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Case Number 108,2012

## IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY PLOOF,	)	
Defendant Below Appellant,	) ) Nc	o. 108, 2012
	)	
V.	) Cc	ourt BelowSuperior Court
	) of	f the State of Delaware
STATE OF DELAWARE,	) in	n and for New Castle County
	) II	No. 0111003002
Plaintiff Below	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

### APPELLANT'S OPENING BRIEF

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DATED: September 17, 2012

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## NATURE OF PROCEEDINGS

Gary Ploof has been sentenced to death for the alleged murder of his wife, Heidi Ploof. He is appealing the Superior Court's denial of relief under Rule 61 in an Opinion dated January 30, 2012. The prior case history is included in the Statement of Facts.

### SUMMARY OF THE ARGUMENT

- 1. The Superior Court erred in its finding that trial counsel rendered effective assistance of counsel in the pretrial and guilt-phase proceedings. Counsel failed to investigate or consult with experts necessary to rebut the State's forensic ballistics and toxicology evidence, they failed to rehabilitate jurors dismissed due to their beliefs about the death penalty and they filed to adequately address and adjudicate additional trial and pretrial issues. Appellate counsel were ineffective for failing to raise arguably meritorious issues on appeal.
- 2. The Superior Court erred in its finding that counsel's mitigation investigation was professionally reasonable and that Ploof was not prejudiced by the mitigating evidence as it was planned and presented by his trial attorneys. Ploof, 2012 Del. Super. LEXIS 58 at \*6 (Ex. 1). Trial counsel fell well short of their "obligation to conduct a thorough investigation of the defendant's background." Williams v. Taylor, 529 U.S. 362, 396 (2000) Because trial counsel had not done the "thorough investigation" that the Sixth Amendment requires in capital cases, counsel was not in a position to make "reasonable" tactical decisions about what penalty phase case to present. Further, the lack of investigation caused an ineffective and inadequate presentation in the penalty phase.

The evidentiary hearing revealed a significant amount of evidence establishing that Mr. Ploof was exposed to and was victimized by childhood trauma and abuse. Further, the record established that Mr. Ploof's father routinely sexually molested and assaulted many of the

- 33 foster children taken in by the Ploofs during Mr. Ploof's childhood and adolescence, while Mrs. Ploof refused to intervene. (The Ploof foster home was forcibly closed by New York State Authorities in 1984, when Mr. Ploof was 20.) Mr. Ploof also suffered and witnessed physical and emotional abuse by his mother against him, his disabled brother, and the foster girls. As such, Mr. Ploof was prejudiced and asks this Court to grant him a new penalty phase.
- 3. Under established federal and Delaware constitutional law, the postconviction court is obligated to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [postconviction] proceeding—in re-weighing it against the evidence in aggravation." Norcross v. State 36 A.3d 756, 771 (Del. 2010). The lower court committed error by failing to engage in the re-weighing process; as such, Mr. Ploof's constitutional rights have been violated.
- 4. The Superior Court erred in finding trial counsel's presentation during the penalty phase regarding Mr. Ploof's military career to have been effective.
- 5. The Superior Court erred in denying Mr. Ploof's other penalty phase claims, as set out in his Amended Motion for Postconviction Relief.
- 6. The Superior Court erred in denying Mr. Ploof's Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama, 511 U.S. 127 (1994), Witherspoon, and additional constitutional claims.

### STATEMENT OF THE CASE

### A. Procedural History

On November 5, 2001, Gary W. Ploof was arrested for the November 3, 2001, shooting death of his wife, Heidi Ploof. On January 7, 2002, Mr. Ploof was indicted on two charges: Murder in the First Degree in violation of 11 Del. C. § 636, and possession of firearm during the commission of a felony in violation of 11 Del. C. § 1447A.

John McDonald and Thomas D. Donovan of the Office of the Public Defender were originally appointed to represent Ploof. Sandra Dean of the Public Defender's Office replaced Mr. McDonald. Sheryl Rush-Milstead replaced Mr. Donovan. Ms. Dean and Ms. Rush-Milstead acted as counsel for Mr. Ploof from pre-trial proceedings through and including direct appeal. They were aided by Bernard J. O'Donnell during the direct appeal. The State was represented at trial by Deputy Attorneys General Robert O'Neill and Marie O'Connor Graham. The Honorable Kim E. Ayvazian and John Williams represented the State along with Mr. O'Neill and Mrs. O'Connor Graham during the appellate phase. Mr. Williams, Mr. O'Neill and Mrs. O'Connor Graham have been representing the State throughout the postconviction proceedings.

The Honorable Henry duPont Ridgely presided over the pre-trial and trial proceedings. The Honorable Robert B. Young presided over the postconviction proceedings. Voir dire commenced on May 27, 2003, and concluded on May 28, 2003. Trial was held from June 2, 2003 until June 16, 2003. The State's case lasted six and ½ days. The Defense case lasted about one and ½ days. On June 16, 2003, the jury found

Ploof guilty of Murder in the First Degree and of Possession of a Firearm During the Commission of a Felony.

The jury returned a verdict of death on June 19, 2003. A unanimous jury found the evidence showed beyond a reasonable doubt the aggravating factor that the murder was committed for pecuniary gain. See 11 Del. C. § 4209(e)(1)(o). The jury then unanimously found by preponderance of the evidence that the aggravating factors outweighed the mitigating factors. On August 22, 2003, the Court sentenced Ploof to death. On August 11, 2004, the Delaware Supreme Court affirmed Ploof's conviction and death sentence. Ploof v. State of Delaware, 856 A.2d 539 (Del. Supr. 2004).

On July 6, 2005, Mr. Ploof filed a pro se motion for post-conviction relief. He raised three issues for review. On February 17, 2006, the State filed its Answer to the Pro Se Motion for Post-Conviction Relief. Ronald Poliquin was appointed to represent Ploof throughout the post-conviction proceedings. On March 27, 2006, Mr. Poliquin filed an amendment to Ploof's pro se motion. Counsel's amended motion was eight pages in length. It raised the same three issues identified by Mr. Ploof and discussed them in summary fashion.

The undersigned, Kathryn Garrison, and James Liguori<sup>1</sup> filed a Motion to Amend Mr. Ploof's Motion for Postconviction Relief to include Claims Inadvertently Omitted, along with an Amended Motion for Postconviction Relief on June 6, 2008. A corrected Amended Motion for

<sup>&</sup>lt;sup>1</sup> Mr. Ploof was represented by a number of attorneys through the postconviction process. (See A-1320-1321 and A-0d001-0d023.)

Postconviction Relief was filed with the Court on June 9, 2008.<sup>2</sup> On June 21, 2008, counsel filed a Second Corrected Amended Motion for Postconviction Relief. All references to Mr. Ploof's Motion for Postconviction Relief shall be to the Second Corrected Amended Motion for Postconviction Relief unless otherwise noted.

The State filed an Answer to the Amended Motion for Postconviction Relief on July 31, 2008. Postconviction counsel filed a Supplement to the Amended Motion for Postconviction Relief on August 1, 2008, and the State filed an Answer to the Supplement to the Amended Motion on August 13, 2008. Mr. Ploof's Reply to the State's Answer to Defendant's Amended Motion for Postconviction Relief was filed on October 1, 2008.

A hearing on the Rule 61 Motion was held on October 27-28, 2010, November 1, November 3 and November 22, 2010. Ploof's Post Hearing Brief of Proposed Findings of Fact and Conclusions of Law was filed on July 18, 2011. The State's Answering Proposed Findings of Fact and Conclusions of Law was filed on August 25, 2011. Relief was denied on January 30, 2012. This appeal ensued.

### B. Statement of Facts-Guilt Phase

Heidi Ploof died of a gunshot wound to the head. She was found in the driver's seat of her car, slumped over the console, in the Walmart parking lot in Dover. The State's case focused on the allegation that Ploof shot his wife. The Defense argued that Heidi Ploof committed suicide and Mr. Ploof attempted to cover it up. Ploof

 $<sup>^{2}</sup>$  The only changes in the first Corrected Amended Motion were the addition of page numbers and the document was bound.

incorporates by reference the facts as set forth in the Lower Court's opinion affirming Mr. Ploof's convictions and penalty. See Ex. 1 at 2-5. Additional details will be included where necessary to a specific claim.

## C. Statement of Facts-Penalty Phase

Trial counsel presented only three witnesses at the penalty hearing. Keith Frye testified regarding Mr. Ploof's military service. Mr. Ploof's mother, Shirley Ploof, testified about the impact that Mr. Ploof's execution would have on the family. Dr. Abraham Mensch testified that Mr. Ploof did not exhibit a risk of future dangerousness in custody. Ex. 1 at 16.

# I. THE SUPERIOR COURT ERRED IN FINDING THAT TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE OF COUNSEL IN THE PRE-TRIAL AND GUILT PHASE PROCEEDINGS

### QUESTION PRESENTED

Whether the Superior Court erred in its finding that trial counsel rendered effective assistance of counsel in the pre-trial and guilt-phase proceedings. This issue was preserved through the filing of an Amended Motion for Postconviction Relief, a lengthy evidentiary hearing, and post-hearing briefing.

### SCOPE OF REVIEW

This Court reviews the Superior Court's decision on an application for post-conviction relief under Rule 61 for an abuse of discretion. Questions of law are reviewed de novo. Bailey v. State, 588 A.2d 1121, 1124 (Del. 1991).

The United States Supreme Court has interpreted the Sixth Amendment right to counsel to include the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). A defendant is entitled to relief if his counsel's performance was deficient, i.e. counsel's performance fell below an objective standard of reasonableness, and defendant was prejudiced thereby. Id. at 687-88.

### MERITS OF THE ARGUMENT

A. Trial Counsel were Ineffective for Failing to Investigate the Ballistics and Toxicology Issues or to Consult with a Ballistics, Toxicology or Forensic Pathologist Expert.

Effective lawyering in a capital case includes the duty to adequately investigate the defendant's case. Rompilla v. Beard, 545 U.S. 674, 387 (2004). Similarly, counsel have a duty to investigate possible methods for impeaching important prosecution witnesses. See Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003) ("Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel."); Reynoso v. Giurbino, 462 F.3d 1099 (9th Cir. 2006) ("if counsel's failure to investigate possible methods of impeachment is part of the explanation for counsel's impeachment strategy (or lack thereof), the failure to investigate may in itself constitute ineffective assistance of counsel."). Counsel also have a duty to secure the assistance of experts where appropriate for, inter alia, "preparation of the defense," "adequate understanding of the prosecution's case," or "rebuttal of any portion of the prosecution's case." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guideline"), Guideline 11.4.1 See also ABA Guideline 10.7 commentary at 80 ("With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.").

For the guilt phase of Mr. Ploof's trial, the State presented, or consulted with six experts<sup>3</sup>. Although, trial counsel considered consulting with experts, in the end they did not consult with or retain a single expert to aid in the preparation for the guilt phase of the trial. (See, e.g., A-508-511, 624-25, 1509-11.) In some instances, their failure to retain or consult with experts did not harm Mr. Ploof's case, as his testimony, and their suicide theory, was consistent with the expert's conclusions. Their failure, however, to consult with a forensic pathologist or a toxicologist did prejudice Mr. Ploof's case.

At trial, Dr. Judith Tobin, a State medical examiner, testified for the State that Heidi's cause of death was a gunshot wound to the head. She stated that the gunshot wound was not a contact wound, and that it came from six to seven inches away. (A-1442-1443, 1487.) Dr. Tobin also testified that it was unlikely for a woman to have committed suicide with a gun. She stated that out of all of the many autopsies she had done, she had seen only 5 women commit suicide using a firearm. (A-1482-1483, 1495.) She then concluded that "if a woman is found with a gunshot wound, consider it homicide until proven otherwise." In rebuttal, she testified that in her "honest opinion," she felt Heidi Ploof's death was definitely not a suicide. (A-1488.) During closing arguments, the Deputy Attorney General repeated Dr.

The State's expert witnesses were Dr. Judith Tobin, a medical examiner (A-1438-1506), Torin Zach Suber, a firearms examiner (see Trial Tr. E at 19-92), Rodney Hegman, a State Police fingerprint examiner (see Trial Tr. E at 119-135), Georgia Carter, a questioned document examiner, (see Trial Tr. E at 144-162), Daniel Katz, a DNA analyst, and Rebecca Jufer, a toxicology expert, (A-1466-1467).

Tobin's opinion, telling the jury that if you have a woman who has been shot in the head, you can presume homicide unless proven otherwise. (A-1513.)

Trial counsel made no attempt to challenge Dr. Tobin's qualifications. Their cross-examination of her was ineffective, accomplishing nothing for Ploof's defense. In fact it did the opposite, allowing Dr. Tobin to buttress her opinion that women do not commit suicide with guns. Trial Counsel were not familiar with the science of gunshot wounds. They had done no research into the area, nor had they consulted with an expert of their own. (A-508-510, 624-25.)

During Mr. Ploof's Rule 61 hearing, counsel presented the testimony of Dr. Werner Spitz, a forensic pathologist. Dr. Spitz reviewed Dr. Tobin's autopsy report, color photographs from the autopsy, her testimony at trial, two x-rays, the medical/legal tests of Heidi Ploof's blood and urine, and the crime scene photographs and reports. (A-1186-87.) Based on his review of those documents and testimony, Dr. Spitz agreed with Dr. Tobin that Heidi died of a gunshot wound to the head, but contrary to Dr. Tobin's testimony, he stated that it was possible for Heidi to have died of a self-inflicted gunshot wound. (A-1189-90, 1241-42.) Dr. Spitz noted that the gun in Mr. Ploof's case had not been test-fired, and that it therefore would have been difficult to make an accurate assessment of range of fire just by evaluation of the wound given the close range of the shot. (A-1190-91, 1192-94.) He stated that he believed the shot was fired from a closer distance than six to seven inches, but could not say for

sure what the distance would have been without having test-fired the weapon. (A-1231-32.)

During his testimony, Dr. Spitz also reviewed two photographs of In one, she is holding a cup in her left hand. Heidi. (A-1507-8.)In the other, she is holding a cigarette in her left hand. Both photographs were obtained by undersigned counsel from trial counsel's Heidi's gunshot wound entrance was in her left temple. Tobin testified at trial that it was her understanding that family members had said Heidi was right-handed. (A-1484, 1492-93.) used that information to physically demonstrate to the jury that it would have been impossible for a right-handed person to shoot herself in the left temple. (A-1484-86.) Mr. Ploof told trial counsel that Heidi was ambidextrous and so testified at trial. (A-1515-16.)During the Rule 61 hearing, Mr. Ploof's daughter, Ashley Hurley, testified that Heidi wrote with her left hand. (A-433-34.) Trial counsel never interviewed Ashley. (A-434-35, 513.) Nor did they use the photographs, which they had at the time of trial, to impeach Dr. Tobin's testimony.4

Dr. Tobin also testified at trial about a toxicology report generated at the time of Heidi's death. The report indicated a positive screen for cannabinoids in Heidi's blood. Dr. Tobin testified that the positive result for cannabinoids was not significant since marijuana could stay in the blood for a week, or two weeks or more. (A-1466-1467.) Trial counsel did not dispute Dr. Tobin's conclusion.

<sup>&</sup>lt;sup>4</sup> Trial counsel did request funding for a handwriting expert to determine handedness, but funding was denied. (A-196-97.)

(A-1472-1480.) Trial counsel neither retained nor consulted with a forensic toxicologist expert of their own. (A-510-11.) If trial counsel had retained an expert, they could have shown that marijuana had been present in Heidi's blood and urine within two days of her death. (See A-1509,1518.) Evidence of the presence of drugs in Heidi's system at or near the time of her death would have bolstered trial counsel's suicide theory.

The court below denied Ploof's claims that trial counsel were ineffective for failing to challenge Dr. Tobin's qualifications as an expert and for failing to consult with a ballistics expert or forensic pathologist or toxicologist. The Court found Dr. Tobin was qualified to testify as to shot distance and that women rarely commit suicide by shooting themselves in the head. Therefore, trial counsel's decision not to challenge her qualifications was justified. The Court found that since Dr. Spitz was not able to say that Heidi Ploof had committed suicide, only that it was possible she had committed suicide, that he had presented no evidence to contradict Dr. Tobin's testimony. Therefore, counsel was not ineffective for failing to consult with an expert and there was no reasonable probability that the outcome would have been altered had they done so. Ex. 1 at 11-15.

Trial counsel's defense theory was that Heidi Ploof had committed suicide. Although Dr. Spitz could not opine that Heidi had committed suicide, he would have cast doubt on Dr. Tobin's conclusion that Heidi had not committed suicide, and would have given credibility to the defense's theory that she had. Had trial counsel done any research or consulted with an expert, they could have challenged the validity

of Dr. Tobin's conclusions. They could have impeached her statement that "textbooks" state that "if a woman is found with a gunshot wound, consider it homicide until proven otherwise." As of at least the early 1980s, twenty years before Heidi's death, scholarly works and statistical analyses showed no such trend. In fact, at the time of Heidi's death, it was not uncommon at all for women to commit suicide with a gun. See, e.g., Eisele, J.W., D.T. Reay, and Ann Cook, Sites of Suicidal Gunshot Wounds, 26 J. of Forensic Sci., No. 3, 480 (1981), (A-1524) (finding in a 1981 study that one-fourth to one-third of female suicide was by gun, and that 72% of the female suicide victims in the study shot themselves in the head.)

Based on the prevailing professional norms at the time of Mr. Ploof's trial, it was objectively unreasonable for trial counsel to have done nothing to prepare themselves for Dr. Tobin's testimony. Their failure to investigate and challenge the medical forensic evidence was unreasonable, because they lacked sufficient information

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<sup>&</sup>lt;sup>5</sup> Trial counsel recalls that she objected "strenuously" at trial to Dr. Tobin's statement that if a woman dies by gunshot, it's a homicide; however, a review of the trial transcript reveals no objections were made. (A-510, 1482-83, 1495.)

Firearms, Ballistics, and Forensic Techniques 143, at 355 (2d ed. 1999) ("Since the mid-1980s . . . use of firearms has become the most popular method of suicide in women."), (A-1528); Romero, Michael P. and Garen J. Wintemute, The Epidemiology of Firearm Suicide in the United States, 79 J. of Urban Health: Bulletin of the N.Y. Acad. of Med. 39, 40 (March 2002), (A-1530) (noting that throughout the 1980s and 1990s suicide by firearm has consistently been the leading method of committing suicide, regardless of gender); CDC Nat'l Ctr. for Injury Prevention & Control, Web-based Injury Statistics Query and Reporting System (WISQARS) at <a href="https://www.cdc.gov/ncipc/wisqars">www.cdc.gov/ncipc/wisqars</a> (statistics showing that between 32 and 33% of women who committed suicide between 1999 and 2007 did so by firearm), statistics attached hereto at A-1539-41.

to determine whether investigation was unnecessary. See, e.g., Gersten v. Senkowski, 426 F.3d 588, 608 (2d Cir. 2005), (finding trial counsel ineffective for failing to consult with or call a medical expert, and noting that trial counsel "essentially conceded that the physical evidence was indicative of sexual penetration without conducting any investigation to determine whether this was case."); Pavel v. Hollins, 261 F.3d 210, 223-25, 227-28 (2d Cir. 2001) (finding counsel ineffective for failing to seek assistance of medical expert who could have undermined testimony of state's medical expert); Holsomback v. White, 133 F.3d 1382, 1388 (11th Cir. 1998) (finding counsel ineffective for failing to investigate, develop and present medical expert testimony that could have undermined state's case); Harris v. Wood, 64 F.3d 1432, 1436 (9th Cir. 1995) (finding counsel ineffective for failing to obtain "independent evaluation of the ballistic evidence or the forensic evidence"); Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986) (finding counsel ineffective for failing to consult expert to refute prosecution forensic expert), aff'd, 828 F.2d 670 (11th Cir. 1987) (per curiam).

# B. Trial Counsel Ineffectively failed to Object to or Rehabilitate Jurors Dismissed by the Court for Cause Due to Their Beliefs About the Death Penalty.

During voir dire, several jurors were excused for cause because of their views about the death penalty. Trial Counsel failed to object to the exclusion for cause of all but one of the venire persons (Jacqueline Aull) who expressed reservations about the death penalty. See voir dire of Eileen Adriance, Amy Kellam, Corey L. Garnett, Paulette Darling, and Susan Smith, at A-1542-68, 1579-94. Counsel

failed to object despite their duty to preserve issues for their client, and inexplicably, even advocated the dismissal of the venire persons as if they were acting in collusion with the State and against their client. See, id. See also voir dire of Stephen Hawkins at A-1570-78. Nor did trial counsel make any attempt to rehabilitate any of the jurors who expressed reservations about the death penalty. There could be no strategic or tactical basis for failing to object or request additional voir dire. Appellate counsel were ineffective in failing to raise this issue on appeal.

Although the Lower Court denied Ploof's Witherspoon claim, it did not address the assertion that trial counsel were ineffective for failing to object to or attempting to rehabilitate jurors removed for cause because of their beliefs about the death penalty. Guidelines, Guideline 10.10.2(B), provide that Counsel should be "familiar with techniques . . . for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable." It is up to defense counsel to counteract the sociological effect of death qualifying a jury, a process that tends to skew the jury towards a death sentence and conviction. commentary at 102; Witherspoon v. Illinois, 391 U.S. 510, 520-21 (1968) ("In its quest for a jury capable of imposing the death penalty, the State produce[s] a jury uncommonly willing to condemn a man to die."). See also ABA Guideline 10.8 (addressing counsel's obligation to preserve issue for later review). It was patently unreasonable for trial counsel to have done next to nothing to attempt to rehabilitate jurors who would have been more likely to vote for a life sentence.

# C. Trial Counsel were Ineffective in Failing to Adequately Address and Adjudicate Additional Trial and Pretrial Issues.

For the reasons stated in his Amended Motion for Postconviction Relief, Ploof asserts the following additional claims:

- 1) Trial counsel were ineffective for failing to request a curative instruction or a mistrial when the prosecutor improperly commented on Mr. Ploof's right to remain silent and for failing to request voir dire of the jury when the prosecutor called Ploof a "cold-blooded killer" to the press, and appellate counsel were ineffective when they failed to raise these issues on appeal. (See A-1409-13, 1417-19.)
- 2) Trial counsel were ineffective in failing to renew their motion for change of venue and to properly raise and litigate this issue pre-trial, and during trial. Appellate counsel were ineffective in failing to raise this issue on appeal. (See A-1386-93.)
- 3) Trial counsel were ineffective for failing to request that a sleeping juror be dismissed and to request further questioning of, investigation into, and dismissal of a juror who had discussed the case with coworker. Appellate counsel were ineffective in failing to raise these issues on appeal. (See A-1413-16.)
- 4) Trial counsel were ineffective in failing to cross-examine Deborah Jefferson in keeping with a single, coherent defense theory. (See A-1434-36.)

# D. Appellate Counsel were Ineffective for Failing to Raise Numerous Meritorious Issues on Appeal.

Many issues were raised or came up during Mr. Ploof's trial, which could have been raised on appeal. See appellate counsel deficiency issues raised supra and infra. Despite the many arguably meritorious issues that could have been raised on appeal, appellate counsel chose to raise only five. See Ploof v. State, 856 A.2d 539, 541 (Del. 2004) (listing the five issues counsel for Ploof raised on appeal). Counsel in a capital case can have no reasonable basis for failing to present any and all arguably meritorious issues on direct Appellate "counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious." ABA Guideline 10.15.1(C). "'Winnowing' issues in a capital appeal can have fatal consequences." Id. commentary at 126. See also ABA Guideline 11.9.2(D) (1989 ed.), commentary ("Traditional theories of appellate practice notwithstanding, appellate counsel in a capital case should not raise only the best of several potential issues. . . . When a client will be killed if the case is lost, counsel (and the courts) should not let any possible ground for relief go unexplored or unexploited.").

Appellate counsel's failures to raise these arguably meritorious claims on appeal constitutes prejudicially deficient performance under federal constitutional law. See, e.g., Mason v. Hanks, 97 F.3d 887, 892 (7th Cir. 1996) (finding appellate counsel ineffective for failing to raise claim relating to the erroneous admission of hearsay evidence); Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994) (finding appellate counsel ineffective for failing to raise issue relating to

state discovery rule); Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987) (finding appellate counsel ineffective for failing to raise claim relating to comment on defendant's post arrest silence). For the reasons stated herein and in Ploof's Amended Motion for Postconviction Relief, appellate counsel were ineffective for failing to raise arguably meritorious claims on appeal.

# E. Mr. Ploof was Prejudiced by Counsel's Deficient Performance.

Prejudice requires a defendant to make a showing of a reasonable likelihood of a different result. A reasonable likelihood of a different result is established when a defendant provides sufficient evidence to undermine confidence in the outcome — not even proof of prejudice by a preponderance of the evidence is necessary under the Constitution. Strickland, 466 U.S. at 693. Confidence in the outcome is undermined when counsel's omissions call into question the reliability of the guilt or penalty verdict. "This standard is not a stringent one." Jacobs v. Horn, 395 F.3d 92, 105 (3d Cir. 2005).

The central issue in this case was whether Heidi Ploof was killed by Mr. Ploof or whether she killed herself. Since trial counsel failed to consult with a forensic pathologist or toxicology expert, they missed chances to call into question the State's murder theory and give credence to their suicide theory. They missed the opportunity to let the jury know that Heidi very likely had marijuana in her system at the time of her death. Due to their ineffectiveness, the Deputy Attorney General was able to tell the jury that Gary Ploof had remained silent regarding his wife's suicide for 19 months, directly challenging the credibility of his assertion that Heidi

committed suicide. The Deputy Attorney General was also able to tell the jury that since Heidi had a gunshot wound, they could presume that she could not possibly have committed suicide. This last remark was especially prejudicial, because the prosecutor essentially told the jury they could presume guilt no matter what possibilities the science allowed for. Cf. Ex. 1 at 14 (noting that Dr. Tobin conceded that it was possible Heidi Ploof had committed suicide).

Trial counsel also confounded the jury and cast doubt on their own theory of the case by cross-examining Deborah Jefferson as if trying to prove Ploof had not been present at Walmart on the night of his wife's death, even though he later testified he had been. Trial counsel's failure to investigate and effectively present their theory of the case undermines confidence in the outcome of the guilt phase of Mr. Ploof's case.

In addition, trial counsel's failure to attempt to rehabilitate jurors who expressed concern about the death penalty, undermines confidence in the impartiality of the jury. In making little attempt to preserve those jurors who might have been inclined to vote for a life sentence, they may have inadvertently created a jury inevitably skewed to choose a sentence of death.

II. THE SUPERIOR COURT ERRED IN FINDING THAT MR. PLOOF WAS NOT PREJUDICED BY TRIAL COUNSELS' FAILURE TO INVESTIGATE AND PRESENT READILY AVAILABLE MITIGATING EVIDENCE; FURTHER, THE LOWER COURT DID NOT RE-WEIGH THE TOTALITY OF THE EVIDENCE AS CONSTITUTIONALLY REQUIRED.

# QUESTION PRESENTED

Whether Superior Court erred in its finding that trial counsel rendered effective assistance of counsel in the sentencing proceedings? *Ploof v. State*, 2012 Del. Super. LEXIS 58 at \*6 (Ex. 1). This issue was preserved through the filing of an Amended Motion for Postconviction Relief, a lengthy evidentiary hearing, and post-hearing briefing.

### STANDARD AND SCOPE OF REVIEW

Questions of law and constitutional issues are reviewed *de novo*.

E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co., 498 A.2d 1108,

1113 (Del. 1985). This Court reviews for abuse of discretion the Superior Court's decision on an application for postconviction relief.

This ineffective assistance of counsel claim is governed by Strickland v. Washington, 466 U.S. 668, 694 (1984), which entitles a petitioner to relief if counsel performed deficiently and prejudiced resulted. Counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," and performs deficiently when his performance falls below "an objective standard of reasonableness." Id. Prejudice is established when counsel's deficient performance undermines confidence in the outcome of the proceeding. Wiggins v. Smith, 539 U.S. 510, 521 (2003).

### MERITS OF ARGUMENT

## A. Legal Standards Governing Trial Counsels' Performance.

Under the Sixth Amendment, counsel's performance in a mitigation investigation is "measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'" Rompilla v. Beard, 545 U.S. 374, 380 (2004), quoting Strickland, 466 U.S. at 688; Wiggins, 539 U.S. at 521. The Court has long referred to professional standards of conduct - such as the American Bar Association (ABA) Standards for Criminal Justice and the ABA Guidelines for the Appointment and Performance of Counsel in Capital Cases - in assessing the reasonableness of counsel's conduct. The 2003 ABA Guidelines themselves were admitted into evidence during Mr. Ploof's hearing as State's Exhibit 3, and were utilized and discussed at some length during the testimony of Attorney Dean who offered several times that she felt that her team was in compliance with them. (A-522.)

### B. Duty to Conduct a Thorough Mitigation Investigation

The case law and the professional norms consistently recognize that capital counsel have an "obligation to conduct a thorough investigation of the defendant's background" for mitigating evidence. Williams, 529 U.S. at 396, citing, 1 ABA Standards for Criminal Justice 4-4.1, commentary, at 4-55 (2d ed. 1980), quoted in Wiggins v. Smith, 539 U.S. at 522. Of course, sound strategic decisions cannot be based on an inadequate or cursory investigation; these decisions are only "strategic choices made after less than complete investigations are [only] reasonable . . . to the extent that reasonable professional

judgments support the limitations on investigations." Strickland, 466 U.S. at 690-91.

The United States Supreme Court has defined "thorough" as a requirement that counsel's "investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor," Wiggins, 539 U.S. at 524 (emphasis in Wiggins), quoted in Rompilla, 545 U.S. at 387 n.7.

Delaware courts and the Third Circuit Court of Appeals have consistently imposed the same requirements with regard to counsel's investigation in preparation for the penalty phase. See State v. Wright, 653 A.2d 288, 303 (Del. 1994) (making clear that a minimal, rudimentary mitigation investigation is not sufficient to protect a capital defendant's rights). In Outten v. Kearney, 464 F.3d 401, 416, 419, 423 (3d Cir. 2006), the Third Circuit found merit to the petitioner's claim that his trial counsel's investigation presentation of the penalty phase were unreasonably deficient. Court found support for its conclusion in the controlling Supreme Court precedents, as well as in Guideline 11.4.1 of the 1989 ABA Guidelines, which, the Outten court observed, set forth the "standard practice," which required a penalty phase investigation to include medical, educational, family, social, employment and correctional history. 464 F.3d at 417-18. The Court held that Outten's counsel's performance was constitutionally deficient for limiting investigation to conversations with Outten and his mother instead of

following these "'well-defined norms.'" Id. at 418, quoting Wiggins, 539 U.S. at 524.

A minimal, rudimentary mitigation investigation is not sufficient to protect a capital defendant's rights. Wright at 303. Failing to "present possibly mitigating evidence cannot be justified when counsel have not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background.'" Outten at 419. Further, the Wiggins court held, "In assessing the reasonableness of an attorney's investigation, [a] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, at 527. As such, in order for the investigation to pass constitutional muster, further investigation into known evidence is required.

# C. The legal standard for prejudice and the requirement for the trial court to re-weigh the totality of mitigation evidence, both trial and postconviction, against the aggravating evidence of record

Prejudice occurs when the confidence in the penalty phase's outcome is undermined. Strickland at 694. In other words, prejudice is established when the totality of the evidence "more likely than not" would have changed the outcome. Id. The Supreme Court has explained that[t]o assess that probability [of a different outcome under Strickland], we consider "the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding" — and "reweigh it against the evidence in aggravation." Williams, 529 U.S. at 397-398. This prejudice standard applies "regardless of how much or how little mitigation

evidence was presented during the initial penalty phase." Sears v. Upton, 130 S.Ct. 8 at 3266-3267 (2010).

In both Williams v. Taylor, 529 U.S. 362 (2000), and Wiggins v. Smith, 539 U.S. 510 (2003), the United States Supreme Court reversed based on multiple failures of defense counsel during the penalty phase. In Williams, the Court held that the trial judge was correct to conclude that "the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised 'a reasonable probability that the result of the sentencing proceeding would have been different." Williams at 535.

In Wiggins, the Supreme Court quoted Williams to explain that it "evaluate[s] the totality of the evidence - 'both that adduced at trial and the evidence adduced in habeas proceeding[s].'" Id. at 535. Then it asks: Would a competent, reasonable attorney have introduced the evidence in admissible form? Would defense counsel have changed their strategy and presentation based on this discovery, for instance to prioritize it? Only after answering these questions, the Court said, should a court consider whether a jury confronted with that presentation would have returned a different verdict or sentence. Id. at 538. "In assessing prejudice," the Court added, acknowledging the penalty-phase context, "we reweigh the evidence in aggravation against the totality of the evidence the totality of available mitigating evidence . . . ." Id. at 534. That evidence is "taken as a whole." Id.

Just last year, this Court remanded a capital appeal to the Superior Court for the very same reason, holding that under Williams, Wiggins, Outten and other cases, the lower court failed to "evaluate

the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [postconviction] proceeding—in re-weighing it against the evidence in aggravation." Norcross v. State 36 A.3d 756, 771 (Del. 2010). As such, it is clear that this Court adheres to established precedent and requires re-weighing.

# D. Trial counsel's investigation and the red flags left unpursued

Sandra Dean, Esquire was the lead trial attorney in the case and responsible for decision making. (A-458.) She hired Linda Zervas to serve as a psychoforensic evaluator. Ms. Zervas interviewed Mr. Ploof in January 2002, using a questionnaire she had developed. He denied any childhood trauma or major family dysfunction. (A-345.) Ms. Zervas concluded in an email to trial counsel, "And unless he changes his story Re: his childhood, i.e. [sic] no abuse, et cetera...there REALLY isn't any mitigation that can be discussed at this time (from what he told me)." (capitalization in original document) (A-353.)

In June 2002, Ms. Zervas sent an email to trial counsel relating that Dr. Stephen Mechanick had evaluated Mr. Ploof and had noted that Mr. Ploof's brother was disabled and that the Ploof family had more than 30 foster children during Mr. Ploof's upbringing. (A-364.) Dr. Mechanick and Ms. Zervas thought those issues may have had an impact on Mr. Ploof's upbringing. *Id.* Despite Ms. Zervas' endorsement of the idea that collateral sources are important, especially when the client is being recalcitrant, the defense did not attempt to interview any of the 33 foster children.

Instead, the defense team relied on 3 historians: Gary Ploof, his father Gerald Ploof, and his mother Shirley Ploof. (A-368.) The

parents, when interviewed, spoke of how they treated the foster children like their own, took them on vacations, and still maintained contact with them into adulthood. (A-367.) (All Ms. Zervas' interactions with Gary Ploof's parents were by telephone. (A-372.)) Ms. Zervas decided not to follow up with anyone to confirm the accounts. *Id*.

Because the defense team believed the Ploofs' story, they neglected to investigate further. Had they done so, they would have learned that the Ploofs' foster home was involuntarily closed by New York authorities in 1984, when Gary was 20, due to complaints of inappropriate sexual contact with the girls by Gerald Ploof. (A-159, A-370.) In fact, State documents as far back as 1975, when Gary was 11, express concern about marital discord between the Ploofs "that may contribute the instability of future relationships with future foster children." (A-408.)

Even though the team did not obtain these crucial facts during their limited investigation, there were other signs that the Ploof household was not as idyllic as the three Ploofs said it was. In July 2002, Ms. Zervas returned a call to Gerald Ploof, who stated that he needed to talk with his wife before deciding if he should talk about "it." (A-373.) Ms. Zervas was of course curious about the mysterious "it," hypothesizing that it might be a family secret such as abuse. Id. Despite following up (again by phone), she was never able to learn the "it" that Gerald Ploof called about. Yet Ms. Zervas never interviewed any of the foster children. (A-411.)

Lead trial counsel was well aware of case law establishing the significance of an abusive childhood in death cases and was "on the lookout" for any such indicators. (A-468.) Yet, although she obtained signed releases to obtain Gary Ploof's records, she never obtained releases from his parents or any other family members. (A-480.) Other than having Ms. Zervas interview Mr. Ploof's parents by phone, she did not act on the suggestion by Dr. Mechanick and Ms. Zervas that over 30 foster children in the Ploof home may have had an effect on Gary. (A-486.) Like Ms. Zervas, she wondered about the meaning of Gerald Ploof's reluctance to talk about "it," but did not have a "hint" based on interviews with them what the issue was. (A-506.) No member of the defense team interviewed any of the foster children, nor did they attempt to obtain any of the foster family records. (A-507.)

# E. The Ploof home: a chronicle of sexual and physical abuse that was never presented to the jury

The truth about the Ploof home contrasts markedly with the Ploofs' idyllic portrayal. Through the testimony of 6 former foster children, a tragic picture emerges of militant strictness, physical violence, and sexual abuse. These witness accounts encompass the timeframe of Gary Ploof's childhood and teen years, and portray a nightmarish and abusive environment.

Camille Deyo was placed in the Ploof home when she was about 15 years old. Gary was 18 or 19. She only lasted 4 months. (A-89-90.) She described Gerald Ploof as "sinister." Gary tried to protect the girls when Gerald was in his worst moods by telling them, "Go take a walk...just keep walking around the block." (A-90.) When they came back to the house to see if things had calmed down, Gerald would be yelling

and Gary would be crying. (A-91.) She heard he sounds of hands hitting flesh. Camille estimates that Gerald would hit Gary 3 or 4 times a week. *Id.* Shirley Ploof did nothing to stop it—she was "[i]ndifferent. Unemotional. Cold" (A-93.) Shirley was very strict and made Gary and the foster children constantly re-do their chores. (A-94.)

In front of Gary and Shirley Ploof, Gerald Ploof would walk around in boxers and touch Camille and the other girls' breasts and buttocks. Gerald told Camille she was a slow developer and her breasts were not big enough. (A-95.) When these comments were made, Gary would tell the girls to take a walk or go to their room. (A-96) After running away several times and finally making surreptitious phone calls (she was not allowed to use the phone), Camille was finally removed from the home. (A-98-99.)

Michelle Irwin Miller arrived at the Ploof home when she was 4 and stayed 5 years. Gary Ploof was 7 or 8 years older and living at the house as well. (A-39-40.) One day when Michelle was waiting for the school bus, Gerald Ploof approached him wearing a towel, then he took his towel off and asked Michelle if she wanted to play with his penis. (A-41.) The elder Ploof stated, "Oh come on. You're going to see one of these eventually someday." (A-42.) She stayed away from Gerald Ploof as much as possible after that.

Kimberly Goodwin was placed with the Ploofs when she was about 14 and stayed a total of 4 years; Gary Ploof lived at the residence as well. (A-889-890.) She recalled Gerald Ploof was volatile and angry, and after drinking beer, became physically and mentally abusive. (A-

891-2.) She recalled Gerald and Shirley Ploof fighting constantly in hers and Gary's presence, most notably about Gerald's affair with a 16 year-old babysitter. (A-892.) Gerald Ploof punched Shirley in the face, slap her, and push her into walls—all in front of Gary, Kevin and the foster girls. (A-893.)

Kimberly also had occasion to observe Gerald Ploof strike Gary on a regular basis with his fists. Gerald would also throw Gary down a flight of stairs. (A-894.) Gary would never fight back. Shirley never intervened. (A-895.) Shirley would also slap Gary, sometimes with such force it knocked Gary off his feet. Kimberly also saw Shirley twist Kevin's arm so far behind his back, she broke his arm. *Id*. Kimberly recalls that the home was volatile when just the family was present, but when visitors came, it was like Leave it to Beaver—"perfect home, household, children." (A-896.)

Shortly after Kimberly arrived, Gerald Ploof came up behind her and fondled her breasts and touched her crotch. (A-897.) Gerald also stood in front of a bedroom mirror and masturbated with the door open in full view of Kimberly. (A-898.) Kimberly was raped dozens of times, orally and anally, by Gerald Ploof. (A-899) In order to get her to comply, he threatened to have her kicked out and that no one would believe a foster child. (A-899.) Eventually, he became more physical with his threats, choking her and threatening not to tell anyone. (A-900.) Kimberly personally observed Gerald anally raping another foster child—a young girl of seven or 8. (A-900.)

Gary Ploof on at least one occasion witnessed Gerald raping Kimberly. She recalls crying due to the pain and Gary walking in

while the rape was occurring. (A-904.) Eventually, Gary and Kimberly became confidents and often talked and hugged and held hands. They were about the same age. Gary would apologize for his parents' actions. (A-90.)

Davia Williams was placed in the Ploof home at about age 14 after suffering sexual abuse by her former foster brother and another member of the household. (A-55.) She described the Ploof home as sterile and cold. (A-56.) Davia described Shirley Ploof as a perfectionist who required all chores to be done in an exacting manner. She recalls an incident in which she did not fold the sheets to Mrs. Ploof's specifications and Mrs. Ploof pulled everything off the closet shelves and required her to do the chore again. (A-59.)

Davia tried to stay in her room as much as possible, because Gerald Ploof gave her a "creepy vibe." (A-61.) One night at the dinner table, she recalls Gerald stating that there is no such thing as rape—the women want it. Gary Ploof, and for that matter, Shirley Ploof, were also sitting at the table when this comment was made. (A-62.) On another day, Davia and another foster child took the bus to the mall, and were late coming home. Davia recalls Shirley Ploof coming to the mall, calling them whores and slapping them both in the face in the middle of the mall. (A-64.)

Christine Rumshottel was two years old when she was placed in foster care due to sexual abuse by a parent. (A-640.) She was placed in the Ploof home when she was 17 and Gary Ploof was 14 or 15. She stayed three years. (A-642.) She described the home as cold and distant. (A-643.) Shirley Ploof punched Christine in the stomach and

also bent Gary's handicapped brother Kevin's hand backwards until he cried out in pain. (A-644.)

Gerald Ploof began exposing his genitals to Christine on several occasions; after it started happening, Christine tried to stay out of the house as much as possible. (A-645-6.) She also saw Gary Ploof copying his father's behavior on at least one occasion. (A-646.)

Debra Paradowski was placed with the Ploofs after being sexually assaulted at knifepoint by her mother's boyfriend. (A-1113.) She was about 13 when she arrived at the Ploof home. (A-1117.) During the year she lived there, Gary was also living at the home. (A-1119.) Debra recalls Shirley Ploof being extremely strict; for example, if the girls' clothing was not folded to her specifications, Shirley would dump out all the drawers and make them start again. (A-1121.)

Debra knew that Gerald Ploof was beating Gary, because she would hear them in the basement. She heard the snap of a belt across Gary's body. (A-1126.)

Debra was "scared to death" to be in that house. (A-1128.) Gerald Ploof often wore only underwear, and would come up behind Debra and "rub against me with his privates." (A-1130.) Gerald frequently came to Debra with money and offered to pay her for oral sex; she refused. (A-1132.) Debra told Shirley, but she replied to the effect that her husband would never do something like that. (A-1134.) Eventually, Debra devised a plan to intentionally get into troubledrinking, staying out late-until eventually Shirley Ploof asked for her to be removed from the house. (A-1140.)

All six of these women were available and willing to testify at trial. None of them were contacted by trial counsel.

# F. The trial court erred in ignoring the new evidence of abuse, violence and neglect presented at the evidentiary hearing.

The trial judge's Order and Opinion mentions none of the shocking evidence of brutality in the Ploof home, except for a passing reference: "Without any indication of any problems from any source, counsel chose not to pursue interviews with the foster children." Ex. 1 at 17. That one sentence speaks volumes about trial counsels' utter failure under Strickland and its progeny. The first part, about there was no indication of problems from any source referred to by the Judge is an indictment of trial counsel's paltry investigation. addition, it is untrue on its face. Clearly there were red flags that demanded further inquiry. The home had 33 foster children, a fact which troubled the investigators. Gerald Ploof's phone call about deciding whether the Ploofs were ready to talk about "it" was another mystery that cried out for investigation. Thanks to the women who came forward to tell their stories, it is now clear that "it" was the reign of terror by Gerald and Shirley Ploof and its clear impact upon Gary's development.

The second portion of the judge's sentence, "counsel chose not to pursue interviews with the foster children," gets right to the heart of the issue of ineffectiveness. For as Strickland instructs, strategic choices by counsel are only as reasonable as the investigation upon which they are built. Trial counsel failed Gary Ploof by conducting cursory interviews with their client and his

parents and nothing more. This is the same weak performance found unconstitutional in *Outten* and *Wright*. And rather than finding this performance constitutionally bereft, the trial court erred by endorsing a clearly deficient performance.

# G. The trial court erred in finding that counsel's investigation was reasonable; in fact, it was constitutionally deficient.

The trial court held that counsel interviewed only Gary Ploof and his parents to inquire if there had been any abuse in the household. As the court below noted, "[i]n each instance, the resounding answer was "no." Ex. 1 at 17. That observation underscores trial counsel's deficient performance and the prejudice to Mr. Ploof: a reasonable investigation would have made the answer a resounding "yes." Interviewing only the client and his parents is the exact same "narrow set of sources" yielding "rudimentary knowledge" that was found deficient in Outten. Outten at 416.

Of course, several landmark decisions of this Court and others hold that minimal, rudimentary investigations do not comport with the defendant's constitutional rights. This Court found prejudice in State v. Wright, 653 A.2d 288, 303 (Del. 1994) for almost exactly the same reasons present here:

this Court finds that defense counsel's almost complete lack of investigation into Wright's mental, school, and family history, and, thus, lack of knowledge regarding it, in addition to his lack of strategy in presenting mitigation evidence in the penalty phase, constitutes ineffective assistance of counsel sufficient to undermine confidence in the outcome of the jury's death penalty recommendation.

Wright at 303.

Wright is in keeping with the legion of jurisprudence finding minimalistic investigation by trial counsel unreasonable and prejudicial. In the recent United States Supreme Court decision, Sears v. Upton, that Court held, "[T]he cursory nature of counsel's investigation into mitigation evidence-'limited to one day or less, talking to witnesses selected by [Sears'] mother'-was 'on its face ... constitutionally inadequate." Sears v. Upton, --- U.S. ----, 130 S.Ct. 3259, 2010 WL 2571856, at \*3 (2010).

The trial court's holding that the cursory family interviews constituted all the available sources of information is at severe odds with these precedents. Moreover, the client's recalcitrance or lack of candidness with his counsel does not allay counsel's duty. The United States Supreme Court held in Porter v. McCollum that even counsel claimed that the client though was "fatalistic uncooperative" the client had made no blanket instruction of prohibitions regarding the witnesses with whom the defense team could speak. Counsel in Porter did not ever move beyond the closed circle of family and the Court found: "Counsel thus failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service. The decision not to investigate did not reflect reasonable professional judgment." 558 U.S. 30, 130 S. Ct. 447, 453 (2009).

Further, the ABA Guidelines, as endorsed in *Outten* and many other cases, make it clear that counsel's duty to investigate is not negated by the assertions of the client:

Counsel's duty to investigate is not negated by the expressed desires of a client. Nor may

counsel "sit idly by, thinking that the investigation would be futile." The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each. Without investigation, counsel's evaluation and advice amount to little more than a guess.

Outten at 418, citing Guideline 11.4.1 (Emphasis in Outten)

In any event, trial counsel for Mr. Ploof had from the beginning the opinions of their investigator and psychoforensic evaluator that Mr. Ploof could be in denial as a means of coping with the abuse he endured and witnessed. Ms. Zervas emailed to trial counsel her concerns:

Both Dr. Mechanick and I wonder about how his brother's impairments and having all those foster children REALLY impacted him and question whether he is being open about it or more like in denial.

(A-859.)

Dr. Mechanick, who was a member of the defense team, was also concerned that Mr. Ploof was in denial. At the evidentiary hearing, he testified at length as to the types of and reasons for a sufferer of childhood abuse to be in denial about it as an adult. (A-1251-53.) Yet trial counsel never heeded the advice of the members of the team and ventured outside the insular circle of the three Ploofs. That failure constitutes clear ineffective assistance.

The trial court noted, "In sum, Trial Counsel determined there was little in the way of mitigating evidence." Exhibit 1 at 17. That statement, while true, does not answer the question of whether trial counsel was ineffective. It only begins the inquiry. The real issue is whether trial counsel's conclusions rested on a foundation of an

effective investigation. Here, it most certainly did not, and Mr. Ploof was prejudiced as a result.

# H. The prejudice to Mr. Ploof due to his ineffective trial counsel can only be cured by a remand for a new penalty phase.

The evidence adduced in postconviction proceeding conclusively undermines any confidence in the penalty phase's outcome. Strickland at 694. To be sure, this is a case in which the totality of the evidence "more likely than not" would have changed the outcome. Id. An evaluation of the fully formed mitigation case leads inexorably to the conclusion that there is a reasonable probability of a different outcome had Mr. Ploof had effective assistance of counsel.

Childhood experiences of trauma, abuse and physical violence, especially at the hands of family, are hallmark mitigators, which humanize the defendant and present a full picture to the jury. The United States Supreme Court has held that childhood abuse is the kind of "troubled history we have declared relevant to assessing a defendant's moral culpability." Porter v. McCollum, 130 S. Ct 447, 449(2009), quoting Wiggins, 535 U.S. at 539. As Dr. Pablo Stewart testified, in working with approximately 200 capital defendants, "most oftentimes, the people I've worked with have had very abusive, traumatic backgrounds." (A-144-5.)

The trial court's holding that "...nor can it be said that any of the prolonged foster child information probably could have made any impact, even if presented," simply does not comport with the record and constitutes error. Ex. 1 at 18. The 6 women who came forward provided testimony that was powerful, poignant, and highly relevant to

a determination of Mr. Ploof's moral culpability. Moreover, the testimony presented a clear picture of crucial mitigation evidence: severe physical abuse, rampant sexual abuse, parental marital problems, including infidelity and a cold, sterile and fear-inducing family environment. The prejudice flowing to Mr. Ploof is palpable and of constitutional dimension. He seeks the remedy of a new penalty phase.

## I. The trial court failed to engage in the compulsory reweighing of all the aggravating and mitigating circumstances.

As the opinion makes clear, the trial court failed to comply with the mandate set forth in Williams, Wiggins, and Norcross: "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [postconviction] proceeding—in re-weighing it against the evidence in aggravation." Norcross at 771. The trial court's opinion is devoid of any analysis of this sort. Mr. Ploof's right to due process of law and his rights under the Delaware and federal constitutions require that this error be remedied.

Because of the volume and impact of the post-trial record in this case, the re-weighing requirement is of significant importance. Trial counsel's ineffectiveness created a penalty phase that was grossly inadequate and misleading to the jury. Only by an evaluation of all the evidence in mitigation it against the aggravating evidence can the appropriate and constitutionally sound conclusion be reached. Here, that conclusion is one of prejudice and remedy.

# J. Trial counsel was ineffective for failing to adequately develop and present evidence of Mr. Ploof's long and distinguished military career.

Service in the military is a significant and compelling mitigator in a death case; counsel must present this evidence effectively to the jury. In Porter v. McCullum, 130 S. Ct. 447, 449 (2009) (per curiam), the United States Supreme Court concluded that counsel's failure to investigate and present mitigating evidence that described Porter's military service was prejudicial. The evidence the Court found persuasive included detailed testimony regarding Porter's military service in the Korean War, including discussion of particular battles in which Porter was engaged. Porter's jury, however, did not hear this detailed and descriptive testimony. This Court therefore concluded that jurors "heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." Id. at 454.

Trial counsel's performance in the presentation of Mr. Ploof's military background fell well short of a reasonable professional standard. Like Porter, Mr. Ploof's jury did not hear the detailed and descriptive testimony regarding his military history. During Mr. Ploof's trial, counsel presented only one witness, Keith Frye, who testified generally about his military service, (A-1595-1620.) Mr. Frye, in the one brief meeting to discuss his testimony, did not review with counsel any portion of Mr. Ploof's service record in preparation for that testimony. (A-712-13.) Trial counsel failed to capitalize on Mr. Frye's knowledge regarding Mr. Ploof's service. Mr. Frye's testimony, which can only be described as brief and general in

nature, glossed over Mr. Ploof's nineteen and one-half years of military service.

The evidentiary hearing featured the testimony of Mr. Frye and Michael Kealty both of whom supervised Mr. Ploof. (A-710-735, A-747-780). Mr. Frye and Mr. Kealty described in detail working with Mr. Ploof and testified regarding performance reports they had prepared during their period of supervision. Id. Post-conviction counsel also presented the testimony of Dr. John Guilmartin, a highly decorated retired Lieutenant Colonel in the Air Force. (A-673-709.) Guilmartin, now a military historian, reviewed Mr. Ploof's military records, including performance reports, and the awards commendations he received during his nineteen and one-half years in service. (A-679, A-680-81.) Dr. Guilmartin opined that Mr. Ploof's records showed a "dedicated, committed young airman." (A-688.) Dr. Guilmartin also testified about Mr. Ploof's several deployments, including Operation Desert Storm, where he was involved in the launch of over 3,000 missions. (A-690.) Finally, Dr. Guilmartin described, in detail, the several awards and commendations Mr. Ploof received, including two Air Force Achievement Medals, the fourth highest award given to enlisted servicemen for non-combat performance. (A-696-700.)

As the foregoing illustrates, trial counsel had an ideal opportunity to provide the "detailed and descriptive" account of Mr. Ploof's military service. Yet counsel squandered this opportunity. The trial court's holding that there were only "a few more details" adduced at the evidentiary hearing does not comport with the record. Exhibit 1 at 32. Mr. Ploof seeks relief from this error.

## K. Other penalty phase claims

Mr. Ploof incorporates by reference the other penalty phase claims made by postconviction counsel. These claims are fully set forth in the following pages of the Appendix: A-1386-93 (trial counsel's failure to renew objection to a prior unadjudicated crime admitted during the penalty phase), A-1384-85 (defense mental health expert's failure to provide competent assistance).

# III. THE SUPERIOR COURT ERRED IN DENYING MR. PLOOF'S OTHER CONSTITUTIONAL CLIAMS

#### QUESTION PRESENTED

Whether the Superior Court erred in denying Mr. Ploof's Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama, 511 U.S. 127 (1994), Witherspoon, and additional constitutional claims. These issues were preserved through the filing of an Amended Motion for Postconviction Relief.

#### SCOPE OF REVIEW AND MERITS OF THE ARGUMENT

For the reasons stated herein and in his Amended Motion for Postconviction Relief, Ploof asserts that 1) his constitutional equal protection clause rights to a representative jury were violated when the State exercised a peremptory challenge to remove an African American Woman (A-1393-1400), 2) his Sixth and Fourteenth Amendments and Article 1, § 7 rights to a trial by a fair and impartial jury were denied because several jurors were excused for cause due to their beliefs about the death penalty (A-1401-1409), 3) his Sixth and Fourteenth Amendment rights to a fair and impartial jury were violated when the Court denied his request for a change of venue (A-1386-1396), 4) his Fifth, Sixth and Fourteenth amendment rights to a fundamentally fair trial were violated when the prosecutor improperly commented on his right to remain silent (A-1409-1412), 5) and called him a "coldblooded killer" (A-1417-1419), 6) his Fifth, Sixth and Fourteenth amendment rights to a fundamentally fair trial were violated when the Court did not dismiss a sleeping juror and a juror who had discussed the case with coworkers (A-1413-1416), 7) his Fifth, Sixth, Eighth and Fourteenth Amendment rights and his rights under Delaware Law were

violated by the admission of the evidence of his prior arrest for assault during the penalty phase (A-1419-1424), and 7) his Fifth Amendment and Article 1,  $\S$  7 rights against self-incrimination were violated by handwriting exemplars that he wrote at the behest of Georgia Carter, which were used by her to conclude he authored two letters used as evidence by the State (A-1424-1426).

#### CONCLUSION

For the reasons and authorities cited, Ploof prays that this Court vacate his judgment of conviction and death sentence and remand the case to the trial court for new proceedings.

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DATED: September 17, 2012 Attorneys for Appellant