UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAVID FOELL, Petitioner, vs. JOHN MATHES, Warden, Iowa State Penitentiary, Respondent.	No. C02-3029-MWB **REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF *HABEAS CORPUS***

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I. INTRODUCTION

This matter is before the court on a petition for writ of *habeas corpus* (Doc. No. 4) filed by the petitioner David Foell ("Foell") on April 9, 2002, in the Southern District of Iowa. The case was transferred to this district on April 19, 2002.

In his petition, Foell asserts his trial counsel was ineffective in failing to pursue and offer a diminished capacity defense, and generally in his presentation of Foell's case to the jury. (*See* Doc. No. 1, Petition, p. 5, ¶ 12A) The parties have briefed the issues thoroughly. Foell filed an opening brief on September 13, 2002 (Doc. No. 10). The respondent John Mathes ("Mathes") filed a responsive brief on October 29, 2002 (Doc. No. 11). On October 30, 2002, Mathes filed an Appendix of Decisions (Doc. No. 12), and on November 6, 2002, he submitted some additional documents from state court proceedings in Foell's case (Doc. No. 13). Foell filed a reply brief on December 13, 2002 (Doc. No. 14). Mathes filed a response to Foell's reply on December 20, 2002 (Doc. No. 15), and Foell filed an addendum to his reply brief on January 2, 2003 (Doc. No. 16). On February 3, 2003, Mathes filed a citation of supplemental authority to alert the court to a case decided by the Eighth Circuit Court of Appeals on January 29, 2003, which Mathes believes is applicable to the present case (Doc. No. 17). On March 6, 2003, Foell filed a response to Mathes's citation of additional authority (Doc. No. 18).

On May 31, 2002, Chief Judge Mark W. Bennett referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. (Doc. No. 6) The court finds Foell's petition has been fully submitted, and turns to consideration of the merits of his claim.

II. FACTUAL AND PROCEDURAL BACKGROUND

On June 5, 1992, Foell was sentenced to life in prison after his conviction for the first-degree murder of Marian Atkinson, a 69-year-old woman living in Sheffield, Iowa.

After his conviction, Foell properly exhausted his State remedies, and he now brings this action to challenge his attorney's effectiveness in representing him at trial. Foell argues his attorney was ineffective in three ways, described in his brief as follows:

> First, his attorney did not bring to bear reasonable judgment in evaluating the risks and benefits of the various theories of defense that were available. As a result, at the end of the day, Foell was left without a valid defense to present to the jury. Second, Foell's counsel provided constitutionally inadequate representation by failing to adequately investigate, recognize and pursue the statutory defense of diminished capacity. Specifically, Foell's attorney didn't obtain the necessary evaluations and reports sufficiently in advance of trial to give them adequate consideration; he did not understand or recognize that a "mental defense" short of insanity was available; and he did not offer any evidence in support of the statutory defense of diminished capacity. Third, Foell's attorney "persuaded" Foell into abandoning even the consideration of any "mental defense" by telling his mother that he would withdraw as Foell's lawyer if Foell wanted to pursue a defense based on Foell's mental deficiencies.
>
> Foell was prejudiced by these deficiencies because the evidence in support of a diminished capacity is sufficient to undermine the confidence in the outcome of Foell's trial.

(Doc. No. 10, pp. 14-15)

The court will summarize the underlying facts relevant to Foell's claims. The following summary of the facts leading to Foell's conviction is taken from the trial transcript; the opinion of the Iowa Court of Appeals on Foell's direct appeal, *see State v. Foell*, 512 N.W.2d 809 (Iowa Ct. App. 1993) (Doc. No. 12, p. 9); the opinion of the Iowa District Court for Franklin County on Foell's application for postconviction relief ("PCR") (*Id.*, p. 15); and the opinion of the Iowa Court of Appeals on Foell's appeal from the

denial of his PCR application, *see Foell v. State*, 2001 WL 1658885 (Iowa Ct. App. Dec. 28, 2001) (Doc. No. 12, p. 43).

On December 8, 1991, Foell was introduced to an individual named Chris Oltman by a mutual acquaintance, Mark Torres. Foell rode around with Oltman, his girlfriend Jennifer Frank, and Torres, as they went to a friend's home, a couple of fast food restaurants, a Target store, and other locations. Eventually, the four drove to Sheffield, Iowa, to the home of Oltman's grandmother, Marian Atkinson. Before going to Ms. Atkinson's residence, they stopped at a gas station where Foell, who was the only one of the four over twenty-one, bought four quarts of beer. During the evening, and during the drive to Sheffield, Oltman and Torres had conversations about Torres killing Ms. Atkinson that night. Apparently, Ms. Atkinson disapproved of the relationship between Oltman and Frank, and she intended to cut Oltman out of her will. Consequently, Oltman offered to pay Torres and Foell to kill his grandmother.

When the group arrived at Ms. Atkinson's residence, Oltman went inside to talk to his grandmother, while the other three individuals remained outside in the car. Frank testified that while Oltman was inside the residence, Torres and Foell discussed how they were going to kill Ms. Atkinson. When Oltman left his grandmother's residence, he left the garage door unlocked. He told Foell and Torres he had left the back door unlocked for them. He also told them where they could find a knife in Ms. Atkinson's kitchen, and gave them directions to her upstairs bedroom.

Foell and the other individuals went back to Mason City, Iowa, and visited an individual named Jake Frank, Jr. While they were at Jake's residence, Foell and Torres told Jake about their plans to return to Sheffield to kill Ms. Atkinson. When they left Jake's house, the others dropped Torres off at his residence, and Foell, Oltman, and Jennifer Frank left together. Later, in the early morning hours of December 9, 1991,

Foell, Oltman, and Jennifer Frank were out driving near a gravel pit in Mason City, when their car became stuck. A police officer gave them a ride to a telephone at approximately 1:45 a.m., so they could call a tow truck. At approximately 2:20 a.m., Foell called Broome's Wrecker Service in Mason City. Mr. Broome testified he talked with Foell for about three minutes, during which Foell told him the car was stuck out at the gravel pit and they needed a tow. Broome stated Foell sounded "pretty excited" or "desperate," but he seemed rational and his speech was not slurred, loud, or too fast. He stated Foell mentioned he needed to get to Sheffield.

Broome dispatched a driver, Dean Porter, to meet Foell and the others at a Kum & Go station. Porter talked with Foell about payment for the tow, and he testified Foell was "antsy" or nervous, but did not appear to be intoxicated. He stated Foell had no difficulty standing, walking, or getting into the tow truck, and he did not smell of alcohol. Porter further stated he was inside Oltman's car briefly when he was hooking up the car to be towed, and he did not smell alcohol inside the car.

After Oltman's car was towed out of the gravel pit, Foell, Oltman, and Frank went back to pick up Torres, but they were unable to rouse him. At approximately 4:00 a.m., Foell, Oltman, and Frank drove back to Ms. Atkinson's residence in Sheffield. Frank testified no one forced Foell to make the trip, and he knew what he was doing and why they were returning to Sheffield. Frank stated although Foell had been drinking, he had no difficulty walking, talking, or knowing what he was doing. When they arrived in Sheffield, Oltman parked his car across the street and a little way down from his grandmother's house. Foell entered Ms. Atkinson's home through the back door Oltman had left unlocked. He went into the kitchen, found a knife, and went up the stairs to Ms. Atkinson's bedroom. Foell stabbed the woman sixteen times. He then returned to Oltman's car and told Oltman his grandmother was dead. They started to leave, but a

short distance away, Foell told Oltman to stop the car because he had forgotten his glasses, which had been knocked off during the attack. Foell returned to Ms. Atkinson's house, retrieved his glasses from her bedroom floor, looked through her closet briefly to see if he could find any money, and then returned to Oltman's car. Oltman, Frank, and Foell went from the scene to a friend's house, and then out to breakfast.

Later the same day, Oltman was arrested for Ms. Atkinson's murder. Oltman gave a statement to law enforcement in which he implicated Foell as the actual killer. Oltman also stated he had offered Foell money to kill his grandmother. That evening, friends told Foell the police wanted to talk with him. Foell and his parents went to the local police station, where Foell ultimately confessed to the murder. He was charged with first-degree murder, and an attorney from the local public defender's office was assigned to represent him. The attorney had considerable experience trying felony cases, including murder cases.

Foell filed a pretrial motion to suppress his confession, arguing the police coerced him into making a statement. The trial court held an evidentiary hearing, and denied the motion. Foell's trial on the first-degree murder charge commenced on April 27, 1992. Prior to trial, Foell's attorney filed notice of an intent to assert the defenses of compulsion by duress, and intoxication. Counsel withdrew the compulsion defense at the commencement of the trial, but stated he would still maintain the intoxication defense. *See* Trial Tr. at 12.

During voir dire, the jury was advised that Foell would be offering the defense of intoxication. In the prosecutor's opening statement, he reminded the jury of this fact, and asked them "to pay very close attention to the evidence concerning Mr Foell's behavior prior to the murder, during the murder and following the murder," indicating the evidence

would show Foell had presence of mind and knew what he was doing when he committed the crime. Trial Tr. at 127-28

In defense counsel's opening statement, he told the jury about Foell's theory of defense and the evidence they would hear. Relevant excerpts of his opening statement are as follows:

> David Foell confessed to this deed. He did not confess to the murder in the first degree. David Foell will take this witness stand and he will tell you what he did and he will tell you what he did not do. The evidence in this matter will show that Chris Oltman took a weapon, loaded it and pointed it at his grandmother and that weapon, ladies and gentlemen, is David Foell.
>
> The planning of this crime was done with Jenny Frank, the 15-year old girl friend of Chris Oltman, Chris Oltman, who's 18 years of age, and Mark Torres, a friend of Mr. Oltman who just turned 18. All of that planning was done on Sunday afternoon when Mr. Foell met Mr. Oltman for the first time and everything was already planned out by Mr. Oltman at that time, planned out by Mr. Oltman and Ms. Frank that they would take someone and they'd get them drunk with the intention of having them go kill Chris's grandmother but when they got this person drunk, they didn't tell that person that's what they were going to do. If they had asked Dave Foell in a sober state will you go kill my grandmother, he would have said no.
>
> Mark Torres and Dave Foell sat in the back of Chris Oltman's car driving around Sunday night. Mark Foell – or, excuse me, Mark Torres by prearrangement was getting Dave Foell drunk in the backseat. Dave and Mark were sitting in the back drinking. Mark was getting him drunk on purpose by pre-arrangement with Chris Oltman. Was Chris Oltman drinking? No. Was Jenny Frank drinking? No. They were sitting in the front seat. They were the brains of this operation and they had to keep a clear head.

. . .

> Ladies and gentlemen, the evidence will show that this was not planning by my client, Dave Foell. When they were in the back of the car and Dave was getting drunker and drunker and drunker, it first started out that Mark Torres was going to do this. Mark Torres was going to kill Chris'[s] grandmother. Then after Dave was more drunk, it was Mark was going to do it and Dave was going to help. Then after Dave got drunker and drunker, it was Dave was going to do it and Mark was going to help. Then they were going to have to drop off Mark Torres because he has curfew to make. They dropped him off and there was never any intention of picking him back up. Intention was that Chris was going to drive Dave Foell, the dupe, to Sheffield and then Chris was going to be able to escape any responsibility for this.
>
> . . .
>
> When you've heard all of the evidence and listened to it and gone back into the jury room, I believe that you will conclude that David Foell is guilty of murder in the second degree, not murder in the first degree. The planning and premeditation belongs to but one man and one girl and that's Mr. Oltman and Ms. Frank. My client has to bear responsibility for what he did and he will. . . . He will tell you the truth. He will take responsibility for what he did but in the situation he was the dupe. He's the patsy. Chris Oltman is the one that should bear full responsibility here and first degree murder because, again, he took that weapon. He loaded it and he pointed it at his grandmother.
>
> I believe that's what the evidence will show.

Trial Tr. at 138-22)

Foell's attorney called thirty-five witnesses to testify on Foell's behalf at the trial. Through these witnesses, Foell's counsel elicited testimony to show the murder plan had

been concocted by Oltman and Frank, Foell did not participate in planning the murder, and Foell was not known to be someone who would commit a murder unless he was drunk.

Foell also testified in his own behalf at the trial. His account of the events was substantially similar to his attorney's description during opening statement. He also testified briefly about his problems with alcohol abuse as a teenager and an adult. He admitted he committed the murder, but testified that he was drunk, and he was afraid Oltman would hurt him if he did not comply with Oltman's directions to kill Ms. Atkinson. In support of Foell's claim that he was drunk at the time of the murder, his attorney elicited testimony from several witnesses, summarized below.

Lori Portis, a cousin of Jennifer Frank's, testified she called Jennifer after the murder and asked her what happened. She stated Jennifer told her Oltman had paid Foell $6,000 "and got him drunk and took him up to the house, showed him how to get into the garage and where the knives were and that he was suppose[d] to kill her. . . ." Trial Tr. at 617. She testified that she used to hang around with Foell and if he was drinking, it was easy to take advantage of him. Trial Tr. at 619-20.

Yvette Green testified she knew Foell, but not well. From her testimony, it appears her son Anthony was friends with Foell. Green testified Foell came to her house the morning after the murder and wanted to talk to Anthony. She smelled alcohol on Foell. Trial Tr. at 630. Anthony Green also testified that Foell smelled like alcohol. However, Green stated he is familiar with how Foell behaves when he is drunk, and Foell "didn't really act like he was drunk or anything." Trial Tr. at 638.

William Basler, an investigator for the Iowa Division of Criminal Investigation, testified regarding his investigation of the case, including interviews with Oltman. According to Basler, Oltman confirmed that Foell had bought four quarts of beer on their first trip to Sheffield. (Trial Tr. at 668-69)

Keith Wade Dickerson testified he came to know Foell quite well during November or December of 1990, when Foell was a student at Teen Challenge, where Dickerson works as a teacher and counsel. He explained Teen Challenge is "a Christian discipleship program known primarily for drugs and alcohol rehabilitation." Trial Tr. at 743. He stated Foell "had a history of alcohol abuse and . . . could be impulsive and unpredictable in his behavior at times." Trial Tr. at 744. According to Dickerson, Foell's "primary presenting problem at Teen Challenge was his alcohol and his abuse of alcohol and unsocial behavior while under the influence of alcohol." Trial Tr. at 744-45. Dickerson also stated Foell was influenced easily, "very vulnerable to the suggestions of his peers," and "very likely to go along with whatever was suggested in order to gain their approval." Trial Tr. at 745. Dickerson opined Foell would not commit a murder if he was not drinking. He stated Foell behaved fairly normally when he was sober, "but when he would get under the influence of alcohol, he would say and do things that were very abnormal, which is not unusual for someone under the influence of alcohol. [Foell] just seemed to have a much more serious response to that influence than most people do." *Id.* He further opined that Foell "had a much greater problem with being influenced by people" than other people do. Trial Tr. at 746.

On cross-examination of the State's rebuttal witness, Lesley Abernathy, Foell's attorney elicited testimony that Abernathy had seen Foell, Torres, and Oltman drinking around 10:00 p.m. on Sunday, December 8, 1991. She saw them bring in several quart bottles of beer, but she was unable to say how much Foell drank. When she saw him the next morning, he did not appear to be drunk. Trial Tr. at 757-60.

Foell offered no expert testimony to support an intoxication defense, nor did he offer evidence about Fetal Alcohol Syndrome.

During a conference in chambers to discuss jury instructions, Foell's attorney stated as follows regarding his theory of defense:

> I would like to state for the record[,] as I have previously informed the Court upon the record, it has been the Defendant's theory of defense from the beginning of this case that the Defendant was guilty of murder in the second degree but not murder in the first degree. The Defendant has voluntarily participated in that theory of defense. It was a theory of defense that he concurred with. For that reason, I am not requesting any lesser included offenses other than murder first, murder second, not guilty.

Trial Tr. at 763. The trial judge reviewed the elements of the lesser included offenses and found there was no factual basis to support submitting the lesser included offenses of voluntary manslaughter, involuntary manslaughter, unintentionally causing a death by an offense other than a forcible felony, or accidentally causing a death. Foell's attorney then stated as follows:

> Just in regard to the lesser included offenses and the record the Court has just made. I would for the record state that I've reviewed those matters with my client prior to the decision being made of going for the murder second . . . and I did review with him the arguments that could be made in his – on his behalf in support of lesser included and would state that we would waive any of those arguments.

Trial Tr. at 766.

The prosecutor sought to clarify the defense theory for the record, and asked the following question of Foell's attorney:

> MR. MILLER: Just so the record's clear. It is my understanding, correct, counsel, that defense feels it's a matter of trial tactics that whether there are additional lesser includeds that would meet the Jeffries test or not, the defense feels that its chances of avoiding first degree murder verdict and the

> serious penal consequences that go with that could be enhanced by submitting only first and second degree murder rather than additional lesser included as trial tactic? It's felt that might be defense's advantage in this trial fashion?

Trial Tr. at 766-67. Foell's attorney replied, "That is correct, Mr. Miller." Trial Tr. at 767.

During closing argument, the prosecutor discussed Foell's intoxication defense, as follows:

> Now, the defense, I believe, is going to ask you to consider [the] question of intoxication and your instructions will tell you that intoxication can be something that could negate specific intent. So here again, I think specific intent is the real question here. This is where everything comes together because the intoxication instruction relates only to that element.
>
> Let's talk about the evidence that relates to the question of intoxication. The first beer that was consumed, if I recall the testimony correctly, was purchased at Sheffield on Sunday evening when Mr. Foell and the others went down there to case out, if you will, Marian Atkinson's home. These people, and Mr. Foell more particularly, already knew what was going to happen before any beer was drank [sic]. There was a plan and that plan was to kill Chris Oltman's grandmother.
>
> You heard from Officer Reindl who saw Mr. Foell a couple of hours ahead of the time Mrs. Atkinson was killed. He was in close proximity of Mr. Foell. He gave him a ride in his car. He talked with him. He's a police officer who's trained in looking for just that kind of thing and he told you that given the time of day he was suspicious and he did not observe any signs of intoxication.
>
> You heard from Wayne Broome. He talked with Mr. Foell on the phone. He said Mr. Foell didn't sound

intoxicated. Mr. Foell told him I have to get to Sheffield. He knew what he was doing.

Dean Porter, the wrecker driver, much like Officer Reindl[,] was in close proximity to Mr. Foell even as late as an hour before the murder was committed. No signs of intoxication.

Then you have Mr. Foell following Chris Oltman's instructions to the letter. Finds his own way to the house, goes in the door like he was told, even has the frame of mind to, in his own words, pick out the biggest knife, followed the instructions to the letter. He returned to the car, had the presence of mind to remember that his glasses had been knocked off and he had the presence of mind to think that might be important. So he went back to the crime scene, went back into the house where he had killed this woman to retrieve his glasses and to go through the closet to try to find some money. He knew what he was doing. These are not – not the actions of a man who was so intoxicated that he didn't know what he was doing. Then he goes to Tammy Scott's house, lies to her about where he had been. He had the presence of mind to tell her something that would help cover his tracks and cleans off his clothing.

Miss Scott testified she didn't see any signs of him not knowing what he was doing or any difficulty in talking, walking, speaking and this was at about 5:00 in the morning, just an hour or so after the murder was committed.

Danielle Willson, a waitress from Perkins, she didn't see any signs of intoxication.

And, finally, Mr. Foell has some pretty vivid recall about what he did in that bedroom that night. He remembered how he held the knife. He remembered how she was laying on the bed. The only evidence that you have before you that would indicate Mr. Foell – would indicate Mr. Foell may have been intoxicated is his own testimony and, frankly, I don't think his own testimony even supports his theory that he was

> intoxicated but you have to consider the source. Mr. Foell is a desperate man and his claim of intoxication is simply an act of desperation. His actions speak louder than his words. He did not act like a person who did not know what they were doing on December 8 and December 9, 1991.

Trial Tr. at 774-78.

Foell's attorney focused his closing argument on Foell's lack of premeditation, arguing at length that Oltman and Frank planned the murder. He referred to the intoxication defense briefly on three occasions during his argument. First, he noted the medical examiner had testified the number and depth of stab wounds indicated this was a murder involving "high emotion." Foell's attorney argued to the jury as follows: "You have to determine whether that high emotion was because [Foell] was going to get money. You have to determine whether that high emotion was because of some effect Chris Oltman was having upon Dave Foell or you have to determine whether that was just because Dave Foell had been drinking combined with all these other factors." Trial Tr. at 784.

A short time later, he argued Oltman had to find someone to kill his grandmother before she had a chance to cut him out of her will, and "Dave Foell was the fall guy. Dave Foell was the person that he got drunk and they got him drunk – They didn't tell him they were going to have him go do this. They got him drunk with the intent of having him go do this terrible, terrible act." Trial Tr. at 785.

Finally, at the end of his argument, Foell's attorney argued, "Chris Oltman took a weapon and shot his grandmother and I told you that weapon was David Foell[.] . . . Chris Oltman took that weapon. He loaded it. He intoxicated Dave Foell. He got Dave Foell to the point where he thought Dave would do what he wanted him to do. He pointed Dave Foell in the direction of his grandmother and now Marian Atkinson is dead." Trial

Tr. at 788-89. Foell's attorney urged the jury to find Foell guilty of second-degree murder, rather than first-degree murder.

In rebuttal, the prosecution brought up the intoxication defense again. The prosecutor first argued Foell "is a person who is given to impulsive behavior, antisocial behavior and inappropriate behavior, and maybe when he's had a couple drinks is a little bit better able to release those criminal impulses." Trial Tr. at 797. A moment later, the prosecutor argued as follows:

> I guess I'm a little confused. The claim of intoxication[,] which is what I thought the defense was initially claiming[,] now is one of premeditation but don't be confused. They're two separate issues. Please recall that the Court has instructed you intoxication does not excuse and does not even affect the degree of guilt unless a person[,] by virtue of intoxication[,] is incapable of forming a specific intent[,] if the intoxication is such that the person suffers from a mental disorder that prevents them from even forming a specific intent. Whether he had a few beers or not that night is totally beside the point. The fact of the matter is[,] and by his own admission[,] he knew what he was doing, was aware of what he was doing and did so with a specific purpose, that of taking a human life.

Trial Tr. at 798.

After forty-eight minutes of deliberation, the jury found Foell guilty of first-degree murder.

III. DECISIONS BELOW

Foell raised the issue of his counsel's ineffectiveness on direct appeal, in a PCR action, and on appeal from the denial of his PCR application. On direct appeal, Foell argued his trial counsel was ineffective for, *inter alia*, failing to call "witnesses from South

Dakota who would have testified that he suffered from fetal alcohol syndrome." *State v. Foell*, 512 N.W. 2d 809, 814 (Iowa Ct. App. 1993). Applying the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and applicable Iowa law, the Iowa court found Foell was not denied his right to effective assistance of counsel. The court held:

> An attorney's decision regarding strategy or tactics does not ordinarily provide an adequate basis for a claim of ineffective assistance of counsel. *State v. Wilkens*, 346 N.W.2d 16, 19 (Iowa 1984). When trial counsel acts reasonably in selecting and following through on the chosen strategy, the claim of ineffectiveness is without merit. *Id.* at 19. We conclude the defendant's trial counsel was within the normal range of professional competency in deciding upon strategy and in presenting evidence consistent with that strategy.
>
> Further, we do not believe Foell has shown he was prejudiced from his trial counsel's alleged breach of duty. The evidence of Foell's guilt was overwhelming. The State introduced into evidence Foell's confession and the testimony of Oltman's girlfriend, who was granted immunity. Foell himself testified he intended to kill the victim when he entered her house. He also stated he was fully aware he was killing the victim when he repeatedly stabbed her.
>
> We are unable to say, but for the alleged errors committed by his trial counsel, the jury would not have convicted Foell of first-degree murder.

Foell, 512 N.W.2d at 814.

Foell renewed his claim that his counsel was ineffective in his PCR action. In its recitation of the factual background of the case, the PCR court noted:

> Going into trial, therefore, defense counsel was faced with evidence which left no question as to who did the actual killing. Given his client's confession, and the overwhelming

> evidence pointing to his client's participation in the killing, defense counsel, as a matter of trial strategy, decided to aim for getting a verdict for Second Degree Murder. Consistent with his trial strategy, he presented evidence at trial trying to show that Chris Oltman was the primary catalyst and instigator. . . . [Foell's trial counsel] applied his substantial experience in helping to make the decisions in Mr. Foell's defense.

Foell v. State, No. PCCV002644, "Findings of Fact, Conclusions of Law, and Ruling" (Franklin Cty, Iowa, Aug. 11, 2000) ("PCR Opinion") (Doc. No. 12, pp. 19-20).

The PCR court reviewed at length the efforts of Foell's trial counsel in exploring the issue of Foell's mental capacities and the possibility of asserting Fetal Alcohol Syndrome as a defense. *See* PCR Opinion at 13-20. The court noted counsel obtained the records from Foell's psychiatric treatment at Mercy Medical Center and from his substance abuse treatment. He also arranged for Foell to be evaluated by Dr. Greg Roberts, Kenneth Schmitz, Ed.D., and James Anderson, a psychiatric social worker.

Counsel discussed the issue of Fetal Alcohol Syndrome with psychiatrist Dr. Donald Larsen, who opined Fetal Alcohol Syndrome would not provide a viable defense for Foell. Dr. Greg Roberts had a similar opinion, stating, "Based on my experience in working with Fetal Alcohol Syndrome in a Native American population and a non-Native American population, it has been my experience that this syndrome would in no way take the onus of responsibility off individuals in criminal cases with the mental status that David Foell presents with." PCR Opinion at 16 (Doc. No. 12, p. 30).

The PCR court found Foell's trial counsel "made an adequate investigation both as to the legal and medical support for advancing [the Fetal Alcohol Syndrome] defense on behalf of Mr. Foell." PCR Opinion at 20 (Doc. No. 12, p. 34). With regard to the hearing on Foell's motion to suppress, the PCR court found counsel's performance "was

not deficient; to the contrary, it was competent, adequate, and based on a thorough, competent investigation." PCR Opinion at 24 (Doc. No. 12, p. 38).

In addition, the PCR court noted Foell's attorney was cognizant of the potential risks presented by offering a defense based on diminished capacity. During Foell's interviews with the psychologists, he disclosed that he and his father had frequent sexual contact when Foell was a teenager. Foell disclosed that he performed the sex acts "primarily for the money because his father would give him money or buy him things after they had sexual contact." PCR Opinion at 18 (Doc. No. 12, p. 32). The court noted:

> Needless to say, the family, and particularly [Foell's] parents, Wayne and Irma, were embarrassed by this revelation . . . [and] [a]ll three family members – David, Wayne and Irma – requested that [Foell's attorney] not get into the mental health issue so as not to cause any further embarrassment to the entire family. Specifically, they did not want the mental health reports shared with anyone else. [Counsel] specifically advised them that if they did not wish the reports released, they could not pursue any other mental health defenses. [Counsel] also recalls that, after they received the letter from Dr. Roberts [opining Fetal Alcohol Syndrome would not be a viable offense for Foell], there wasn't much further discussion regarding presentation of a Fetal Alcohol Syndrome defense.

PCR Opinion at 19 (Doc. No. 12, p. 33).

In addition to embarrassing the family, counsel was concerned the evidence that Foell had performed sexual acts for money would bolster the prosecution's case. Counsel envisioned the State arguing Foell "would do anything for money, without any remorse or moral contrition, including brutally stabbing a sleeping 69-year-old woman." PCR Opinion at 19-20 (Doc. No. 12, pp. 33-34).

The PCR court noted neither party had cited a single case where the Fetal Alcohol Syndrome defense had been used successfully. The PCR court discussed several cases in

which defendants asserted, or attempted to assert, Fetal Alcohol Syndrome as a defense, noting the defense has arisen most often in the context of the guilt phase of capital murder cases. *See* PCR Opinion at 21-23 (Doc. No. 12, pp. 35-37). The court concluded Foell's attorney could not find a basis, "either in the law, or in medicine, indicating that the Fetal Alcohol Syndrome or Fetal Alcohol Effect would be a potentially successful defense for [Foell]," and counsel "made adequate investigation in both areas." PCR Opinion at 24 (Doc. No. 12, p. 38).

Relying on the *Strickland* standards, the PCR court concluded Foell's trial counsel was not ineffective, either in pretrial proceedings or during Foell's trial, for not offering a defense based on Fetal Alcohol Syndrome or other mental defect. The PCR court concluded further that even if Foell could show his trial counsel's performance was ineffective, he nevertheless failed to show prejudice. PCR Opinion at 23-26 (Doc. No. 12, pp. 37-40). The Iowa Court of Appeals affirmed the denial of Foell's PCR application, finding that due to the overwhelming evidence of his guilt, Foell could not show prejudice even if his attorney's performance was deficient, an issue the court declined to decide. *Foell v. State*, 2001 WL 1658885, at *3 (Iowa Ct. App., Dec. 28, 2001).

IV. STANDARDS OF REVIEW

A. General Standards for Habeas Cases

The court's review of Foell's petition is governed by the standards set forth by the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The *Williams* Court explained:

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the

> relevant state-court decision was either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Williams, 529 U.S. at 404-05, 120 S. Ct. at 1519 (quoting 28 U.S.C. § 2254(d)(1)).

Under the first category, a state-court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.*, 529 U.S. at 405, 120 S. Ct. at 1519. The Court explained:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.

Id., 529 U.S. at 412-13, 120 S. Ct. at 1523. Further, "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Court's] decisions as of the time of the relevant state-court decision." *Id.*, 529 U.S. at 412, 120 S. Ct. at 1523.

The second category, involving an "unreasonable application" of Supreme Court clearly-established precedent, can arise in one of two ways. As the Court explained:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id., 529 U.S. at 407, 120 S. Ct. at 1520 (citing *Green v. French*, 143 F.3d 865, 869-70 (4th Cir. 1998)). Thus, where a state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," that decision "certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established federal law.'" *Id*, 529 U.S. at 407-08, 120 S. Ct. at 1520. Notably,

> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id., 529 U.S. at 411, 1250 S. Ct. at 1522.

If the state court decision was not contrary to clearly established Federal law, as determined by the Supreme Court of the United States, and if it did not involve an unreasonable application of that law, then the federal court must determine whether the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

B. Standards for Ineffective Assistance of Counsel Claims

The standard for proving ineffective assistance of counsel was established by the Supreme Court in *Strickland v. Washington*:

> <u>*First,*</u> the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. <u>*Second*</u>, 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 . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) (emphasis added). The reviewing court must determine "whether counsel's assistance was reasonable considering all the circumstances." *Id.*, 466 U.S. at 688, 104 S. Ct. at 2065.

The defendant's burden is considerable, because "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*, 466 U.S. at 689, 104 S. Ct. at 2065 (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)). "Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful." *James v. Iowa*, 100 F.3d 586, 590 (8th Cir. 1996).

Furthermore, even if the defendant shows counsel's performance was deficient, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.*, 466 U.S. at 693, 104 S. Ct. at 2067.

Thus, the prejudice prong of *Strickland* requires a petitioner, even one who can show that counsel's errors were unreasonable, to go further and show the errors "actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Id. See Boysiewick v. Schriro*, 179 F.3d 616, 620 (8th Cir. 1999) (citing *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997)).

Rather, a petitioner must demonstrate "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, 104 S. Ct. at 2068.

A petitioner must satisfy both prongs of *Strickland* in order to prevail on an ineffective assistance of counsel claim. *See id.*, 466 U.S. at 687, 104 S. Ct. at 2064. It is not necessary to address the performance and prejudice prongs in any particular order, nor must both prongs be addressed if the district court determines the petitioner has failed to meet one prong. *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069. Indeed, the *Strickland* Court noted that "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999) (citing *Strickland*).

In short, a conviction or sentence will not be set aside "solely because the outcome would have been different but for counsel's error, rather, the focus is on whether 'counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" *Mansfield v. Dormire*, 202 F.3d 1018, 1022 (8th Cir. 2000) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)).

V. ANALYSIS

In the present action, Foell argues vigorously that his attorney's performance was deficient in the following ways: (1) failing to conduct a timely investigation of Foell's mental health; (2) filing and litigating a motion to suppress Foell's confession before obtaining a complete evaluation of Foell's mental health; (3) formulating a theory of defense before properly assessing Foell's mental condition and how his condition could tie

into an intoxication defense (Doc. No. 10, p. 21, noting in Iowa, an intoxication defense "can be based on a mental condition peculiar to the defendant," citing *State v. Hulbert*, 513 N.W.2d 735, 737 (Iowa 1994)); (4) making an unreasonable choice of defenses, and ultimately presenting no valid defense at all; (5) appealing to the jury's sympathies and pursuing a strategy of jury nullification, which Foell argues "runs counter to the accepted view of how cases are to be presented to and decided by a jury" (Doc. No. 10, p. 24, citing *Spark v. United States*, 156 U.S. 51, 102 (1895)); and (6) unreasonably persuading Foell to abandon a defense based on Fetal Alcohol Syndrome. (Doc. No. 10)

Foell argues he was prejudiced by his counsel's ineffectiveness in these areas because evidence of his mental condition would have provided a basis for suppression of his confession, and would have refuted the State's theory that he was a cold-blooded killer for hire, providing a legal basis for the jury to return a verdict on a lesser charge than first-degree murder.

Mathes disagrees with Foell's claims, and both parties filed excellent briefs in support of their respective positions.

It would be difficult for this court to improve upon the comprehensive analysis undertaken by the PCR court in reviewing Foell's PCR application. The PCR court thoroughly reviewed the record, and the evidence Foell offered in support of his PCR application, and found no basis upon which to grant relief. Relying on the Supreme Court precedent represented by *Strickland*, the PCR court found that even if Foell were able to show his attorney was ineffective, he had failed to prove prejudice, given the over-whelming evidence against him in the case.

Very simply, this court agrees with the PCR court's *Strickland* analysis, which was affirmed by the Iowa Court of Appeals. Although the defense strategy adopted by Foell's trial counsel was unsuccessful, and, in hindsight, possibly even ill advised, counsel

nevertheless did adopt a trial strategy he believed to be in his client's best interests; *i.e.*, an attempt to obtain a verdict that Foell was guilty of second-degree murder, but not first-degree murder. As the PCR court noted, Foell's attorney was faced with an impossible situation. His client had confessed to the murder, and even without the confession, there was overwhelming evidence against Foell. His attorney diligently research the medical and legal basis for a possible defense based on intoxication or Fetal Alcohol Syndrome, and found no basis in law or in medicine to support such a defense. "[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *Cronic*, 466 U.S. at 656 n.19, 104 S. Ct. at 2046 n.19 (citing *Nickols v. Gagnon*, 454 F.2d 467, 472 (7th Cir. 1971)).

Furthermore, this is not a case where Foell's attorney sat mute and did nothing to represent him. Counsel filed and litigated a pretrial motion to suppress. He participated actively in voir dire. He vigorously cross-examined the State's witnesses, and he called thirty-five witnesses to testify on Foell's behalf. He consistently argued Foell was Oltman's patsy, and he elicited testimony to support that defense theory. Although the defense strategy ultimately was not successful, that is not sufficient prejudice to constitute ineffective assistance of counsel. *James v. Iowa*, 100 F.3d 586, 590 (8th Cir. 1996) ("Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful."). "When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred." *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 2045, 80 L. Ed. 2d 657 (1984) (footnotes omitted); *accord Freeman v. Graves*, 317 F.3d 898 (8th Cir. 2003). The court finds Foell has failed to prove prejudice under *Strickland*, and the court therefore does not need to rule on whether

his counsel's performance was ineffective. *See Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999) (citing *Strickland*).

The parties have raised one issue that deserves further discussion here. In his reply brief, Foell raises, for the first time, a claim that prejudice should be presumed in this case because his counsel "'entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing.'" (Doc. No. 14, p. 2, quoting *Cronic*). Mathes argues Foell never raised this particular argument before any State court or in his opening brief in the present action. (*See* Doc. No. 15) The law is well settled in the Eighth Circuit that "'a habeas petitioner must have raised both the factual and legal bases for each ineffectiveness of counsel claim in the state courts in order to preserve the claim for federal review.'" *King v. Kemna*, 266 F.3d 816, 821 (8th Cir. 2001) (quoting *Flieger v. Delo*, 16 F.3d 878, 885 (8th Cir. 1994); *accord Wemark v. Mathes*, 2002 WL 1724022, at *8 (N.D. Iowa, Mar. 6, 2002) (Bennett, C.J.). By failing to cite *Cronic*, or to discuss presumed prejudice under *Cronic* in the State courts, Foell has procedurally defaulted on that theory of relief. *See Wemark, id.* Nevertheless, Mathes proceeded to argue the issue and offered supplemental authorities, and Foell responded to Mathes's arguments. Therefore, the court will consider the issue briefly despite the procedural default.

The Eighth Circuit explained the *Cronic* holding in some detail in *United States v. White*, 341 F.3d 673 (8th Cir. 2003), as follows:

> There are instances when counsel's errors are so great or the denial of counsel is so complete as to create a presumption of prejudice, eliminating the need to prove *Strickland* prejudice. *Cronic*, 466 U.S. at 659, 104 S. Ct. 2039. Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential necessarily leads to the conclusion a trial is unfair if the accused is denied counsel at a critical stage of the proceedings. The Supreme Court has repeatedly found constitutional error without any

showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. *See, e.g., Geders v. United States*, 425 U.S. 80, 91, 96 S. Ct. 1330, 47 L. Ed. 2d 592(1976) (holding "an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment."); *Herring v. New York*, 422 U.S. 853, 864-65, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975) (holding the refusal to allow defense counsel to make a closing argument was a denial of defendant's constitutional rights); *Brooks v. Tennessee*, 406 U.S. 605, 613, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972) (holding "[p]etitioner . . . was deprived of his constitutional rights when the trial court excluded him from the stand for failing to testify first."); *Hamilton v. Alabama*, 368 U.S. 52, 54-55, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (holding prejudice is presumed when a defendant is arraigned in a capital case without the benefit of counsel and pleads guilty).

Similarly, when counsel completely fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights making the adversary process presumptively unreliable. For example, in *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), no showing of prejudice was required because petitioner had been "denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* at 318, 94 S. Ct. 1105 (internal quotation and citations omitted).

We will, however, presume prejudice "only when surrounding circumstances justify a presumption of ineffectiveness [,]" Cronic, 466 U.S. at 662, 104 S. Ct. 2039, and courts have been appropriately cautious in presuming prejudice. *See Scarpa v. DuBois*, 38 F.3d 1, 12 (1st Cir. 1994) ("a showing of actual prejudice remain[s] a necessary element in most

> cases."). When the Supreme Court "spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, [it] indicated that the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. 685, 696-97, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). The failure to oppose the prosecution's case must involve the entire proceeding, not just isolated portions. *Id.* at 697, 122 S. Ct. 1843. Apart from circumstances of such magnitude, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt, *i.e.*, *Strickland* prejudice. *Strickland*, 466 U.S. at 693-696, 104 S. Ct. 2052. The burden of proving ineffective assistance of counsel rests with the defendant. *Cronic*, 466 U.S. at 658, 104 S. Ct. 2039.

White, 341 F.3d at 677-78.

The *White* court further explained *Cronic*'s limited application, holding:

> We have applied *Cronic* "very narrowly and rarely have found a situation that justifies application of the presumption of prejudice." *Fink v. Lockhart*, 823 F.2d 204, 206 (8th Cir. 1987). We recently reaffirmed our narrow application of *Cronic* in *White v. Luebbers*, 307 F.3d 722, 729 (8th Cir. 2002). In *White*, defense counsel in a death-penalty case failed to ask any of the prospective jurors about their views on the death penalty. *Id.* at 729. Counsel claimed his failure to ask questions regarding the death penalty or to follow up on the numerous questions asked by the prosecutor was a strategic decision intended to keep jurors from focusing on the fact it was a death-eligible case. *Id.* We found the strategy untenable because it "left the field entirely to the State." *Id.* at 728. Despite counsel's misguided decision, however, we refused to apply the *Cronic* presumption of prejudice. "[W]e do not believe that the likelihood of prejudice is inherently so great in the present situation as to justify dispensing with the usual requirement that prejudice must be shown." *Id.* at 729.

White, 341 F.3d at 679.

In the present case, the defense strategy employed by Foell's attorney may have been misguided, as was the defense strategy in *Luebbers*, but the court cannot find the likelihood that Foell was prejudiced to be "'inherently so great . . . as to justify dispensing with the usual requirement that prejudice must be shown.'" *Id.* (quoting *Luebbers*, 307 F.3d at 729). And, as noted above, the court has found Foell failed to show *Strickland* prejudice.

The court finds the Iowa courts' analysis of Foell's ineffective assistance of counsel claim was not contrary to existing Supreme Court precedent, did not represent an unreasonable application of the law to the facts of the case, and was not based on an unreasonable determination of the facts in light of the evidence. Accordingly, the court finds Foell's petition for writ of *habeas corpus* should be denied.

VI. CERTIFICATE OF APPEALABILITY

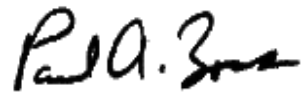
A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal *habeas* petition. *See* 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998). The court finds Foell has failed to make a substantial showing of the denial of a constitutional right, and recommends a certificate of appealability not be issued.

VII. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections[1] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), within ten days of the service of a copy of this Report and Recommendation, that Foell's petition be denied.

IT IS SO ORDERED.

DATED this 6th day of February, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[1]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).