conviction court's standard for reviewing claims of cumulative error, which is set forth by FSC case law, is an unreasonable application of *Strickland* and violates the rights guaranteed under the Sixth, Eighth, and Fourteenth Amendments. The FSC affirmed the post-conviction court's unconstitutional ruling.

A. The FSC's Precedent, Requiring a Piecemeal Analysis of the *Strickland* Prejudice Prong, is an Unreasonable Application of Clearly Established Federal Law.

Under the "unreasonable application" clause of 28 U.S.C. § 2254(d), this Court may grant the writ of habeas corpus if the state courts identified the correct governing legal principle established by the Supreme Court but unreasonably applied it to the facts of the case. *Williams*, 529 U.S. at 419. Tai argued before the state courts in his Initial Brief on appeal of his 3.851 Motion that "[t]he sheer numbers and types of errors in [his] guilt and/or penalty phases, when considered as a whole, virtually dictated the sentence of death." Further, Tai argued that addressing each error "on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence."

The FSC affirmed the post-conviction court's denial of relief on Tai's cumulative error claims, approving the lower court's application of its precedent and holding

> As we have previously stated, "where the alleged errors urged for consideration in a cumulative error analysis are individually 'either procedurally barred or without merit, the claim of cumulative error also necessarily fails."' *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) (quoting *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008)).

Pham, 177 So. 3d at 962. The FSC's nonsensical standard of proof for cumulative error claims directly contradicts every facet of the *Strickland* opinion.

In *Strickland,* the Supreme Court was clear that the analysis of prejudice that courts must undertake in evaluating the effectiveness of counsel's assistance is one of cumulative prejudice. 466 U.S. at 694. The Court identified the standard for finding prejudice as "a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different") (emphasis added). This standard, which requires even less than a showing by a preponderance of the evidence that the "errors of counsel" determined the outcome, does not require a showing that *each error* counsel made *individually impacted* the outcome of the case such that there is a reasonable probability that without the error, the result would have been different. This is clear from the Court's use, throughout its opinion, of the *plural* form "errors" in relation to the *singular* observation of a change in the result of the proceeding.

The Supreme Court directly addressed the standard for assessing prejudice in a capital sentencing [29] as follows, leaving no room for the interpretation that individual errors are to be analyzed in a piecemeal fashion in terms of prejudice:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, *absent the errors,* the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury. Some of the factual findings will have been *unaffected by the errors,* and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, *altering the entire evidentiary picture, and some will have had an isolated, trivial effect*. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the

[29] The *Strickland* case was before the Court on a petition for writ of certiorari to the Court of Appeals, which had reversed the District Court's finding on a petition for writ of habeas corpus that the petitioner, a death-sentenced Florida state inmate, had received his constitutionally-guaranteed effective assistance of counsel. *Strickland*, 466 U.S. at 679. Although it defines the standard for inquiry into whether counsel was ineffective in representing a client on matters of guilt *and* in capital sentencing proceedings, the *Strickland* case itself involved a claim that counsel was ineffective during a capital sentencing proceeding after the defendant had entered a guilty plea. *Id.* at 686 (noting that a non-capital sentencing may require a different approach to defining the effective assistance of counsel).

> unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different *absent the errors.*

Id. at 695-96 (emphasis added); *see also Williams*, 529 U.S. at 397-98 (holding that "the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the *totality of the available mitigation evidence* – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation."). Further emphasizing this point, the Supreme Court also set forth the following:

> In making the determination whether *the specified errors* resulted in *the required prejudice*, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

Id. at 695 (emphasis added).

Accordingly, it is clear that the FSC's piecemeal method of analyzing prejudice under *Strickland* directly violates the clearly established federal law set forth by the *Strickland* opinion itself.

B. The State Courts Unreasonably Applied *Strickland* in Tai's Case By Finding Not Only that He Failed to Prove Ineffective Assistance of Counsel on Each Individual Claim, but Also that He Failed to Prove He Was Prejudiced by the Cumulative Effect of Counsel's Errors.

In Tai's case, the state courts found deficiency on the first prong of *Strickland* as to some of the alleged errors. As to others, the state courts either proceeded to a finding of no prejudice on the individual claims without addressing the deficiency prong, or unreasonably determined the facts to find that counsel did not render deficient performance. The state courts denied Tai relief without undertaking the prejudice analysis required by *Strickland* and evaluating the effect of the errors as a whole on the totality of the evidentiary picture before the judge and jury. *See id.* at 695-96.

i. Counsel's failure to object to Dr. Bulic's testimony prejudiced Tai in both guilt and penalty phases.

The post-conviction court denied Tai an evidentiary hearing on Claims 3 and 14, in which he argued that counsel was ineffective for failing to object to Dr. Bulic's testimony pursuant to the holding in *Crawford.* The FSC affirmed. This claim is discussed under Ground Three, where it is argued that the state courts' refusal to grant Tai the opportunity for evidentiary development was contrary to 28 U.S.C. § 2254(d)(1) and (2). The prejudice that stemmed from Dr. Bulic's testimony contributed to the outcome of the guilt and penalty phases, and should have been considered accordingly in a cumulative prejudice analysis.

ii. Counsel's failure to impeach Higgins prejudiced Tai in both guilt and penalty phases.

The post-conviction court found that deficiency existed under the first prong as to Claim 7, the claim that counsel was ineffective for failing to impeach Higgins with his prior felony convictions. P11/2065. However, the court declined to find prejudice, determining only that that the "credible evidence against the Defendant during the guilt phase was overwhelming." P11/6065. As discussed under Ground Two, this finding was itself the result of an unreasonable determination of the facts and an unreasonable application of clearly established federal law, and the FSC erred in affirming the post-conviction court. Furthermore, the guilt phase prejudice stemming from Higgins' unimpeached testimony should have been combined with the guilt phase prejudice stemming from counsel's failure to object to Dr. Bulic's testimony. Had the state courts engaged in a reasonable application of the law and the facts, there is a reasonable probability that the outcome of the guilt phase would have been different.

In addition, the post-conviction court failed even to address Tai's claim that counsel's failure to impeach Higgins' testimony resulted in *penalty phase* prejudice related to Higgins'

victim impact statement and the effect it had on the judge and jury in terms of reaching the decision to sentence Tai to death. P11/2065. This oversight was not corrected on appeal to the FSC. *Compare* Initial Brief on 3.851 Motion at 94-95 (squarely raising the issue) *with Pham*, 177 So. 3d at 962 (addressing counsel's failure to impeach Higgins only in terms of guilt phase prejudice). With regard to Higgins' penalty phase victim impact testimony, the post-conviction court found only that it was not improper in relation to Claim 16 of Tai's 3.851 Motion. P11/2063. As discussed under Ground Two, Higgins' victim impact testimony was improper because it was not limited to describing the victim's uniqueness as an individual but instead described the effect her death had on him. Furthermore, however, the testimony should have been subject to scrutiny in terms of the effect his criminal convictions had on his credibility. There is a reasonable probability that his testimony predisposed the jury to feel sympathy toward him and his loss and, while it should not have been admitted in the first place, it also insinuated that he had a deeper relationship with the victim than he did in reality; thus, there is a reasonable probability that the jurors' sympathy ran deeper and impacted their sentencing recommendation. Tai was unconstitutionally denied the opportunity to have this error analyzed in terms of its effect on his sentence, and Tai seeks *de novo* review under 28 U.S.C. § 2254(d).

iii. All of Tai's penalty phase ineffective assistance claims should have been analyzed for cumulative effect on the outcome of the sentencing.

As to the remainder of Tai's penalty phase ineffective assistance claims, Claims 9 – 17[30], the post-conviction court determined that

> The defendant demonstrated at the evidentiary hearing that trial counsel failed to contact the members of the Defendant's family who lived outside the United States, failed to obtain records from the Illinois Department of Children and Families, and failed to obtain the complete records from the Florida State Hospital. Collateral

[30] Claims 14 and 16 are discussed in terms of their contribution to the cumulative error analysis in the penalty phase under subsections (i) and (ii) respectively. Claim 17 is itself a claim regarding the cumulative effect of the errors on the penalty phase proceedings.

> counsel asserts that each of these claims are worthy of relief on their own merits, but further asserts that the absence of this information rendered the mental health investigation inadequate. Additionally, the Defendant argues that testimony of his substance abuse history should have been presented in mitigation, as should the letter from the Victim's mother.
>
> *Trial counsel did not provide a satisfactory explanation for the failure to obtain much of this evidence.* While it was unclear whether a trip to Vietnam for face-to-face interviews would have been necessary or approved, there was certainly no impediment to making telephone calls to the family. The witnesses from the Illinois Department of Children and Families testified that they were available and willing to testify and that their records would have been provided had such a request been made. Similarly, there is little doubt that the records from the Florida State Hospital would have been provided to trial counsel.

P11/2066 (internal citations omitted) (emphasis added). From these findings, it is clear that the post-conviction court believed counsel rendered deficient performance as to many of the penalty phase claims pursuant to the first prong of the *Strickland* analysis, even though the court did not explicitly state that conclusion, going on to the prejudice analysis and declining to find sufficient prejudice existed on each claim. The court stated

> Even if it is concluded by this Court that trial counsel was deficient in failing to obtain the evidence contained in grounds 9-12, that does not entitle the Defendant to relief. The Defendant must still establish the prejudice prong of *Strickland.*

P11/2066.

a. Claims 9 and 10

The post-conviction court analyzed each penalty phase claim piecemeal in terms of prejudice. As to Claim 9, the claim that counsel was ineffective for failing to contact Tai's family in Vietnam and France, which is thoroughly discussed herein under Ground One, the post-conviction court found that the evidence counsel could have presented as a result of contacting Tai's family was either not probative or was cumulative in nature. P11/2069. The court found that factors relating to Tai's toddler years "would not have made any difference in his moral culpability." P11/2069. This finding was inexplicable, considering that the factors described were

directly related to Tai's childhood development and were direct evidence of developmental delay and potential disability. However, the court also found that "other factors indicating his delayed development in certain areas, while perhaps not specifically discussed, were amply covered in the mental health testimony that addressed his inability to normally develop mentally, emotionally, and socially" and that "[p]resenting additional areas of delayed development would have been cumulative." P11/2069.

Regarding evidence that Tai's father hit him with a stick and tied him up to discipline him, the post-conviction court held that direct evidence of these occurrences would have been "cumulative," because during the penalty phase trial, the defense expert Dr. Day testified that such disciplinary procedures were common in Vietnam. In other words, pursuant to the post-conviction court's reasoning, to hear that something is commonplace is the equivalent of hearing that a particular person experienced that thing. Similarly, the post-conviction court found that Hang's testimony "about the specific challenges" she and Tai faced when captured and imprisoned was cumulative because there was general testimony and a video presentation about prison camps. P11/2069.

Finally, the court found that, in essence, none of Tai's childhood experiences prior to the traumatic escape attempts had probative value sufficient to have altered the outcome of the penalty phase proceeding. P11/2069. As is thoroughly discussed under Ground One, the trial court's finding as to Claim 9 that Tai did not demonstrate prejudice under the *Strickland* standard is patently unreasonable and standing alone is sufficient to undermine confidence in the outcome, even though a plethora of other prejudicial errors exist.

As to Claim 10, the claim that counsel was ineffective for failing to obtain records from the Illinois DCF, the post-conviction court similarly determined that no prejudice existed because

the court "already gave great weight to mitigation from the Defendant's background as it related to his escape from Vietnam and his upbringing in Illinois." P11/2071. In other words, despite Florida's rule of law in *Tedder v. State*, that the trial court must give *great weight* to the jury's recommendation for death, a *Strickland* prejudice analysis that looks only to the trial court's sentencing order is sufficient. 322 So. 2d at 910 (Fla. 1975) (abrogated by *Hurst*). This too is patently unreasonable.

The FSC affirmed the trial court's order, finding that "[c]ompetent, substantial evidence supports the circuit court's determination" as to Tai's failure to establish prejudice as to his various penalty phase claims. *Pham*, 177 So. 3d at 961. The FSC approved of the post-conviction court's finding that the evidence presented in post-conviction as to Claims 9 and 10 was cumulative. *Id.* The FSC determined that the additional evidence would not have changed the sentencing outcome because the trial court already gave great weight to "the existence of any other factor in the Defendant's background." *Id.*

b. Claims 11 and 12

The post-conviction court also denied Tai relief on Claim 11, the claim that counsel was ineffective for failing to obtain the FSH records, finding that counsel made a reasonable strategic decision not to obtain the records and that no prejudice existed because the defense experts testified that they had seen the reports and considered the information found within them. P11/2071. As argued under Ground One, these findings constitute an unreasonable determination of the facts, unsupported by the evidence below.

Furthermore, the defense experts who testified in post-conviction reviewed these records and came to different conclusions than the trial level experts, determining that Tai suffered from PTSD and bipolar disorder, extremely mitigating diagnoses that neither the judge nor the jury

heard during the penalty phase trial. P15/689-90, 702-04, 712-16, 773, 786-99; P16/808-12, 817-20. The expert that the state presented in post-conviction concurred with the PTSD diagnosis and only failed to diagnose Tai with bipolar disorder because he felt he could not be sure whether Tai had ever experienced a hypomanic episode. P16/889. Therefore, it is clear that Tai was prejudiced by counsel's failure to obtain these records. The post-conviction court, however, attributed the trial experts' failure to diagnose Tai with PTSD to the alleged increased cooperation Tai had engaged in since the penalty phase. P11/2072. Finding that counsel was not ineffective, the court concluded that collateral counsel had simply "discovered witnesses who gave more favorable diagnoses." P11/2072.

Breaking Claim 11 down into the two parts of the *Strickland* analysis, the post-conviction court's findings on deficiency rest upon the conclusion that counsel's alleged strategic decision not to obtain the records was reasonable. However, as argued under Ground One, that finding cannot stand in light of the fact that no strategic decision was made. Moving to the findings in terms of prejudice, there was no support for the conclusion that the trial level experts had the complete set of records nor that it was Tai's alleged increased cooperation rather than the records' availability that allowed the post-conviction experts to diagnose PTSD. The post-conviction experts identified the records as key to their diagnoses. P15/770-73; P16/903-04. Under a reasonable factual determination, Tai would have proven both prongs of the *Strickland* analysis. However, the FSC affirmed the post-conviction court's unreasonable findings as to both prongs of the *Strickland* analysis.

As to Claim 12, the claim that counsel was ineffective for failing to provide the DCF and FSH records to the defense experts, the post-conviction court concluded that Tai was not prejudiced because the experts had most of the information and came to similar conclusions about

his mental health issues. P11/2072. The FSC affirmed. *Pham*, 177 So. 3d at 961-62. Regarding the DCF records, the FSC referred to the evidence about Tai's time in Illinois in general as "cumulative" and therefore denied relief because the sentencing court gave great weight to his background in terms of mitigation. *Id.* at 962. This type of analysis cannot stand in light of *Tedder* and the fact that the jury's recommendation is afforded "great weight."

The state courts' conclusions are inconsistent, incomplete, and thoroughly unsupported by the record. They demonstrate an unreasonable determination of the facts, and the prejudice stemming from counsel's failures with regard to the FSH and DCF records must be included in the cumulative analysis of prejudice required by *Strickland.*

c. Claim 13

As to Claim 13, the post-conviction court found that counsel was not ineffective for failing to present evidence related to Tai's substance abuse. P11/2071-72. The court found that Tai was not prejudiced by counsel's failure to present this evidence during the penalty phase because the post-conviction defense expert Dr. Buffington "conceded that he could not opine that the Defendant was under the influence of [angel's trumpet and crack cocaine] or suffering flashbacks during the killing." P11/2072. Further, the court determined that there was "evidence of premeditation, careful planning, and calculated action," a conclusion that, as discussed under Ground One, is thoroughly unreasonable, and therefore, Tai could not possibly have been prejudiced by the failure to introduce this information because the evidence of substance abuse was "either irrelevant or so speculative as to have no probative value." P11/2072. The FSC affirmed the post-conviction court on this claim, finding that the lower court's determinations were supported by "[c]ompetent, substantial evidence." *Pham*, 177 So. 3d at 961.

The prejudice stemming from this failure on the part of trial counsel must too be included

in an analysis of cumulative error because it is not necessary that, in order for a defendant's substance abuse to be mitigating, counsel must prove that the defendant was under the direct influence of the substance at the time of the crime. *Tennard v. Dretke*, 542 U.S. 274, 287, 124 S. Ct. 2562, 159 L.Ed.2d 384 (2004) (rejecting the suggestion that mitigating evidence is only relevant where "the defendant also establishes a nexus to the crime"). The substance abuse was part of the particularized presentation of all of the circumstances surrounding Tai at the time that should have been done by trial counsel in this case but was passed over in favor of a weak and generalized presentation. *See Gregg*, 428 U.S. at 206.

d. Claim 15

As to Claim 15, a claim that counsel was ineffective for failing to present the letter from the victim's mother stating that she forgave Tai and did not want to see him sentenced to death, the post-conviction court found that counsel's failure to present the letter during the penalty phase was not evidence of ineffectiveness because the victim's mother's opinion on the suitability of the punishment was not "relevant or admissible" and because her forgiveness was "relevant, but not compelling." P11/2073. The post-conviction court also came to the inexplicable conclusion that there is no reasonable probability that knowledge of her forgiveness would had any effect on the jury. P11/2073. The FSC affirmed without comment on this claim. *Pham*, 177 So. 3d 955.

The post-conviction court's determination of the facts and application of *Strickland* are unreasonable and, accordingly, the FSC's affirmation of the lower court's order is also unreasonable. The prejudice stemming from counsel's failure to introduce this letter should have been considered in terms of a *Strickland* analysis.

iv. If the state courts had reasonably applied *Strickland* and had reasonably determined the facts of the case, Tai would have been granted relief.

Considering the prejudice stemming from each penalty phase failure on the part of trial counsel in a cumulative fashion, one sees the story of a man who started out developmentally-delayed and experienced many traumatic events during childhood, not the least of which was being separated from his family and forced to go by boat to another country in appalling conditions, where he was then placed in foster care. His many traumatic experiences left him suffering from PTSD, and this was in combination with bipolar disorder and substance abuse. With no healthy way of dealing with the overwhelming trauma he had suffered in his lifetime, Tai was extremely emotionally disturbed.

Contrast this view with the presentation during the penalty phase and *Spencer* hearing and it is overwhelmingly obvious that this view, as developed in post-conviction, is far more compelling and accurate. The judge and jury heard during the trial level proceedings that Tai was a Vietnamese refugee who left the country by boat and that *people like him* experienced certain things. The people who held Tai's life in their hands did not hear about *his life* and that *his experiences* left him struggling with PTSD. On top of this, they did not know that he started out from a disadvantaged position even in comparison to other Vietnamese refugees. He showed signs of developmental difficulty at a young age, and the judge and jury did not hear the possible causes of that difficulty. The judge and jury did not look at each one of his family members as they testified, each one providing a different perspective about what shaped Tai as a human being, even though it was perfectly possible for trial counsel to have presented this evidence to them. The cumulative effect of the prejudice stemming from counsel's failures must be assessed in order to comply with *Strickland* and the state courts failed to undertake the proper analysis. Tai is entitled to habeas relief.

GROUND FIVE

On May 21, 2008, in the morning of the second day of the penalty phase trial, an alternate juror, Andrew Valenti, handed Deputy Kelty a letter for the court. R13/218. The letter indicated that Mr. Valenti overheard some of the other jurors discussing the case during a time when the court had instructed them not to speak about the case. R13/219-20. Defense counsel moved for a mistrial on the grounds that the jury would not give Tai a fair determination as to sentence and did not give him a fair determination as to guilt because they were not willing to follow the court's orders or the law. R13/221-22.

Mr. Valenti was brought before the court and questioned about the contents of his letter. R13/222-35. Mr. Valenti informed the court that he heard at least two other jurors make comments. One juror said something about "the sad story stuff". R13/222-35. The other juror made a comment about "all verdicts being emotional decisions". R13/223. He did not know the names of the two jurors, but he described their physical appearance and where they sat. R13/224-25. He heard other comments that were made in a group under the breath, but he could not tell who made those comments. R13/223. Regarding the guilt phase, he reported that "the general consensus was the Defendant committed the act", and the jurors were talking casually about intent and speculating about what evidence was and was not introduced. R13/226-27, 234. Following the inquiry of Mr. Valenti, the trial court asked counsel if they would like to individually inquire of each individual juror or try to identify the two individuals referred to by Mr. Valenti. R13/235-36. At that time, counsel opted for the latter approach.

The court next inquired of the two jurors Mr. Valenti seemed to be describing. Juror Kristen Appleman (the foreperson) informed the court that she heard another juror make the following comment:

> [E]veryone has a rough life in some case, but you are – this is the law, this is – there is right and wrong, and, you know, if you wanted to come to America, you have to live by American standards, American law.

R13/241. She could not remember who made the comment. R13/242. She also recalled comments about why the jurors were being taken in and out of the courtroom, speculation about the point of certain witnesses, and "everyone has a sob story". R13/243. Juror Peter Perkins stated that he heard "idle chitchat", and somebody said, "[I]t's too bad to hear those kind of stories, but, you know, a lot of people have tough luck". R13/247.

After speaking with the three jurors, the court asked whether either side wished to inquire further, and counsel declined the offer. R13/251-52. Defense counsel renewed the motion for mistrial, and the court reserved ruling. R13/255-56. Prior to jury deliberations in the penalty phase, defense counsel provided the court with case law in support of his motion for mistrial. R14/493. The court denied the motion for mistrial, stating that based on the inquiry of the three jurors, while there may have been a lack of compliance with the court's instructions, it did not inure to the verdict. R13/504-05.

Defense counsel filed a Motion for New Sentencing Hearing and for Interviews of Jurors on May 30, 2008, eight days after the jury returned a death recommendation. R3/507. The motion was filed within the ten days following the jury verdict, which is required by Florida Rule of Criminal Procedure 3.575. Defense counsel argued to the trial court that the jury's unusually short penalty phase deliberation, and well as the inappropriate demeanor of some of the jurors following the deliberation warranted further juror interviews. R17/1083-86. On June 18, 2008 the court denied the motion, stating

> The Court has previously conducted an in depth inquiry in response to Mr. Valenti, who was an alternate juror, in response to his letter which was dated May the 20th. The inquiry was conducted on May the 21st. An inquiry was made by the Court.

> The Court allowed opportunity for the State to question Mr. Valenti and for the Defense to question Mr. Valenti. The two individuals that were identified as having made comments, and those individuals were Mr. Peter Perkins and Ms. Kristen Appleman, were brought in and questioned.
>
> The comments that Mr. Valenti indicated were made by those individuals were, it's a sad story and verdicts are emotional decisions. Again, both the State and the Defense made inquiries of these individuals.
>
> Once that – those inquiries were concluded, the Court offered the opportunity for individual inquiry to me made of each of the remaining jurors. That opportunity was declined.
>
> For the reasons previously stated on the record and based on the responses of Mr. Valenti in court, the response of Ms. Appleman and the response of Peter Perkins, the Court at that time found no basis to grant a mistrial as far as the penalty phase and finds no basis to grant a new penalty phase.
>
> Again, as to the opportunity for jury inquiry that Court had previously offered that opportunity. That opportunity was declined. There has been nothing new that has occurred since that time that would justify further inquiry.
>
> The Court would deny both motions.

R17/1097-98.

On direct appeal, appellate counsel raised the denial of Tai's motion for mistrial and motion for new penalty phase, but not the denial of Tai's motion to interview jurors. The standard of review for an order denying a motion for juror interviews is abuse of discretion. *Marshall v. State*, 976 So. 2d 1071 (Fla. 2007). The FSC denied Tai's claim regarding the denial of the motion for mistrial and the motion for new penalty phase "[b]ecause it is not apparent on the record that the comments affected the verdict or sentence recommendation in any way." *Pham*, 70 So. 3d at 492.

Tai argued in his Petition for Writ of Habeas Corpus in the FSC that he received ineffective assistance of appellate counsel due to counsel's failure to raise a specific claim regarding the trial court's denial of Tai's motion to interview jurors. The lower court held that:

> On direct appeal, Pham alleged that certain members of the venire prejudged him based on his nationality, and now alleges that appellate counsel was ineffective for

> failing to raise a specific claim regarding the trial court's denial of Pham's motion to interview jurors.
>
> . . .
>
> Pham's first subclaim, that appellate counsel was ineffective for failing to raise a specific claim regarding his motion to interview jurors, misapprehends the record. Notably, appellate counsel addressed the juror bias on appeal despite not raising a separate claim regarding the denial of the motion to interview jurors. Such a claim would have been without merit because, as noted by the State, trial counsel was asked whether he wished to continue to interview jurors and declined. Accordingly, appellate counsel cannot be found ineffective for failing to raise a meritless claim.

Pham, 177 So. 3d at 963. In denying Tai's claim, the lower court unreasonably determined the facts in light of the evidence presented. Tai's claim would not have been without merit because he initially declined the trial court's offer to continue to interview jurors. Given what is already known from the trial court's interviews of only three jurors, there was clearly cause for concern that Tai's jurors were not following the court's instructions or the law; enough so that the trial court initially offered to individually inquire of each of the jurors. R13/235. If the trial court had these concerns on May 21, 2008, there is no reason why the court would not have had those same concerns eight days later. Furthermore, because Tai was born in Vietnam, the comment from an unknown juror that "if you wanted to come to America, you have to live by American standards, American law", R13/241, is particularly troubling in light of the jurors' racial biases and inability to consider mitigation, which would have affected their penalty phase verdict.

This is not a matter which inheres in the verdict. As the Florida Second District Court of Appeals explained in *Sconyers v. State*, 513 So. 2d 1113, 1118 (Fla. 2d DCA 1987), a case in which it reversed the trial court's denial of a post-judgment motion to interview jurors:

> When a motion to interview a juror or jurors sets forth allegations that the movant has reasonable grounds to believe that the verdict may be subject to legal challenge, such as a reasonable belief that a juror has been guilty of misconduct, then the trial court should conduct such an interview, limiting it as narrowly as possible, to determine if such grounds do exist.
>
> Interviewing each of the jurors individually would have allowed trial counsel to develop

the record in support of the motion for mistrial and motion for new penalty phase. Because there was a reasonable probability of juror misconduct that involved more than just the three jurors who were interviewed, the trial court abused its discretion when it denied defense counsel's timely filed motion to interview jurors.

Furthermore, the state courts unreasonably applied clearly established federal law as set forth in *Strickland*. Tai has a Sixth Amendment right to be sentenced by jurors who are free from external influence and who render their verdict based solely on the evidence that was presented at trial. *See Ward v. Hall*, 592 F.3d 1144, 1175 (11th Cir. 2010) *citing Parker v. Gladden*, 385 U.S. 363, 363-66, 87 S.Ct. 468, 468-71 (1966); *see also*, *Coleman v. Zant*, 708 F.2d 541, 544 (11th Cir. 1983). It is clear from the three jurors who were interviewed that "one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial." *Coleman*, 708 F.2d at 544; *see also*, *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1960).

Appellate counsel provided prejudicial ineffective assistance in violation of the Sixth Amendment when they failed to raise the issue of the denial of Tai's motion to interview jurors on direct appeal. This issue was properly preserved below and appellate counsel's failure to raise it on appeal constitutes ineffective assistance of appellate counsel.[31] This error is not harmless. Confidence in the outcome of the appellate process is undermined because had appellate counsel raised this issue on appeal, there is a reasonable probability that Tai's convictions would have been reversed and he would have been granted a new trial.

[31] In a case management conference regarding Tai's motion for post-conviction relief, which was held on June 11, 2013, The Honorable Marlene Alva, who was also the trial judge, stated that the court's denial of Tai's motion to interview jurors could have been raised on direct appeal and is a state habeas issue. P6/990.

GROUNDS SEVEN AND EIGHT

In Ground Seven of his Petition, Tai asserts that, in violation of the Fifth, Sixth, and Fourteenth Amendments and the clearly established federal law set forth in *Ring v. Arizona*, the state trial court erred by taking testimony regarding his conviction for battery on a law enforcement officer and relying on the testimony to support a finding of the aggravating factor, under Fla. Stat. § 921.141(5)(b), that he had previously been convicted of a felony involving the use or threat of violence to a person. In Ground Eight, Tai asserts that the death sentencing scheme under which he was sentenced is a violation of *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the facts that must be found to impose the death sentence were not alleged in the charging document nor were they unanimously found to exist beyond a reasonable doubt by a 12-person jury. Because Grounds Seven and Eight overlap in terms of their constitutional foundations, they are combined for discussion. Tai raised the issues asserted under Grounds Seven and Eight at his first opportunity and pursued them on direct appeal.

A. The FSC's Precedent at the Time of Tai's Sentencing Unreasonably and Erroneously Applied *Ring* and *Apprendi.*

In *Ring*, the Supreme Court extended to capital cases the holding of *Apprendi*, that any fact necessary to increase a sentence beyond the statutory maximum must be proven to a jury beyond a reasonable doubt. *Ring*, 536 U.S. at 609. The capital sentencing statute found unconstitutional in *Ring* dictated that "the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." *Id.* at 588. Arizona law required that "'at least one aggravating factor is found to exist beyond a reasonable doubt'" before a death sentence could be imposed. *Id.* at 597 (quoting *State v. Ring*, 25 P.3d 1139, 1152 (Ariz. 2001) (citing Ariz. Stat. § 13-703.E ("the court . . . shall impose a sentence of death if

the court finds one or more of the aggravating circumstances enumerated")))).

Like the Arizona statute declared unconstitutional in *Ring*, the Florida capital sentencing statute under which Tai was sentenced placed the sentencing decision solely and squarely in the hands of the trial judge, although case law, discussed *supra*, dictates that the trial judge give the jury's ultimate sentencing recommendation great weight. A defendant convicted of a capital felony by a unanimous jury would be sentenced to death if an additional sentencing proceeding resulted "in findings *by the court* that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole." Fla. Stat. § 775.082(1) (a) (2005) (emphasis added). The additional sentencing proceeding, set forth in Fla. Stat. § 921.141, provided for the *presence* of a jury (the trial jury unless it was unable to reconvene or the defendant had pled guilty). Fla. Stat. § 921.141(1). However, although it provided for a jury to *hear* the penalty phase evidence alongside the court, the statute did not provide for any *findings* to be made by the jury. Rather, the jury was only to "render an *advisory* sentence to the court, based upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5); (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death." Fla. Stat. § 921.141(2) (emphasis added).

The advisory sentence could not operate to satisfy the jury requirement of *Ring* and *Apprendi* because not only was it made by a bare majority of the jury, the statute offered no standard of proof, nor did it offer any method of determining what circumstances had been proven and by what standard to any member of the jury. *Id.* Furthermore, the trial judge was able to completely ignore the jury's recommendation if it independently reweighed the aggravating and

mitigating circumstances and came to a different conclusion. Fla. Stat. § 921.141(3) ("*Notwithstanding the recommendation* of a *majority* of the jury, the court, *after weighing the aggravating and mitigating circumstances*, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.") (emphasis added).

Under no reading of Florida's statutory capital sentencing scheme could it be said that a jury was required to determine beyond a reasonable doubt the existence of any fact necessary to impose the death penalty. However, at the time of Tai's sentencing, the Florida state courts were bound by erroneous FSC precedent holding that *Ring* did not apply to Florida's capital sentencing scheme. *See, e.g., Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). The recent holding of the United States Supreme Court in *Hurst* confirmed that the FSC's precedent was in direct violation of clearly established federal law.

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, *we have previously made clear* that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele*, 921 So. 2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").

Hurst, 136 S. Ct. at 621-22;

The Court in *Hurst* outright rejected the State's argument that *stare decisis* compelled it to

uphold Florida's capital sentencing scheme because it had approved of the very same scheme in pre-*Ring* cases. *Id.* at 620-21, 623 (referring to *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L.Ed.2d 340 (1984) and *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L.Ed.2d 728 (1989)). The Court also pointed out that the conclusions in those cases were "irreconcilable with *Apprendi*" and that it had, in fact, previously recognized that reality in its *Ring* opinion, where it "held that another pre-*Apprendi* decision – *Walton* – could not 'survive the reasoning of *Apprendi.*'" *Id.* at 623 (citing *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990) and quoting *Ring*, 536 U.S. at 603) (internal citations omitted). The Court went on to highlight the fact that the *Walton* decision was a "mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme." *Id.* (citing *Walton*, 497 U.S. at 648).

While the *Hurst* opinion had not been rendered at the time of Tai's sentencing, he argued the points of law on which the decision rests to the state courts below. The federal law set forth in *Apprendi* and *Ring* was clearly established when Tai was sentenced, and he was sentenced in violation of it. The *Hurst* opinion lends tremendous support to Tai's position.

B. Tai's Sentence Was Unconstitutionally Imposed in Violation of *Ring*, *Apprendi*, and the Fifth, Sixth, Eighth, and Fourteenth Amendments.

i. The facts that must be found to impose the death sentence were not alleged in the charging document.

Tai argued on direct appeal that his sentence was unconstitutionally imposed because the trial court denied his "motion to preclude the death penalty due to the failure of the indictment to allege a crime punishable by the death penalty." Under Florida law, the charging document must contain allegations of all facts necessary to impose a particular punishment. *See, e.g.*, *Lane v. State*, 996 So. 2d 226 (Fla. 4th DCA 2008). The charging document, under Florida law, must also allege each essential element of a crime. *State v. Dye*, 346 So.2d 538, 541 (Fla. 1977). Under the rule of

Apprendi and *Ring*, therefore, because the facts enhancing the sentence for first-degree murder to death "operate as 'the functional equivalent of an element of a greater offense'" and must therefore be found by a jury, it follows that under Florida law, if *Ring* and *Apprendi* are reasonably applied, these facts must be alleged in the charging document. *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494, n. 19).

The FSC denied Tai relief on this issue, citing its precedent which determined that *Ring* does not require aggravating circumstances to be alleged in the indictment. *Pham*, 70 So. 3d at 496. In doing so, the FSC artificially narrowed the claim, which was presented as a failure of the indictment to allege the facts necessary to impose a death sentence, to one of the indictment's failure to allege aggravating circumstances. The two types of allegations are distinct, because a death sentence under Fla. Stat. § 921.141 at the time rested not just on the existence of "sufficient aggravating circumstances" but also on a finding that there were "insufficient mitigating circumstances" to outweigh them. Fla. Stat. § 921.141(3) (2005). In any event, the FSC's precedent is an unreasonable application of *Ring* and *Apprendi* to Florida law, which seems to be supported by its erroneous precedent holding those cases inapplicable in Florida and by further precedent holding that sufficient notice of aggravating circumstances is provided by the capital sentencing statute, which enumerates all possible aggravating circumstances the state may seek to prove. *Pham*, 70 So. 3d at 496 (citing, *inter alia*, *Blackwelder v. State*, 851 So. 2d 650, 654 (Fla. 2004) and *Lynch v. State*, 841 So. 2d 362, 378 (Fla. 2003)). Tai is entitled to relief.

ii. The facts that must be found to impose the death sentence were not found by a unanimous jury beyond a reasonable doubt.

Tai also argued on direct appeal that his sentence was imposed in violation of *Ring* and *Apprendi* because the facts needed to impose the death sentence, "sufficient aggravating circumstances" and "insufficient mitigating circumstances" were never found beyond a reasonable

doubt by a 12-person jury. The FSC denied relief, citing the lower court's finding that the "prior violent felony" aggravating circumstance applied.

> This Court has repeatedly held that where a death sentence is supported by the prior violent felony aggravating circumstance, Florida's capital sentencing scheme does not violate *Ring* or *Apprendi*. *See, e.g., Frances v. State,* 970 So. 2d 806, 822 (Fla.2007) (citing *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348); *Jones v. State,* 855 So. 2d 611, 619 (Fla.2003). A Florida jury unanimously found Pham guilty of three violent felonies. Therefore, the trial court found that the death sentence was supported by the prior violent felony aggravating circumstance, which satisfies express exceptions to *Apprendi* that were unaltered by *Ring.*

Pham, 70 So. 3d at 495-96.

This analysis utterly failed to address Tai's Sixth Amendment issue, instead conflating the findings necessary to impose a death sentence under *Arizona* law at the time of the *Ring* decision with the facts necessary to impose a death sentence in *Florida*. As such, the state courts unreasonably applied the clearly established federal law in *Ring* and *Apprendi*, and Tai should be afforded habeas relief.

iii. The existence of a "prior violent felony" was not found by a jury, and even if it had been, such a finding is not sufficient to support a death sentence under Florida's capital sentencing scheme.

The state courts denied Tai relief, as the above quoted portion of the FSC's direct appeal opinion demonstrates, due to the erroneous conclusion that any defendant meeting the requirement for a finding of the "prior violent felony" aggravating circumstance is eligible for the death penalty. This conclusion is incorrect, as nowhere in Florida's capital sentencing statute did the Legislature determine that death-eligibility was conditioned upon the finding of one aggravator. *See* Fla. Stat. § 921.141. Florida's statutory scheme stands in contrast to that of Arizona at the time of *Ring*, which did condition eligibility for the death penalty upon such a finding. *See State v. Ring*, 25 P.3d at 1152 (citing Ariz. Stat. § 13-703.E).

Under Ground Seven, Tai raises the issue of the trial court's unreasonable application of

Ring in taking testimony from a law enforcement officer and making findings on the "prior violent felony" aggravator in support of the death sentence. The battery supporting the "prior violent felony" finding under Fla. Stat. § 921.141(5)(b) was alleged to have occurred *after* the crime on which the State sought the death penalty, and the conviction for it occurred after the penalty phase. The State presented testimony from the law enforcement officer in question during the *Spencer* hearing, and the trial court referenced it in its sentencing order. R3/559. On direct appeal, Tai argued that the lower court erred in considering this evidence and using it in support of the "prior violent felony" aggravator because it did so independent of any findings by, and indeed, out of the presence of, the jury. It is Tai's position that, in doing so, the trial court violated *Ring* by making findings that should have been made by the jury.

The FSC denied relief on this issue, finding that admitting the details of the conviction was within the trial court's discretion, despite the fact that it was done outside the presence of the jury and that, furthermore, the contemporaneous conviction for the attempted murder of Higgins alone established the "prior violent felony" aggravator. *Pham*, 70 So. 3d at 494-95. The fact of a "prior violent felony" is not sufficient to impose the death sentence, however. Under Florida's capital sentencing scheme, a defendant can only receive a death sentence if the aggravators are not outweighed by the mitigators, and as *Ring* made clear, this fact must be found beyond a reasonable doubt by the jury. It is impossible to engage in a retrospective analysis concerning whether the jury made the requisite findings because the members of the jury were not asked to do so, and not informed of their role under a constitutionally-compliant scheme. The FSC further restricted the trial courts' ability to divine the particular findings of the jury when it held in *State v. Steele*, 921 So. 2d 538, 544-49 (2005), that it was error for a trial court to require a special verdict form on which the jury details its findings as to each aggravator.

A prior violent felony finding is irrelevant as to whether Tai was afforded a constitutional sentencing. Tai's sentence was imposed in violation of his constitutional rights and under an unreasonable application of clearly established federal law. His sentence must be vacated.

RELIEF REQUESTED

Under the AEDPA, this Court can grant habeas relief because the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceedings. *See Wiggins*, 539 U.S. at 528; *see* 28 U.S.C. § 2254(d)(2). Tai has rebutted factual findings on which the state courts relied on by clear and convincing evidence. *See* 28 U.S.C. § 2254(e) (1). Furthermore, this Court can grant habeas relief state courts unreasonably applied clearly established federal law to the evidence in the state court proceedings. Accordingly, Tai respectfully requests that this Court find that his Constitutional rights were violated in accordance with the foregoing Grounds, grant his writ, and vacate and set aside his conviction and sentences or grant such other relief that it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this Friday, April 1, 2016, I electronically filed the foregoing **PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HIS PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS** with the Clerk of the United States Court of Appeals in and for the Middle District of Florida, Orlando Division, United States Courthouse, 401 West Central Boulevard, Orlando, Florida 32801, by using the CM.SCF system, which will send notice of electronic filing to Stacey Elaine Johns Kircher, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, Florida 32118, at Stacey.kircher@myfloridalegal.com and at CapApp@myfloridalegal.com.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing was mailed to Tai Pham, DOC# 953712, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026, a non-CM/ECF participant, on this Friday, April 1, 2016.

Respectfully submitted,

s/ Raheela Ahmed
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No. _____

IN THE

Supreme Court of the United States

TAI A. PHAM,

Petitioner,

v.

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

Respondents.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX H

Order Denying Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, dated December 20, 2013.

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 05-CF-4717-A

STATE OF FLORIDA,

Plaintiff,

vs.

TAI PHAM,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851

This cause came before this Court for the Defendant's "Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851," filed on February 25, 2013.

The facts as established at trial were set forth in the direct appeal. The Florida Supreme Court briefly summarized the facts as follows:

> Pham entered Phi's apartment where her oldest daughter, his stepdaughter Lana, was alone and awaiting Phi's return. After binding Lana, Pham hid in her bedroom for an hour, then stabbed Phi at least six times as she entered the room. Prior to returning to the apartment, Phi and Higgins were together at a party and returned in different vehicles. Phi's stabbing occurred while Higgins secured his motorcycle outside. Once Higgins entered the apartment, he struggled with Pham. During the struggle, Lana was able to get free and call the police. Higgins was severely injured during the struggle, but was able to subdue Pham until the police arrived.

Pham v. State, 70 So. 3d 485, 491 (Fla. 2011), *cert. denied*, 132 S. Ct. 1752 (U.S. 2012).

As a result, the Defendant was charged with four felonies: one count of first-degree premeditated murder, a capital felony; one count of attempted first-degree premeditated murder, a life felony; one count of armed kidnapping, a life felony; and one count of armed burglary of a dwelling, a first-degree felony punishable by life. The State sought the death penalty for count one. A death qualified jury was selected and the guilt phase took place from March 3-7, 2008. The Defendant was found guilty of all charges. The penalty phase was then held from May 20-22, 2008. The jury recommended death by a vote of 10-2. A *Spencer*[1] hearing was held on August 8, 2008.

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[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

On November 14, 2008, the Court issued its order finding that the State proved the following aggravating factors beyond a reasonable doubt: the Defendant had a prior violent felony, Fla. Stat. §921.141(5)(b); the capital felony was committed while the Defendant was engaged in the commission of a burglary and a kidnapping, Fla. Stat. §921.141(5)(d); the capital felony was especially heinous, atrocious, and cruel, Fla. Stat. §921.141(5)(h); and the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, Fla. Stat. §921.141(5)(i). These aggravating factors were weighed against the following established mitigating factors: the capital felony was committed while the Defendant was under the influence of mental or emotional disturbance; the capability of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; the other factors in the Defendant's background, specifically his childhood escape from Vietnam and his adolescence in Illinois, Fla. Stat. §921.141(6)(h); and his positive employment history. The Court found that the aggravating circumstances outweighed the mitigating circumstances and, accordingly, sentenced the Defendant to death for the murder count and concurrent life sentences for other counts. The convictions and sentences were affirmed by the Florida Supreme Court. *Id.*

After the Florida Supreme Court affirmed the convictions and sentences, the Office of Capital Collateral Regional Counsel was appointed to represent the Defendant in his collateral proceedings pursuant to Fla. R. Crim. P. 3.851. His Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851, raising twenty-one grounds, was filed on February 25, 2013. The State responded to the motion on April 30, 2013. At the Case Management Conference held on July 11, 2013, claim 1 was withdrawn by the Defendant and this Court determined that claims 2, 3, 14, and 18 did not merit an evidentiary hearing. The Defendant did not request an evidentiary hearing as to claims 8, 16, 17, and 19-21. The remaining claims 4-7, 9-13, and 15 were scheduled for an evidentiary hearing.

The evidentiary hearing was bifurcated to accommodate witnesses. The first part was held on October 8, 2013. At this hearing, the Court heard testimony from the Defendant's family members, including: his mother, Nho Thi Nguyen, his sisters, Kim Oahn Pham and Hang Pham, and brother, Anh Tuan Pham, all residents of Vietnam; and his sister, Ang Ngoc Thi Pham, a resident of Paris, France. The second portion of the evidentiary hearing was held from October 28-31, 2013. At this hearing, the Court heard from several defense witnesses and two state witnesses. The Defendant presented: Dawn Saphir Pruett, Susan Ottesen, Verl Johnson-Vinstrand, and Dr. Tam Thi Dang Wei regarding the Defendant's time under the supervision of the Illinois Department of Children and Families; Olliander Csisko, the law enforcement victim of a battery committed by the Defendant; trial counsel Timothy Caudill and James Figgatt and investigators David McGuiness and Jeffrey Geller regarding the trial preparation and strategy

by the Office of the Public Defender; Nina Nga Nguyen, a Vietnamese translator who translated the content of a letter penned by the Victim's mother's relating to the Defendant's sentence; and Dr. Daniel Buffington, Dr. Daniel Lee, and Dr. Francis Abueg regarding mental health and substance abuse mitigation. The State presented evidence from Dr. Bruce Goldberger and Dr. Harry McClaren to rebut the Defendant's experts' testimony.

According to the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), a defendant must meet a two-prong test to successfully allege ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S.Ct. at 2064. The Supreme Court further stated that

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

466 U.S. at 689, 104 S.Ct. at 2065. "Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). "A Defendant bears the burden of establishing both prongs of the *Strickland* test before a criminal conviction will be vacated." *Schofield v. State*, 681 So. 2d 736, 737 (Fla. 2d DCA 1996).

Although there is some overlap, generally claims 1-7 focus on specific issues that apply to the guilt phase and claims 9-16 address particular penalty phase claims. Claims 8, 17, and 19 assert cumulative error. Claims 18, 20, and 21 raise due process concerns about to the imposition of the death penalty and the execution procedures. The following claims did not require an evidentiary determination and are denied:

- Claim one: Withdrawn by collateral counsel at the case management conference on July 11, 2013.
- Claim two: Trial counsel sought to interview the jurors in conjunction with a Motion for New Sentencing Hearing. The Court heard testimony and argument and denied the motion. The issue of juror misconduct was raised and addressed by the Florida Supreme Court. *Pham*, 70 So. 3d at

492-94. Since this claim was raised on direct appeal, it is procedurally barred. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990) (holding that "[p]roceedings under rule 3.850 are not to be used as a second appeal. Moreover, it is inappropriate to use a different argument to relitigate the same issue").

- Claims three and fourteen: There was no legal basis upon which trial counsel could have successfully objected to Dr. Bulic's testimony because he was qualified to opine on the victim's cause of death. *See Schoenwetter v. State*, 931 So. 2d 857, 870-71 (Fla. 2006). Trial counsel objected when he felt that Dr. Bulic strayed into areas where the witness was not qualified to offer an opinion. (See ROA Vol. 9, p. 1162-90). However, as to Dr. Bulic's testimony in general, any objection would have been futile, and counsel cannot be deemed to be ineffective for failing to make a futile motion. *Gordon v. State*, 863 So. 2d 1215, 1223 (Fla. 2003).
- Claim sixteen: The victim impact testimony by Christopher Higgins was not improper. *See Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991).
- Claim eighteen: There was no due process violation when the Defendant was not afforded an opportunity to consult with the Vietnamese Embassy pursuant to the Vienna Convention on Consular Relations. *Valle v. State*, 70 So. 3d 530, 552-53 (Fla. 2011).
- Claim twenty: The confidentiality of the execution team members' identities does not violate the constitutional rights of the Defendant. *Troy v. State*, 57 So. 3d 828, 840-41 (Fla. 2011).
- Claim twenty-one: Any claim that the Defendant may be incompetent at the time of his execution is premature. *Id.* at 843.

The remaining claims are individually addressed below.

In claim four, the Defendant asserts that counsel was ineffective for failing to move for disqualification of Judge Alva based upon her professional relationship with Deputy Sheriff Olliander Csisko. Deputy Csisko was a courthouse deputy for 22 years. During that time, she had occasion to work with all of the Circuit and County Judges in Seminole County, including this Court. There was no evidence that Deputy Csisko was ever assigned as a court deputy to this Court on a regular basis. She testified at the *Spencer* hearing that she was providing courtroom security in dependency proceedings on October 12, 2006 when the Defendant became disruptive and violent, injuring her wrist. The Defendant was convicted of battery on a law enforcement officer as a result of that incident.

Trial counsel Timothy Caudill testified that he was aware of Deputy Csisko's long term employment at the Seminole County Courthouse and her presumed familiarity with this Court. Considering the relatively small courthouse, he believed that all of the courthouse security officers would be familiar with all of the judges. There was no evidence that there was a close relationship between Deputy Csisko and this Court, nor was there any assertion that Deputy Csisko and the Court engaged in

any social interactions outside of the workplace. Trial counsel never considered filing a motion to disqualify because he did not believe there were sufficient grounds to file one. Even had he filed such a motion based upon the passing acquaintance between this Court and the witness, it would not have been legally sufficient.

> There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g., friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers. However, such allegations have been found legally insufficient when asserted in a motion for disqualification.

MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1338 (Fla. 1990). Thus, his determination that there was not a sufficient legal basis for disqualification was correct. Counsel cannot be deemed ineffective for failing to file a futile motion. *Gordon*, 863 So. 2d at 1223.

Even assuming *arguendo* that there was a sufficient basis to file a motion for disqualification, the Defendant cannot demonstrate prejudice. Deputy Csisko was called to establish the aggravator of prior felony involving the use or threat of violence to the person. In that the Defendant had been convicted of battery on law enforcement officer after a jury trial conducted before another judge, there is no possibility that this aggravator was found or given great weight due in any manner to the relationship between this Court and Deputy Csisko. Moreover, this aggravator was also established by the Defendant's contemporaneous conviction for the attempted murder of Christopher Higgins. This aggravator would have been established beyond any reasonable doubt and given great weight no matter the fact-finder.

In claim five, the Defendant asserts that trial counsel should have provided the letter penned by the victim's mother to the State in order to secure a plea offer for life in prison. Ms. Pham Minh Duong wrote that the Defendant should not be executed because his family needed him, that she had forgiven him, and because "I know he is remorseful." There was no indication that she had any first-hand knowledge that he was remorseful based upon correspondence or conversations with the Defendant.[2] The tone of the note and the words selected lead to an interpretation that she forgave the Defendant and someone who committed such a murder would naturally feel remorseful.

The evidence presented at the hearing was that the decision to seek the death penalty was made by the elected State Attorney, Norman Wolfinger, and he was never inclined to forego the death penalty in this case. Ms. Duong had no right to override the State's decision regarding how the case will be prosecuted. *Barnett v. Antonacci*, 122 So. 3d 400, 406 (Fla. 4th DCA 2013). Furthermore, the letter was written on or about March 11, 2008, after the Defendant had already been found guilty of first-degree murder by the jury. At that point, there was no possibility that Mr. Wolfinger would have changed his position on the appropriateness of the death penalty. The Defendant cannot demonstrate that he was

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[2] She has since passed away, so further clarification is impossible.

prejudiced by counsel's failure to present this post-verdict letter to the State in an effort to secure a plea offer of life in prison. Any suggestion that this letter could have resulted in a favorable plea offer is pure speculation which was refuted by the testimony.

In his sixth claim, the Defendant asserts that counsel was ineffective for questioning the Defendant's stepdaughter about the Defendant's disciplinary methods, thereby painting the Defendant as a violent man. During a bench conference shortly after that testimony, trial counsel explained that this was a strategic decision to show a bias by the witness against the Defendant. Counsel stated, "It goes to the witness' bias, Your Honor, it goes to – Part of the reason I was asking questions about discipline and all is to show bias against our client ... it goes to her dislike in general for him." (ROA Vol. 8, p. 877-78). This was a reasonable strategy, so the Defendant is not entitled to relief on this claim.[3]

The Defendant asserts in claim seven that counsel was ineffective for failing to impeach Christopher Higgins with his prior felony convictions. Trial counsel was aware of these convictions and could not offer any strategic explanation for failing to ask the witness whether he had been convicted of any felonies or crimes of dishonesty. Thus, the first prong of *Strickland* is met.

However, the Defendant cannot demonstrate that he was prejudiced by the failure to introduce this evidence. The credible evidence against the Defendant during the guilt phase was overwhelming. The victim's daughter was an eyewitness to the events and her testimony was corroborated not only by Higgins' testimony, but also by the first responding law enforcement officers, the 911 tape, and the physical evidence. In light of the fact that the State's evidence was substantially consistent, there is no possibility that the introduction of Higgins' prior convictions for purposes of impeachment would have changed the result of the trial. *See Hunter v. State*, 29 So. 3d 256, 271-72 (Fla. 2008).

Moreover, the Defendant testified to a version of events that was substantially at odds with the other testimony and physical evidence and was, consequently, not credible. He testified that he went to the apartment to give money and mail to the victim, but he did not bring these items into the apartment. He testified that he immediately told his stepdaughter to get off of the computer because she was inappropriately using Myspace, but that website was not active on the computer screen when law enforcement arrived. He testified that he was attacked by Higgins in the kitchen/dining room area as soon as Higgins and Phi walked into the apartment, but the victim was stabbed in the bedroom and hallway. It is inconceivable, based on the Defendant's testimony, that the victim could have been inadvertently stabbed six times during the fight that the Defendant described. In light of the overwhelming evidence of guilt, there is no possibility that presenting this impeachment evidence would have altered the result of the trial.

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[3] The Court took judicial notice of the Court file, including all relevant transcripts, at the request of both parties.

Claim eight, his final claim relating to the guilt phase, is that the cumulative errors of counsel rendered the results of the trial unreliable. Because all of the individual claims of error are without merit, a claim of cumulative error must fail. *Kormondy v. State*, 983 So. 2d 418, 441 (Fla. 2007); *Griffin v. State,* 866 So. 2d 1, 22 (Fla. 2003); *Vining v. State,* 827 So. 2d 201, 219 (Fla. 2002); *Downs v. State,* 740 So. 2d 506, 509 (Fla. 1999).

Claims 9-17 address trial counsel's mitigation investigation in preparation for the penalty phase. The case had been pending for nearly three years before trial and there was a two month delay between the guilt phase and the penalty phase. The Defendant demonstrated at the evidentiary hearing that trial counsel failed to contact the members of the Defendant's family who lived outside the United States, failed to obtain records from the Illinois Department of Children and Families, and failed to obtain the complete records from the Florida State Hospital.[4] Collateral counsel asserts that each of these claims are worthy of relief on their own merits, but further asserts that the absence of this information rendered the mental health investigation inadequate. Additionally, the Defendant argues that testimony of his substance abuse history should have been presented in mitigation, as should the letter from the Victim's mother.

Trial counsel did not provide a satisfactory explanation for the failure to obtain much of this evidence. While it was unclear whether a trip to Vietnam for face-to-face interviews would have been necessary or approved, there was certainly no impediment to making telephone calls to the family. The witnesses from the Illinois Department of Children and Families testified that they were available and willing to testify and that their records would have been provided had such a request been made. Similarly, there is little doubt that the records from the Florida State Hospital would have been provided to trial counsel.

Even if it is concluded by this Court that trial counsel was deficient in failing to obtain the evidence contained in grounds 9-12, that does not entitle the Defendant to relief. The Defendant must still establish the prejudice prong of *Strickland*.

> [He] must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"— and "reweig[h] it against the evidence in aggravation."

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[4] There are certain indications in the transcript that these records were inspected by the experts, but those statements were not corroborated by the testimony at the evidentiary hearing. For example, at the *Spencer* hearing, Dr. Riebsame stated, "You'd expect to see his cognitive deficits since the age of ten. The Illinois mental health professionals would have recognized them as well." (ROA 18, p. 129). This implies that he reviewed those records and found no such notation. While it is undisputed that counsel did not obtain those records directly, they may have been included in the Florida DCF records provided pursuant to counsel's Motion to Compel.

Porter v. McCollum, 558 U.S. 30, 41 (2009), *quoting Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 1515, 146 L.Ed. 2d 389 (2000).

Before specifically evaluating the penalty phase claims in this collateral proceeding, it would be helpful to summarize the mitigation evidence that was presented to the penalty phase jury and at the *Spencer* hearing.[5] The Defendant did not testify as to any mitigation. The key witness regarding the Defendant's personal history was his older sister, Thuy Pham. She is the sibling with whom he escaped from Vietnam in 1984. She provided details on Vietnamese society at the end of the Vietnam War, specifically describing the effects on the family, including the imprisonment of their father and resultant loss of the family's property. She also conveyed the atmosphere of terror created by the persistent gunfire and dead bodies in the streets. She testified about her family's efforts to flee the country and the Defendant's resultant capture and imprisonment for a year. She then recounted the particular details of their escape from the country, including the traumatic boat trip to Malaysia, the deplorable conditions in the refugee camp, their assimilation into American society after arriving in Illinois (her assimilation was successful and his was troubled), and the Defendant's adult life in Florida. (ROA Vol. 12, p. 77-118). Short of hearing details straight from the Defendant's mouth, her testimony was the most pertinent to the specific issues the Defendant faced because she encountered those same hardships contemporaneously, although she and the Defendant were physically separated for much of the time.

The Court then received substantial evidence about the conditions in the prison and refugee camps in Vietnam and Malaysia in that era. This evidence was presented through the live testimony of Xuan Nguyen (ROA Vol. 12, p. 145-60), and Thuog Foshee (ROA Vol. 13, p. 260-82), as well as a video documentary produced by the Canadian Broadcasting Company that was played for the jury. (ROA Vol. 13, p. 284-96). Xuan Nguyen, the Defendant's brother-in-law, was imprisoned in Vietnam before he escaped to the Pulau Bidong refugee camp in Malaysia, where the Defendant and his sister arrived years later. Xuan's experiences, although predating the Defendant's, were relevant because his treatment would have been similar to theirs. Ms. Foshee routinely assisted Vietnamese refugees when they arrived in America and she testified about the challenges they often faced when they entered the country.

Additionally, there was mitigation evidence presented relating to the Defendant's good character. The Defendant also presented testimony from his niece that he was a good father. (ROA Vol. 12, p. 120-32). There was also testimony from his employers regarding his employment history. (ROA Vol. 12, p. 133-43, 161-72). He then presented testimony from certain Altamonte Springs police officers in an effort

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[5] The State's presentation on aggravation was relatively brief. The medical examiner testified as to the specific circumstances of the victim's death for purposes of the HAC aggravator. Then, victim impact evidence was presented by the guardian of the victim's children and from Mr. Higgins. Other than that, the State relied on evidence presented during the guilt phase.

to corroborate details of his testimony regarding his reason for being at the Victim's apartment. (ROA Vol. 12, p. 174-99; Vol. 13, p. 204-208).

The Defendant next presented testimony from Dr. Deborah Day. She opined primarily on the Defendant's extreme mental and emotional disturbance and the Defendant's inability to appreciate the criminality of his conduct. She considered the background facts of the Defendant's upbringing and life in making her assessment. (ROA Vol. 13, p. 298-378). Dr. William Riebsame testified in rebuttal that the Defendant was suffering emotional disturbance, but such disturbance could not be characterized as extreme. (ROA Vol. 13, p. 380-99; Vol. 14, p. 404-82). He further testified that the Defendant could appreciate the criminality of his actions. After weighing the evidence, the jury recommended death by a vote of 10-2.

At the *Spencer* hearing, the State presented testimony from Deputy Csisko to establish the prior violent crime aggravator. (ROA Vol. 18, p. 15-34). The Defendant then presented testimony from Dr. Jacquelyn Olander, a psychologist specializing in neuropsychology. She met with the Defendant after the penalty phase hearing for the purpose of assessing his mental functioning. She determined that, at the time of testing, he was of low intelligence with mental abilities ranging from significantly impaired to average. His cognitive deficits, she believed, were indicative of organic brain damage resulting from dehydration suffered during his 4-6 week boat trip from Vietnam to Malaysia at the age of ten.[6] The cognitive impairments taken in combination with his unfamiliar setting in the United States resulted in low self-esteem and, eventually, severe behavioral problems. (ROA Vol. 18, p. 35-120). Dr. Riebsame was called again by the State in rebuttal. He refuted Dr. Olander's opinions as unsupported because they were wholly inconsistent with the Defendant's stellar employment record in the electronics field and his real-life functioning within society. Moreover he opined that the Defendant's deficits, had they been the result of organic brain damage suffered at ten years old, would have manifested long before the murder.[7] (ROA Vol. 18, p. 121-61).

In claim nine, the Defendant asserts that counsel should have contacted his family in Vietnam and France to incorporate aspects of his troubled childhood into the presentation before the jury. His relatives in Vietnam would have testified as to certain information about the Defendant's early childhood years. They would have provided these additional details about the Defendant's time in Vietnam:

- the Defendant was told that his grandfather was beheaded by the communists some years before the Defendant's birth;
- the Defendant's birth was difficult, with his mother's labor lasting for three days;

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[6] The evidence presented at the 3.851 hearing demonstrated that the boat trip was arduous, but did not last 4-6 weeks.

[7] Each of the experts at the evidentiary hearing specifically found that there was no evidence of organic brain damage.

- he was treated for a boil on his head at approximately six months old;
- he was developmentally delayed and did not begin to walk until after he reached the age of two;
- he suffered from nosebleeds and fevers and he cried more than his siblings;
- he had difficulty toilet training;
- he was disciplined by his father by being hit with a stick or by being tied up on at least one occasion;
- he was teased in school and often got into fights with his tormentors;
- he was left back in school three times;[8]
- he saw his deceased brother's body after his accidental death; and
- he was incarcerated and mistreated in a prison camp as a result of an unsuccessful attempt to escape from Vietnam.

While this information could easily have been discovered, there is no possibility that it would have altered the jury's recommendation or this Court's weighing of the aggravating and mitigating circumstances.

Considering that the escape attempts from Vietnam were presented as the paramount traumatic experiences that affected every facet of the Defendant's adolescent and adult life, factors relating to his time prior to that have minimal probative value. The first six factors in the list relate to his toddler years and would not have made any difference in his moral culpability. The other factors indicating his delayed development in certain areas, while perhaps not specifically discussed, were amply covered in the mental health testimony that addressed his inability to normally develop mentally, emotionally, and socially. Presenting additional areas of delayed development would have been cumulative. Testimony about the prevalence of domestic violence and common physical disciplinary methods used in Vietnam, including striking children with sticks, was presented through Dr. Day. (ROA 13, p. 343). Thuy testified that the Defendant was incarcerated in a prison camp for a year and trial counsel introduced substantial evidence through Ms. Foshee, Xuan Nguyen, and the CBC video about the conditions present in such camps and presented testimony from Dr. Day about how these conditions would have impacted the Defendant. Although Hang Pham could have provided additional information about the specific challenges she and the Defendant faced when they were captured, counsel presented substantial evidence of the conditions and life in the prison camps through these other witnesses. There is not a reasonable probability that the result of the penalty phase would have changed as a result of her testimony.

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[8] The testimony at the 3.851 hearing was that the Defendant started school at six years old and reached the second or third grade. If he were left back three times, imprisoned for a year, and then successfully escaped Vietnam at the age of ten, those facts are inconsistent.

The tenth claim before this Court is that counsel should have obtained the records from the Illinois Department of Corrections to further illustrate the Defendant's adolescent years. Thuy Pham's penalty phase testimony included the Defendant's years in orphanages and his tumultuous placement with his uncle in Illinois.

At the evidentiary hearing, the Court heard from four additional witnesses who had pertinent information regarding the Defendant's placements or had personal interactions with the Defendant during his time in Illinois. Dawn Saphir-Pruett is the records custodian for the Illinois Department of Children and Families. Her testimony was limited to the fact that the Defendant's file was available and could have been produced relatively quickly had it been requested by counsel. Susan Ottesen did the intake evaluation on the Defendant. She did not have any personal recollection of the Defendant. However, her records reflected that at age twelve, he had a slightly above average IQ and scored between second and fifth grade level on various aptitude tests. It was also noted that he had very low self-esteem and became frustrated easily.

Verl Johnson-Vinstrand was the Defendant's case worker when he was placed in foster care. She specifically recalled the Defendant and was not basing her testimony on her reports. Initially, the Defendant was placed with his uncle's family. Their relationship soured and the Defendant was moved to a non-relative foster home. In this placement, the Defendant frequently failed to attend school and complete chores. The situation came to a head when the Defendant slammed a trophy on a table and broke a window in the foster home before running outside. He was then returned to his uncle's home, but the same behavioral issues arose and he stole a car and moved briefly to another uncle's home in North Carolina. The Defendant soon returned to Illinois and was again placed with his uncle in Peoria for yet a third time. When the relationship failed again, he was placed in the Tha Huong group home. He was supervised by the Department until he was 18-19 years old when he moved to Florida to live with Thuy.

Finally, the Defendant presented testimony from Dr. Tam Dang Wei, a school psychologist who was a consultant with the Tha Huong program. She was asked to evaluate the Defendant when he was twelve years old to address his behavioral problems. She made several recommendations to help the Defendant become assimilated to American culture and to provide an outlet for his anger. She never followed up to see if those recommendations were adopted by the program.

Attorney Caudill testified that he did not get these records from the Illinois Department of Children and Families, but he was aware of most of the information contained therein from conversations with the Defendant and Thuy. Having subsequently reviewed the records, they corroborated what he already knew and presented to the jury through Thuy. He testified he was reluctant to go into greater detail on the Defendant's time in Illinois because utilizing the information in explanation as to underlying reasons for the Defendant's criminal behavior could have provided fuel for a diagnosis and argument that

the Defendant had an antisocial personality. This would have been a valid concern in this case, as there was no indication that the problems in Illinois stemmed from external factors, such as abuse or mistreatment in his foster placements.

With those considerations in mind, the penalty phase strategy focused on humanizing the Defendant by presenting his positive qualities as a good-hearted man and a diligent worker. Trial counsel also focused on his cultural upbringing and how his traumatic escape from Vietnam was the catalyst for the Defendant's mental and emotional deficits that manifested at the time of the murder. Showing the Defendant's incorrigible behavior in his various placements in Illinois was unnecessary and would have detracted from the picture painted by counsel. Those records show that the Defendant was unable to acclimate himself after living in two family placements, a private foster home, and a group home. These placements failed in large part because of the Defendant's uncontrolled anger. His problems also resulted in three criminal charges, although they were not prosecuted. Had this evidence been presented, there is no reasonable probability that the jury's recommendation would have been different. This Court's weighing of the aggravating and mitigating circumstances would not have changed, as the Court already gave great weight to mitigation from the Defendant's background as it related to his escape from Vietnam and his upbringing in Illinois.

In ground eleven, the Defendant faults trial counsel's failure to obtain records from the Florida State Hospital during the time of the Defendant's incompetency. Attorney Caudill testified that he had seen some of the reports and he was aware that the Defendant was not well behaved while in that facility, including reported violence against the staff. The information contained within the complete set of reports was consistent with his belief. While counsel may not have seen the daily reports himself, the decision not to obtain them because of his knowledge of negative information contained therein was reasonable.

Furthermore, the transcript of the *Spencer* hearing indicates that the experts did review the Florida State Hospital reports. During cross-examination, Dr. Olander stated that she saw those reports prior to the hearing. (ROA 18, p. 118). Dr. Riebsame also testified that certain information was contained in the Florida State Hospital reports, implying that he had seen those records. (ROA 18, p. 145). Thus, because the experts saw those reports and considered the information contained therein, the failure to earlier obtain the complete records from the Florida State Hospital also did not prejudice the Defendant.

Claim twelve asserts that the failure to provide the above materials to the mental health experts rendered counsel ineffective by failing to ensure that a competent mental health evaluation was conducted. There was very little information contained in those independent records that was not discovered by the experts from either the Defendant or Thuy. Doctors Day, Tressler, Danziger, and

Riebsame all came to similar conclusions about the Defendant's underlying mental issues. Those conclusions meshed with trial counsel's educated opinion about the Defendant's mental condition. "[A] new sentencing hearing is warranted "in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage." *Rose v. State*, 617 So. 2d 291, 295 (Fla. 1993), *quoting State v. Sireci*, 502 So. 2d 1221, 1224 (Fla. 1987). The evaluation by Dr. Day was not grossly deficient and did not ignore clear indications of mental illness. Counsel's decision not to obtain additional records for Dr. Day was not unreasonable when her opinion was comprehensive and consistent with three other expert witnesses. Notably, the Defendant did not present any evidence that Dr. Day's opinion would have been different had she been provided the additional information.

Additionally, collateral counsel presented evidence from Dr. Lee and Dr. Abueg that the Defendant suffered from post-traumatic stress disorder and bipolar disorder on the date of the offense. Their diagnoses were based not only on the additional records and interviews with family members, but also on multiple intensive interviews with the Defendant, who had become more open and forthcoming since trial. This is in contrast with the Defendant's reluctance at times to cooperate with the experts who visited him before trial and the penalty phase. Even without the Defendant's cooperation, Dr. Day testified that the Defendant has traits of these disorders, but felt she could not make a conclusive DSM IV diagnosis. Under the circumstances of this case, counsel was not ineffective simply because collateral counsel has discovered witnesses who gave more favorable diagnoses than Dr. Day. *See Rose v. State*, 617 So. 2d 291, 295 (Fla. 1993).

The thirteenth claim is that counsel should have presented evidence related to the Defendant's pattern of substance abuse that began during his incarceration shortly before the murder. Dr. Buffington testified that the Defendant reported using angel's trumpet and crack cocaine most evenings from July until October 2005. He noted that the Defendant became more aggressive when he was under the influence of those substances. He also stated that chronic users of these substances can suffer flashbacks even when they are not actively under the influence of those substances. Although Dr. Buffington noted in his report that the Defendant had self-reported that he had consumed one of these substances sometime on October 22nd, Dr. Goldberger testified that the Defendant's medical records from the night of the murder did not show any evidence that these substances were in his system. Dr. Buffington conceded that he could not opine that the Defendant was under the influence of these substances or suffering flashbacks during the killing. Based upon the evidence of premeditation, careful planning, and calculated action, this Court finds evidence of substance abuse would have been either irrelevant or so speculative as to have no probative value. As such, there is no possibility that the investigation and presentation of this evidence

would have affected either the jury's advisory verdict or this Court's ultimate weighing of the aggravating and mitigating circumstances.

In claim fifteen, the Defendant asserts that trial counsel should have presented the letter penned by the victim's mother to the jury during the penalty phase or to the Court during the *Spencer* hearing. Attorney Caudill testified that he did not believe that the letter was admissible during the penalty phase under any accepted legal theory, other than the nebulous concept that "death is different." Ms. Duong's opinion on the suitability of the death penalty is not relevant or admissible. *Payne*, 501 U.S. at 830 n.2. As to her forgiveness of the Defendant, such evidence is relevant, but not compelling. Her belief that the Defendant was remorseful is nothing more than a feeling contained in her heart and there is no evidence that it was based on any statements made by the Defendant. There is no reasonable possibility that this letter or evidence of her forgiveness would have changed the jury's recommendation or this Court's ultimate sentence.

His final penalty phase claim, claim seventeen, is that the cumulative errors of counsel rendered the results of the penalty phase unreliable. Because all of the individual claims of error are without merit, a claim of cumulative error must fail. *Kormondy*, 983 So. 2d at 441; *Griffin*, 866 So. 2d at 22; *Vining*, 827 So. 2d at 219; *Downs*, 740 So. 2d at 509.

Similarly, his nineteenth claim is without merit. In this claim, he asserts that all of the errors committed in the guilt and penalty phases, in the aggregate, require a new trial. As with claims eight and seventeen, these cumulative error claims do not warrant relief. *See Kormondy*, 983 So. 2d at 441; *Griffin*, 866 So. 2d at 22; *Vining*, 827 So. 2d at 219; *Downs*, 740 So. 2d at 509.

ORDERED AND ADJUDGED:

1. The Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 is hereby **denied**.
2. The Defendant has 30 days from the date of rendition of this Order in which to file an appeal.

DONE AND ORDERED in chambers at Sanford, Seminole County, Florida this 20th day of December, 2013.

MARLENE M. ALVA, Circuit Judge

I hereby certify that copies of the foregoing have been furnished by mail this 23 day of December, 2013, to:

John A. Tomasino, Clerk of the Court
Florida Supreme Court
500 South Duval Street
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MARYANNE MORSE, Clerk of Courts

By: C Cheese
DEPUTY CLERK

No. _____

IN THE

Supreme Court of the United States

TAI A. PHAM,

Petitioner,

v.

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

Respondents.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX I

United States District Court for the Middle District of Florida Judgment in a Civil Case, dated February 28, 2023.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TAI A. PHAM,

Petitioner,

v. **Case No: 6:15-cv-2100-RBD-EJK**

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

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Petition for Writ of Habeas Corpus filed by Tai A. Pham is hereby DENIED and this case is DISMISSED WITH PREJUDICE.

Date: February 28, 2023

ELIZABETH M. WARREN,
CLERK

s/LJ, Deputy Clerk