

IN THE SUPREME COURT OF FLORIDA

TAI A. PHAM,

Appellant,

v.

Case No. SC14-142

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA
ANSWER BRIEF OF APPELLEE**

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Pham." Appellee, the State of Florida, was the prosecution below; this brief will refer to Appellee as such, the prosecution, or the State.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief are italicized; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

Tai Pham murdered his estranged wife, Phi “Amy” Pham on October 22, 2005. In the same incident, Pham tied up his stepdaughter, Lana, and tried to kill Phi’s boyfriend, Higgins. Pham was found guilty of first-degree murder, attempted first-degree murder, armed kidnapping, and armed burglary on March 7, 2008, following a jury trial. On May 22, 2008, the jury returned a recommended sentence of death by a vote of ten to two. (DAR,V14, R577¹).

A *Spencer*² Hearing was conducted on August 18, 2008. (V18, R1100-1272). On November 14, 2008, the court followed the jury’s advisory sentence and imposed a sentence of death on Pham for the first degree murder of Phi. (DAR,V3,

¹ The direct appeal record will be referred to as DAR, V_, R_. The postconviction record will be referred to as V_, R_.

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

R568; V18, R1293).

In aggravation, the court found the following: (1) Previously convicted of another capital felony or of a felony involving the use or threat of violence to the person-given great weight; (2) Capital felony was committed while the defendant was engaged in the commission of a burglary or kidnapping-given moderate weight; (3) Capital felony was especially heinous, atrocious, or cruel-given great weight; (4) Capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification-no evidence of any moral or legal justification was presented and argued. (V3, R558-562).

The following statutory or non-statutory mitigating circumstances were considered: (1) Capital felony was committed while Defendant was under the influence of extreme mental or emotional disturbance-the court did not find “extreme” mental or emotional disturbance- not proven as a statutory mitigator, but given moderate weight as a non-statutory mitigator; (2) Capacity of Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired-not proven as a statutory mitigator, but given moderate weight as a non-statutory mitigator; (3) Existence of any other

factor in Defendant's background-given great weight;³ (4) Defendant had stable employment history and was considered a hardworking employee. -given some weight; (5) Defendant was a good father and caring husband-not established; (6) Defendant cared for his sister's children for two weeks while their parents recuperated from a car accident-not a mitigating circumstance. (DAR,V3, R563-567).

Notice of appeal was duly given on December 10, 2008. (DAR,V3, R576-77). Pham's Initial Brief was filed on or about September 29, 2009, in which Pham raised seven issues on direct appeal:

- (1) that the prosecutor's improper statements during closing arguments entitled him to a new trial;
- (2) that juror misconduct entitled him to a new penalty phase;
- (3) that the trial court erred in finding the prior violent felony aggravator;
- (4) that his death sentence was unconstitutional because the aggravating circumstances were not alleged in the charging document;
- (5) that the trial court erred in finding the murder was heinous, atrocious, or cruel (HAC);

³ This Court relays this mitigator in its opinion on direct appeal as "Pham's traumatic childhood had a negative impact on his emotional and mental development." *Tai A. Pham v. State*, 70 So. 3d 485, 501 (Fla. 2011).

(6) that the trial court erred in finding the murder cold, calculated, and premeditated (CCP); and

(7) that his death sentence was not proportionate.

Additionally, this Court reviewed the sufficiency of the evidence to support Pham's conviction.

Each of Pham's claims lacked merit and was denied. Pham's conviction and sentence was affirmed. This Court found that the evidence presented was sufficient to support Pham's conviction, and that the death sentence was proportionate. In its opinion, this Court rendered the following summary of the procedural history and facts:

I. FACTS AND PROCEDURAL HISTORY

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. Both Lana and Higgins testified at trial. Pham was the sole witness for the defense. On May 22, 2008, the jury, by a vote of ten to two, recommended the death penalty after the penalty phase. After the *Spencer*¹ hearing held on November 14, 2008, the trial court

found the aggravators² outweighed the mitigation³ and entered a sentence of death.

Pham v. State, 70 So. 3d at 491-492. (footnotes omitted). Pham filed a petition for writ of certiorari to the United States Supreme Court which was denied on March 19, 2012. *Pham v. Florida*, 132 S.Ct. 1752, 182 L.Ed.2d 541 (2012).

PENALTY PHASE FACTS⁴

On May 20, 2008, this case proceeded to the penalty phase with respect to the capital conviction. The State presented Dr. Predrag Bulic, medical examiner. (DAR, V12, R56). Bulic testified that Phi maintained a period of consciousness during the time she was stabbed. (DAR, V12, R57). There were no injuries to her head that would have rendered her unconscious. (DAR, V12, R58). The stab wound to Phi's abdomen would have caused "increased pain," "a burning sensation," due to gastric spillage from the intestines and stomach into the abdomen. (DAR, V12, R59, 63). Phi was conscious when she made a motion to her daughter, Lana, to get out of the apartment. (V12, R66).

The State introduced victim impact statements from Bernadette Hanlon, the adoptive mother of Lana, Kimmie, and Zena Pham, and Christopher Higgins.

⁴ The facts in this section are relayed as heard by the jury in the penalty phase and considered by the trial court in the *Spencer* hearing. Some of these facts are significantly different from the actual (and less mitigating) facts that were testified to and supported in the evidentiary hearing.

(DAR, V12, R70-75).

In mitigation, Pham presented nine witnesses and presented a CBC documentary on the Vietnamese “boat people.” Defense counsel called Pham’s closest sister, Thuynga Pham, Pham’s niece, Quincy Nguyen, Pham’s former boss, Chanh Nguyen, Pham’s brother-in-law, Xuan Nguyen, Pham’s former employer, Tom Diamond, Detective Bill Nuzzi, Joanie Wimer,⁵ Thuog Foshee, and Dr. Deborah Day.

Pham’s older sister, Thuynga Pham,⁶ described their escape from Vietnam when Pham was approximately nine years old. (DAR, V12, R77). Thuynga testified that when Pham was a child in Vietnam, the communists were in control of Saigon, there was fighting and gunshots and there were dead bodies throughout the city. (DAR, V12, R83). Their father was a soldier in the army in special forces. (DAR, V12, R78). When their father was imprisoned, the family lost their land. (DAR, V12, R82). The family had tried to escape Vietnam several times and shots were fired at them. (DAR, V12, R84). Several family members, including Tai, were imprisoned when they were caught trying to escape. (DAR, V12, R85). Pham

⁵ Nuzzi and Wimer were called to establish that Pham had pieces of mail belonging to Phi in his car, and cash in his wallet, presumably to support his defense theory that he came to the apartment to bring her her mail and give her money.

⁶ Hereafter, referred to as “Thuynga” or “Thuy.”

was imprisoned with his sisters where they spent over a year, doing hard labor. (DAR, V12, R85-86). Tai was eight years old at the time. (DAR, V12, R86). Pham was released into the streets at 8 years old. (DAR, V12, R86).

Eventually, Thuyngha, Pham, and a cousin escaped to Malaysia, leaving the family behind. (DAR, V12, R88, 90). On the refugee boat, there was not sufficient food, water, and no bathroom facilities. (DAR, V12, R89). Pham spent about two weeks on the boat, and became ill and nearly died. (DAR, V12, R90; V13, R318).

The boat landed in Malaysia, and after recuperating in a hospital, Thuyngha and Pham were sent to a refugee camp. (DAR, V12, R90, 93-94). The camp was like a prison. Thuyngha was only able to see Pham occasionally. (DAR, V12, R95). The refugees were treated very badly by the guards. (DAR, V12, R90). Pham was punished by the guards for trying to get extra food. (DAR, V12, R91). Pham was separated from his sister. (DAR, V12, R90). Pham would cry and ask for his parents. (DAR, V12, R95).

Pham and Thuyngha were in the camp for two years before they were able to come to the United States. (DAR, V12, R96). Upon arriving in the United States, Appellant and his sister were placed in an orphanage in Illinois. (DAR, V12, R96, 98). They were not able to contact their family in Vietnam. (DAR, V12, R98). Pham spoke only Vietnamese. (DAR, V12, R97) Eventually, she and Pham were sent to live with separate foster families. (DAR, V12, R101-02). Pham never got to

return to Vietnam. (DAR, V12, R111). Pham never talked about the escape from Vietnam because it was too painful. (DAR, V12, R112).

Thuynga married and moved to Florida. Pham came to live with her and worked for her husband when he was eighteen years old. (DAR, V12, R103-04). Pham married Phi while she was pregnant with Lana, and considered Lana his own child. (DAR, V12, R108-09). Pham and Phi had two more daughters together. (DAR, V12, R109). Thuynga said she and Phi were very close, just like “sister(s).” (V12, R107).

Quincy Nguyen is Pham’s niece. (DAR, V12, R120-21). She often played with Pham’s children and had family outings together. (DAR, V12, R121-22). Pham was a “really good father” and took care of her as if she was his own child. (DAR, V12, R123, 131).

Chanh Nguyen is Pham’s former boss. Pham worked for Nguyen for ten years and was an excellent employee. (DAR, V12, R133-34). On occasion, Pham’s children came to work with him. Pham was a very caring father and loving husband. (DAR, V12, R135, 136). Pham would work 14 to 15 hours a day, six days a week. (DAR, V12, R135). When Chanh closed his repair shop, he referred Pham for employment with Crystal T.V., which was a repair center for electronic equipment. (DAR, V12, R162-163).

Tom Diamond employed Pham for approximately three months in 2005 to do

home repairs. Pham was a conscientious, hard-working, “topnotch” employee who had no trouble working with the general public. (DAR, V12, R164, 167, 169). Pham only had a problem with one employee, the female secretary at Diamond’s electronic business. (DAR, V12, R169). Pham would work six days a week from 9:00 A.M until 6:00 P.M. (DAR, V12, R165). Diamond knew that Appellant was very concerned about his family. (DAR, V12, R165). Pham talked about his children often and indicated his concern for them. (DAR, V12, R165).

Xuan Nguyen is Pham’s brother-in-law. (DAR, V12, R145, 150). Nguyen testified as to his experience in prison in Vietnam before escaping to a Malaysian refugee camp years before Pham. Pham lived with Nguyen and his wife in America while Nguyen taught him how to do electronic repairs. (DAR, V12, R151). Pham worked with Nguyen for a year before going to work for Nguyen’s friend, Chanh Nguyen. (DAR, V12, R152). Pham’s family and Xuan Nguyen’s family often socialized. (DAR, V12, R152).

Detective Bill Nuzzi, Altamonte Springs police, located several pieces of mail addressed to Phi, found in the trunk of Pham’s car subsequent to Phi’s murder. (DAR, V12, R175-76, 177, 180). Some of the mail was dated nine months prior to Phi’s murder. (DAR, V12, R181). Most of the mail found in the trunk of Pham’s car belonged to Pham. (DAR, V12, R184).

Joanie Wimer, investigative technician, assisted in examining Pham’s car on

April 7, 2008. (DAR, V12, R185-86, 188). She counted money found in Pham's wallet located in the trunk. There was currency in the amount of one thousand and one dollars. (DAR, V12, R191, 193; V13, R205).

Thuog Foshee left Vietnam in 1969. (DAR, V13, R261). Foshee visited several refugee camps in the Philippines and in Malaysia. (DAR, V13, R262-263). Foshee testified that the camps were very unsanitary and provided very little shelter. (DAR, V13, R265). Refugees told her the camps in Malaysia were considered to be the worst. (DAR, V13, 263). Foshee worked with Vietnamese refugees in an effort to help them acclimate to the United States. (V13, R265). Because many families lost members when they escaped, Foshee assisted in finding sponsors in the United States for Vietnamese refugees and their families. (DAR, V13, R266). Foshee testified that in Vietnamese culture, parents, education, and children were very important. (DAR, V13, R268). Some parents beat their children if they did not do well in school. (DAR, V13, R268). Most Vietnamese who came to the United States tried to maintain their culture. (DAR, V13, R268).

A CBC video was played for the jury which documented the problems faced by the refugees from Vietnam, Cambodia and Laos. (Defense exhibit 7, DAR, V13, R284-296). Thousands left Vietnam to end up in squalid detention camps where they were unwelcome, unwanted, and mistreated. (DAR, V13, R284-286).

Dr. Deborah Day, psychologist, testified for Pham in the penalty phase. She

met with Pham in jail on October 26, 2005. (DAR, V13, R298, 300). Pham was despondent and depressed. There were concerns that he was suicidal. (DAR, V13, R300-01). Pham was unable to effectively communicate with Day. He only spoke about his concerns for his children. (DAR, V13, R301). When she met with Pham the next month, his emotional state had improved. Although still depressed, he was not suicidal. Another inmate provided Pham with emotional support. (DAR, V13, R302-03).

Day next met with Pham on July 2, 2006. Pham was “experiencing a major depressive disorder.” (DAR, V13, R303). Pham told her he was born in Malaysia and had many siblings. He came to the United States with his sister as “Boat People.” He said Phi was pregnant with a child when he met her that he considered his own. They married and had two more children. (DAR, V13, R304-05).

Day met with Pham again on January 14, 2007. (DAR, V13, R306). Pham was “manic,” and unable to communicate any relevant history at all. He was paranoid, suspicious, and angry. (DAR, V13, R307). Subsequent to this meeting, Pham was administered competency evaluations by psychiatrists Dr. Jeffrey Danziger and Dr. Ralph Ballentine. Attempts were made to administer psychotropic medications to stabilize Pham’s mood and “deteriorating state.” Pham “stored” his medication so there were concerns about a suicide attempt. He was placed in the Florida State psychiatric hospital and medicated. (DAR, V13, R308). Upon returning to the

Seminole County jail, Pham continued to be medicated. (DAR, V13, R309).

Day said Pham would not communicate with Danziger. Danziger found Pham had significant mental health issues and opined that Pham had a major depressive disorder. (DAR, V13, R309, 310). Danziger's and Ballentine's reports expressed concerns with Pham's competency. Pham also refused to communicate with Riebsame. (DAR, V13, R309-10). Danzinger examined Pham and felt he had significant mental health issues. (DAR, V13, R309). Danzinger's opinion, according to Day, was that Pham had bipolar disorder. (DAR, V13, R310). He also felt that Pham suffered a clinically-based mood disorder which was either an anxiety or psychotic-related disorder. (DAR, V13, R310). In Danziger's opinion, Pham suffered personality disorders, enduring personality traits that led him to misinterpret his environment and act in certain predictable and inappropriate ways. (DAR, V13, R310-311).

Day spoke with Pham's sister, Thuynga. (DAR, V13, R311-12). She relayed how their life was in Vietnam in the 1970's. Their parents lost all of their belongings. There were eight children. Their father was imprisoned for a while, but upon his release, remained in hiding. The family experienced a lot of trauma. (DAR, V13, R312-13). Pham's father was imprisoned again in 1975. (DAR, V13, R314). When Pham was nine years old, he and his sister were imprisoned during an escape attempt. Pham remained in prison for one year. (DAR, V13, R315).

Eventually, Pham, Thuyngha, and an older cousin escaped in a boat, arriving in Malaysia. (DAR, V13, R316, 318). During Pham's escape there were several near-drowning episodes which were particularly traumatizing for Pham who could not swim. (DAR, V13, R317). During the year Pham was in the refugee camp, he developed disorganized attachments not knowing whom he could trust. (DAR, V13, R316). Pham kept losing people who were closest to him which set the stage for his inability in later years to be emotionally attached to people. (DAR, V13, R316). Pham perceived he had been abandoned by his family and couldn't understand why they sent him away. (DAR, V13, R322). According to Day, Pham's personality disorder is deeply rooted in his early childhood experiences. (DAR, V13, R329).

Pham and his sister relocated to the United States through the Catholic Social Services System. (DAR, V13, R321). Due to Pham's traumatized life, "his view of relationships is very unhealthy and out of sync with normal developmental milestones with young adults." (DAR, V13, R324). Day testified that Ballentine's diagnosis was consistent with her diagnosis. Pham suffered from a major depressive disorder as well as a bipolar spectrum disorder. (DAR, V13, R325). However, there was no historical information that supported a bipolar disorder diagnosis. (DAR, V13, R326). Pham had a major depressive disorder and possibly a bipolar illness though that could not clearly be established. (V13, R330). This

condition had to have been pre-existing. (DAR, V13, R330). Pham's Axis I diagnosis was severe depressive disorder. (DAR, V13, R331-332). Pham's Axis II diagnosis is a personality disorder not otherwise specified which manifested itself in three ways: a) anti-social personality disorder; b) border line personality disorder; and c) dependent personality disorder which meant that Pham did not have a good sense of himself to with which to live separately from others but at the same time he resented being dependent on others. (DAR, V13, R333). The borderline personality disorder manifested itself as a person who needed relationships but hated that he needed relationships. (DAR, V13, R333). Such an individual would be very volatile and inappropriate. (DAR, V13, R333). Pham suffered from a major depressive disorder and there was a suggestion that he suffered a bipolar spectrum disorder. (DAR, V13, R325). The fact that Pham succeeded in a technical job does not foreclose this diagnosis. (DAR, V13, R328).

Day noted in her testimony, that in 2005, Tressler had examined Pham and given an Axis I diagnosis of adjustment disorder with mixed disturbance of mood and conduct. (DAR, V13, R337). Tressler's Axis II diagnosis was a personality disorder NOS which was consistent with Day's conclusions. (DAR, V13, R337). At that time, Tressler said "something's happened and he's not adjusting to it, and there's a mood component and a behavior component to what he's doing right now." (DAR, V13, R337). Tressler defined Pham as an alleged victim of physical

and sexual abuse as a child. (DAR, V13, R337).

Day concluded that in October 2005, Pham was experiencing a major depressive disorder, personality disorder NOS, and was under significant stress and duress at the time of Phi's murder. (DAR, V13, R330, 348, 355). Day got a sense of significant trauma but was unaware of the source of this trauma. (DAR, V13, R303). During their conversations, Pham kept his hand over his eyes and answered in short, one-word responses. (DAR, V13, R305). Mental illness is not talked about and not treated in Vietnam. (DAR, V13, R343). Pham exhibited signs of post-traumatic stress disorder from his childhood experiences. (DAR, V13, R345). The signs of PTSD were present in Pham, though Day could not fully diagnose Pham because he was uncooperative in providing his history. (V13, R346). Pham's family fell apart and at a very early age and he was forced to function independently at a time when children his age were not capable of making good decisions. (DAR, V13, R334). His capacity to appreciate the criminality of his conduct was impaired. (DAR, V13, R350, 370).

In Day's opinion, all Pham's personality and depressive disorders came together the night that Pham murdered Phi such that his ability to conform his conduct to the requirements of the law was substantially impaired. (DAR, V13, R250). She further testified that Pham committed the offense while under extreme emotional disturbance by virtue of his mental illnesses. (DAR, V13, R375).

Pham's stress level and personality disorder caused him to take Phi's life. (DAR, V13, R377).

Dr. William Riebsame, forensic psychologist, testified for the State in the penalty phase. He administered a competency examination to Pham in July 2007. (V13, R380-81, 383). Riebsame's interaction with Pham was very brief. Pham was belligerent and uncooperative. He had been hiding his medication and there were concerns of a suicide attempt. (DAR, V13, R384-85). After fifteen minutes, Pham "covered his head with his sheets, rolled over in the cot, and the evaluation, per se, was finished." (DAR, V13, R385). Riebsame reported to the court that Pham appeared competent but suggested hospitalization at the State psychiatric facility. (DAR, V13, R385, 441). Pham was hospitalized from September 7, 2007, to October 30, 2007, when it was determined he was competent. (DAR, V13, R387, 442).

Riebsame evaluated Pham again in April 2008. (DAR, V13, R390). He reviewed previous psychological evaluations administered to Pham by Dr. Jean Richardson in 2002, Dr. Daniel Tressler in 2005, Dr. Jeffrey Danziger, Dr. Ballentine, and the 2007 evaluation conducted at Florida State Hospital. (DAR, V13, R398). He reviewed records from DCF, Altamonte Springs Police Department, and various depositions and court proceedings. (DAR, V13, R399, 442).

Riebsame administered intelligence and personality testing. Pham's IQ was in the average range, approximately 100. This was the same result reached by Dr. Tressler in 2005. (DAR, V14, R404). Riebsame administered the Millon Clinical Multiaxial Inventory, and the Personality Assessment Inventory. (DAR, V14, R406, 452). Riebsame concluded Pham suffers from a mood disorder which varies in its intensity. He suffers from periods of depression. (DAR, V14, R407. Because Pham maintained stable employment for a long period of time, Riebsame opined that he was not suffering from a "severe mood disorder." (DAR, V14, R409-10, 411). Pham experienced a severe mood disorder subsequent to Phi's murder. The murder itself could have triggered a major depressive disorder. (DAR, V14, R410). Pham has a pattern of not dealing well with females. He becomes angry and behaves aggressively. (DAR, V14, R414, 447-48). Cultural background could have influenced this type of behavior. (DAR, V14, R447-48).

In Reibsame's opinion, there was no evidence that Pham suffered from a psychotic disorder. (DAR, V14, R434, 468). He acted in a "controlled fashion" before killing his wife. Because he consistently denied murdering Phi, Riebsame concluded Pham was able to appreciate the criminality of his conduct. (DAR, V14, R436). Pham experienced an emotional disturbance at the time of the murder but it was not "extreme." (DAR, V14, R439, 468). Riebsame's testing revealed possible post traumatic stress disorder and possible bipolar disorder. (DAR, V14, R459).

Riebsame noted that there was some lack of ability on Pham's part to conform his behavior to the requirements of the law. (DAR, V14, R462). Riebsame noted that the diagnostic interpretive results of the tests he administered to Pham were consistent with the findings by Ballentine, Dansinger, Day, and Tressler. (DAR, V14, R480). Riebsame did not find that Pham exaggerated or minimized any mental health problems. (DAR, V14, R480).

POSTCONVICTION PROCEEDINGS

Pham filed a motion for post conviction relief on February 25, 2013. (DAR, V1, R33-171). The State filed its response. (DAR, V3, R525-51). The court granted evidentiary development as to claims 4, 5, 6, 7, 9, 10, 11, 12, 13, and 15; reserved ruling on the legal claims 8, 16, 17, 19, 20, and 21; and summarily denied claims 2, 3, 14, and 18. (DAR, V11, R2061). An evidentiary hearing was held; commencing on October 8, 2013, and concluding on October 31, 2013 upon oral presentation of closing arguments. (DAR, V11, R2061). The record comprises 5 volumes. The trial court denied Pham's postconviction motion on December 20, 2013. (DAR, V11, R2060-2074). The pertinent testimony from that hearing is as follows.

At the evidentiary hearing, Pham presented eighteen witnesses, including his mother, Nho Thi Nguyen, his sister, Kim Oahn Pham, his sister, Hang Pham, his sister, Ang Ngoc Thi Pham, and his brother, Anh Tuan Pham; Defendant also

called Dawn Saphir Pruett, Susan Ottesen, Verl Johnson-Vinstrand, Dr. Tam Thi Dang Wei, Olliander Csisko, Timothy Caudill, James Figgatt, David McGuiness, Jeffrey Geller, Nina Nga Nguyen, Dr. Daniel Buffington, Dr. Daniel Lee, and Dr. Francis Abueg. The State presented evidence from Dr. Bruce Goldberger and Dr. Harry McClaren.

The Rule of Sequestration was invoked as to lay witnesses, and the expert witnesses for both sides were permitted to remain in the courtroom. (V12, R8, R11).

Pham called his sister, Ms. Pham Kim Oanh (hereafter referred to as “Kim”), from Thu Duc, a city about 10 kilometers south of Ho-Chi Minh City, Vietnam, who testified through a Vietnamese interpreter Ms. Kim Zglenski (hereafter referred to as “Interpreter” or “Zglenski”). (V12, R9, R12). Kim was the oldest of nine siblings in the Pham family. (V12, R15). Their father was named Pham Si Si, and their mother was named Nguyen Thi Nho. (V12, R15). The siblings from oldest to youngest were Kim, Pham Thuy Thi Hang, Pham Anh Tuan, Pham Thuynga, Pham Anh Tu, Pham Anh Tuan, Pham Tai, Pham Thi Ngoc Anh, Pham Anh Vu Thuy, and Pham Thi Vu Vi. (V12, R15-16). Kim was around 12 years old when Pham was born. (V12, R16). Because she was the oldest, she would take care of him as well as all of the siblings. (V12, R16). Their father was away in the army serving for South Vietnam and America, and their mother was away selling

vegetables at the market. (V12, R16, R19). Their father would return periodically for visits. (V12, R18). Tai was a child during the Vietnam War. (V12, R18). Children of army soldiers were “very scared” of the Communists. (V12, R19). If the Communists caught children of soldiers they killed them. (V12, R18, R19). Military children could go to school for free, and were protected by the government. (V12, R18). Their father was originally from North Vietnam, where he served for the French, but then “they moved him to the south to protect him.” (V12, R19). Their maternal grandfather had just passed away a few years ago. (V12, R19). Their paternal grandfather⁷ was captured by North Vietnam forces, and he died in jail, while their paternal grandmother escaped to South Vietnam with their two uncles. (V12, R19). Their grandmother did not know when her husband died. (V12, R20). A man who had been in prison with him escaped, and told her he was dead. (V12, R20).

Pham was born smaller than his siblings. (V12, R20). Pham’s mother was hospitalized when Pham was born. (V12, R19). When he was a few months old, he had “a tumor, real big, on the right side of his head.” (V12, R21). Their mother put a Chinese medicinal patch on the lump and it “bust and it was bleeding.” (V12, R21). They took Pham “to like the emergency room and they put a band-aid on

⁷ At this point, Kim identifies this grandfather as her paternal grandfather, but at V12, R42, she identifies him as her “mom father.”

and send him home.” (V12, R21). Pham suffered from fevers at this time. (V12, R21). He would be taken to urgent care where they would “just give us some pill to lower his temperature and that was it.” (V12, R22). Around two or three years old, Pham would get nose bleeds. (V12, R22). The family would “just wipe it off and that’s it.” (V12, R22). Pham fell down more than the other siblings. He used to “fell a few times.” The family would carry him. “He has a bump, that was it.” (V12, R22). At four or five years old, Pham “just can’t control” his urination and defecation he would “do it all over,” he kept “forgetting” to go to the bathroom in the right place. (V12, R22).

Pham started school at six years old. (V12, R42). He escaped from Vietnam when he was nine years old. (V12, R43). Pham wet the bed until he was nine or ten years old. He also wet his pants in school, for which he was teased. (V12, R23). Pham cried a lot as a child. He would cry or bang his head on the floor when he was upset or did not get what he wanted. (V12, R23). Pham was “a little bit slower” than his siblings in learning to talk. He began to talk around fourteen or fifteen months old. (V12, R23). He began to walk around two years old. (V12, R24). Pham was a quiet child who did not have many friends. He preferred to stay home. (V12, R24). He was a slow student. He had “ugly” handwriting and was “not really” good at reading. (V12, R24). “[M]any times” he had to repeat a grade

in school. Sometimes he had to spend “three years in one grade.”⁸ He was sad about this, and was teased by his friends for being a “dummy.” (V12, R25, R26). Pham was forgetful from ages 5 or 6 to 9 years old. (V12, R25). Occasionally, he would skip school from ages 5 or 6 to 9 years old, but he was in school continuously during this timeframe. (V12, R25). Sometimes, Pham would get into fights. (V12, R26). Their father sometimes hit the siblings, including Pham, “on the butt” with a long stick as a form of discipline. (V12, R27). Pham enjoyed, and was talented with, fixing things as a child. (V12, R28-R29).

In 1972, when Pham was born, the Communists were in control of the area. (V12, R42). In the city Pham grew up in, people were afraid of the Communists, and of their guns. (V12, R29). If the surveyors saw them approach, they would ring the church bells and people would hide in a neighbor’s basement. (V12, R29). Pham went outside sometimes when he wasn’t supposed to. (V12, R29). Kim saw people killed. (V12, R29-R30). Their brother Pham Anh Tu passed away at the age of thirteen while he was riding a bicycle and a car “ran over his throat.” (V12, R30). He was close with Pham, who was around nine years old when he passed.

⁸ The trial court made a factual finding that Pham was left back in school “three times,” but in footnote 8, points out: “[t]he 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.”

(V12, R30). Pham was present when the family held the funeral at their home. (V12, R31). Pham was “very scared” by his brother’s death. (V12, R31). In a spiritual gesture, Pham’s mother told him to go up to the casket and apologize for any “bad” he had done for forgiveness. (V12, R31).

The whole family tried to escape Vietnam when Pham was around eight or nine years old. (V12, R32). Military children were not being allowed to advance in school. People were leaving Vietnam to find freedom, even though they knew they had “little chance to survive.” (V12, R32). Their city was not near a port, so they had to travel far to try to escape in small groups. (V12, R33). Large groups would be noticed by the “undercover” and separated, so they attempted escape in small groups. (V12, R33). The first time Pham attempted escape with his older sister Pham Thuy Hang, they were captured. (V12, R33). They let Pham come home after three months, but Thuy was imprisoned in a camp for three years. (V12, R33). Pham was very happy to be home, but he was scared, and never wanted to attempt escape again. (V12, R33). About two or three days later, Pham was tricked into escaping with his older sister Thuynga. (V12, R35). Pham Thuynga was four years older than Pham. She is the sister, with whom he successfully escaped Vietnam. (V12, R40). Thuynga currently resides in Orlando. (V12, R40).

Kim lived with Pham in the family home for about nine years until she married and moved “back to her in-law family.” (V12, R42). The last time Kim saw Pham

he was approximately nine years old.

The family tried to keep in contact with him after he came to America but the “phone communication is kind of hard.” They would receive letters and their mother would relay the conversations to Kim. (V12, R35-36). Only their mother, Nga, and Pham had phones. (V12, R37). Kim left Vietnam in 2012 to care for her sister in France for a few months. (V12, R36). Kim met Pham’s wife Phi when he sent her home for a visit. Pham had not been back to Vietnam. (V12, R36).

In 2005, their mother received a call from Nga in Orlando, who informed her that Pham had “done something bad,” and the family became aware that Pham had murdered Phi. (V12, R37). In 2005, the family could not receive letters. (V12, R38). Between 2005-2008, trial counsel did not contact the family, according to Kim. (V12, R38). She would have “loved to talk to that person.” (V12, R39). The first contact she was aware of occurred in February 2013. (V12, R39). CCRC assisted Kim in getting her Visa to come to the U.S. for the evidentiary hearing. (V12, R39-40).

Pham then called his mother, Nho Thi Nguyen, from Thu Duc, a city about 10 kilometers south of Ho-Chi Minh City, Vietnam (hereafter referred to as “Nho” or “their mother”). She testified through Vietnamese interpreter Zglenski. (V12, R46). Pham’s father was ranked as a sergeant and worked as a ranger in the army, fighting against the Viet Cong. (V12, R47, R48). He was in the field until he grew

older and felt weaker. He then applied for a job in the office. (V12, R48). He passed away around 1997. (V12, R47). Pham was born in 1972. (V12, R50). Nho stayed home with the children. She would also go to the market and sell vegetables “to make a little money.” (V12, R50). There was a lot of armed military presence in the village when Pham was a child. (V12, R50). There was a battlefield nearby and they would hear gunshots. When there was fighting, they would run to the neighbor’s basement until everything calmed down. (V12, R50). There were dead bodies in the streets “when they first came in.” (V12, R51). Nho and her children were frightened. (V12, R52).

Pham was the sixth of nine children. (V12, R52). The fifth child was Pham Anh Tu, the son that passed away at thirteen. (V12, R53). Of all the pregnancies, Pham was the most difficult to carry and deliver. (V12, R53, R54). Nho was sick and weak. (V12, R53). Nho lived in the country with little access to medicine or healthcare so she did not go for checkups during pregnancy. When it was time to deliver, she just went to the hospital and delivered the baby. (V12, R53). Most of her children were delivered in one day; Pham was delivered in three days. (V12, R54). She had a difficult delivery with pain and bleeding. She feared Pham was going to die because he did not cry “for a long time.” (V12, R54). All her children had the same lack of pre-natal care and type of hospital services as Pham. (V12, R55). Pham was a “[m]edium” “[s]mall” infant, smaller than his siblings, weighing

about 2 kilos. (V12, R56). Pham was the most difficult of her children to raise. (V12, R56). Pham was slower to walk and talk than his siblings. (V12, R57). At six months old, he developed the lump on his head. (V12, R57). She applied the medicinal patch to the lump and one day awoke to find it had burst blood and pus onto his pillow and he had a fever. (V12, R57, R58). They got the neighbor's motorcycle and took Pham to urgent care where medical personnel gave him three kinds of medicine and applied a bandage. The family took him back to the clinic the next morning to have the bandage changed. (V12, R58). Nho was scared that Pham might die. (V12, R58). It took a long time for it to heal. (V12, R58).

Pham would go to the bathroom everywhere, and not just the designated pot, until he was around five years old. (V12, R61). Pham wet the bed "every night" until he was seven or eight years old. (V12, R58). Pham started school at five years old. (V12, R62). The teachers wanted to kick Pham out of school because he could not study and would fail; however, Nho asked to teachers to let him stay, and they did. (V12, R62-63).

Pham was slow, quiet, a loner, and was bullied for being "dumb." (V12, R63). Pham had a talent for electrical work. (V12, R64). Pham's mother "love[d] him the most," and they were very close. (V12, R64). Pham was more like his mother than his father, but he used to carry his father's guns around and wanted to be a soldier when he grew up. (V12, R65). Pham used to sleep with Nho's mother, his maternal

grandmother. She would tell all the children the story of their grandfather's imprisonment and death due to his Catholic faith. (V12, R65). The family never saw his body. (V12, R65). Pham's father was loving, and not very strict, but if they were wrong, he would discipline them. (V12, R65). Their father "usually give them one whip" with the stick if they were disciplined. (V12, R66). That is how all "good family" in Vietnam disciplined their children. (V12, R66). Pham was never tied up. (V12, R67). Pham slept like he was crawling on his stomach. (V12, R67).

Nho and her husband decided to send their children away because children of military personnel were treated poorly. She wanted them to "have their future and freedom." (V12, R69). First, they attempted to build a small boat to take the whole family, but they were captured, and the owner of the boat was sent to prison. They decided to "send slowly whoever can escape, just go." (V12, R69). It cost two sticks of gold for each person to escape. (V12, R69). All the family's money went to help the children to escape. (V12, R69). Nho was also afraid that her sons would be drafted by the army, especially Anh Tuan, the oldest son. (V12, R70). He attempted escaped many times, but was always captured. (V12, R70). Kim attempted escape with the whole family, but once they were captured, she ran away, and she did not attempt escape again. (V12, R70). Pham Hang, the second eldest sister, attempted one escape with Pham but was captured and imprisoned.

Pham Anh Ngoc and Pham Tu attempted escaped together. Nho was told both

of her children were captured when another prisoner was released and told her. (V12, R73). Pham was told to go play with his sister, but he was actually attempting escape. (V12, R74). Pham didn't want to escape. When he was released after three months, Nho was shocked but happy to see him. He kept holding her and cried. (V12, R74-75). Pham would not have left the second time had his mother not told him to go to the zoo with his sister, Thuy. (V12, R77).

Nho was notified once they reached the island so she could pay more money. (V12, R77). Nho met Phi once a couple of months after Zena was born. Pham sent Phi and his mother-in-law, Duong, back to Vietnam for a visit. (V12, R77-78). Mother testified no one called her during the trial, but she would have talked to them and testified. (V12, R77). Post conviction counsel helped her get a visa to travel to America. (V12, R77). Only Pham and Thuy ever successfully escaped Vietnam. (V12, R83). There was no more fighting in Vietnam after 1975 when the communists took over. Pham born in 1972. (V12, R85).

Pham Anh Tuan is Pham's elder brother by 8 years. (V12, R85). Tuan has always lived with his mother in Vietnam. (V12, R90-91). Children of soldiers could not go to college. You could be drafted into the army as a boy upon reaching age eighteen. (V12, R92). Their grandmother used to tell stories to the children, including the fact that the grandfather was in a prison camp because he was Catholic. The family did not know how he died. (V12, R95). Pham was a loner, he

wanted to be by himself, and he was sometimes teased. (V12, R96). Pham was called “moc moc, means a little crazy.” (V12, R97). The other children picked on him, but never hit him. (V12, R97). At six or seven years old another child threw a rock at Pham and it hit him in the forehead, causing Pham’s forehead to bleed. (V12, R97-98). Pham smoked cigarettes he had stolen from his father at 4-5 years old. (V12, R98). Father tied Pham up “about a few times.” (V12, R99). Disciplining children with sticks was normal for “over there.” (V12, R99). “If you listen, you good, he won’t use that [the stick.]” (V12, R99). Pham was very sad when his brother passed because they were close, only a year older than Pham. (V12, R100). He apologized to his brother at the wake. (V12, R100). Tuan tried to escape Vietnam seven or eight times, but he was always caught. (V12, R101). Tuan doesn’t know if his mother’s home could accept phone calls. (V12, R103). No one contacted him but he would have testified. (V12, R103). Tuan has not seen Pham since Pham was nine years old. (V12, R102).

Pham then called his younger sister Pham Thi Ngoc Anh Tran from Paris, France. (V12, R108). She would occasionally speak to her older sister Thuynga and Pham on the phone. (V12, R109). She found out about Pham’s arrest in 2005 from a phone call from Thuynga. Thi then notified the rest of the family in Vietnam. (V12, R109). No attorneys called her until Thuynga facilitated contact by email. (V12, R109). She then gave post conviction counsel contact information for

Hang and the rest of the family in Vietnam. (V12, R110). Thi would have spoken to attorneys but “there’s no way for me to connect with anyone over here.” (V12, R111). The first time Thi escaped she was with her brother Tuan but she was captured, and never attempted escape again because she was scared. Approximately 63 people were on a small fishing boat for about a week. There was no food, water, adequate space, or hygiene facilities. (V12, R119). They were then transferred to a large boat. (V12, R119). They were on the large boat for two days. (V12, R119). The boat hit a bad storm and flipped upside down. The decision was made to turn back to Con Doan. (V12, R120). Thi saw someone shot in the arm and then everyone was captured. (V12, R120). Thi was sent to a female prison camp when she was nine years old. (V12, R123). She was given one half a bowl of rice per day and some water, she was very hungry. She slept on the ground. She was imprisoned there for more than two months before she was allowed to return home. (V12, R123). She never attempted escape again. (V12, R123). She married a French citizen who was also a refugee, and moved to France. (V12, R125).

Pham next called his older sister Pham Thuy Hang from Saigon, Vietnam. (V12, R128). Hang was 10 years older than Pham. (V12, R128). “At the beginning, when united” the food situation was “hard.” The family would have to stand in line beginning in 1975 to receive government rations of rice and barley. (V12, R131, 132). It was never enough food. (V12, R132). After the unification, the food was

“terrible.” (V12, R132). The government provided one meter of material per year per person for clothing. (V12, R132). They drank from a well but the water had to be boiled before drinking. (V12, R133). Pham saw dead bodies “when they are first took over, the dead body all over and then they cleaned it up afterwards.” (V12, R158). Hang wanted to leave Vietnam because she was not allowed to proceed to college. (V12, R133). She was twenty years old when she tried to escape Vietnam with Pham, who was nine. (V12, R135). They left at 4 am and did not say goodbye to anyone. Pham thought they were going out to play. (V12, R136). They took a bus to Bac Lieu where they were taken to a house to wait with twenty or so people. (V12, R137). Shortly afterward, the police came to arrest them, pointing guns and screaming to hand over their money and valuables. (V12, R137). Pham was scared and pale. (V12, R137). Their hands were tied together. (V12, R140). They were taken to a house where they slept on the floor for about a month. (V12, R137). They were fed a small amount of rice, steamed vegetables, and fish sauce; however, neither she nor Pham felt like eating. (V12, R142). They had a pot for water and a shared pot for a bathroom. (V12, R143). When Pham cried, she attempted to soothe him. (V12, R143). He kept his eyes downcast. (V12, R143).

They were then transported to Ca Mau prison camp. (V12, R145). Because Hang was older, she would receive half a bowl of rice at about 4 or 5 in the

morning when she went out to work in the fields. (V12, R145). Pham did not receive anything, so Hang would give her rice to Pham. (V12, R146). Hang received a second handful of rice when she was working out in the field. (V12, R146). In the evening, Hang received a full bowl of rice and Pham received a half a bowl of rice. (V12, R146). They drank from a barrel of rainwater. (V12, R147). There were insects and mosquitoes at the prison camp. (V12, R148). They got sick at the prison camp, but tried to care for one another. (V12, R148). On the days that Hang worked, she had to plant rice in the rice fields and work in bare feet in the water, or on the hard ground until she fainted. She almost drowned a “few times.” (V12, R149). Hang was beaten and her elbow was broken, leading to limited mobility in her arm to this day. (V12, R155). Pham was in Ca Mau by himself while Hang worked in the fields all day. (V12, R160). Pham was released, but Hang was imprisoned until 1984. (V12, R156).

When Pham married Phi, he called home. (V12, R157). Hang met Phi and the baby, Zena, but Pham did not come to Vietnam with them. (V12, R158). She became aware Pham was in jail in 2005 from her mother, who learned the news from Thuynga in Orlando. (V12, R129). She was not contacted by anyone before CCRC, but she would have given the same testimony. (V12, R129-130).

Pham admitted into evidence, without objection, Defendant’s exhibit A, which was the Illinois Department of Children and Family Services records; Defendant’s

Exhibit B, which was Pham's Florida State Hospital records; and Defendant's Exhibit C, which were the certified convictions for Higgins, which were admitted into evidence as Defendant's 2, 3, and 4, respectively. (V12, R164-165).

Pham next called Dawn Saphier-Pruett, the closed file supervisor for Midwest Adoption Center. (V12, R166). Her agency had a basic-information website in 2000, but the current website with the ability to link to information became active in 2010. (V12, R169, 178). The records were provided in about a month, which is about the quickest it could be done. (V12, R173). CCRC was the first to request these records from her agency. (V12, R174-175).

Pham next called Susan Ottesen, a former school psychologist for Catholic Social Services in Peoria, Illinois. (V12, R181). Ottesen worked with seventy-five to one hundred unaccompanied minor Vietnamese children during that time. (V12, R182). She examined Pham on December 21, 1984, when he was twelve years, three months old. (V12, R183). Her evaluation of Pham was approximately ninety minutes. (V12, R198). She had no independent recollection of Pham, and testified just from her report. (V12, R199). She spoke to him in English and he was difficult to understand; however she was able to communicate with him, although sometimes with difficulty. (V12, R185). She had a report from Sundo, a case worker, Dr. Wei, and the school. (V12, R185). At the time of her evaluation, Pham was living at the Tha Huong residential program for unaccompanied minors. (V12,

R186).

Pham was easily frustrated, unengaged, somewhat hesitant, and somewhat tense. (V12, R187). Pham's behavior at school was described as having difficulty getting along with the other children, aggressive, and been excluded from school. (V12, R187). "[H]e'd run away, he'd engage in hiding and he had outbursts of anger, temper tantrums," as well as having been suspended from school. (V12, R188). These problems were not typical of other Vietnamese unaccompanied minors she had evaluated. (V12, R188). Ottesen typically found Vietnamese unaccompanied minors to be eager to please, compliant, and motivated to do their best and please the people working with them. (V12, R188). Her job was to evaluate children one time. (V12, R189). Pham received ongoing counseling as part of the program at Tha Huong. (V12, R189). Pham had had four years of school in Vietnam. (V12, R188). He was described by his school reports, as having been an enthusiastic student at times, and, at other times, easily frustrated and avoidant of his work. He did not seem to be able to accept praise, but that it did improve his work performance. (V12, R190-191). Pham scored slightly above average on a non-verbal IQ test, even though his English was limited. His academic level was between second and fifth grade level, with reading scored lower than math. (V12, R191). He showed strength in non-verbal reasoning and math computation, and a weakness in expressive vocabulary, which was likely due

to his limited English. (V12, R192). Eye contact was difficult for him. (V12, R197). She believed Pham had low self-esteem. (V12, R197). Ottesen made recommendations for Pham including placing him in the sixth grade so he would feel more comfortable with peers of his own age. (V12, R195). No one contacted her before, but she would have testified. (V12, R197-198).

Pham next called Verl Johnson-Vinstrand, a caseworker from the former Catholic Social Services in Illinois. (V13, R210). She had an independent recollection of Pham when he was approximately fourteen years old from “spending a lot of time with him and his aunt and uncle and sister” and their children. (V13, R215, 216). Pham had unexplained incidences of angry outbursts and running away. (V13, R220). Pham joined the Outward Bound program and did well in it. (V13, R223). Pham began working in an auto garage, where he seemed to be successful. (V13, R223). Pham ran away from his aunt and uncle’s home and was placed in a foster home. (V13, R223). Vinstrand felt this was best as Pham was disruptive to his aunt and uncle’s home, as well as to his cousins and sister. (V13, R225). While in his foster home, Pham did not want to go to school or do his chores, “he seemed to just want to sleep all day or watch TV. So they had a confrontation that escalated to Tai running away.” (V13, R225). Vinstrand witnessed Pham in an altercation with his foster mother wherein he tense up, broke a trophy, slammed it down on a table, punched out a window, and jumped out of it,

refusing to come back inside. (V13, R226). Pham ran away and when he was found, he was eventually placed back with his uncle, until the confrontations started again.

Pham then ran away to his uncle in North Carolina. (V13, R230). He was legally placed in North Carolina with that uncle until he decided he wanted to come back to Illinois with his uncle and aunt there. (V13, R233). That placement fell through yet again based on Pham's truancy and not relating well to the family. (V13, R233). Pham had been arrested for stealing a battery when he was around twelve years old, but charges were never filed. He had stolen his aunt's car when he was eighteen or nineteen, to flee North Carolina, but she did not press charges. He had also stolen an agency car also when he was eighteen or nineteen. (V13, R236, 244). Pham had a pattern of violent outbursts. (V13, R245). Pham was the worst case on her caseload, and the worst behaved in the unaccompanied refugee minor "population." (V13, R236). No one contacted her, but if they had, she would have testified the same. (V13, R236). Pham "could get like As and Bs on an average pretty easily." (V13, R249). Pham was sent back to the Tu Huong program after he failed to successfully integrate with either uncle's family. (V13, R250).

Olliander Csisko, is a retired deputy from the Seminole County Sheriff's office. (V13, R254). She and deputy Dickens had a violent altercation with Pham when she worked as a bailiff in the courthouse. Her hand was injured during the

altercation. (V13, R263).

Dr. Tam Thi Dang Wei, is a psychologist who evaluated Pham when he was in the Tha Huong program. (V13, R273). She observed Pham for a full day when he was twelve years old. (V13, R295). She learned Pham spent a year in a prison camp in Malaysia before being brought to the U.S. and to the Tha Huong program. (V13, R287). He got into trouble at the camp for trying to get food rations for his sister so they cut his hair short and put him in jail. (V13, R287-288). She observed Pham at Tha Huong and determined he became easily frustrated and had difficulty controlling his anger. (V13, R288). It was her opinion that having done something good and having received such harsh punishment “affect[ed] his behavior and his frustration to a new situation.” (V13, R289). She recognized he had undergone several traumatic experiences. (V13, R294). She counseled Pham on assimilating in American culture and advised him as to why his parents made the decision to send him away. (V13, R295). She made recommendation for Pham as a school psychologist, not as a treating physician. (V13, R295, 304). No one contacted her but she would have testified on Pham’s behalf. (V13, R303).

Pham then called Investigator David McGuinness of the Public Defender’s Office. (V13, R309). Douglas Harris was the initial lead investigator on Pham’s case for about two years before McGuinness hired Jeffrey Geller to take over. (V13, R313). McGuinness and other investigators would routinely assist with Pham’s

case. (V13, R314). McGuiness assisted Gellar. (V13, R314). Investigator referrals come from the attorney in writing. (V13, R313). Gellar was “very, very anal about his cases” and “he really, really did a great job” on Pham’s case. (V13, R317). There were “financial restraints ... we’re underbudget and budget had been cut in the last few years and so ... the Public Defender was very frugal.” (V13, R318).

Investigators in a capital case attempt to find everyone that knew the defendant. (V13, R319). Gellar and McGuiness wanted to travel to Chicago and to Vietnam to follow-up on leads and to meet with witnesses in person. They did not want to interview them on the phone. (V13, R319). The request to travel for in-person interviews was denied due to financial constraints. (V13, R319). Securing interpreters was subject to the approval of the attorney’s cost request. (V13, R320). Gellar and McGuiness consulted Caudill and Figgatt regarding Pham’s sister in France and family in Vietnam. They also discussed possible leads in Chicago, but the attorneys informed them “that we couldn’t afford it.” (V13, R322). Gellar offered to go to Vietnam if Caudill could get him approved for two weeks of paid vacation, even though he did not speak Vietnamese. (V13, R323). Gellar retrieved some of Pham’s records from Illinois. (V13, R323).

Timothy Caudill was Pham’s trial counsel. (V13, R330). Caudill has been an Assistant Public Defender since 1993, and he has handled capital cases since 1997. (V13, R331-332). He is death penalty qualified. (V13, R333). He has been

involved in approximately one hundred death penalty cases. (V13, R333). He regularly attends training seminars including Life over Death and Death is Different. (V13, R333). Caudill does not take a lot of notes in Capital Cases. (V13, R334). Every Capital case in Sanford that is represented by the Public Defender's Office is handled by Caudill and Figgatt as a team. (V13, R335-336). They determine at the time the case comes in who will be lead counsel and who will be second chair on each particular case. (V13, R336). Although Pham's case was assigned during the time Figgatt's mother was ill, it never affected Figgatt's work. (V13, R336-337). Figgatt was first chair for Pham's case and Caudill was second chair. (V13, R337). Caudill and Figgatt both worked on both phases of the trial. (V13, R338).

There were no active investigations ongoing during the time Pham was in the State Hospital for competency determination. (V13, R42). **Pham was “not very” cooperative with trial counsel upon his return from the hospital. (V13, R343).** When trial counsel met with Pham to discuss mitigation, he sat with his head down. He did not make eye contact. In response to discussions about mitigation, Pham would say “that's okay” and “you don't need to do that, it's not necessary, give me the death penalty.” (V13, R344). Pham said that during every conversation with Caudill. (V13, R344). Pham “was not forthcoming” about his childhood and background. (V13, R344). He “did not like to discuss those matters.” (V13, R344).

Pham was reluctant to see the recommended doctors. (V13, R344). Caudill took the lead in the penalty phase for presenting Pham's cultural background, presenting mental health testimony through Dr. Day and his sister, and for his circumstances leaving Vietnam. (V13, R346). Caudill was looking for evidence of mental illness, and they hired several mental health experts. (V13, R348). They sought out, reviewed, and provided collateral source reports to their experts. (V13, R349). Caudill met with Thuy "seven or eight" times in addition to phone calls. (V13, R350). Thuy told them about the family still in Vietnam, the sister in France, and the uncle in Illinois. (V13, R352). He was aware Pham was a ward of the state of Illinois. (V13, R352). There were discussions pertaining to Pham's sister in France. (V13, R354). They thought about hiring a Vietnamese mental health expert but never found one. (V13, R360). They had some of the Florida State Hospital Records. (V13, R362). Trial counsel did not consider hiring Dr. Buffington for this case. (V13, R364). Trial counsel was aware Pham had a history of substance abuse, so they discussed that with their experts. (V13, R364-365). Trial counsel had Ms. Duong, Phi's mother, write a letter that she was "still supportive" of Pham and did not want to see him get the death penalty, but ultimately, decided not to use this letter in the penalty phase. (V13, R369-370). If Higgins had stated he had been convicted of impeachable offenses at his deposition, Caudill would have used that to impeach him, without having to order certified conviction records. (V13, R373).

On cross-examination of trial counsel Caudill, he clarified that Pham had never given them any indication he had been under the influence of drugs or alcohol at the time he murdered his wife. (V13, R379). Pham never admitted to his involvement in the murder. (V13, R379). Their defense centered on Pham's not being "particularly intelligent" paired with his traumatic experiences escaping Vietnam. (V13, R379). They put on Pham's experiences leaving Vietnam and being held in the prison camp in Malaysia for approximately 2 years through his sister Thuy because she had "firsthand knowledge" of the family conditions in Vietnam, the escape, being imprisoned at the refugee camp, and their experiences upon reaching the U.S. (V13, R380). Pham would tell Caudill "... I don't want this, give me the death penalty," as it related to possible defense strategies and mitigation. (V13, R381). Caudill was concerned that "Mr. Pham would at some point in time tell those family members not to cooperate with us." (V13, R382). Caudill saw no real basis to move Judge Alva to recuse herself. (V13, R382). Plea negotiations were never "on the table" in this case, and an offer of even life in prison was never made. (V13, R383). Caudill was not aware of any legitimate legal theory under which Ms. Duong's letter could have been admitted. (V13, R384). Caudill testified that the documents from Catholic Social Services, specifically that he had done well in school at times, and made As and Bs in regular classes, was not consistent with the defense theory that Pham lacked

intellectual capacity or was brain damaged. (V13, R386). Caudill's review of the records from Illinois showed a pattern of violence and criminal activity, including two car thefts and a gun charge. (V13, R387). Caudill explained that they made a choice not to present this information because it did not lend credence to their theory of the case, and presented harmful information that mental health experts could have used to make an unfavorable diagnosis like explosive disorder; which could be used to form a diagnosis of antisocial personality disorder, which is the "last thing [they] want to have offered as a diagnosis for [their] clients in a capital case." (V13, R388-389). Caudill decided it would not have greatly helped Pham's case to attack Higgins credibility in front of the jury when he was also a victim. (V13, R390). Caudill would have liked a "more substantial prior criminal record that that." (V13, R390). Caudill did not believe it was wise to put on several witnesses to say the same thing. Juries "get tired" and don't appreciate when you try to "pound it into their heads simply by repeating it over and over again" (V13, R391). Foshee was the cultural expert. (V13, R392). Caudill believed Pham always holding his head down was a cultural manifestation as well as an expression of shame or remorse. (V13, R392). Caudill did mental health court, and had dealt with thousands of mentally ill clients, and he never believed Pham suffered from a "recognized mental illness," except for possibly depression or PTSD. (V13, R393). While at the Florida State Hospital, Pham denied suffering from any mental illness.

He was uncooperative with treatment, had difficulty following the rules, and was violent towards the staff. (V13, R393-394). The official records showing that the boat trip was four days as opposed to two weeks or more “it certainly doesn’t help when you have that kind of contradiction.” (V13, R395). Pham’s uncles in Illinois did not have a good relationship with him and were not sympathetic to Pham. (V13, R395). Caudill does not remember having seen the Florida State Hospital or Illinois records during the trial period, but he did have knowledge of what the records contained, most likely from Thuy. (V13, R397-398).

Pham next called Nina Nga Nguyen who was presented for the meeting, and interpreted Ms. Duong’s letter. (V14, R417, 420). The letter was not admitted because it was hearsay with no exception to the hearsay rule, but CCRC was allowed to proffer it into evidence. (V14, R425).

Pham next called Dr. Daniel Buffington. (V14, R425). Buffington’s expertise is in pharmacology. (V14, R436). He met with the defendant on 12/19/02 at Union Correctional. (V14, R438). He testified as to Pham having used alcohol at various times in his life; and using cocaine, and a legal, naturally-occurring flower with hallucinogenic properties called Angel’s Trumpet since July 2, 2005. (V14, R440, R442). Pham was taught how to use these substances by other inmates when he was incarcerated in 2005. (V14, R450). He used them in a manner that he was able to maintain steady employment and retain normal functioning. (V14, R454).

Buffington testified that Pham told him he could not recall if he was using Angel's Trumpet at the time of the murder, but on his report he stated he had used it on the day of the murder. (V14, R459).

Pham then called trial counsel James Figgatt. (V14, R465). Figgatt had been involved in more than fifty first-degree murder cases. (V14, R467). Figgatt had a rule that he would meet with clients within 48 hours of being in jail, and he would begin the investigation into the guilt and penalty phases, starting on "day one." (V14, R468). Figgatt testified that he would talk to the client as soon as possible to observe any possible mental illness component and then try to locate family members. (V14, R470). Figgatt was lead counsel in this case, and had the final decision as to strategy, though he and Caudill were a team and had worked together for about fifteen years at this point. (V14, R472-473). They were in contact with Thuy as early as six to eight weeks after being appointed to Pham's case. (V14, R476). Once able to effectively communicate with Thuy, she gave them the names and information of the Pham family. (V14, R480). Figgatt does not know if he assigned an investigator to do any telephone contacts or follow-up with this information. (V14, R484-485). There was no decision not to contact the other family members. (V14, R486). Sometimes Pham would refuse to see his defense team, and he had difficulty communicating with them when he was depressed. (V14, R488). Figgatt did not feel he hindered their investigations in the case. (V14,

R488). He wanted to use historical records to humanize Pham. (V14, R492). His practice was to provide all records to his experts. (V14, R494). Figgatt testified he did nothing with the information that Pham was in foster care in the state of Illinois. (V14, R498). If witnesses were overly cumulative, they might be excluded for financial constraints. (V14, R506). Figgatt would have provided all the information to his experts, without redaction on his part. (V14, R509). “Mr. Pham was not necessarily communicative” with Gellar, the defense investigator. (V14, R515). The continuance of the penalty phase was due to Figgatt’s mother being ill and passing away. (V14, R517-518). Figgatt testified there were plea negotiations in the case. (V14, R521). “[B]ecause of those intellectual discussions” and because of a notarizations issue with the translation, Ms. Duong’s letter “didn’t get presented to the [c]ourt at all ...” (V14, R526, 536). Dr. Olander was retained for the Spencer hearing. (V14, R539). Dr. Day was involved with Pham for approximately 2 years. (V14, R538).

Ms. Foshee was an activist for Vietnamese refugees who had been imprisoned and drugged in Vietnam for her assistance to refugees. (V14, R541-542). Good grades and comments pertaining to Pham’s lack of regard for rules or authority figures were not helpful for trial counsel to portray Pham as unintelligent. (V14, R547). The jury heard that the boat trip in the South China Sea lasted approximately 2 weeks, but the documents from the State of Illinois verify that the

boat trip was actually 4 days. (V14, R549). Pham expressed a desire to just plead guilty but Figgatt “wasn’t willing to abide.” (V14, R553). Pham’s testimony at the trial was that he didn’t know how his wife was killed. (V14, R554). There were a number of incidences of violence against staff and patients while at the Florida State Hospital. (V14, R555). There was a period of time when trial counsel could not communicate with Pham. (V14, R557). Phone calls to France or Vietnam would not have cost the Public Defender’s Office anything. (V14, R559).

Pham then called Jeffrey Geller. (V14, R566). Geller was a defense investigator who worked on Pham’s case. (V14, R568). He read the case file and then discussed possible areas of investigation with Caudill and Figgatt. (V14, R569). Geller was aware of the other siblings, and discussed that with Caudill and Figgatt, who also had that information. (V14, R571-572). He was never assigned to contact the sister in France or family in Vietnam. (V14, R572, 573). Investigators’ role was to perform the tasks attorneys asked them to. (V14, R572). Geller was aware Pham was in an orphanage in Illinois, so he attempted to retrieve the related records. (V14, R573-574). His request to travel to Chicago to retrieve the records in person was not authorized. (V14, R574). Geller kept daily logs of his activities while at the Public Defender’s Office. (V14, R575). The first investigative referral for Pham Geller reflected in his logs was on January 16, 2008, for an investigative meeting. (V14, R580). Geller memorialized notes and a list of investigative leads

from this meeting. (V14, R584). Geller and Assistant Public Defender Sinclair were asked to retrieve documents and records, and Geller contacted Pham's sister and ran background checks. (V14, R587). Gellar attempted to find witnesses who "either escaped by boat or somebody that could give cultural information about the Vietnamese." (V14, R590). Geller attempted to get records from catholic social services but he was unsuccessful. He elicited the help of his chief investigator as well, because they were in a "time crunch" but they were not able to get the records. (V14, R597). Geller made several attempts to locate and secure records from Illinois, by internet, email, telephone, and attempted travel, as evidenced by his time logs and memos. (V14, R598, 599). In April and May of 2008 Geller was performing mitigation work by looking for witnesses, materials, and securing people for court. (V15, R610). Most of the work was done in 2008. (V15, R617).

Pham next called Dr. Daniel Lee, also know as Le Dinh Phuoc in Vietnamese. (V15, R632). Dr. Lee was a Vietnamese psychologist based in California.⁹ (V15, R634). He has worked with Vietnamese refugees since 1975. (V15, R639). Lee has worked extensively with Vietnamese boat people including unaccompanied children. (V15, R640-660). Lee consulted with Dr Abueg and Dr. Wei on this case. (V15, R667, 670). Lee reviewed all the records in this case, spoke to Pham's

⁹ Lee is not licensed in the State of Florida. (V15, 725).

mother, three sisters, and his brother. (V15, R674). He interviewed Pham over the phone once and twice in person. (V15, R675). In his experience, Vietnamese people would only answer the direct questions asked of them, and be hesitant to talk about mental problems due to the personal taboo. (V15, R677-678). In Lee's opinion, Pham may have suffered from "perinatal anoxia" due to a lack of oxygen during his birth. (V15, R680). He testified that Pham's behavior in later years was "consistent with a person who suffering from brain impairment;" which is distinguishable from brain damage. (V15, R681). Lee testified that Pham told him both his grandfathers had been decapitated for being Catholic leaders. (V15, R685). In Lee's opinion, Pham suffered from PTSD. (V15, R690). This diagnosis was based on many experiences from Pham's childhood. (V15, R692-693). Lee was under the impression that, after Pham's release from prison at nine years old, his brother's death was "a few months after that." (V15, R693). Pham suffered from guilt for what happened to his siblings. (V15, R695). Pham's escape and his experiences at the refugee camp "would intensify his symptom of PTSD." (V15, 701). His PTSD was not treated, and when PTSD goes untreated, the condition will worsen, and is triggered by stress. (V15, 703-704). Lee has experience with several incidences of violence by former unaccompanied minor refugees with PTSD. (V15, 707). In his opinion, "most survivor of the war, the refugee, they are suffering from PTSD." (V15, 711). They will lead a normal life until some unusual

stressor occurs, and then they “snap.” (V15, 711). Lee believed that PTSD worsens when it is not actively being treated. (V15, 711-712). More contributing factors to PTSD were his move to a new home and adjustment to a new environment. (V15, 711). Lee testified that the angry outbursts and acting out behavior in Illinois were symptoms of PTSD. (V15, 711). Lee opines that Pham’s case is the worst case of PTSD he’s dealt with, due to Pham’s “continuous succession of different trauma.” (V15, 716). In Lee’s opinion, he murdered Phi because he was afraid of losing his wife and family. (V15, 717). Pham began using cocaine and Angel’s Trumpet weeks or months before the murder. (V15, 718). He had used Angel’s Trumpet when he was young in Illinois, and he learned to use cocaine from another inmate when he was incarcerated. (V15, 718).

Lee believed that Pham was under the influence of extreme mental disturbance at the time of the crime by virtue of his PTSD. (V15, 718-719). The Illinois records establish that the boat journey lasted four days, as opposed to two weeks. (V15, 724). The Illinois records also establish that the boat approached an oil rig and they were given food and water. (V15, 724). Lee used the DSM IV TR to diagnose Pham with PTSD. (V15, 726). Lee saw no distinction for failure to fall asleep at Union Correctional than for an unincarcerated person who suffered from insomnia. Lee testified that Pham met the criteria for D(3) for PTSD in that he had difficulty concentrating, even though he could concentrate for many hours at a time, repair

electronics, in his career. (V15, R733). Lee testified that Pham could still have had PTSD, culture impairment, poor concentration, and emotional problems, and still been able to have held a job working long hours. (V15, R734). PTSD crimes are those where the murderer just snaps and commits the offense. (V15, R737). In this case, Pham laid in wait for his wife for approximately an hour. (V15, R738). Lee believed it was the fear of losing his family that caused Pham to snap. (V15, R739). Dr. Lee did not have any “concrete evidence of the brain damage.” (V15, R757).

Pham then called Dr. Francis Abueg, a clinical psychologist licensed in California with a focus in PTSD. (V15, R758, 763). Abueg reviewed documents, Dr. McClaren’s report, and interviewed Pham’s family members. (V15, R768-769). Speaking with the family and reviewing the collateral sources were important to Abueg because “many of the traumas were familial,” and Pham “was too young or those memories were simply not accessible to him.” (V15, R770). Abueg diagnosed Pham with “chronic PTSD [with the dissociative subtype] and bipolar II” on the DSM-V. (V15, R773). On the DSM-IV-TR his diagnosis would have been PTSD and bipolar II. (V15, R773-774). Abueg also tested Pham on November 6th and 7th of 2012. (V15, R774). Abueg testified that his IQ was 66, adjusted to 73, but that he was not intellectually disabled because he did not lack adaptive functioning in everyday life. (V15, R776). In Abueg’s opinion, Pham was

below average in terms of intellectual functioning. (V15, R778). Abueg felt that Pham was putting forth an effort in the testing, and not malingering. (V15, R783). Her findings included “[i]ntrusive experiencing, dissociation, trauma, externalization and somatization, these are all very high ... and the next higher pair of scales would be in the anger and defensive avoidance ... consistent with severe PTSD.” (V15, R784). Pham expressed the most fear from “loss of family” and darkness, though he also mentioned drowning. (V15, R788-790). Pham’s mental condition worsened since DCF “took his children” because of “the way he disciplined them.” (V15, R792). Abueg testified that Pham met all the DSM criteria for PTSD. (V15, R795). In Abueg’s opinion, Pham had these symptoms prior to the first escape attempt. (V15, R799). In Abueg’s opinion, Pham was suffering from “severe PTSD and hypomania part of the bipolar, but it was highly exaggerated” at the time of the murder, and the bipolar was “driving” him. (V16, R823, 829).

Abueg did not feel Pham was intellectually disabled. (V16, R834). The Personality Assessment Inventory test results involved “considerable distortions and [were] unlikely to be an accurate reflection of [Pham’s] objective clinical status.” (V15, R835). Abueg testified that Pham murdering his wife “contributed to, exacerbated his PTSD and bipolar.” (V16, R845). Abueg has never testified for the State. (V16, R846). There were discrepancies between the reports of Pham and

his family and the DCF records, which were the only available official records of the events. (V16, R848). Dr. Abueg was not able to find any evidence that Pham suffered from brain damage. (V16, R852). There were no substances in Pham's system at the time of the murders. (V16, R853).

Pham rested and the State called Dr. Bruce Goldberger, a toxicologist, to the stand. (V16, R859). Goldberger reviewed the medical records from Orlando Regional Medical Center and found no indication that Pham was intoxicated or under the influence of any drugs at the time of his admission, directly after the murder. (V16, R859, 865, 870). Goldberger testified that the effects of cocaine only last a few hours, and he did not find the possibility of Angel's Trumpet causing flashbacks to be credible. (V16, R869-870, R874).

The State then called Dr. Harry McClaren, a forensic psychologist. (V16, R877). McClaren reviewed records; then interviewed Pham over a three-day period. He spent about fifteen hours of face to face interaction with Pham. He administered three psychological tests. (V16, R884-885). In McClaren's opinion, Pham suffered from "a mood disorder in the form of a major depression ... at times he has been perceived to have perhaps a bipolar spectrum disorder or a mood disorder not otherwise specified," perhaps an antisocial personality disorder, and PTSD. (V16, R887, 888-889). McClaren testified that Pham may have had "a degree of emotional disturbance" but not one that was extreme; rather, he was

angry, depressed, and frustrated. (V16, R890). Phi's murder cannot be connected to post-traumatic stress. (V16, R895). Pham told McClaren he was "a bad kid in Vietnam and I smoke, I drank, gambled" and recounted skipping school to "hang out." (V16, R913). Pham told McClaren the only dead body he had ever seen was a woman. (V16, R926-927). According to the Midtown Manhattan study, approximately one in three Americans would be diagnosed with some type of mental disorder. (V16, R932).

On December 20, 2013, the trial court issued its Order Denying Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 in which it denied relief on all claims. This is Pham's appeal of that denial.

SUMMARY OF ARGUMENTS

Argument I: The trial court did not err in denying relief as to penalty phase claims 9, 10, 11, 12, & 13. Trial counsel mounted a reasonable investigation into Pham's background, mental state, and mitigating factors. The hearing demonstrated that trial counsel's investigation led to several mitigating factors, including Pham's traumatic childhood in Vietnam, his time spent in a prison camp, an arduous journey to Malaysia on a refugee boat, a near-drowning experience, his time in a refugee camp away from his family, his difficult assimilation into American society, and the factors that led mental health experts to suspect likely

Post Traumatic Stress Disorder, Bipolar Disorder, Depressive Disorder, and a various personality disorders.

The jury heard testimony of Pham's harrowing childhood in war-torn Vietnam and his difficulties assimilating to American culture through the testimony of his sister, Thuynha. Thuynha was the best witness to testify to these facts because she grew up alongside Pham, escaped, experienced the boat trip, the Malaysian refugee camp, and ultimately, went on to be placed with family living in Illinois as an unaccompanied refugee with him. Pham received the benefit of mental mitigation because experts testified to his having elements of PTSD, bipolar disorder, depression, and substance abuse.

There was no seminal evidence adduced at the post-conviction evidentiary hearing that would have formed the basis for additional mitigating factors at trial. Even if Pham had not already received the benefit of the mitigation presented at the evidentiary hearing, there is no reasonable probability that any of this information, independently or cumulatively, could have outweighed the exceptionally heavy aggravation in this case such that Pham would have received a life sentence.

Argument II: The trial court did not err in denying relief as to penalty phase claims 7 and 16.

As to claim 7, there is no reasonable probability that Pham would have a

received a life sentence had trial counsel impeached attempted murder-victim Higgins with evidence of his convictions. Higgins's credibility was not of paramount importance when his testimony was supported by the physical evidence, the testimony of fellow eyewitness Lana Pham; and fact that Pham's version of events was completely discredited.

As to claim 16, there is no deficiency in trial counsel's "failure" to exclude Higgins' victim impact testimony because there was no legal basis to do so. Higgins victim impact statement constituted proper victim impact testimony under *Payne v. Tennessee*. Furthermore, even if the victim impact evidence was admitted in error, there is no reasonable probability that the exclusion of this evidence would have led to a life sentence recommendation for Pham; thus, there was no prejudice.

Argument III: The court did not err in summarily denying claims 3 and 14. The court can summarily deny claims that are procedurally barred, legally insufficient, refuted by the record or without merit.

As to claim 3, there was no deficiency in not objecting to Bulic's testimony because the record clearly showed that he was qualified to testify as an expert on the victim's cause of death. There was no legal basis to exclude Bulic's testimony. Furthermore, there is no reasonable probability of a life sentence recommendation had Bulic's testimony been excluded because neither cause of death, the victim's

consciousness, nor the killer's identity were at issue in this case. Law enforcement arrived on scene and witnessed Pham still engaged in the struggle with Higgins, recovered the murder weapon, and witnessed Phi's body covered in stab wounds matching the knife. The jury would have still heard the testimony of Higgins and Lana; and how Phi struggled for life while Pham stabbed her to death. As such, Bulic's testimony was unessential.

As to claim 14, there was no deficiency in not objecting to Bulic's testimony based on *Crawford* when Bulic testified as a "surrogate" for Parsons because the record clearly showed that Bulic testified to his own credentials, experience, and opinion, and was not a conduit for hearsay. As such, there was no sufficient legal basis to exclude Bulic's testimony under *Crawford*.

Argument IV: The court did not err in denying claims 8, 17, & 19 of cumulative error. None of the individual issues is meritorious. There is no error on any of the claims, so there can be no error to "cumulate" and Pham is not entitled to any relief.

STANDARDS ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Before ruling on the claims of ineffective assistance of counsel, the trial court properly recognized *Strickland* as the controlling authority for claims of ineffective assistance of counsel:

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.

(V10, R1645-46).

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).

(V10, R1645-46).

When the postconviction court rules after holding an evidentiary hearing, this Court “review[s] the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence.” *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). Appellate courts do not “reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses.” *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009) (quoting *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007)). “[W]e review the trial court's application of the law to the facts *de novo*.” *Green*, 975 So. 2d at 1100. *Lambrix v. State*, 39 So. 3d 260, 268-269 (Fla. 2010).

SUMMARY DENIAL OF POST-CONVICTION CLAIMS

Florida Rule of Criminal Procedure 3.851 provides that a claim may be denied without a hearing where the motion, files, and records in the case conclusively show that the movant is entitled to no relief. A court may summarily deny a post-conviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. *See Franqui v. State*, 59 So. 3d 82, 95-96 (Fla. 2011); *Troy v. State*, 57 So. 3d 828 (Fla. 2011) (citing *Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008)). A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. *Doorbal v. State*, 983 So. 2d 464 (Fla. 2008) (citing *Downs v. State*, 453 So. 2d 1102 (Fla. 1984)); *See also Moore v.*

State, 820 So. 2d 199, 203 (Fla. 2002). When the trial court denies postconviction relief without conducting an evidentiary hearing, this Court accepts the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009) (citing *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000)). To uphold the trial court's summary denial of claims raised in a post conviction motion, the claims must be either facially invalid or the record must conclusively refute them. *Gordon v. State*, 863 So. 2d 1215, 1218 (Fla. 2003) (citing *Occhicone v. State*, 768 So. 2d 1037, 1041 (Fla. 2000) (citing Florida Rule of Criminal Procedure 3.850(d)); *Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Rivera v. State*, 717 So. 2d 477 (Fla. 1998); *LeCroy v. Dugger*, 727 So. 2d 236 (Fla. 1998). However, the defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000) (citing *Kennedy v. State*, 547 So. 2d 912 (Fla.1989)). If the claim is legally sufficient, this Court must then determine whether the claim is refuted by the record. *Mungin v. State*, 932 So. 2d 986, 995-96 (Fla. 2006). A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court, and its ruling is subject to *de novo* review. See *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

LEGAL SUFFICIENCY

Rule 3.851(e)(1)(D) requires a defendant to include a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought. The burden is on the defendant to establish a legally sufficient claim. *See Franqui*, 59 So. 3d 82 (Fla. 2011) (*citing Freeman v. State/Singletary*, 761 So. 2d 1055, 1061 (Fla. 2000)); *Nixon v. State/McDonough*, 932 So. 2d 1009, 1018 (Fla. 2006). Conclusory allegations are not legally sufficient. *Franqui*, 59 So. 3d at 96.

The rule of sufficiency is equally applicable to claims of ineffective assistance of counsel. *See Knight v. State*, 923 So. 2d 387 (Fla. 2005); *Thompson v. State*, 796 So. 2d 511, 515 n.5 (Fla. 2001). The facial sufficiency of an ineffective assistance of counsel claim is determined by applying the two-pronged test of deficiency and prejudice set forth in *Strickland. Troy*, 57 So. 3d at 834, (*citing Duest v. State*, 12 So. 3d 734, 747 (Fla. 2009)). Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for post-conviction relief. *Dennis v. State*, 109 So. 3d 680 (Fla. 2012) (holding counsel cannot be deemed ineffective for failing to make a meritless argument); *See also Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008).

ARGUMENT

ARGUMENT I: THE COURT DID NOT ERR IN DENYING RELIEF AFTER CONDUCTING AN EVIDENTIARY HEARING ON PENALTY PHASE CLAIMS 9, 10, 11, 12 & 13; THE TRIAL COURT’S FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

Pham claims the trial judge erred in denying Claims 9, 10, 11, 12, and 13 after the evidentiary hearing on those claims. In these claims, Pham argues that trial counsel failed to investigate and present mitigation. The trial court correctly disagreed.

A defendant’s claim that he was denied effective assistance of counsel because counsel failed to present mitigation evidence will be rejected where the [sentencer] was aware of most aspects of the mitigation evidence that the defendant claims should have been presented. *Troy*, 57 So. 3d at 835 (citing *Van Poyck v. State*, 694 So. 2d 686, 692-93 (Fla. 1997)). Further, if the record demonstrates that counsel’s decision not to present evidence “might be considered sound trial strategy” the claim may be summarily denied. *Franqui*, 59 So. 3d at 99 (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). As this Court explained in *Winkles v. State*, “an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.” 21 So. 3d 19, 26 (Fla. 2009). *See also Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004).

When a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, the defendant is “required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel’s failure to call, interview, or present the witnesses who would have testified prejudiced the case.” *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004), *cited in Bryant v. State/Crosby*, 901 So. 2d 810, 821-22 (Fla. 2005) (concluding that a 3.851 claim of ineffective assistance was legally insufficient where the substance of the testimony was not described in the motion and the motion did not allege the specific facts to which the witness would testify). Stating that a witness could testify about a subject, without more, is insufficient to require an evidentiary hearing. *Franqui*, 59 So. 3d at 101.

When the postconviction court rules after holding an evidentiary hearing, this Court “review[s] the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence.” *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). Appellate courts do not “reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses.” *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009) (quoting *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007)).

A. RULE GOVERNING FAILURE TO INVESTIGATE AND PRESENT MITIGATION CLAIMS

As stated in *Robinson v. State*, 95 So. 3d 171, 178 (Fla. 2012), in order to

prevail on an ineffective assistance of counsel claim on this ground, Pham must first show “that counsel's ineffectiveness deprived the defendant of a reliable penalty phase proceeding.” (quoting *Henry v. State*, 937 So. 2d 563, 569 (Fla. 2006)); *Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000); *Coleman v. State*, 64 So. 3d 1210, 1218 (Fla. 2011). Second, he must demonstrate prejudice. He has shown neither.

B. TRIAL COURT’S ORDER DENYING POST-CONVICTION RELIEF

After an evidentiary hearing, the trial court made the following findings of fact and conclusions of law with regard to Pham’s claim regarding failure to investigate and present mitigation:

In claim nine, Pham 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;
- 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;¹⁰

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.

¹⁰ Here, the trial court acknowledges that there is a factual discrepancy, stating in footnote 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." (ROA, V11, R2069).

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.**

(ROA, V11, R2068-2069).

As to Claim 10, the trial court found:

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 repolied 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.

(V11, R2060-2073).

These findings are supported by competent, substantial evidence. As in *Clark v. State*, 35 So.3d 880, 890 -891 (Fla. 2010), this is not a case where the trial court did not consider mitigation evidence present in the record. The record establishes that trial counsel presented the mitigating evidence at the *Spencer* hearing, so Pham was accorded the benefit of the sum of the mitigation produced at the evidentiary hearing, during his penalty phase. Therefore, there can be no likelihood of a life sentence in this 10-2 decision.

MERITS—ARGUMENT SUPPORTING THE TRIAL COURT’S FINDINGS THAT COUNSEL WAS NOT INEFFECTIVE

Counsel was not ineffective. Pham has shown neither deficient performance nor prejudice. Although the trial court did not make express findings on the deficiency element, the record reflects that counsel conducted a reasonable investigation.

Investigation notes show various requests into researching family members, records, and the information relating to Vietnamese refugees, and the “boat

people” specifically. This led to trial counsel becoming aware of, and hiring Foshee. Foshee testified as to the chaos in Vietnam around the time of the Vietnam War, the experiences of the Vietnamese in the refugee camps and the difficulty assimilating into American culture.

Trial counsel then showed the CBC documentary film highlighting the experiences of the “boat people,” of which Pham was a part. This video illustrated the hardships undergone by Pham and other refugees from Vietnam during that time for the jury.

Defense counsel called Pham’s sister, Thuynga Pham, Pham’s niece, Quincy Nguyen, Pham’s former boss, Chanh Nguyen, Pham’s brother-in-law, Xuan Nguyen, Pham’s former employer, Tom Diamond, Detective Bill Nuzzi, Joanie Wimer, Thuog Foshee, and Dr. Deborah Day. Defense counsel then tied those traumatic childhood experiences testified to by Thuynga, Xuan, and Foshee back to Pham’s mental state at the time of the murder through mental health expert testimony.

Defense counsel hired Day to testify, but Pham was also administered competency evaluations by psychiatrists Danziger and Ballentine. Both of these doctor’s reports were reviewed and testified to by Day as well. Day was provided reports of these other doctors, as well as Pham’s background information. There is an indication as well, as pointed out in the trial court’s order denying

postconviction relief, that the experts did have the benefit of documents not specifically obtained by defense counsel, such as the Illinois DCF records when Reibsame notes, “...The Illinois mental health professionals would have recognized them as well.” (DAR, V18, R129; V11, R2066). Regardless, Day had sufficient information to make a complete diagnosis of Pham, and the additional records produced at the evidentiary hearing did not make Pham’s case more mitigating, or his mental health picture significantly different than what Day testified to.

Day’s testimony established both statutory mental health mitigators, as well as a suspected diagnosis of PTSD, Bipolar Disorder, and Personality Disorder NOS, which she stated directly led to the crime.

Reibsame evaluated the defendant for the State, and then defense counsel also hired Dr. Jacqueline Olander, a neuropsychologist. (DAR, V18, R15-34). Pham was evaluated before the *Spencer* hearing by no less than five mental health professionals.

Pham’s sister Thuynga was the best witness to testify to Pham’s background mitigation as she was the only family member in recent contact with Pham. In addition, Thuynga was the sister who experienced the boat trip and the refugee camp with Pham. Thuynga recounted Pham’s background, family life, and the harrowing story of their escape from Vietnam. She testified to their time in a

refugee boat in the South China Sea and their experiences in the Malaysian refugee camp. She also testified about coming to America and living in an orphanage alongside Pham. Thuynga also recounted how Pham eventually came to live with her and her husband. No other family member could give a more complete testimony as to Pham's mitigation than Thuynga, and anything they could provide would have been cumulative to her testimony. The investigator's logs show that, in fact, mitigation investigations into Pham's family and background were done, though the investigations were not active until Pham was released from the State Hospital and the case was returned to the trial docket.

Pham was alternatively, quiet and withdrawn or angry and belligerent, and did little to assist in trial counsel's mitigation investigation. Trial counsel testified at the evidentiary hearing that there was an indication that had they pursued additional members of Pham's family, they would lose the cooperation of his sister Thuynga, who was crucial to the case.

Pham relies on cases in which counsel declined to present a mitigation case to say that Pham's defense counsel was deficient. (*IB* at 63). For example, in *Ragsdale v. State*, 798 So. 2d 713, 716 (Fla. 2001), trial counsel put on only one witness, who provided minimal evidence in mitigation, and yet, at the 3.850 evidentiary hearing five siblings as to horrific abuse in Ragsdale's childhood environment. The information that was produced postconviction was new,

shocking, and provided a plethora of new mitigation evidence. *Stevens v. State*, 552 So. 2d 1082 (Fla. 1989) is another case wherein deficiency was found based on defense counsel's almost total lack of preparation for the penalty phase because he believed the defendant's alibi defense.

Walker v. State, (properly cited at 88 So. 3d 128, 138 (Fla. 2012)) is equally inapplicable in an analysis of deficiency for failure to investigate in this case. In *Walker*, defense counsel's investigation into background consisted of five phone conversations with Walker's mother and sister and by talking to some mostly unidentified "local people." Defense counsel never sought any records and he did not seek background information from any other immediate or extended family members prior to trial, even though a cousin was available to offer new mitigation testimony as to Walker's background. Defense counsel also presented two experts who only testified generally that those with bipolar disorder tend to "self-medicate" with drugs, but did not tie that testimony back to the defendant or the role it might play in the murder. Likewise, *Robinson v. State*, 95 So. 3d 171, 179 (Fla. 2012) is inapplicable because the crux of the deficiency in that case, is the discovery of new mitigating evidence that was ignored or failed to be discovered, at the evidentiary hearing. In *Robinson*, counsel was deficient because by failing to continue his investigation in the defendant's background he failed to discover that defendant's father often threatened to kill the entire family; defendant's father and

at least two of his brothers were drug dealers; his father glorified drug dealing in front of his children; the defendant's family made the children fight each other; the defendant used alcohol and drugs; the defendant was sent to a group home where there was ongoing physical and sexual abuse; and the defendant was beaten by his father with two-by-fours, sticks, extension cords, and his fists.

These cases are not relevant because, here, trial counsel presented voluminous mitigation evidence, and everything “discovered” at the evidentiary hearing was cumulative or less mitigating than that which the jury heard at the penalty phase.

Moreover, in this case, Pham’s own lack of cooperation undermines his allegations of ineffective assistance of counsel for failing to investigate additional mitigating evidence. *See Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005) (counsel was not ineffective when the defendant refused to cooperate with counsel and refused to offer information that would have helped in the presentence investigation); *see also Cherry v. State*, 781 So. 2d 1040 (Fla. 2000); *Rose v. State*, 617 So. 2d 291 (Fla. 1993). As the United States Supreme Court noted in *Strickland*, “[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.” *Strickland*, 466 U.S. at 691.

In the instant case, defense counsel's investigation was limited by Pham’s lack

of cooperation. For example, when Day attempted to evaluate Pham in 2006, he was despondent, and unable to communicate with her. (DAR, V13, R301). Pham would not make eye contact with her and their conversation was brief. (DAR, V13, R301). Day was not able to ascertain any background information from Pham until her third visit to him. (DAR, V13, 304). Again, in January 2007, Appellant was in a highly manic state and unable to communicate with Day. (DAR, V13, R307). Pham had stopped communicating with Danzinger. (DAR, V13, R309). Riebsame attempted to administer a competency examination to Pham in July 2007. (DAR, V13, R380-81, 383). Pham was belligerent and uncooperative. (DAR, V13, R384-85). After fifteen minutes, Pham “covered his head with his sheets, rolled over in the cot, and the evaluation, per se, was finished.” (DAR, V13, R385). Riebsame reported to the court that Pham appeared competent but suggested hospitalization at the State psychiatric facility. (DAR, V13, R385, 441). Pham was hospitalized from September 7, 2007, to October 30, 2007, when it was determined he was competent. (V13, R387, 442). In contrast, both Dr. McClaren, the State’s mental health expert in post conviction, and Drs. Lee and Abueg, collateral counsel’s mental health experts, testified Pham was cooperative.

The background investigation in this case was comparable to the mitigation preparation found constitutionally adequate in *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), where the United States Supreme Court observed:

Despite all the mitigating evidence the defense did present, Van Hook and the Court of Appeals fault his counsel for failing to find more. What his counsel did discover, the argument goes, gave them “reason to suspect that much worse details existed,” and that suspicion should have prompted them to interview other family members-his stepsister, two uncles, and two aunts-as well as a psychiatrist who once treated his mother, all of whom “could have helped his counsel narrate the true story of Van Hook's childhood experiences.” 560 F.3d, at 528. **But there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties.** The ABA Standards prevailing at the time called for Van Hook's counsel to cover several broad categories of mitigating evidence, see 1 ABA Standards 4-4.1, comment., at 4-55, which they did. **And given all the evidence they unearthed from those closest to Van Hook's upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents.** This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, *cf. Wiggins*, 539 U.S., at 525, 123 S.Ct. 2527, or would have been apparent from documents any reasonable attorney would have obtained, *cf. Rompilla v. Beard*, 545 U.S. 374, 389-393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). It is instead a case, like *Strickland* itself, in which defense counsel's “decision not to seek more” mitigating evidence from the defendant's background “than was already in hand” fell “well within the range of professionally reasonable judgments.” 466 U.S., at 699, 104 S.Ct. 2052.

Van Hook, 130 S.Ct. at 18-19 (emphasis added; footnote omitted).

As in *Van Hook*, the investigation into mitigation in Pham's case was constitutionally sound. As a result, the jury was well aware that Pham had been slower than his siblings as a child. They were aware he suffered a traumatic upbringing in war-torn Vietnam, had spent time in a prison camp at nine years old, and had been forced to leave his family and his home with his sister Thuynga at

only nine years old. They were aware he had been forced to make a dangerous boat trip without adequate food, water, or hygiene facilities. The jury was also aware Pham spent two years in a Malaysian refugee camp before coming to America to live in an orphanage in Illinois. They knew Pham had had difficulty assimilating to American culture. The jury also knew Pham had been separated from his sister until he came to live with her at eighteen years old. Most importantly, the jury was also well aware of Pham's mental characteristics and disorders from the testimony of Drs. Day and Riebsame.¹¹

PREJUDICE

Even if trial counsel was deficient, Pham has not demonstrated prejudice. To establish prejudice, a defendant must prove that because of counsel's deficient performance, he was deprived of a fair trial with a reliable result. *Bradley v. State/McNeil*, 33 So. 3d 664, 672 (Fla. 2010) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). The prejudice requirement is satisfied only if 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.” *Strickland*, 466 U.S. at 694,

¹¹ Drs. Day and Reibsame also considered the evaluations of Drs. Danziger and Ballentine.

104 S.Ct. 2052. Mere speculation that counsel's error affected the outcome of the proceeding is insufficient. *Id.* at 693, 104 S.Ct. 2052.

Moreover, this case is still heavily aggravated. The jury recommendation was 10 to 2 in favor of death. In aggravation, the court found the following: (1) Previously convicted of another capital felony or of a felony involving the use or threat of violence to the person-given **great weight**; (2) 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, any: 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-given **moderate weight**; (3) Capital felony was especially heinous, atrocious, or cruel-given **great weight**; (4) Capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification-no evidence of any moral or legal justification was presented and argued. (DAR, V3, R558-562).

The following statutory or non-statutory mitigating circumstances were considered: (1) Capital felony was committed while Defendant was under the influence of extreme mental or emotional disturbance-the court did not find

“extreme” mental or emotional disturbance- not proven as a statutory mitigator, but given **moderate weight as a non-statutory mitigator**; (2) Capacity of Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired-not proven as a statutory mitigator, but given **moderate weight as a non-statutory mitigator**; (3) Existence of any other factor in Defendant’s background-given **great weight**; (4) Defendant had stable employment history-given **some weight**; (5) Defendant was a good father and caring husband-not established; (6) Defendant cared for his sister’s children for two weeks while their parents recuperated from a car accident-not a mitigating circumstance. (DAR, V3, R563-567).

The court gave “great weight” to the “existence of any other factor in Defendant’s background,” including specifically, how his traumatic childhood negatively impacted his mental and emotional development, so Pham could not have been accorded any more mitigation to his traumatic past than he already was. Any additional information going to the social climate of Vietnam in the 1970’s, the harrowing boat escape, the refugee camp, his difficulty acclimating to American society, and his difficulties raising his family in a less strict culture, all would have been cumulative, and could not have changed the outcome of his sentencing proceeding. Moreover, his mental mitigation was already established in the penalty phase and at the *Spencer* hearing. While the experts testifying at the

evidentiary hearing may have had a more cooperative Pham, and thus, a more complete report, that certainly does not mean Pham's penalty phase was deficient. Trial counsel was entitled to rely on the opinions given by their qualified experts, and the same basic information and diagnosis were already accorded moderate weight, so again, there is no possibility, let alone probability of a life sentence.

The mitigation presented at the evidentiary hearing was not new; in fact, everything that was testified to at the evidentiary hearing was already established during the penalty phase. For example, Pham's family all testified to the same conditions of his birth, upbringing, and conditions that his sister had in the penalty phase. The only person who could describe the escape attempt from Vietnam was his sister, Thuy, who survived the escape with him and who testified at the penalty phase. The evidentiary hearing testimony was not only cumulative to the evidence at trial, but it actually made a less compelling case for mitigation. For example, the jury heard mitigation that included the boat escape lasting two weeks, during which time there was not adequate food, water, or hygiene facilities (DAR,V7, R89), while the evidence at the evidentiary hearing established that the refugees were on the boat approximately 3 days, and received nourishment and assistance from an offshore oil rig. So, to the extent that anything was new or further elaborated upon, it is still not persuasive. Nothing testified to at the evidentiary hearing would have impacted the sentencing decision such that Pham would have

been granted a life sentence. Trial counsel is not ineffective for failing to present cumulative evidence. *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007); *Gudinas v. State*, 816 So. 2d 1095, 1106 (Fla. 2002); *Sweet v. State*, 810 So. 2d 854, 863-64 (Fla. 2002).

Pham was not constitutionally entitled to perfect or error-free counsel, only to reasonably effective counsel. *Waterhouse v. State*, 522 So. 2d 341, 343 (Fla. 1988).

The evidentiary hearing below reflected the best penalty phase investigation that could have been conducted, and not simply what was constitutionally compelled. To say that defense counsel was deficient for not assembling a “dream team” of hand-picked experts from all over the country; employing unlimited resources to obtain travel Visas; securing family members from the far reaches of the globe; and employing every individual that has ever seen the defendant, even if the last relevant contact from that person is over 20 years ago; is simply not a workable standard. Such a standard ignores the practical reality that trial attorneys are necessarily limited by time and resources, which does not render their performance unreasonable.

The testimony presented at the evidentiary hearing presented little new information, and at times, contradicted, or even presented a less-mitigating picture

than that which the jury heard¹². Even if trial counsel had hired the experts who appeared at the evidentiary hearing rather than the experts that appeared for trial; and even if trial counsel could have secured the witnesses from Vietnam, and France, respectively, it would not have resulted in a life sentence recommendation.

Since trial counsel mounted a reasonable investigation into Pham's background and mitigating factors, and because there is no reasonable probability of a life sentence from the additional witnesses that were presented at the evidentiary hearing, Pham has failed to meet either prong of *Strickland*; and therefore, failed to prove his ineffectiveness claim.

ARGUMENT II: THE COURT DID NOT ERR IN DENYING RELIEF ON GUILT PHASE CLAIM 7, AND PENALTY PHASE CLAIM 16 AFTER CONDUCTING AN EVIDENTIARY HEARING; THE TRIAL COURT'S FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

A. CLAIM 7: IMPEACHMENT

Pham asserts that his counsel was ineffective for failing to impeach attempted murder victim Christopher Huggins with regard to 9 felony convictions and 7

¹² For example, the jury heard testimony from Dr. Jacquelyn Olander, a psychologist specializing in neuropsychology, that Pham suffered from "organic brain damage resulting from dehydration suffered during his 4-6 week boat trip from Vietnam to Malaysia at the age of ten;" while the testimony presented at the 3.851 hearing was that the boat journey lasted approximately 3-4 days. Furthermore, all of the experts at the 3.851 hearing agreed that there was no evidence of Pham having suffered from organic brain damage.

misdemeanor convictions involving crimes of dishonesty. Pham argues that, had the jury known about Higgins's worthless check, forged check, and petit theft charges, they would have accorded less credibility to his eyewitness testimony at trial. The trial court correctly disagreed. When the postconviction court rules after holding an evidentiary hearing, this Court "review[s] the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). Appellate courts do not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009) (quoting *Brown v. State*, 959 So. 2d 146, 149 (Fla.2007)).

The trial court found deficiency, but as to prejudice, reasoned:

... 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).

(DAR, V11, R2068).

In *Lamarca v. State*, 931 So. 2d 838, 851 (Fla. 2006), this Court held that "The fact that defense counsel failed to elicit an additional, lesser prior conviction does

not require a finding of ineffective assistance. *See Mansfield v. State*, 911 So. 2d 1160, 1174 (Fla. 2005) (rejecting ineffectiveness claim based on failure to elicit federal charges pending against State's witness because the appellant failed to show how the outcome would have been different if the witness's full record had been known). Similarly, Higgins's criminal history is exclusively one of property crimes, the majority of which are worthless check-type charges. Impeaching Higgins would not have lent credence to Pham's defense, or version of events; which was directly debunked by the physical evidence in the case. Moreover, Higgins's version of events aligned with Lana's, the first responders, and the physical evidence in the case. While a witness's credibility is always at issue, there is absolutely no reasonable probability of a life sentence in this case, had trial counsel impeached Huggins, an attempted murder victim, with his prior record.

Kormondy v. State, 983 So. 2d 418, 432 (Fla. 2007) is similar to the case at bar. In *Kormondy*, trial counsel had the witness's criminal record showing a felony conviction, but failed to impeach the witness. This Court found that because trial counsel used other lines of questioning to impeach the witness, there was no prejudice demonstrated. Here, defense counsel mounted a vigorous cross-examination of Higgins. (DAR, V8, R954-979). Trial counsel Figgatt attempted to discredit Higgins' testimony as to his actions upon seeing Amy on the floor, questioning, "[a]nd its your testimony that what you did in response to seeing that

was you walking into the house and set your motorcycle helmet down?” (DAR, V8, R962). Figgatt also attempted to discredit Higgins’ actions against Pham, to make him look like the aggressor, questioning “[y]ou indicated to us you made an effort to place that knife at his neck...to use the weapon against him...” (DAR, V8, R963). Figgatt also attempted, through cross-examination of Higgins, to color his testimony regarding the struggle as incredible, questioning, “...then meanwhile he was going around and looking for something with his right hand?” (DAR, V8, R965). He further attempted to cast doubt on Higgins testimony by asking, “Okay. But do you recall telling Investigator Nuzzi that much of it was unclear to you...you don’t recall that...and do you recall telling Investigator Nuzzi that you weren’t real good on all the details?” (DAR, V8, R966). Trial counsel also laid the predicate to impeach Higgins as to whether he had told Lana to stab Pham with Pham’s knife. (DAR, V8, R965-966). It is clear from trial counsel Caudill’s testimony at the evidentiary hearing and the transcript of the guilt phase cross examination of Higgins that trial counsel made a sound trial strategy to impeach Higgins on the details of his testimony, and not on the relatively minor offenses in his background.

Appellant asserts “[t]his failure deprived the jury of the relevant and damning knowledge that painted Higgins as a dishonest person and a multi-convicted felon.” (*IB* at 94). Even if that was case, it would make no difference to the

outcome of the trial. Higgins was a victim, as well as the significant other of the murder victim. Higgins's testimony was corroborated by the physical evidence in the case, and the other eyewitness accounts. The trial court made a credibility determination that Pham "testified to a version of events that was substantially at odds with the other testimony and physical evidence and was, consequently, not credible." (DAR, V11, R2065). The court cites the discrepancies in Pham's testimony in the following passage:

He [Pham] 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.

(DAR, V11, R2065).

There was independent corroboration for all of Higgins' testimony. For example, Higgins's voice can be heard on the 911 call that was entered into evidence asking responders to "help" and to "hurry," law enforcement officers arrived to find Pham still engaged in a struggle with Higgins. Lana, who Pham had bound, also testified that Pham was the one who attacked her mother and not

Higgins. Pham confessed that he had been the one to tie Lana up, and that Higgins was not at the apartment. Pham's version of events included coming to the apartment to bring Amy money and her mail, and yet he left those items in his car. The physical evidence corroborated Higgins's and Lana's retelling of events and discredited Pham's version. The question regarding Higgins's convictions would not have changed the effect of his testimony on the jury, or made Pham's version of events more credible such that he would have received a life sentence. As such, there is no sufficient probability to undermine confidence in the outcome of the verdict, and the court did not err in denying this claim.

B. CLAIM 16: VICTIM IMPACT STATEMENT

The trial court was correct in summarily denying the claim that counsel was ineffective for failing to exclude Higgins' victim impact testimony. The trial court pointed to the correct standard for victim impact statements in denying evidentiary development on this claim by citing *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991).

Here, Pham's claims of ineffectiveness based on Higgins's victim impact statement was conclusively refuted by the record, and did not warrant evidentiary development.

Higgins's victim impact statement was not objectionable, and read as follows:

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.

(DAR, V12, R75).

Pham claims that defense counsel's failure to object to Higgins's statement amounts to ineffective assistance of counsel because the statement was "irrelevant" and "prejudicial." (*IB* at 95). However, "[c]ounsel cannot be deemed ineffective for failing to make a meritless objection." *Schoenwetter v. State*, 46 So. 3d 535, 546 (Fla. 2010) (quoting *Hitchcock v. State*, 991 So. 2d 337, 361 (Fla. 2008)).

Section 921.141(7), Florida Statutes (2006), provides that in a capital case, once the prosecution has provided evidence of one or more aggravating factors, the prosecution may present victim impact evidence and that:

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.

This Court explains the purpose of victim impact statements in *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008), stating, "[v]ictim impact evidence is designed to show 'each victim's 'uniqueness as an individual human being,

whatever the jury might think the loss to the community resulting from his death might be,”” quoting *Payne v. Tennessee*, 111 S.Ct. 2597 (1991). A loss to the family is a loss to both the community of the family and to the larger community outside the family. *Bonifay v. State*, 680 So. 2d 413, 420 (Fla. 1996). A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. *Kalisz v. State*, 124 So. 3d 185, 211 (Fla. 2013) *cert. denied*, 134 S.Ct. 1547 (2014); *Braddy v. State*, 111 So. 3d 810, 857 (Fla. 2012); *Deparvine v. State*, 995 So. 2d at 378; *Schoenwetter v. State*, 931 So. 2d 857, 869 (Fla. 2006).

In *Kalisz*, this Court further articulated what factors to look for in evaluating whether or not a victim impact statement complies with the guidelines articulated in *Payne* when it stated:

The statements [admitted in *Kalisz*] were not overly emotional and did not mention [Defendant]. The daughters did not implore the jury to impose the death penalty or to seek revenge on [Defendant] for their mother's death. Consequently, because the statements complied with the guidelines articulated in *Payne* and under Florida law, we affirm the trial court's decision to allow introduction of the victim impact statements.

This case is similar to *Jackson v. State*, 127 So. 3d 447, 473 (Fla. 2013), wherein this Court held that “[the victim’s] excerpted statement does not fall within one of the proscribed categories of victim impact evidence delineated in section 921.141(7). These proscribed categories are characterizations and opinions concerning (1) the crime, (2) the defendant, or (3) the appropriate sentence. [The

victim's] statement addresses the pain and grief produced by the death. Moreover, we conclude that [the victim's] sixty-four-word statement constitutes permissible victim impact evidence because it was directly related to the effect of [the decedent's] death on [the victim]." *See also Abdool v. State*, 53 So. 3d 208 (Fla. 2010), *cert. denied*, — U.S. —, 132 S.Ct. 149, 181 L.Ed.2d 66 (2011) (holding that the admission of a victim impact statement was not in error because the statement was limited to the impact the victim's death had on the speaker and his son, and because it was directly related to the impact of the victim's death on her family.)

Here, Higgins's statement was brief, uninflamatory, did not not the focus of the penalty phase, contained no testimony from the proscribed categories, and made no mention of the crime, the defendant, or the appropriate sentence. Rather, Higgins's statement addressed the pain and grief from Amy's death, and the effect of her death on his life. The statement was entirely appropriate for the express purpose of victim impact testimony. There was nothing objectionable or improper in Higgins's statement.

Pham's defense counsel was not deficient for failing to object to Higgins's statement because the statement was proper. Moreover, even if counsel had objected and that objection was meritorious, the preclusion of the statement would not have led to a reasonable probability of a life sentence, so the admission of the

statement did not prejudice Pham's case. Because Pham failed to meet either prong of *Strickland* necessary to find ineffectiveness, this Court should affirm the decision of the post conviction court to deny relief on this claim.

ARGUMENT III: THE COURT WAS CORRECT IN DENYING A HEARING ON CLAIMS 3 AND 14 BECAUSE THERE WAS NO LEGAL BASIS TO EXCLUDE BULIC'S TESTIMONY; THE CLAIMS WERE MERITLESS.

Pham asserts that trial counsel was ineffective for failing to object to Dr. Bulic's testimony based on a "conduit to hearsay" theory and waiver of Pham's right to confrontation theory under *Crawford v. Washington*.¹³ Bulic testified in Parsons's stead in both phases.

In summarily denying claims 3 and 14, the court stated:

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).

The legal standard for a trial court to consider when summarily denying 3.851 claims is discussed *supra*, on page 58-59. The threshold question in a

¹³ *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

Confrontation Clause claim is whether the challenged statement is testimonial in nature, and if it is not, then the Confrontation Clause does not apply. *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007).

Procedurally, this claim is insufficiently pled. Pham broadly claims that trial counsel was ineffective for failing to object to Bulic's testimony, but fails to identify the specific statements Bulic made which would be objectionable, stating only; "Bulic [sic] testimony as to the contents of Parsons' files and deposition constituted inadmissible testimonial hearsay." (*IB* at 97). Therefore, that portion of Pham's argument is insufficiently argued and should be denied.

Moreover, the cases upon which Pham relies are not applicable to the case at bar. In both *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314, and *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), the Supreme Court ruled that forensic reports, which were introduced for the purpose of proving the truth of what they asserted, were hearsay and subject to the Confrontation Clause.

Here, in contrast, the question presented is the constitutionality of allowing an expert witness, Dr. Bulic, to use and discuss Dr. Parsons's report in formulating his own opinion when Dr. Parsons's report is not, itself, admitted as evidence. This is controlled, not by *Bullcoming*, but by *Williams v. Illinois*, 132 S. Ct. 2221, 2223-2224, 183 L. Ed. 2d 89 (2012), where the Supreme Court determined the use at

trial of a DNA report prepared by a laboratory “bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.” (citing *Bryant*). As stated in *Williams*:

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. A long tradition in American courts permits an expert to testify in the form of a “hypothetical question,” where the expert assumes the truth of factual predicates and then offers testimony based on those assumptions. See *Forsyth v. Doolittle*, 120 U.S. 73, 77, 7 S.Ct. 408, 30 L.Ed. 586. Modern evidence rules dispense with the need for hypothetical questions and permit an expert to base an opinion on facts “made known to the expert at or before the hearing,” though such reliance does not constitute admissible evidence of the underlying information.

The Court in *Williams* further discusses how this type of evidence is distinguishable from the type concerned in *Bullcoming* and *Melendez-Diaz*.

The forensic reports in *Melendez-Diaz* and *Bullcoming* ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving a particular criminal defendant's guilt. But the Cellmark report's primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time. Nor could anyone at Cellmark possibly know that the profile would inculcate petitioner. There was thus no “prospect of fabrication” and no incentive to produce anything other than a scientifically sound and reliable profile. *Bryant, supra*, at —, —, 131 S.Ct., at —, —. Lab technicians producing a DNA profile generally have no way of knowing whether it will turn out to be incriminating, exonerating, or both.

Here, it is the same. Parsons performed an autopsy on the victim. He documented his findings in a report. Bulic reviewed that report and testified as to his own, independent, expert opinion. The body diagram was admitted at trial,

while the autopsy report was not. Bulic was cross-examined at trial. Bulic's testimony did not violate the Confrontation Clause. Because, as stated in *Williams*:

[t]he purpose of disclosing the facts on which the expert relied is ... to show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts.”

Id at 2240.

The autopsy report was not prepared for the primary purpose of accusing Pham, but rather, for determining Amy's cause and manner of death. In fact, Bulic states “[a]n autopsy... is a medical procedure ... in order to determine the cause and manner of death.” (V9, R1163). In identifying the primary purpose of an out-of-court statement, this Court applies an objective test. *Bryant*, 131 S.Ct., at 1156. Or rather, what primary purpose a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances. *Id* at 2243.

The autopsy report in this case does not fall within the categories of testimonial evidence described in *Crawford*. There is ample authority for this assertion to be found in Federal caselaw. See *Hensley v. Roden*, 2014 WL 2791868 (1st Cir. June 20, 2014); *United States v. James*, 712 F.3d 79, 99 (2nd Cir. 2013) (deciding that the autopsy report at issue “was not testimonial because it was not prepared primarily to create a record for use at a criminal trial”), *cert. denied*, — U.S. —, 134 S.Ct. 2660, —L.Ed.2d —, 2014 WL 2178370 (May 27, 2014);

People v. Dungo, 55 Cal.4th 608, 147 Cal.Rptr.3d 527, 286 P.3d 442, 450 (2012) (finding that even though California's statutory scheme required the reporting of suspicious autopsy findings to law enforcement, an autopsy serves several purposes and the “autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial”); *Banmah v. State*, 87 So. 3d 101, 103 (Fla. 3rd DCA 2012) (concluding that autopsy reports are not testimonial because they are made pursuant to a statutory duty and not, in all instances, used in prosecutions); *People v. Cortez*, 931 N.E.2d 751, 756 (2010) (finding that *Melendez–Diaz* did not upset the court's prior holdings that autopsy reports are business records without Crawford implications).

As this Court reasoned in *Smith v. State*, 28 So. 3d 838, 854-855 (Fla. 2009) (where there was no error in receiving the testimony at trial of an FBI analyst who did not, herself, perform the work contained in the report she testified about):

At least two federal courts have held that the Sixth Amendment Confrontation Clause does not require an expert to have performed the actual laboratory work to permissibly testify with regard to conclusions that he or she has drawn from those results. In *United States v. Moon*, 512 F.3d 359, 362 (7th. Cir.), *cert. denied*, 555 U.S. 812, 129 S.Ct. 39, 172 L.Ed.2d 19, and *cert. denied*, 555 U.S. 812, 129 S.Ct. 40, 172 L.Ed.2d 19 (2008), the Seventh Circuit Court of Appeals concluded that “the Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial.” (Emphasis supplied.) Similarly, the Fourth Circuit Court of Appeals held that a Confrontation Clause violation did not occur where the chief toxicologist of a lab reviewed the data from tests conducted by technicians at the lab and issued a report based upon that data where

the toxicologist testified at trial with regard to his conclusions. See *United States v. Washington*, 498 F.3d 225, 228 (4th Cir. 2007) (“While Dr. Levine did not see the blood sample and did not conduct any of the tests himself, three lab technicians operating under his protocols and supervision conducted the tests and then presented the raw data from the tests to him.”)

We find the rationale followed by the federal courts in *Moon* and *Washington* to be persuasive with regard to the challenge raised by Smith. Accordingly, even though the FBI team supervisor did not actually perform the testing to extract DNA samples from the shirt and from Smith, her testimony did not implicate the Confrontation Clause because she, as supervisor, formulated her own conclusions from the raw data produced by the biologists under her supervision and control on her team, and she was subject to cross-examination with regard to those conclusions.

Similarly, in *Schoenwetter v. State*, 931 So. 2d 857, 870-871 (Fla. 2006), this Court held that the trial court did not abuse its discretion in allowing Dr. Qaiser to testify about the autopsies performed by Dr. Vasallo, where Dr. Vasallo was unavailable to testify, and Dr. Qaiser was a qualified expert who had reviewed the autopsy reports, photos, and notes and had spoken with Dr. Vasallo.

In *Geralds v. State*, 674 So. 2d 96 (Fla. 1996), this Court held that that a pathologist could testify as to manner and cause of a murder victim's death, when that pathologist based his opinion on materials prepared by another pathologist who actually performed the autopsy. Likewise, in *Capehart v. State*, 583 So. 2d 1009 (Fla. 1991), this Court held that a medical examiner could testify by relying on facts not in evidence where the expert formed her opinion based upon the autopsy report done by another pathologist, because the information was of a type

reasonably relied upon by medical examiners.

In this case, Bulic reviewed the medical examiner file, which included the photos, the body diagram, Parsons's deposition, and the autopsy report. Bulic was qualified to render an opinion as a medical doctor and forensic pathologist. He testified that he had performed more than six hundred autopsies, and currently performs them on a daily basis as an associate medical examiner. Bulic formed his opinion on the manner and cause of death on the basis of his review of the documents created by Parsons. When the State asked 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." (DAR, V9, R1188). Trial counsel did not object to Bulic's qualifications as an expert, (though he was never formally tendered as an expert in this case,) but rather, made an objection as to his testimony relating to 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." (DAR, V10, R1189). It is clear counsel is strategically making objections, and strategic decisions made by counsel do not constitute ineffective assistance of counsel. *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000).

Pham's defense counsel was not deficient for failing to object to Bulic's testimony because it was not hearsay or violative of the Confrontation Clause, and

as the trial court correctly stated, counsel cannot be deficient for failing to make a meritless objection. *Johnston v. State*, 63 So. 3d 730, 737 (Fla. 2011).

Trial counsel stipulated to the substitution of Bulic for Parsons from the bench conference that appears in the record at (DAR, V9, R1172), Stone states “... I’m not sure what we agreed to.” (DAR, V9, R1173). While it is completely appropriate for Bulic to testify as to his independent opinion as a qualified expert, having reviewed Parsons’s report, trial counsel Caudill objects to keep Bulic from doing just that. He states, “... I can’t tell whether that’s an opinion, that doesn’t sound like something Dr. Parsons wrote. It sounds like his own opinion.” (DAR, V9, R1172). It is clear trial counsel is listening intently to the testimony and is making objections when he deems appropriate, as pointed out by the trial court.

Moreover, even if there was error in trial counsel stipulating to or not objecting to Bulic testifying, Pham can demonstrate no prejudice. Assuming, *arguendo*, counsel had objected and that objection was meritorious, the preclusion of Bulic’s testimony would not have led to a reasonable probability that it contributed to Pham’s conviction or death sentence. The evidence presented by the State, even without Bulic’s autopsy testimony, was sufficient to find that Pham was guilty and to merit the death penalty. This evidence included Pham having been discovered by officers; in the deceased victim’s apartment, covered in the victim’s blood, still involved in a struggle with Higgins, the eyewitness testimony of Higgins and Lana,

Pham's voice on the 911 call, and a confession by Pham of binding Lana's hands and feet. Because Pham failed to meet either prong of *Strickland* necessary to find ineffectiveness, this Court should affirm the decision of the post conviction court to deny relief on this claim.

ARGUMENT IV: THE TRIAL COURT WAS CORRECT IN DENYING CLAIMS 8, 17, AND 19 CLAIMING CUMULATIVE ERROR.

Pham claims "[t]he sheer number and types of errors in Tai's guilt and/or penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards ..." (*IB* at 99).

However, when none of Pham's claims warrant relief, there is no cumulative error. 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). As this Court has held:

... [N]one of [the Defendant's] individual claims of ineffectiveness of counsel warrant relief. "Where, as here, the alleged errors urged for consideration in a cumulative error analysis 'are either meritless, procedurally barred, or do not meet the *Strickland* standard for ineffective assistance of counsel[,] ... the contention of cumulative error is similarly without merit.' " *Bradley v. State*, 33 So. 3d 664, 684 (Fla. 2010) (alteration in original) (quoting *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008)).

Butler v. State, 100 So. 3d 638, 668 (Fla. 2012), *cert. denied*, 133 S. Ct. 1726 (2013).

First, this claim is insufficiently pled because it contains only general averments to error rather than specific instances and facts. Alternatively, if this claim is considered sufficiently pled through incorporation of Pham's other claims, there is no basis for relief because there is no "error" or "sum of errors" to "cumulate." The success of this claim is contingent upon the Defendant succeeding on *several* of his individual claims. As such, the State will rely on the substantive responses provided to the specific claims. Nonetheless, the State anticipates that upon a thorough review of each of Pham's post-conviction claims, the cumulative error claim will necessarily be denied.

CONCLUSION

Based on the foregoing authority and arguments herein, the State respectfully requests this Honorable Court affirm the order of the circuit court and deny all relief.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Raheela Ahmed, Esq., by e-portal service on Raheela Ahmed, Maria Christine Perinetti, ahmed@ccmr.state.fl.us, perinetti@ccmr.state.fl.us and support@ccmr.state.fl.us, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this 4th day of September, 2014.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,
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/s/



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